Creative Commons 4.0 Licenses: a Sui Generis Challenge?

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Abstract: *The* Sui Generis Database Rights *(SGDR) protection grants an exclusive right on databases when a substantial investment is required to collect and arrange the database contents. Since this specific protection makes any re-use of such contents impossible without an explicit permission, therefore directly impacting on the exploitation of Open Data, managing SGDR (where exsisting) –* e.g. *by adopting a license - is crucial for any public body who wants to make its data available for re-use. The paper examines the new features introduced in the 4.0 version of the Creative Commons Public Licenses, with particular attention to the treatment of SGDR to describe the suitability of the 4.0 version in the specific field of Open Data licensing and re-use. The evaluation has been conducted in light of the current EU legal framework on database rights, also considering the issue of interoperability with other existing database licenses.*

Keywords: *Copyright, Sui Generis Database Right, Public Sector Information, Creative Commons Licenses, Open Data*

Acknowledgement: *This paper was drafted in the context of the Network of Excellence on Internet Science EINS (GA n°288021), and, in particular, in relation with the case studies concerning Governance, Standards and Regulation (JRA4). The authors acknowledge the support of the European Commission and are grateful to the network members for their support.*

Introduction

Open Data needs open licenses (Krötzsch, Speiser 2011, p. 356, with further references). The current "copyright default" – i.e. the set of rights that the existing regime of copyright (and related rights) protection automatically grants to authors/creators – is such that, in the absence of a clear statement about the legal status of a dataset, it is safer to assume that data are legally locked-up preventing any kind of reuse (or copy). Therefore, when re-use is desirable, the terms under which data can be re-used should be explicit (Bizer, Heath, Berners-Lee 2009, Miller, Styles, Heath 2008). As Leight Dodds (2010) puts it, to open data, "*we need to be clear on what forms of re-use we expect or want to support*" (Dodds 2010, p. 13).

As most readers familiar with the Open Data domain already know (and as this paper will briefly discuss), there is a rich offer of open licensing solutions. In fact, several government and

communities adopt a diverse set of somehow similar legal tools. The question, from the point of view of a re-user of open (government) data is therefore: "*What license should we choose?*".

A first approach goes through the adoption of interoperability-proof solutions consisting of the dedication of datasets to the public domain (e.g., using the Creative Commons Zero, hereinafter CC0 waiver). However, this approach neglects the existing demand for attribution/provenance requirements (which is especially widespread amongst public sector bodies and frequently for good reasons, e.g., related with accountability) or share-alike clauses (which enable the typical self-defensive but inclusive approach adopted by online communities).

As Mike Linksvayer (2011) puts it, in particular when a share-alike approach is needed, "*a single universal recipient license (i.e., a single widely used copyleft license, or the equivalent) for all non-software works, including databases, is crucial*" *(Linksvayer, 2011, p. 2)*. The recently released CC Attribution Share-Alike license version 4.0 is one of the candidates for this role, since it finally manages all relevant rights (including the ones on databases) in a simple and consistent way. And the same can be achieved in the domain of "attribution licenses", where CC Attribution 4.0 may represent a standard solution reducing transaction costs, e.g., making it superfluous to read yet another license and check its attribution clauses.

The paper at hand is a first attempt to test the promises made by CC 4.0 licenses to finally become the global focal point for Open Data licensing.

The rest of this paper is organized as follows. In Section 1, we offer a bird's-eye view on the "market" for Open Data licenses. Section 2 focuses on the Creative Commons licenses, which are the main object of the paper at hand, providing a synthetic historical perspective. Section 3 offers an analysis of the main changes (from the Open Data point of view) introduced by the 4.0 version of the CC licenses. The following two sections offer an even smaller focus. Section 4 is dedicated to the EU database protection regime and its impact on open data initiatives, while Section 5 is devoted to the treatment of the *Sui Generis* Database Right (hereinafter, SGDR) in the Creative Commons Licenses. Finally, in Section 6 the Authors highlight some of the CC 4.0 licenses pros and cons in the view of exploiting such new licenses in the field of Open Data.

