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EFG – The European Film Gateway

M.5.3 Research Report Open Content Models

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usable and exploitable.

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Introduction

This report researches the possibility of offering film archival content online, using open content models. This document has the aim to inform the EFG consortium members of the background on open content models, the possibilities open content models offer and what content may be offered via open content licenses. The focus lies on open content models which are frequently used by institutions which are also part of the cultural heritage sector.

Copyright legislation and cultural heritage institutions share the ultimate goal to assure the availability and dissemination of cultural production for society as a whole.

Through the digitisation of their collections archives are able to conserve their collections and provide improved access to their collections. A digitised collection also creates more opportunities for income generation. The commercial value of audiovisual material has grown due to the widening possibilities or re-use of materials.

EFG aims at finding and implementing solutions for providing integrated access to the wealth of Europe's cinematographic heritage. Open content licenses can provide users with easy to use copyrighted material without having to contact the archives for every single use. The EFG web portal will be providing access to digital objects from (currently) 14 European film archives and cinémathèques.

The institutions conserving audiovisual heritage are very often not the copyright holder to their collections. In Deliverable 5.2 a start was made into developing Guidelines for the EFG-consortium members to clear the rights of the works they would like to make available online. Rights clearance may be time-consuming and costly, it is however essential to making content available online.¹

Disclosing archival collections online is of importance for the general public, making cultural heritage available for as many purposes possible, will benefit user involvement. Previously the BBC, BFI, Open University and Channel 4 have pioneered the Creative Archive project. According to the BFI this project had as its' main aim to enable user involvement, Richard Patterson, BFI:

¹ In the Netherlands a preservation-exception (article 16n Auteurswet 1912) exists for libraries and cultural institutions dealing with heritage, however digitized objects cannot be made available for the public without previous consent of existing right holders.

“The main factor was to enable creative reuse. We had been approached by VJs about such a possibility several years earlier; we have a history of experimentation and innovation in media education.”²

Copyright may restrict the use of cultural heritage; strictly speaking anytime someone posts a picture online without the permission of the copyright holder, copyright is being violated. Opening up the collections for re-use will be possible via open content licenses. A large barrier may be that only copyright holders may decide to license their works, as mentioned earlier the archives are not always the copyright holder to works. However, as archives will need to contact the copyright holders to authorize online publication, in the negotiations they could also suggest open content licensing.

Chapter one of this research report will go into the origins of open content: the evolution from Free Software to open content is described to give background information on the concept of opening up content and sharing. Research³ has shown that in most cultural organisations and institutions open content is not a very well-known concept, therefore an introduction of open content will be needed.

In the second chapter various open content licenses are presented and examples from use by other museums and archives.

In chapter 3 the challenges of Creative Commons, the Creative Archive License and the Free Art License are discussed. The conclusion sets forth which open content license would be best suitable for EFG.

Various institutions with open content experience have been contacted for this research. The BFI and BBC have given input on their Creative Archive-project and the Tropenmuseum (Royal Dutch Institute for the Tropics) has commented on their participation in Wikimedia. Creative Commons the Netherlands was also contacted for more information on their licenses.

² As stated by Richard Patterson off the BFI in an e-mail of 8-2-2010

³ A Belgian research concluded that one out of three cultural organisations or institutions was not familiar with open content. See also: Evens, Tom, Het gebruik van open content licenties in het culturele veld, 2008 <http://www.faronet.be/blogs/jeroen-walterus/gebruik-van-open-content-licenties-het-culturele-veld-rapport>

1. What is open content?

The internet has made information more accessible than it has ever been before. Images and videos can be retrieved online, content can be downloaded and exchanged. This free flow of information however is not always in line with copyright. A very evident infringement of copyright is the distribution of illegal copies of films. However posting an image on a social network profile (such as facebook) without the consent of the copyright holder also constitutes a breach of copyright: only the copyright holder may give permission for publication of its work. Recently the Dutch Buma Stemra (Collective rights management organisation for music authors and publishers) infuriated Dutch bloggers by announcing that it would be charging for embedding music videos on blogs and social network sites (non professional use). According to Buma Stemra, users should pay a fee when they embed a video of Michael Jackson in a blog-post commemorating the death of the King of Pop. After heavy criticism from the media, lawyers and the public, Buma Stemra decided not to imply these charges for non- professional use of music online.⁴

Currently the restrictions and limitations of copyright are being perceived as a burden by a part of the creative community, but also experts from legal or economic background such as Lawrence Lessig⁵ and Chris Anderson⁶.

Aside from the copyright aspect, the internet offers an enormous audience: for institutions that want the public to get to know their collections the online environment offers a wide range of possibilities. Copyright may limit access, however the open content movement seeks to utilize copyright in a less restrictive manner.

Open Content is all material (text, sound, images) that the general public can freely use, distribute and modify without the traditional restrictions which copyright might apply. These actions can be sanctioned either by an Open Content license or by commonly accepted practice.⁷

Before going into the aspects of open content it is helpful to first have knowledge of the origin of open content and its link with the open source movement.

⁴ <http://www.bumastemra.nl/en-US/OverBumaStemra/Actueel/BS+response.htm>

⁵ Lessig is one of the founders of Creative Commons, law professor and influential critic of copyright in its current form. His most recent publication is „Remix: making art and commerce thrive in the hybrid economy“ which also formed the basis for the documentary „RiP: a remix manifesto“. This documentary gives insight in today’s mash-up and remix culture, it can be viewed at: <http://www.ripremix.com/>

⁶ Anderson is editor in chief of the magazine „Wired“ and has published „The Long Tail: Why the Future of Business Is Selling Less of More“(2006) and „Free“ (2009) Both books examine the emergence of an information society and culture of giving and sharing.

