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Intellectual property in the digital world: an extinct monopoly?

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Abstract
Digital technologies are proving to be one of the biggest challenges facing the legal regime of "traditional" intellectual property. Over the last few centuries, intellectual property has become a useful mechanism to encourage creation, to guarantee remuneration for authors and artists and, in general, to regulate a specific market, namely the creation and exploitation of works and performances. However, digital technology questions many of this regime's traditional concepts, from the very concepts of author and work to the scope of exclusive rights in online environments, the regime of licences, the role of collecting societies, etc. This article examines some of the issues currently under debate: violation via P2P systems, the limit to private copying and how to compensate this and the Creative Commons licensing system.

Keywords
Intellectual property, author's rights, internet, private copying, public licences, collecting societies.

Resum
Les tecnologies digitals estan demostrant ser un dels reptes més importants als quals ha de fer front el règim jurídic de la propietat intel·lectual "tradicional". Durant els darrers segles, la propietat intel·lectual ha esdevingut un mecanisme útil per fomentar la creació, per garantir una remuneració als autors i als artistes i, en general, per regular un mercat concret –el de la creació i l'explotació d'obres i prestacions. La tecnologia digital, però, qüestiona molts dels conceptes tradicionals d'aquest règim, des dels mateixos conceptes d'autor i d'obra, a l'abast dels drets exclusius en entorns en línia, el règim de llicències, el rol de les entitats de gestió, etc. En aquest article examinarem alguns dels temes de debat actualment: la infracció mitjançant sistemes P2P, el límit de còpia privada i la manera de compensar-la, i el règim de les llicències Creative Commons.

Paraules clau
Propietat intel·lectual, drets d'autor, internet, còpia privada, llicències públiques, entitats de gestió.

1. Introduction

Over the last few years, as a result of the emergence of digital technologies (and most particularly the internet), the debate regarding intellectual property has gone from being limited to professional and academic circles to becoming a complete part of society. Almost every day the media publish some news item related to the issues of intellectual property: exchanging files through P2P (*peer-to-peer*) systems, the duty levied to make up for private copying, licences for public communication in hairdressers, hospitals and other places open to the public, the role of collecting societies, public licences (such as Creative Commons licences), etc. To a greater or lesser extent, everyone has a particular opinion about the appropriateness or unfairness of these issues, albeit often resulting from declarations that are not very well informed. This article attempts to deal with some of the most pressing issues related to intellectual property in digital environments and provide an intelligible and objective legal view. Specifically, these three issues: the exploitation and infringement of online works, especially via P2P systems; private digital copying and how to remunerate it; and public licences, such as Creative Commons licences. First, however, we need to explain briefly the legal system that protects intellectual property.

2. The regime of intellectual property

Intellectual creation is natural in humans, who have always created irrespective of whether there is a legal regime to protect creation. The great authors of the Renaissance, for example, did not have any "ownership rights" (in the sense of exercising exclusive and excluding control) over their works (normally contained within a single unit), which directly went on to be the *property* of whoever had financed them (the monarchy, church or patrons). To find a legal regime as such, we have to go back to the 16th century, when the arrival of printing severed the link between the "work" and the "copy", resulting in a new market that had to be regulated (the so-called printing "privileges" granted to printers to *exclusively exploit* a specific work) or at least to the 18th century, with the first English intellectual property act (*Statute of Anne,* 1709), which granted authors of printed works a period of 14 years for the exclusive right to authorise publishers to exploit the work.[1]

The regime protecting intellectual property can be justified in two quite different but perhaps complementary ways: on the one hand, because it's fair to recognise and enable the remuneration of individual effort (creative, artistic, economic, etc.) and, on the other hand, as a mechanism to stimulate and regulate the market of creation, which ultimately benefits everyone (the more that is created, the richer our society).

Something having a name, however, does not always mean that it exists. Although we use the term "property", intellectual property is not "property" in the same sense as with the physical (tangible) goods, movables or real estate around us and over which we are used to exercising absolute and excluding control (that is what property is). Intellectual property is, they say, a "special" kind of property. And very special it is too! Firstly, because the object protected is not a physical object but an *intellectual creation*, irrespective of whether this creation is included within a tangible medium (for example, a CD, a book, a picture, a sculpture or a roll of film) or not (for example, a jazz jam session or mime show). Secondly because, unlike "normal" property, creation can be used (listened to, seen, read, etc.) by many people simultaneously and without exclusion. And, finally, because in the vast majority of cases, intellectual property affects goods of great cultural and social value, as well as economic.[2]

In any case, it's undeniable that, without an intellectual property regime, intellectual creations would "naturally" tend to be in the public domain from the moment they are exteriorised. We are therefore faced with an "artificial" regime, established by law and with highly specific objectives.