A Bird's-eye View on the Open Data License Landscape

Creative Commons licenses (here and below, CCPLs) are the most widespread general purpose licensing tools. These licenses offer to right-holders a menu of elements/modules (described in Section 2) from which they can pick their favourite combination. However, until the release of their (EU) 3.0 version, it was unclear if the CCPLs where an appropriate legal tool for the licensing of databases (potentially) protected by the SGDR (described in Section 4). This was one of the reasons because of which, in 2006, Talis[1] published the first public license specifically targeting Open Data and then funded the drafting of the Public Domain Dedication and License (PDDL). This activity then triggered the creation of the Open Data Commons (ODC) project, which is currently part of the Open Knowledge Foundation project portfolio[2]. To date, the ODC licensing suite includes the PDDL[3], the Open Database License (ODbL)[4] – which is a copyleft license – and an Attribution

[1] Talis is a firm developing Semantic Web solutions and, in particular, consulting and training services in this domain (http://www.talis.com/corporate/).

[2] http://opendatacommons.org/about/

[3] http://opendatacommons.org/licenses/pddl/

license[5]. All these licenses concern the rights covering a database as such (as opposed to the data it contains).

Moreover recently, i.e., since the release of their 3.0 version in various European jurisdictions (mostly in 2008-2011), CCPLs waived the SGDR[6], instead of licensing it at the same conditions at which they licensed copyright (see Section 5 for further details).

Finally, several national governments decided to draft their own licenses for the release of Open Government Data. One of the first countries to do so (also because of the choices of CC of waiving the SGDR) was the United Kingdom, with its "Click Use" license and its current non-transactional evolution(s), the Open Government License (OGL) version 1.0[7] and 2.0[8]. The OGL is essentially equivalent to other "attribution licenses", such as the CC or ODC Attribution licenses, but it also includes some specific provisions concerning "Crown copyright" and other clauses addressing standard public sector worries, such as forbidding uses suggesting any official status of modified information. The OGL approach was almost immediately and is still followed all over the world (e.g., in Canada) and in Europe in particular. For instance, France adopted its own License Ouverte[9], while Italy produced the Italian Open Data License (IODL)[10].

Table 1: Licenses of European government data portals (by V. Bunakov and K. Jeffery – "Licence management for Public Sector Information" (2013) – published under a CC BY 3.0 Austria license)

Country	Portal	Licence
France	Data.gouv.fr	Licence Ouverte
United Kingdom	Data.gov.uk	Open Government Licence
Italy	Dati.gov.it	Creative Commons Attribuzione - Non commerciale 2.5 Italia (CC BY-NC 2.5)
Germany	Govdata.de	Datenlizenz Deutschland – Namensnennung – Version 1.0 (recommended for common use) Datenlizenz Deutschland – Namensnennung – nicht kommerziell Version 1.0 (for exceptions)
Norway	Data.norge.no	Norsk lisens for offentlige data (NLOD)
Netherlands	Data.overheid.nl	No specific common licence but a recommendation for the agencies publishing data through the portal to use the framework of the Open Government Act, and to apply Creative Commons Zero of Public Domain if any licence is desired at all

[4] http://opendatacommons.org/licenses/odbl/1.0/

[5] http://opendatacommons.org/licenses/by/1.0/

[6] *Rectius* (and mainly for license-geeks), the licensor waives the right of using the *Sui Generis* Database Right as a tool to legally enforce the license clauses.

[7] http://www.nationalarchives.gov.uk/doc/open-government-licence/version/1/

[8] http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/

[9] http://www.data.gouv.fr/Licence-Ouverte-Open-Licence

[10] Version 1.0 (http://www.formez.it/iodl/) and 2.0 (http://www.dati.gov.it/iodl/2.0/).

Spain	Datos.gob.es	No specific licence but two parts in extensive legal notes that cover data re-use and are based on different pieces of Spanish national legislation
Belgium	Data.gov.be	No specific common licence. Each public service or government institution determines the terms and conditions governing access to and use of its data published through portal.

2002-2013: Ten Years (and Eleven Months) of Creative Commons Licenses.

Creative Commons is a U.S. non-profit organization founded in 2001, whose mission is to "develop[s], support[s], and steward[s] legal and technical infrastructure that maximizes digital creativity, sharing, and innovation"[11].