⁷ Felix Stalder, „The State of Open Content in Non-Western Countries,“2006 see also http://felix.openflows.com/pdf/OpenContentScan_Final_Reports_All.pdf

1.1 From Open Source to Open Content

The Open Content philosophy has its origins in the Open Source/Free Software movement. The Free Software ideology came as a reaction to the large impact intellectual property was gaining on the software industry in the late eighties/early nineties of the last century.

- **1.1.1 Free Software/Open Source**

With the emergence of personal computers and later the internet, software has become a key factor.

There were many developers that believed copyright was restricting the development of new software that used other software as a basis. They believed copyright was limiting creativity. In 1983 Richard Stallman announced the GNU-project, the first Free Software mass collaboration project.

The Free Software model is based around the user as a producer; users are not passive consumers but want to be actively involved in creating new works. With regards to a copyrighted work the copyright holder is the only one who may give permission for use of the work, or any alterations that may be done to the work. The Free Software movement wants to be able to use works without permission, alter and improve software freely.

Free Software has to be distributed with the GNU General Public licenses. These licenses have the aim to guarantee free distribution and alteration of all the versions of a program, to ensure that free software remains free. The source code of free software programs has to be available for subsequent users to use. In this way the software can be changed or parts of the software may be used in new free programs. The source code is in fact the blueprint of a program.

Important programs which have been created by the Free Software movement are Firefox and Linux. Many developers today rely on open source/free software to create new applications or make improvements for everyday products. Often contradictory to the GNU GPL License, the End Users License Agreements of retail software prevent users from retrieving the source code via decompilation, reverse engineering and other methods. If Free Software has been used in such products, this violates the GNU GPL License: the Free Software Foundation has been known to even bring the infringers of the GNU GPL License to court so to ensure the freedom of reuse of software.

- **1.1.2 From Free Software to Open Source**

In the late 90's a group of leaders of the Freeware projects were not happy with the moralizing and confrontational attitude that had been associated with the term „free software“. During the Freeware-summit in 1998 it was decided to use the term “Open Source” for the projects which were going to be distributed on the grounds of the following criteria:

- free redistribution
- free distribution of source code of the program, or the source code may be obtained for a reasonable reproduction cost
- derived works must be allowed, to be distributed under the same terms as the original software⁸

One of the differences between Open Source and Free Software is that the first does not necessarily have to be freely available, the source code may be obtained for reasonable reproduction costs.

Also in 1998 the Open Content project was started, to apply the Open Source criteria of free distribution and derivative works to all content.

1.2 Open Content

Open Source focussed on open licenses for software, open content intends to apply licenses for the free use of culture, such as documents, photos and audiovisual material.

The Open Content movement has broadened the scope of the core principles (free distribution, usage and collaborative development) of open source to all kinds of media.⁹

The Open Content project formulated the “4Rs Framework”:

1. Reuse - the right to reuse the content in its unaltered / verbatim form (e.g., make a backup copy of the content)

⁸ These are just a few criteria the open source definition consists, for the full version see: <http://www.opensource.org/docs/osd>

⁹ The Situationist International (SI) movement had already decided to offer all their works of art and writing without copyright in the period of 1957-1972. Drawing from Marxism, the SI were extremely anti-capitalist and also viewed copyright as a means of controlling works of art. The SI permitted anyone to copy, translate and rewrite publications without prior authorization. SI works themselves were often subverted other works in which the meaning of the work was changed, the SI themselves referred to this process as détournement. „ There is no Situationist art, only Situationist uses of art“ For more information: Methods of Détournement- Guy Debord

2. Revise - the right to adapt, adjust, modify, or alter the content itself (e.g., translate the content into another language)
3. Remix - the right to combine the original or revised content with other content to create something new (e.g., incorporate the content into a mash-up)
4. Redistribute - the right to share copies of the original content, your revisions, or your remixes with others (e.g., give a copy of the content to a friend) ¹⁰

An important open content project is Wikipedia. Wikipedia combines two core characteristics: First, it uses a collaborative authorship tool, a wiki. This platform enables anyone, including anonymous passers-by, to edit almost any page in the entire project. It stores all versions, makes changes easily visible, and enables anyone to revert a document to any prior version as well as to add changes, small and large. All contributions and changes are rendered transparent by the software and database. Second, it is a self-conscious effort at creating an encyclopaedia – governed first and foremost by a collective informal undertaking to strive for a neutral point of view.¹¹

Wikipedia uses both Creative Commons Licenses as the GNU GPL Documentation license, the only license of the GNU-project that does not cover software but documents instead. Wikipedia has become such a great success due to the collaborative effort of the contributors: each author has refrained from using several aspects of copyright, such as their exploitation rights.

¹⁰ <http://www.opencontent.org/definition/>

¹¹ Yochai Benkler, "Wealth of networks," p.70, available at:
http://www.benkler.org/wealth_of_networks/index.php/Download_PDFs_of_the_book

Creative Commons was founded in 2001 and supported by the Center for the study of the Public Domain.¹³

The aim of Creative Commons is to stimulate creativity by enlarging the commons better known as the public domain. More content should be available for free use and remixing. Culture today is not only being consumed but also used for creating new works, this is the so-called Read/Write-culture.¹⁴

To “Free Culture” Creative Commons has written a set of licenses which copyright holders may use to distribute their works more freely and allow re-use. Instead of the standard “all rights reserved”, some rights may be reserved. Technical copy protection measures¹⁵ would very often restrict the sharing and use of content, these sorts of protective measures may not be used in combination with a Creative Commons (CC) License. Watermarking and fingerprinting do not change the rights granted by the license¹⁶ and are therefore allowed and not considered protective measures.