In order to understand the regime of intellectual property (hereafter IP),[3] we must employ five fundamental concepts: work, author, rights, limits and licences.

a. With regard to the **definition of *work***, any *original intellectual creation* is a work. The work's artistic merit and economic value are irrelevant, as are the use it may have, the technology employed and the complexity involved in creating it. Any *intellectual creation* that is *original* is protected by law. Although it's often very difficult to define what is original and what isn't, the objective scope of application (the front door to the IP house) is quite wide. In addition to works, the law also protects other *performances* related to the creation and exploitation of works but which are not "original intellectual creations" per se, such as interpretations and acts carried out by artists (singers, musicians, actors, directors, etc.), record and audiovisual recording producers, takers of "mere photographs" and broadcasting bodies.
b. However, not everyone who makes a contribution to a work is an author: **only the person who creates it is the *author.*** According to Spanish law, the author is the natural person(s) who create(s) the work. In specific cases, such as collective work and computer programs, the law allows rights to be granted directly to the person (which might be a company) that coordinates the creation of the work. Hereafter, therefore, when we refer to authors, we must also assume this includes the holders of rights to other *performances* protected by law: artists, producers, broadcasting bodies and photographers.
c. The law confers two kinds of rights to the author regarding the work: so-called "moral" rights and "property" rights. The former are aimed at protecting the author's rights of a personal (not economic) nature regarding his or her work, such as **attribution** (the right to be recognised and accredited as the author), **integrity** (preventing the work from being mutilated or deformed in such a way that harms the author's reputation or interests) and **dissemination** (to decide whether to publish the work and how, or to keep it unpublished: logically, dissemination can only be exercised once). Property rights, however, are aimed at authors *being able* (success is not guaranteed) to profit financially from exploiting their work via ***exclusive rights of exploitation:*** **reproduction** (fixing the work or making copies of it), **distribution** (by selling or donating, renting or loaning tangible copies), **public communication** (putting the work in the public domain without distributing copies, including exploiting works via the internet)[4] and **transformation** (modifying the work to make another new one). The law also guarantees some **rights of "simple remuneration"**,[5] such as the right to a share from the public resale of a plastic work and fair remuneration for private copying.
d. And, as happens with all property, **limits** are required. There are two kinds: those related to time and also material limits. Intellectual property is not eternal and is only protected for a limited period of time: in Europe, this protection period is standardised at **70 years as from the death of the author**.[6] After this period, the work enters into the **"public domain"** and from then on can be exploited commercially by anyone and free of charge, provided moral rights are respected. With the public domain, the work "returns" to the community which, in any case, is where it originally came from (no author can create in a cultural vacuum). Material limits, on the other hand, apply while the work is still protected to ensure that, in some specific cases (such as citation, parody, teaching and research, information, etc.) it will be possible to use/exploit the work without requiring the author's permission (and without the author being able to oppose this). It is through these limits that the legislator achieves the "point of balance" between protecting the author's interests (moral and property rights) and protecting other interests (both public and of third parties) that deserve to be imposed, especially regarding fundamental rights such as free speech, freedom to information, access to culture, etc.
e. Authors are free to exercise these rights of exploitation and remuneration as they wish (or to decide not to do so), either directly or by commissioning third parties or organisations (such as collecting societies) via the regime of licences. Licences can be granted exclusively, for a specific time and territory and stating the specific rights and types of exploitation being authorised. Realising that the author is normally the weakest party in a contractual negotiation, the law takes

it upon itself to protect the author and, for example, states that, in any case of doubt regarding the scope of a contract, the interpretation must be the one most favourable for the author (*in dubio pro auctoris*) and types of exploitation must never be understood as authorised that were not known at the time of taking out the licence (the author can always authorise new kinds of exploitation).

3. Intellectual property online

IP regulations are the result of technological developments over the last few centuries. The concept of a *work,* the definition of rights of exploitation and their limits have evolved as technology has provided new ways of creating and exploiting works. Photography, radio, cinema and television are good examples of this. And digital technology is no exception: computer programs, videogames, digital databases, multimedia works, etc. have become part of the object protected by IP laws. Rights of exploitation have also been moulded to digital technology to ensure the system survives in digital environments; and, as a new incorporation, today's laws allow rightholders to establish protective measures using digital technology to control the access and use (copies) made of their works.[7]

With the arrival of digital technology, the author's scope of exclusivity has been strengthened (at least formally) to the extent of definitively erasing the boundary between exploitation (normally commercial and public) and mere use (enjoyment of works). The exclusive right of **reproduction** covers any use and even any temporary, incidental copies that may be made in a computer's RAM are subject to it (although an obligatory limit throughout the whole of the EU condones them).[8]