Building on the experience of previously existing phenomena (such as the Free/Libre and Open Source Software – FLOSS and the Copyleft model) and communities (as the Free Software Foundation that developed the GNU Free Documentation License) (Lessig 2004, Fitzgerald 2007, Elkin-Koren 2006), Creative Commons believes that the default rule of current copyright rules is no longer adequately regulating the circulation of intellectual goods in the digital environment, ultimately limiting the sharing of knowledge and information.

To support its mission, Creative Commons developed a set of legal tools to help users managing the rights they hold on their works; e.g., expanding the boundaries of the "All rights reserved" default regime, assigning broader permissions on their works (Aliprandi 2011) and clearly notifying their choice to other users (Elkin-Koren 2006, providing an external view on the Creative commons "paradigm").

Creative Commons develops its tools since 2002: some of them were modified and improved through the years, while others have been retired on the way[12]. Among them, first and foremost are the six CCPLs: those licenses have been going through a process of modification and fine tuning that brought them from the early version 1.0, launched in 2002, to version 3.0, released in 2007[13]. Finally, the brand new version 4.0 went public on November 25th 2013[14].

In short, CCPLs offer to right-holders a menu of elements/modules from which they can pick their favorite combination and including: "Attribution" (BY); "Non-Commercial" (NC); "No Derivative Works" (ND), meaning that only verbatim copies could be produced; and "Share Alike" (SA), meaning that the author requires creators of derivative works to adopt the same

[11] http://creativecommons.org/about

[12] For a list of CC tools which are no longer recommended and supported by Creative Commons (but still legally operating, though), see: http://creativecommons.org/retiredlicenses

[13] A timeline for Creative Commons major achievements is available at: http://creativecommons.org/about/history

[14] The CCPL 4.0 version official release announcement is available here: http://creativecommons.org/weblog/entry/40768

license used by him/her (the so-called "viral" or "copyleft" effect)[15]. The (meaningful) combinations of the previous elements generate six different licenses.

In addition, Creative Commons has also designed some other tools to further expand the permissions granted by the six "classic" licenses and foster the growth and availability of public domain works. Technically speaking, those tools are not licenses as they can rather be described as: an independent agreement attached to a CCPL to inform that additional permissions can be negotiated with the licensor (CC Plus); a waiver of rights to relinquish the exercise of such rights and thus (almost[16]) attribute the work to the public domain (CC0 waiver); and a mark to label a work that is no longer restricted by copyright, e.g. because the copyright protection has already expired (Public Domain Mark)[17].

As for the volume of CC licenses adoption worldwide, in 2010 Creative Commons estimated that approximately more than 400 million works (at least) were distributed under a CC license[18] (see figure 1).

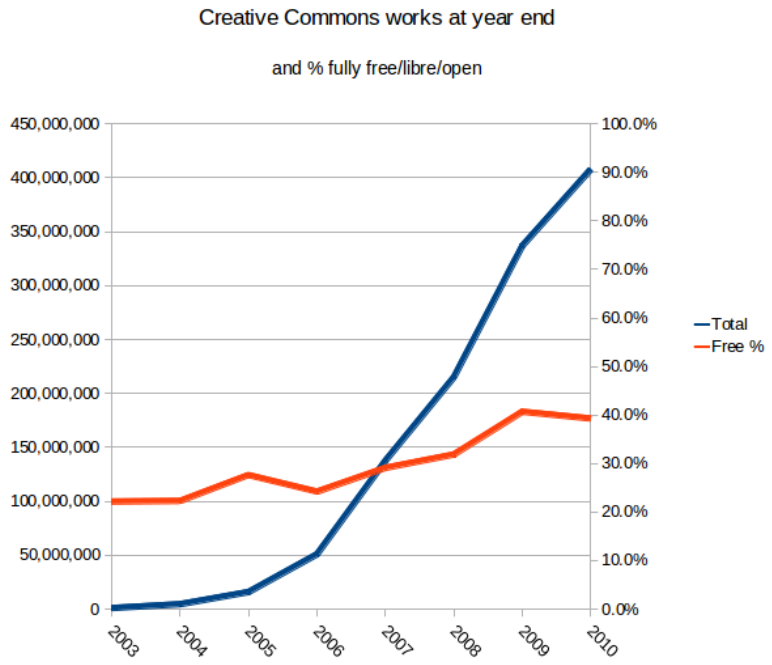

Figure 1: Approximate Minimum Total CC Licensed Works as of December 2010 (400+ million)

[15] More practical information about the CC licenses is available at: http://www.creativecommons.org

[16] Since waiving moral rights is not permitted in every single jurisdiction, adopting a CC0 waiver would not give the work a public domain-like status in those jurisdictions where the author can not relinquish the right of claiming a proper attribution of its work.