- **2.1.1 The Licenses**

All CC-licenses come in three forms; the Legal Code (the license in legal wording), the Commons Deed (a simplified version of the Legal code, written in basic terms) and metadata (machine readable version of the license).

The main condition which is part of all CC-Licenses is:

-  Attribution (CC-BY)¹⁷

The author of the work should be named;

The following conditions may be added to the license:

-  Non- Commercial (CC-NC)

¹³ More information on the Center: <http://www.law.duke.edu/cspd/>

¹⁴ Lessig, Lawrence, *Remix: making art and commerce thrive in the hybrid economy*, Bloomsbury Academic, 2008.

¹⁵ An example of a technical copy protection measure is encryption, which is being used on DVD's to make the copying of the files on the DVD impossible. The music industry used playback restrictions for cd's in cd-rom drives to prevent the copying of music.

¹⁶ Guibault, L.M.C.R. & Helberger, N, *Copyright law and consumer protection*, ECLG/035/05, February 2005, p.10

¹⁷ The icons and acronyms are used online to indicate in a simple manner which Creative Commons license applies

The work may not be used for commercial purposes.

-  No derivatives (CC-ND)

The original work may not be changed in any way. It cannot form the basis of a new work.

- Share alike (CC-SA)

Derivatives of the original work are allowed, but under the same conditions as set by the CC-license. This is not compatible with ND: under a ND-clause no derivatives are allowed, and the SA-clause is specifically aimed at derivatives.

The six licenses, which are possible combining the above conditions:

CC-BY: basically you can use, remix, publish, copy and redistribute this work in any form as long as you mention the author of the original work.

CC-BY-SA: To use and distribute this work attribution is necessary. The user may make variations of the work but has to share the work with the same CC-license as he received it. This means that subsequent users may also make alterations to the new work themselves.

CC-BY-ND: besides mentioning the author of the original work, the work should also stay in its original form. The work may not form the basis for new works, or be altered in any way.

CC-BY-NC: As with all the other licenses, attribution is obligatory. Derivatives of the work are allowed. The work may not be used for commercial gain.

CC-BY-NC-SA: No commercial use, derivatives of the work are allowed but these have to be shared with the same CC-license.

CC-BY-NC-ND: No commercial use and no derivatives are allowed. Work may be shared only in its original format. This is the most restrictive of all the CC-licenses.

All licenses are worldwide, royalty free, non-exclusive and last for as long copyright exists on the work. No territorial applicability is possible for CC-licenses. It is not possible to ask for compensation for the use of content released under a CC-license.

Territorial licensing of content, such as geo-filtering, is also not a possibility for works distributed under CC-licenses, in the UK an alternative was created in the Creative Archive License, which shall be discussed in more detail later.

The non-exclusivity of the CC-License means that the copyright remains with the copyright holder and he is free to license the work to others. However licensing an already CC-licensed work by an exclusive license will prove to be an issue, as the work has already been distributed in a very open non-exclusive manner by the CC-license. A solution for this issue is to distribute low resolution content of audiovisual material with a CC-license while keeping the high-resolution audiovisual material available for exclusive (commercial) licenses.

It is important as a CC-licensor to realise that the license can never be revoked. The author can however always choose to stop distributing the work.¹⁸

In using CC licenses the choice can be made whether to allow derivatives from the original work. This option has the aim to promote creativity in that users may be able to create new works using elements of the original work. Lawrence Lessig, founder of Creative Commons, explains remixing:

“Remixed media succeed when they show others something new; they fail when they are trite or derivative. Like a great essay or a funny joke, a remix draws upon the work of others in order to do new work. It is great writing without words. It is creativity supported by a new technology.”¹⁹

- **Public Domain Declaration**

The Creative Commons movement believes in enlarging and sustaining the public domain, to, which they also refer as “The Commons”. The concept of The Commons comes from the Res Communes, a concept in Roman Law which refers to things that cannot be owned, such as the air or oceans²⁰. Works in the public domain are not longer protected by copyright. In general copyright expires seventy years after the death of the author. Also part of the public domain is works which cannot be protected by copyright such as law texts, governmental documents or works which lack a certain level of originality.²¹

Creative Commons aims to make works, which are still protected by copyright, part of the public domain via a public domain declaration. According to Creative Commons the copyright holder waives his exploitation rights; in the US this would mean the whole of copyright, in Europe however the moral rights will remain with the author.²²

The complete waiver of copyright will not be possible in Europe and therefore a Public Domain Declaration will provide the user with a false sense of freedom. The author, who cannot waive his moral rights, will be able to oppose use on the grounds of his moral rights.

¹⁸ See paragraph 2.3.1 of this report

¹⁹ Lessig, Lawrence, *Remix: making art and commerce thrive in the hybrid economy*, Bloomsbury Academic, 2008.

²⁰ Rose, C., *Romans, Roads, and Romantic Creators: traditions of public property in the information age*, 2003 retrieved from www.law.duke.edu/pd/papers/rose.pdf

²¹ According to the Berne Convention it is up to the national legislator to decide whether or not governmental documents shall be copyright protected (art 2 sub 4 BC). In the Netherlands law texts, administrative and court decisions are not copyright protected (art 11 Auteurswet)

²² See for this CC0-license <http://creativecommons.org/choose/zero>

- **Use, Re-use**

Creative Commons does not define what use or re-use may be possible, the licenses leave this open for interpretation. Guidelines can be formulated by the institutions publishing under a CC-license; this can be done for both commercial as non-commercial use.

- **2.1.2 Creative Commons examples in practice**

The following cases are examples of how both archives as museums make use of Creative Commons licensing in making their content available.

- **Prelinger Archives²³**: American example of a best practice network of the non-profit Internet Archive collaborating with the Library of Congress and the Smithsonian. Over 2000 films can be viewed online from the Prelinger Archives, a collection consisting of educational, advertising, industrial, and amateur material. Most of the material in the Prelinger Archives is published online under a Creative Commons Public Domain Declaration, however some material is offered against a fee. The collection is therefore both commercial and non-commercial. About 5000 clips from the Prelinger archives are available for licensing by Getty Images.
- **Celluloid Remix²⁴**: In 2009 the Nederlands Filmmuseum (NFM) organised a remix-contest to promote the project “Images for the future²⁵”. Twenty-one unique silent film fragments, which were all in the public domain, were offered for download. The theme was Modern Times: use the film-fragments to make a vision on the world of today and the future. The films had to be uploaded to Blip.tv²⁶ and to enter the competition it was required to license the film with a CC-BY or a CC-BY-NC-SA. This was to promote the reuse of the remixes. To

²³ <http://www.archive.org/details/prelinger>

²⁴ www.celluloidremix.nl

²⁵ Images for the future was initiated in 2007 and will run for a period of seven years, the FES (Fund for the reinforcement of Economic Structure) is providing a budget of 154 million euros for the digitization of the Netherlands’ audiovisual memory. With it, the imminent threat of decay and loss of vulnerable films and video- and audiotapes is being taken away. During the project, a total of 137.200 hours of video, 22.510 hours of film, 123.900 hours of audio, and 2.9 million photos from these archives will be restored, preserved, digitized, and disclosed through various services.

The main goal of the project is realising maximum accessibility to the audiovisual material for the targeted user groups (educational institutions, the general public, and the creative sector). To reach this goal, Images for the Future is developing and offering innovative services and applications. Partners in this project are the EYE Film Institute Netherlands, Sound and Vision, National Archive, Centrale

Discotheek Rotterdam, Association of Public Libraries and KnowledgeLand Foundation.

²⁶ <http://celluloidremix.blip.tv/>

ensure a high quality of remixes, various workshops and a Celluloid Remix Summer-school were organised at the Dutch Institute for Media Art (NIMk) and Beamlab, a bimonthly platform for audiovisual innovation. Various social media were used to enhance the community-participation; the best remixes were shown at the Celluloid Remix –award ceremony during the Dutch Film Festival.

- **Open Images/Dutch Footage:** The Dutch audiovisual institute Sound and Vision has published the first set of films online which are available under a CC-license. The 469 items consist mostly of the Polygoon Hollands Nieuws-collection newsreels and the RVD collection (Netherlands Government Information Service). This open media platform is also a side-project of the mass digitisation project „Images for the future“. The aim of “Open Images” is to offer online access to a selection of archive material to stimulate creative reuse. Reuse includes remixing of archive footage in new videos. The ‘open’ nature of the project is underscored by adapting open formats and using open source software for its infrastructure. Software resulting from Open Images will also be released under an open source license.

In addition to this open media platform, Sound and Vision also has a website where it licenses footage for a fee²⁷. This audiovisual content is subjected to a far more restrictive license than that on Open Images: alterations are strictly prohibited, unless explicitly permitted beforehand by the Licensor²⁸.

Open Images/Dutch Footage show that it is possible to license material both through CC-licenses but also make available content against payment through a different platform.

- **The Powerhouse museum:** Museum for design and science based in Sydney, Australia. The Powerhouse museum offers content under several license categories, among them the CC-BY-NC-ND for their Photo of the day blog²⁹. CC-BY-NC and CC-BY-SA licenses are used for the text documentation in their online database of their collection³⁰. Worth mentioning is also the innovative approach The Powerhouse has taken in scanning their