[17] For further details on those tools, check the following resources: http://wiki.creativecommons.org/CCPlus; http://creativecommons.org/about/cc0; http://creativecommons.org/about/pdm

[18] The Approximate Minimum Total CC Licensed Works is based on licenses reported by Yahoo search queries and Flickr and is the minimum number of licensed works across all licenses. For more details on the metrics and estimation process see: http://wiki.creativecommons.org/Metrics and http://wiki.creativecommons.org/Metrics/License_statistics

From 3.0 to 4.0 – How Did the CC Licenses Change

Major Changes

This paragraph examines the significant new features introduced in version 4.0 of CCPLs[19].

Without doubt the most significant change consists in the decision to put aside the porting process adopted so far. The porting process characterized the production of CC licenses up to the version 3.0 requiring the involvement of legal experts from different part of the world to craft localized versions of the licenses: more than mere translations, the ported versions are indeed a proper adaptation of the original licenses, since they introduce modifications to the original text to better comply with the specific legal terms in force within each jurisdiction and are intended to have the same legal meaning and effect as the original licenses (generic, international/unported) and the ported licenses of other jurisdictions with the same license version[20]. The new version 4.0, instead, has been released as single international license suite worldwide, whose text is intended to be legally valid and enforceable in every jurisdiction without needing any adoption. Creative Commons achieved this goal by involving all its affiliates around the world in the drafting procedure *ex ante*, instead of discussing with them the porting of the CC license suite, once released, *ex post*[21]. This new approach towards internationalization[22], required a closer interaction with the various CC affiliates' legal experts during the very draft of the text itself, in order to identify the most suitable legal language and terms: this led to the development of four subsequent drafts before the adoption of the final text[23] and three public discussion periods to gather further contributions and feedback[24].

To ensure as much legal enforceability as possible, some of the notoriously critical clauses has been provided with a new formulation. Both the *Disclaimer of Warranties* and the *Limitation on Liability* (Section 5) now contain a closing expression that excludes their application where this is prohibited by the law. The same caution has been used to manage moral rights in Section 2 b. 1.

Moreover, the wording of the severability clause (Section 8 b.) has been revamped explicitly considering cases in which the reformation of invalid/unenforceable provisions is not possible; in those cases, the provision will be severed from the license without effecting the remaining terms.

Another important addition pertains to the SGDR treatment: we will further examine this topic in the following paragraphs 3.2 b and 4.

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[19] Details on the 4.0 CCPLs drafting process are available on the CC Wiki page: http://wiki.creativecommons.org/4.0. Draft versions of the licenses are available at: http://wiki.creativecommons.org/4.0_Drafts

[20] For more details on the porting process see: http://wiki.creativecommons.org/Version_3#Further_Internationalization

[21] See: http://wiki.creativecommons.org/License_versions#International_License_Development_Process

[22] See: http://wiki.creativecommons.org/4.0/Internationalization; http://creativecommons.org/weblog/entry/29639?utm_campaign=newsletter_1111&utm_medium=blog&utm_source=newsletter

[23] Draft1: http://wiki.creativecommons.org/4.0/Draft_1; Draft2: http://wiki.creativecommons.org/4.0/Draft_2; Draft3: http://wiki.creativecommons.org/4.0/Draft_3; Draft4: http://wiki.creativecommons.org/4.0/Draft_4

[24] For a timeline of the drafting procedure see: http://wiki.creativecommons.org/4.0#Draft_timeline; for more details on the public discussion on the three drafts see: http://wiki.creativecommons.org/4.0_Drafts

Other New (Open Data-oriented) Features

We will skip over many minor changes that simply rephrased the previous wording and describe the most interesting additions to the 4.0 licenses in the perspective of Open Data initiatives (following their order of appearance in the Sections of the CC BY-NC-SA 4.0 license[25]).

a) Considerations for licensors and the public

The Copyright Law notice contains a new sub-portion with specific considerations to help users acknowledging the basic rules of a copyright license before adopting a CCPL to the material or while using the licensed material. A hyperlink to provide further information related to the license practicalities is also included[26]; such information is not part of the text of license.

b) Sui Generis Database Rights

As we said above, the inclusion of SGDR within the licensed rights has determined its mention in some previously existing clauses and the adoption of an *ad hoc* definition and section. The new treatment of SGDR is addressed in Section 4. As a result, should the licensed rights include SGDR that apply to the licensee's use of the licensed material, it is explicitly remarked that: SGDR are contained in the *License Grant* of Section 2 a. 1 (Section 4 a.); that extracting all or a substantial portion of a database in which the licensor holds SGDR and including it into another database (*in which the extractor of the original database contents has SGDR*) makes the latter (as a whole, but not its individual contents) an adaptation of the first, thus requiring its compliance with the terms and conditions provided by the license (Section 4 b.); that licensees have to comply with the *License Conditions* of Section 3 a. when they share all or a substantial portion of the database (Section 4 c.).

It is also clarified that Section 4 supplements and does not replace the obligations of the license; meaning that in case of SGDR the whole provisions of license do apply, not only those pertaining to SGDR.

The SGBR is now mentioned explicitly in the definition of *Copyright and Similar Rights* (Section 1 d.). Finally, the SGDR has been provided with its very own definition in Section 1 m.

c) From Author to Creator; from Work to Material

Arguably a consequence of the inclusion of the SGDR, the terms *Author* and *Work* have been turned into *Creator* and *Material*: given their broader meaning, this new couple seems to fit better than the previous one, in case the license is adopted to publish a database: when the database contents possess little or no creativity at all[27], they are usually consisting of mere information or data, therefore the term Material seems more appropriate to define such entity. For the same reason, the term Creator fits better to encompass the originator of both creative and non-creative works[28].

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[25] The full text of the license is available here: http://creativecommons.org/licenses/by/4.0/legalcode

[26] For the licensors: http://wiki.creativecommons.org/Considerations_for_licensors_and_licensees#Considerations_for_licensors; for the public: http://wiki.creativecommons.org/Considerations_for_licensors_and_licensees#Considerations_for_licensees.

[27] For the protection of non-creative databases see Section 4, below.

[28] The conclusion seems supported by the Database Directive itself, where it distinguishes between the *author* of a copyrighted database (art. 4) and the *maker* of a database protected by the SGDR (art. 7).

d) No sublicensing

The 4.0 version re-ordered the prohibition of sublicensing the material offered by the licensor under the terms of the CC 4.0 license. Section 2 a. 5 reproduces a previous remark of version 3.0[29] according to which every recipient of the material shared and/or modified by the licensee receives an offer from the licensor to use the material he/she (the licensor) published with the CC license on the same terms and conditions. More explicitly, the sublicense prohibition is also contained in the *License grant* (Section 2 a. 1). The choice of defining this condition more clearly within one single section reflects a generic tendency to make the text shorter and more schematic[30], but also a more specific care for ensuring as much interoperability as possible with other free licenses that contain a sublicensing prohibition[31].

e) No endorsement

Section 2 a. 6 features an interesting addition to the endorsement prohibition: not only the licensee can not assert or imply any connection with, sponsorship or endorsement by the licensor, he is now also warned that he is not "*granted official status by the Licensor [...]*". The "official-status" prohibition is contained very often in the text of standard licenses developed and/or adopted by public bodies opening their data[32]. This introduction is arguably a mean to align the CCPL with most of the existing Open Data standard licenses, in view of a better interoperability.

f) Modifications to the licensed material

The Attribution requirements contained in Section 3 (a) are now prescribing a stricter obligation to notify whether the licensed material has been modified and retain an indication of any previous modification33. Probably, the new requirement has been introduced to relieve in part the aforementioned concerns that frequently worries public bodies, when they are pondering to share their data34, and also for the sake of interoperability with licenses specifically developed to share database contents (e.g., with ODC Licenses35).