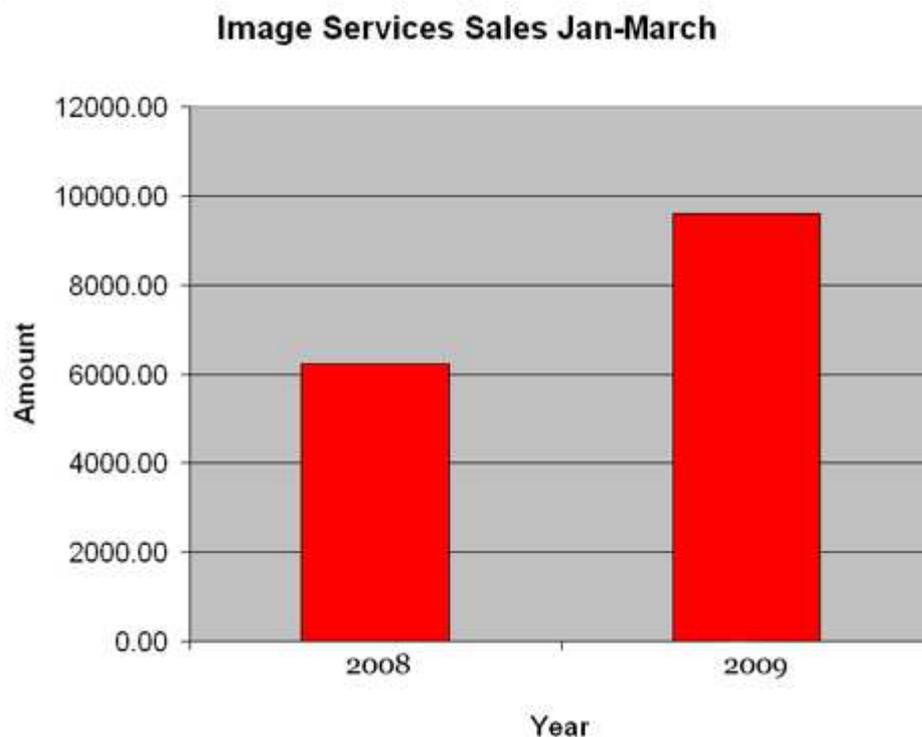
²⁷ www.dutchfootage.com

²⁸ Article 5.2 of the Licensing Agreement Archive Material from Dutch Footage, available at : <http://www.dutchfootage.com/uploads/rte/Dutch%20Footage%20licenseconditions%20ENG.pdf>

²⁹ <http://www.powerhousemuseum.com/imageservices/>

³⁰ <http://www.powerhousemuseum.com/collection/database/>

swatch book collection (small samples of fabric) and putting them online.³¹ The designs of these fabrics are in the public domain, and the Electronic Swatch book may be used for downloading these patterns and using them in any way. This is a good example of making new active use of the, otherwise rather static, collection of a museum. In addition, the Powerhouse museum has added their Tyrrell photographic collection to the Flickr the Commons-project in 2008. Offering these images online has not decreased sales of images for the Powerhouse museum, as shown in the following overview:



Source: <http://www.powerhousemuseum.com/imageservices/?p=1096>

Users of Flickr the Commons could add tags and comments to photographic collections and also share the photographs. The tags and comments enriched the knowledge of the collection, by adding specialist knowledge and also linking images to similar content.³²

- **Bundesarchiv & Wikimedia Commons:** The Bundesarchiv (German Federal Archives) has released over 80.000 images to Wikimedia Commons under a CC-BY-SA-license. Between the Bundesarchiv and Wikimedia Germany an

³¹ <http://www.powerhousemuseum.com/electronicswatchbook/>

³² Springer, Michelle et al, For the common good: the library of Congress Flickr pilot project, 2008 see also http://www.loc.gov/rr/print/flickr_report_final.pdf

agreement has been reached in which the Bundesarchiv asserts that it owns sufficient rights to be able to grant this kind of license.³³

- **Tropenmuseum (Royal Dutch Institute for the Tropics) & Wikimedia Commons:** For their exhibition on the Marron-culture in Surinam, the Tropenmuseum has uploaded over 2000 images to Wikimedia Commons. The Tropenmuseum hopes that the Wikipedia contributors will contribute to the Wikipedia articles on the Marron-culture and the images are also available for digital restoration by volunteers. The images have been provided under a CC-BY-SA License, the Tropenmuseum is copyright holder of all the images they provided. The Museum hopes to upload up 60.000 images on Indonesia in 2010. The main incentive for the Tropenmuseum is to reach a new audience by publishing these archival images on Wikimedia for use on Wikipedia.³⁴

2.2 Creative Archive License

In 2005 in the UK the BBC, BFI, Channel 4 and Open University founded the Creative License Archive Group (CLAG). The CLAG aimed to make archival content available for download under the terms of the Creative Archive License.

- **2.2.1 The License**

Important elements, or rules, of the Creative Archive License have been formulated in a very user-friendly and clear manner:

1. **Non-commercial:** Anything that is created by the user via the available content must be for non-commercial use only. Examples are sharing with friends and family or making use of the work for educational purposes. No profit may be made from the use of the content.
2. **Share-Alike:** Derivative Works may be shared, only under the terms of the Creative Archive License.
3. **Crediting (Attribution):** The author of the original work should also be credited alongside the maker of the derivative work.

³³ <http://commons.wikimedia.org/wiki/Commons: Bundesarchiv>

³⁴ <http://commons.wikimedia.org/wiki/Commons: Tropenmuseum>

4. **No endorsement and no derogatory use:** The content may not be used for endorsement, campaigning, and defamatory or derogatory purposes.
5. **UK only:** the Creative Archive content is made available to internet users for use within the UK.

CLAG comments that the Creative Archive License is heavily inspired by the Creative Commons License. Important differences from the Creative Commons License are:

- UK only: reasoning behind this condition is that the members of the Creative Archive License group are public service organisations in the UK. They only have to disclose their material to UK nationals. Also, often licenses for broadcasting are limited to the UK. This does however keep the option open for commercially licensing the material internationally.
- No Endorsements: the material may not be used in a way that would suggest or imply the Licensor's support, association or approval. This provision was a direct consequence of the BBC Editorial Guidelines: these guidelines have the aim to prevent the BBC from becoming part of compromising situations.³⁵
- The Creative Archive License has a warranty-clause in which the licensor warrants that all the rights have been secured in order to grant the License.³⁶

The first two requirements limit the use of the offered work more than a Creative Commons License would allow.