The EU Database Protection and its Impact on Open Data Initiatives

Databases receive a specific protection in Europe according to the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereinafter, the "Database Directive")[36]. In particular, the Database Directive protects the

[29] In the Miscellaneous Section 8. a.

[30] For instance, another sublicense prohibition was "buried" in the *Restrictions* Section of version 3.0 (4. a.), lacking in coordination with the Miscellaneous remark (8. a.).

[31] *E.g.*, both the Open Data Commons Attribution License (ODC-By) and the Open Database License (ODbL) contains a sublicensing prohibition at point 4.4 and 4.8, respectively.

[32] See, for instance, the French License Ouverte 1.0 (*supra* at note 9), the UK Open Government Licence 2.0 (*supra* at note 7 and 8), the Italian Open Data License 1.0 and 2.0 (*supra* at note 10), the Irish PSI General License (http://psi.gov.ie/files/2010/03/PSI-Licence.pdf)

[33] To check this and other differences with the previous 3.0 attribution requirements see the Attribution/marking treatment Comparison of treatment between Version 3.0 and 4.0d3 http://wiki.creativecommons.org/images/c/cb/Attribution_chart_%28v3_v_d3%29_.pdf.

[34] See the comments on No endorsement, *supra*, Section 3.2 e).

[35] Which requires to offer to the recipients all the alterations made to the original database along with every additional content. E.g., see point 4.6 (*Access to Derivative Databases*) of the OdbL v1.0: for a link to the text see *supra*, at note 4.

[36] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML

investments in information processing systems[37]. As a result, two (non mutually exclusive) levels of protection have been established: a first level for databases eligible for copyright protection due to the nature of the database author's own selection and arrangement of the database contents (*Chapter II – Copyright*); a second level for databases which required a substantial investment in order to obtain, verify or present the database contents (*Chapter III – Sui Generis Right*).

The first level of protection extends the copyright protection to creative databases (Aliprandi 2012): the author has the exclusive right of reproducing in whole or in part, translating, adapting, arranging or altering in any other manner, distributing and communicating the database to the public. As copyright on artistic works, copyright on creative databases is granted for seventy years from the creation of the database.

The second level of protection introduced the SGDR in the European legal framework: according to art. 7.1 of the Database Directive, the maker of a database is granted the right to prevent "*extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database*". The SGDR's term of protection is fifteen years from the completion of the database (or making available to the public, in case such availability is provided before the expiry of the term of protection calculated from the database completion)[38].

While the Database Directive does not provide a specific definition of "data" (Hughenholtz 2006), it clarifies that databases are a "*collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*"[39].

Arguably, the protection granted to databases (and particularly the European SGDR) represents a major legal constraints for the re-use of data. Because of the existence of database protection, any time users come across a set of information organized in a way capable to form a creative work or whose organization required a substantial amount of investment[40], they have to assume that any re-use is forbidden without the prior consent of the database author/maker. Similarly to copyright works then, adopting a licensing scheme has become a fundamental step for public bodies who want to open their datasets to third parties' re-use.

The Treatment of *Sui Generis* Database Rights in the CC Licenses.

While Creative Commons licenses were created to help authors and users sharing copyrighted works, originally they were not specifically designed to license databases. And even though they could have perhaps been used quite successfully since from version 1.0 to license compilations of data protected by copyright (given their creative nature), certainly the SGDR regime has not been explicitly addressed until version 3.0[41].

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[37] See Whereas n. 4; 7; 10 and 12 of the Database Directive.

[38] Art. 9.1 and 9.2. of the Database Directive. Also worth of note is paragraph 3., which grants a renewal of the term of protection in case of substantial changes, particularly those that would require a substantial new investment.

[39] Art. 1.2. of the Database Directive.

[40] And, obviously, as long as the EU Database Directive (and further national implementations) or similar restrictions on databases do apply to them (*for instance*, in case databases are developed within Europe).

[41] With the only exception of ported licenses from Netherlands, Belgium, France and Germany: those countries, in fact, included references to their national legislation on database rights, thus encompassing databases protected by the Database Directive within the definition of "work" contained in the CC license. See the 2006 "*Database and Creative Commons*" document:

Indeed, around the time the porting process of version 3.0 licenses started, Creative Commons acknowledged that the SGDR topic was an issue to be solved; not only to ensure harmonisation between CC licenses around the world, but also to fill the gap with regard to the specific SGDR, whose broadening importance (also in connection with the emerging Open Data 'phenomenon') risked to discourage the adoption of CC licenses. At the same time, however, it was felt that the use of CC licenses for works eligible of protection under the Database Directive might have led to a proliferation of the SGDR protection in countries that do not recognise such right, with potentially negative effects on pure data contexts such as the scientific and research field[42].

A solution was found then, by adopting a three-principle approach according to which, in order to harmonise CC licenses without expanding the scope of protection beyond general copyright laws, a waiver solution was adopted: the licensor gives up his/her SGDR so that databases protected only by the EU *Sui Generis* rights would not trigger the terms and conditions of the 3.0 license (and therefore its restriction would not extend to mere facts and information)[43].

However, since Open Data initiatives were gathering momentum all around the world (with Europe being on the point of starting the revising process of Directive 98/2003/EC on the Re-Use of Public Sector Information[44], for instance), the current CC's policy to simply waive SGDR was questioned regarding its efficacy in the specific data context. As a result[45], version 4.0 opted for the full licensing of SGDR, showing the intention of Creative Commons to subject them to the same copyright terms and conditions: 4.0 CCPLs are now specifically regulating the terms and conditions that apply when SGDR are included among the Licensed Rights that the licensor has granted[46].

Section 4 is now gathering the licensee's rights and obligations towards SGDR protected material: it specifies the License Grant in case a licensee is going to use material protected by the SGDR[47]; it clarifies that if the database on which the licensee has SGDR contains all or a substantial portion of the licensor's database, then the licensee's database does constitute adapted material; it extends the attribution requirements to uses of the licensed material on which SGDR does apply.

As a matter of fact, other licenses have been developed with the specific purpose of regulating the re-use of databases and information held by public bodies: this is the case of the ODC Licenses[48] and various national standard licenses[49]. Therefore, the database challenge that Creative

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http://web.archive.org/web/20110719001027/http://sciencecommons.org/resources/faq/databases/#dbr eplicate; and the CC instructions to implement SGDR's in version 3.0: http://wiki.creativecommons.org/images/f/f6/V3_Database_Rights.pdf

[42] See CC's instructions "*On the treatment of the sui generis database rights in Version 3.0 of the Creative Commons licenses*", *supra*, at note 42.

[43] See CC instructions on SGDR, *supra*, at note 42.

[44] The new text has been approved on June 2013 and is available here: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0275&language=EN&ring=A7-2012-0404

[45] The database issue was debated at the 2011 CC Global Summit and eventually was suggested to move forward to a different approach. For a brief report of the discussion that took place during the Global Summit, see here: http://creativecommons.org/weblog/entry/29639

[46] See *supra*, Section 3.2 lett. b).

[47] The wording of Section 4 a. is now borrowing the language adopted in the Database Directive: see the Draft4 paragraph on the CC Wiki page, here: http://wiki.creativecommons.org/4.0/Sui_generis_database_rights#Draft_4

[48] See supra at note 3, 4 and 5.

[49] See *supra*, at note 33.

Commons is facing is not simply a matter of developing clauses compliant with the existing database legal framework, but also a matter of interoperability with other existing database licenses.

In this sense, progress have been made to match some characteristic prescriptions featured in most of the open data licenses (particularly those developed by public authorities) by prohibiting explicitly to sublicense the material[50], as well as prescribing to mark or indicate modifications to the original data[51] and not to assert any official status regarding the licensee's use of such data[52]. In addition to that, the adoption of the very Database Directive terminology contributes to improve lexical accuracy and clarity.

On the other hand, however, Creative Commons has not announced yet which open licenses are compatible with its ShareAlike licenses: providing this information would remove possible doubts and also conform CC licenses with a practise which is commonly adopted by most of the national Open Data licenses.