- **2.2.2 Creative Archive License in practice**

The pilot of the Creative Archive License-project ran from 2005 to 2006. Currently the BFI³⁷ and Open University³⁸ are still making clips available under the CAL, the Open University explains why:

"We're liberating the film in our archives. Instead of leaving it to gather dust, we want you to give it new life. You bring your imagination – and maybe material that you've made for yourself on your phone, or camcorder. We bring professionally shot footage. Match it, Mash it, Mix it and then share the results."³⁹

³⁵ For the BBC Editorial Guidelines see <http://www.bbc.co.uk/guidelines/editorialguidelines/>

³⁶ See clause 3.1 from the Creative Archive License, which can be read at:

http://www.bbc.co.uk/creativearchive/license/full_license.shtml

³⁷ <http://www.bfi.org.uk/creativearchive/>

³⁸ <http://www.open2.net/creativearchive/whatcanido.html>

³⁹ Idem 28

2. 3 Free Art License / License Art Libre

This is probably one of the first open content licenses which was aiming at use by artists and creatives. In 2000 the Copyleft Attitude meeting was organised in Paris and it is during this event that the Free Art License (FAL) was drafted.

The French Copyleft movement is the initiator of these art specific licenses. Copyleft is a general method of making software programs free for use, and requires all derivatives to be free for use as well. It is the aim of Copyleft to ensure that concepts and ideas remain openly available and cannot be privatised.⁴⁰ The Free Art License strives to apply the concept of the Free Software movement to a license which can be used for creative works.

Goal of the FAL is to encourage public access to works of art. It follows the spirit of the GNU-licenses in that it accentuates the development that distribution-methods have changed and people are now able to distribute works themselves online and transform them.

“The main rationale for this Free Art License is to promote and protect these creations of the human mind according to the principles of copyleft: freedom to use, copy, distribute, transform, and prohibition of exclusive appropriation⁴¹”

- **2.3.1 The License**

Although the Free Art License subjects works to copyright law, the author can specify the extent to which a work may be copied, distributed and modified. Currently the most recent version is the FAL 1.3.

It gives the user the following rights:

- Freedom to make reproductions: right to copy, whatever technique is used.
- Freedom to distribute/ Freedom to perform in public: whatever the medium or place. This may be done commercially or non-commercially.
- Freedom to modify: it has to be indicated that the work has been modified, and if possible which modifications have been made.

Requirements:

⁴⁰ Berry, David M. & Moss, Giles, Libre Culture: meditations on free culture, Pygmalion Books, Winnipeg 2008

⁴¹ Free Art License 1.3, Preamble, see also Annex 3

The license has to be attached to the work, without modification, or it has to be indicated specifically where the license can be found. The author of the original work has to be attributed, it also has to be specified where the original work may be accessed.

If the work is incorporated into a larger work, this may only be allowed if the larger work is licensed under the Free Art License or a compatible license.

Compatible licenses are licenses which give the right to copy, distribute and modify copies of the work including for commercial purposes and without restrictions. Compatible licenses should also ensure proper attribution of the authors and access to the original work if possible. Finally, a compatible license should require that changes to the work should be subject to the same license or to a license which also meets the Free Art license compatibility criteria.

The duration of the license is for as long as the copyright in the work lasts.

The applicable law on the license is French law on copyright and the Berne Convention.⁴²

- **2.3.3 Free Art License in practice**

The website of the Biennale de Paris⁴³ has been published under a FAL, however no images are included in/used on the website and it merely consists of texts and the web-design itself.

On the gallery-site Freemages⁴⁴, all the pictures are available for use under the FAL. Flickr does not yet have the option to license pictures under the FAL.

There does not seem to be a lot of institutions which are currently making use of the FAL.

⁴²Article 11 of the Free Art License

⁴³ <http://www.biennaledeparis.org/en/freeartlicense.html>

⁴⁴ <http://www.freemages.fr/en/>

3. Is Open Content suitable for EFG?

3.1 What content?

It is up to EFG to consider what they want to do with their content. For the visibility and promotion of EFG, and the various archive-websites it would be innovative to follow the examples of, amongst others, the Powerhouse Museum and Prelinger Archives. Using open content to make widespread access to audiovisual heritage available for future generations of users is one of the aims of EFG.

Currently the EFG-site will be offering:

- Metadata
- Embedded images/videos (deep-linked to websites of the content providers themselves)

Both the metadata and the images and videos can be licensed via open content licenses, however the copyright holders to the content should agree to do so (for the metadata this should not be a large issue as most of the content providers will be copyright holders to the metadata). Open content licenses cannot be applied without the consent of the copyright holders or to content which has become part of the public domain. The copyright holders of orphan works are unknown, so no consent can be asked to distribute works under an open content license.

3.2 Which license?

In order to determine which open content license will be most fit for the purpose of European Film Gateway, it should be taken into consideration which less positive aspects the previously discussed licenses might have.

- **3.2.1 Challenges to Creative Commons Licensing**

Creative Commons is the most popular of open content licenses used for artistic works, but this particular form of licensing has also attracted the most criticism. The commentators have different viewpoints, varying from stating that CC is not free enough and merely proliferates a much too strict copyright system, to more theoretical issues. The following issues should be taken into consideration when using a CC-license:

- **Jurisdiction**

CC-licenses do not specify which jurisdiction should apply to their licenses. General rules of private international law apply. This may prove to be problematic in case an infringement might take place.