Also (while not strictly an interoperability issue), the 'classic' definition of commercial uses in the NonCommercial clause has been maintained the same, despite the ongoing debate on the opportunity of better qualifying it[53]; the necessity for a new solution would help user interpreting the clause and therefore infer whether a particular use would fall in the scope of the NonCommercial term or not. In view of the efforts made to re-arrange and concentrate the text for better clarity, the inclusion of a more precise definition of NonCommercial in an *ad hoc* sub-paragraph within Section 3 would have been beneficial; the current or revised definition could have been provided also with some practical examples or an external hyper-link to a resource on the CC website to further develop the matter (perhaps, specifying that both the examples and the hyper-link are intended for informational purposes only, similarly to the considerations for licensors and the public[54]).

More problematic though, seems the portion of Section 4 b. in which it is said that only databases in which *the licensee has SGDR* are adapted material, once they include all or a substantial portion of the licensor's database contents. According to a strictly literal interpretation of the clause, in fact, it would be possible to conclude that any time a licensee *does not* have SGDR on his/her derivative database, such derivative database should not be considered an adapted material at all.

Once the use of the Licensed Material is not resulting in some Adapted Material and (while involving the Licensed Material) what is shared is nevertheless something which is inherently different in its whole from the licensor's material, a paradoxical in-between entity seems to ensue, suggesting that not only the ShareAlike requirements (when a CC BY-SA or a CC BY-NC-SA license is adopted), but also the Attribution requirements may not bind the licensee.

One may argue that the aforementioned situation would imply a use of the Licensed material in "*modified form*" and therefore requires to comply at least with the Attribution conditions; but even if that is the case (and the final paragraph of Section 4 may actually help preserving the

[50] See *supra*, Section 3.2 lett. d).
[51] See *supra*, Section 3.2 lett. f).
[52] See *supra*, Section 3.2 lett. e).
[53] For the drafting debate on the implementation of the NonCommercial clause in version 4.0, see: http://wiki.creativecommons.org/4.0/NonCommercial
[54] See *supra*, Section 3.2 lett. a).

Attributions requirements[55]), the solution adopted in Section 4 b. seems capable of determining different interpretations and confusion regarding the necessity to comply with obligations related to database adaptations.

The risk is not simply theoretic; this may happen any time the contents of a EU database are included in a derivative database by users or entities outside Europe, where SGDR basically does not exists. European public bodies who wants to share their data may have concerns about the treatment of their database contents because of the way Section 4 b. has been expressed: not only a proper attribution to the public body, but also the obligation to indicate if data have been modified could be excluded in most cases. This could keep public bodies from using a CCPL, given the caution they usually take to preserve the integrity and official status of their data.

Conclusions

In conclusion, while it is still too early to provide any evidence on the practical benefits that this newest version could bring (given its recent publication), at least we can say that some of the new features has finally tailored CC licenses to the specific field of Open Data licensing.

Trying to evaluate the pros and cons of the new version 4.0, it seems that Creative Commons put a lot of effort into conceiving and managing a brand new drafting process leading to the release of one single text enforceable in every jurisdiction, thus reducing the proliferation of slightly different versions of their licenses in the view of a better interoperability between licenses available from different organizations around the world.Similarly, the three useful additions regarding a) the prohibition to sublicense, b) the prohibition to imply any official status and c) the requirement to distinguish the original material from its downstream modifications, may help ensuring as much interoperability as possible with other licenses specifically developed for database and information held by public bodies. Also the choice to implement a more condensed text will bring CCPLs closer to the usual structure of national Open Data licenses[56].

On the other hand, beside the doubts on possible ambiguous interpretations regarding the regime of adapted databases on which the licensee does not have SGDR, it should be noted that Creative Commons did not exploit the 4.0 drafting process also to provide a list of CC compatible licenses and finally solve some of the uncertainty regarding the bounds of the NonCommercial clause; while the latter is a delicate issue that notoriously CC takes in serious consideration[57] (and it is likely that the old definition was kept because an adequate solution was not found within the drafting period), it is hope that a list of CC compatible licenses will be added in the near future, also considering that such information is supposed to take place in the Creative Commons website, rather than in the text of licenses including a SA clause[58].

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[55] Where it is said that: "*You must comply with the conditions in Section 3(a) if You Share all or a substantial portion of the contents of the database*".

[56] See *supra*, Section 3.2 lett. d).

[57] As it is described here: http://wiki.creativecommons.org/4.0/NonCommercial#Overview

[58] Namely, at the URL provided in Section 1 c.: http://creativecommons.org/compatiblelicenses

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