- **Termination:**

Termination of a CC-license is not possible; the license lasts as long as the copyright lasts on the work. The license cannot be revoked, Creative Commons gives:

You can stop distributing your work under a Creative Commons license at any time you wish; but this will not withdraw any copies of your work that already exist under a Creative Commons license from circulation, be they verbatim copies, copies included in collective works and/or adaptations of your work.⁴⁵

As CC-licenses are non-exclusive, it is quite possible to license the same work also under different, commercial licenses. However very often commercial parties are mainly interested in exclusive licenses, the inability to offer an exclusive deal may make the work less desirable for commercial use.

Again, deciding which content shall be distributed under open content licenses is key.

Termination of the CC-license is the only **sanction** for users who breach the conditions of the license, this means that the user no longer use the work. Also breach of the Creative Commons license can be brought to court, a Dutch Court ruled in 2006 that publishing pictures in a tabloid violated the Non-Commercial use provision under which the photos were posted on a blog.

- **No warranties:**

Neither CC nor the licensor are responsible for any damages which may occur from the license. Previous versions of CC-licenses contained the guarantee that the licensor was not breaching any third party rights “to the best of his knowledge after reasonable inquiry”. In 2003 this was replaced by the warranty clause. Users making use of CC-licensed works will still run the risk of breaching third party rights. A risk is that the person that makes a work available under a CC-license may do so even if this person is not the copyright holder and not allowed to license the work. CC does not check whether the licensor actually is allowed to license the work.

⁴⁵ http://wiki.creativecommons.org/Frequently_Asked_Questions

- **Licenses are not detailed enough:**

As an example commercial use is not clearly defined in the legal code of the licenses:

“You may not exercise any of the rights above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.”⁴⁶

It is only determined that file sharing shall not be considered commercial use (and therefore will be allowed). If a CC-license is used, it is recommendable to define what commercial use entails for EFG. These conditions can be added via an Annex which would make the license clearer.

CC-licenses do not have any specific clauses regarding derogatory use. It is only mentioned that use of the work should take into account the moral right of the author and that the author can oppose distortion and mutilation or other alterations to the work.⁴⁷

If works were offered under a CC-license there is the possibility that works may be used in a context which EFG would not approve of. The Creative Archive License has included a no endorsement clause which aims at preventing use in for example defamatory situations.⁴⁸

- **3.2.2 Challenges to the Creative Archive License**

In addition to the praise the CLAG has received for its initiative, there has also been criticism on certain aspect of the licenses.

UK-only restriction

Limiting the use of and access to the Creative Archive project only to UK-residents via geo-filtering of IP-addresses very much limits the access to this particular part of cultural heritage. Not giving access to non-UK residents does not promote reciprocal sharing by other non-UK archives.

⁴⁶ Article 4b of Creative Commons Legal Code Attribution, Non-Commercial version 3.0

⁴⁷ Article 3f of Creative Commons Legal Code Attribution, Non-Commercial version 3.0 (translation from NL-version)

⁴⁸ See previous paragraph 2.2 of this document

For the purpose of EFG it would not be functional to make a license geographically applicable, for the reason that it would exclude all non-residents of the country where the archive is located.

Warranties

The warranty which is included in the CAL gives users of the content the warranty that the content has been cleared. The Licensor does have to know the rights status of a work before it licenses it under the CAL. A similar warranty is not included in the CC-licenses, which makes them easier to use for licensors.

Termination

Termination of the license is the only sanction which is mentioned in the license. The license has not been tested yet in court.

- **3.2.3 Challenges to the Free Art License**

The use of the FAL is not widespread at all. No large institutions seem to be using the FAL. The FAL is not very well known and it has not endured as much critique from scholars as Creative Commons has had.

The license itself has some aspects which might prove to be troublesome:

The license gives the right to distribute copies of the work in “whatever the medium and the place”.⁴⁹ Not all jurisdictions allow for the transfer of such future forms of exploitation⁵⁰ and if they do, it should be specified in the license what forms of exploitation are meant. The wording of this clause is most probably too vague to facilitate a valid license of future forms of exploitation.

Termination

The license does not deal with the termination of the license from the side of the author, the license remains in effect for the period copyright lasts on the work. There appears to be a similar situation with the Creative Commons license: once you decide to distribute your works under the FAL you cannot terminate the license.

⁴⁹ Article 2.2 Free Art License 1.3

⁵⁰ For example Czech copyright law excludes all forms of exploitation which did not exist on the time an agreement was made, from the scope of the agreement.

There is no sanction mentioned for violation of the license, the license has not been tested in court.

Incompatibility

Works which are distributed under the FAL can only be incorporated into works which will be subject to the FAL or a compatible license. The FAL is not compatible with the CC-BY license; this license does not require the user to distribute a new work under an open content license. This could prove problematic if works under the FAL are incorporated in works which are distributed under a CC-license.

Conclusion

Digital technologies have changed the relationship between authors, producers, distributors and consumers. The role of the archives is also changing; digitising collections widens the possibilities for use of the content beyond the original preservation role of archives. Archives will be able to distribute their content online to a much larger audience than ever before.⁵¹

The internet has made the options for distribution of content endless, and information is being shared, published and re-used at immense speed. There is a need for material which can be re-used and shared without restrictions.

Open content licensing aims to make content more easy to use, the content is available for free, and may be shared with others under similar conditions. Some open content licenses allow for more restrictions such as the “No Derivatives” and “Non-Commercial” options for CC-licenses).

Cultural institutions are currently already serving the general public by opening up their collections and offering them online via open content licenses. Examples have been discussed in chapter 2: such as the Powerhouse Museum adding parts of their photo-collection to Flickr the Commons. Similar initiatives have also enriched the knowledge of the collection of other archives; users have given specialized knowledge via tagging and commenting on the collection online.⁵²

The Creative Archive-project is one of the first attempts of audiovisual archives such as the BFI and the BBC to make content available online for free re-use. Reasons for this initiative were to demonstrate that the archive is a rich source for reuse.

Being visible online is a means of getting in touch with new audiences. Participating in open content projects can improve the visibility of the collection of an archive. The Library of Congress found that they were reaching new and more more users when they participated in the Flickr the Commons project: the same photographs had been online for years on their own website but failed to generate a similar enthusiastic response:

“Increasing the ability to engage and connect with photos increases the sense of ownership and respect that people feel for these photos.”⁵³

⁵¹ Van Loo, Arjo, Het audiovisuele archief in de twintigste eeuw, Tijdschrift voor mediageschiedenis, jaargang 3, nummer 2, december 2000

⁵² Springer, Michelle et al, For the common good: the library of Congress Flickr pilot project, 2008 see also http://www.loc.gov/rr/print/flickr_report_final.pdf

⁵³ Springer, Michelle et al, For the common good: the library of Congress Flickr pilot project, 2008 see also http://www.loc.gov/rr/print/flickr_report_final.pdf

In short, a main incentive for offering works online is to make collections more accessible and to research whether the online participation can enrich the knowledge of the collection.

Opening up content does not necessarily imply giving away content for free or losing income for licensing. Audiovisual material could very well be made available to users for sharing and remixing. This could serve as a promotional platform, which could be linked, to a commercial licensing platform, such as the example of Open Images and Dutch Footage.

It is also possible to make content available in a low resolution for free and in a high resolution for a fee.

Films from the Prelinger Archive are available online for free re-use, but clip-licensing of these films is also available via Getty Images for a fee. This shows that by making content available online it can generate interest of professional users for specific material (clip-licensing is very popular with vj's and video-artists).

In general, archives which are copyright holders can decide to make material available via open content models. It needs to be taken into account that an archive can decide in what manner content will be available, for instance at what resolution it wants to offer material via open content licenses: for example at a low resolution and save high resolution audiovisual material for commercial exploitation (such as video on demand, DVD's or clip licensing).

It is essential to realise that not all content is suitable to be distributed via an open content license. Public domain material cannot be offered under open content licenses, as this material is no longer protected by copyright. Public domain material may be re-used in any way, so no open content license is needed to make free use possible. Only material which is copyright protected can be distributed under an open content license. Content of which the archives are not the copyright holder, needs to be cleared prior to publication: archives could propose open content licenses in negotiations with copyright holders. This is also suggested by IVIR, the Dutch Institute for Information Law:

“We found that cultural heritage institutions can take up new intermediary tasks in negotiating rights between rights holders and users by using Creative Commons Licenses to achieve broader access and possibilities for re-use.”⁵⁴

Orphan works cannot be distributed via open content licenses; the right holders is not known, so permission cannot be asked to license the orphan work. Distribution of an orphan work via an open content license could be a violation of copyright.

⁵⁴ Hoorn, Esther , Creative Commons Licenses for cultural heritage institutions: a Dutch perspective, IVIR, 2006

On the EFG portal metadata will be provided and the portal will also link to material hosted on the sites of the EFG content providers. The metadata will also be used by Europeana. Europeana will be using Creative Commons licenses to distribute metadata to third parties (CC-Attribution or CC-Attribution-Sharealike). As far as metadata is concerned, copyright may exist on certain aspects of the description, for this reason it may be licensed via Creative Commons license. If EFG chooses to distribute their own metadata under a Creative Commons license it should be in line with the Europeana Licensing Framework. In any case Europeana will be using EFG metadata to combine this with other data to form Europeana metadata. We do not see any reason not to offer metadata under a similar open content license as used by Europeana.

Currently, the use of open content on the EFG portal will be limited, however for the EFG consortium members it will be beneficial to “open” up material for prospective users on their own websites.

From all open content licenses Creative Commons is the license which is currently most in use amongst creatives and cultural institutions. Even in the UK, where the Creative Archive License originates, Creative Commons is more well-known and more often used among cultural organisations and institutions.⁵⁵ The use of the Free Art License is not widespread, and this license is also not compatible with more often used open content licenses such as Creative Commons.

It seems advisable to opt for either a Creative Commons license or a license which is similar to the Creative Archive License. However, an open content license should not be country/ip-specific. Also, not all archives are able to give warranties on the right status of a work. It would not be very efficient to create a new license; there already exist open content licenses which are based on a worldwide network of use such as Creative Commons. Creative Commons licenses have variations in which archives will be able, to a certain degree, to regulate the use of the content (not allow derivatives, not allow commercial use both are options). Users will always have to attribute where the content has come from, and in this way the archive will always be named, which will promote online visibility.

⁵⁵ A research conducted in 2007 in the UK showed that a majority of the respondents were familiar with open content licenses and that Creative Commons was the best known open content license. See for more information on this research: Hatcher, Jordan S., [Snapshot study on the use of open content licenses in the UK cultural heritage sector](#), 2007 Eduserve

EFG can benefit from offering audiovisual content via open content licenses to promote its portal. By stimulating user-participation, EFG can improve its visibility online if users will be able to cross-post material on various sites. The web has become essential to reach new audiences and open content is key for the visibility of archives in the future.

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