On the other hand, the **concept of *public***, inherent to the very concept of *exploitation*, has gradually been broadened. The right of public communication, initially defined in terms of display (exhibition, museums) and live performance (concerts, theatre, dance, recitals, etc.) became increasingly important over the last century with broadcasting technologies that made public communication possible to a distant public. And although the communication carried out within a domestic or private sphere has traditionally been excluded from the scope of this right [article 20 of the Revised Text of the Spanish Intellectual Property Act (TRLPI in Spanish)], recent jurisprudence by the European Court of Justice[9] (ECJ) has ended up broadening the concept of *public* in detriment to the concept of *domestic or private sphere*, which is now difficult to apply to private rooms in hotels, hospitals, hairdressers, etc.

Finally, the internet has ended up breaking down the barriers of time and space: the fact that a protected work is placed at the disposal of the public via the internet, so that any user can access it from anywhere or anytime they want, is an act of public communication. It doesn't matter if no-one ever visits that content and it doesn't matter if it's free or charged for; the important thing is that it has been placed at their disposal and this can only be done legally by the person who is the author of the work or has a licence for it, unless, of course, one of the legally established limits applies. What is under debate now is whether, due to the mere fact of **establishing a link** to an external website, a new act of reproduction and public communication is being carried out of the protected external work and, therefore, if the author's permission is required (as always, unless one of the legally established limits applies). The courts have made several attempts to contribute some kind of solution to this disparity between reality and the law. Some choose to deem that, when an author or rightholder places his or her work at the disposal of the public on the internet, then this person is implicitly allowing (hence the idea of "implicit licence") users to access the work and make links to it.[10] Others prefer to conclude that, when a link is made, no act of reproducing the work is being carried out (at most, the title is being reproduced to activate the link but not the whole work), nor an act of public communication (because it simply leads the user towards the original page).[11] However, nothing has been decided as yet (as always, the law is slow). We all realise that the internet would not be what it is if we couldn't make links. The debate is therefore not purely theoretical but rather significant to today's information society and that of the future.

Downloading files using P2P systems also presents interesting legal issues, both related to direct liability (on the part of the user) and indirect liability (on the part of the person providing the service that makes this possible). Via a P2P system, the user makes available to all other users of that system digital files (normally of someone else's work) saved on his or her computer (or on another disk space). Even in the case of this copy having been made legally within the limits of private copying (see point 2 of article 31 of the TRLPI),[12] the fact that it is made available to other users clearly entails an act of public communication for which the corresponding authorisation should be obtained (for example, with a Creative Commons licence) in order to avoid violation. Having reached this point, there are two issues to be analysed *de lege ferenda*: do we want the unauthorised use of other people's work via P2P systems to be an offence? And, if this is the case, what kind: civil or criminal?

On the one hand, the law could directly permit this new kind of exploitation of alien works by obliging authors/rightholders to request the licence in exchange for payment. This is the "legal or obligatory licence" system, with the law authorising the act of exploitation, accepted in the past to enable the public communication of commercial phonograms on the radio and to transmit broadcast works via cable (see point 1 of article 36 of the TRLPI). This option was the one proposed by the Electronic Frontier Foundation[13] and the one claimed by Napster when sued by the record industry in 2000. Neither the courts nor legislators took any notice and it was preferred to reserve the licensing of this new kind of exploitation to the sphere of exclusivity (and therefore discretion) of the rightholders, possibly hoping that these owners would make new kinds available to consumers. 10 years have passed and, apart from iTunes,

possibly the only model that has been successful, albeit accompanied by significant technological restrictions for consumers, the problem of the new models of online exploitation is still unresolved. New P2P systems (more evolved than Napster and Grokster) are presenting new legal challenges, especially those related to the possible subsidiary (or indirect) liability of the creator/supplier of P2P technology for offences committed by the users of this technology.[14]

The second challenge is the nature of the offence: namely deciding whether the offence committed via P2P systems is civil or criminal, which determines the jurisdiction, measures and actions available, such as the kind of penalty/compensation to be imposed/received.

Pursuant to article 270 of Spain's Penal Code, unauthorised exploitation of a protected work via any medium constitutes an offence against intellectual property provided it is carried out "for a profit and in detriment to a third party". Traditionally, profit has been understood very broadly, to the point of also including any "advantage or benefit" (including savings). In accordance with this doctrine, although someone using P2P systems is not making money they are saving money and this act could therefore be considered "for a profit" for the purposes of article 270 of the Penal Code. In 2006, however, in a clear attempt to legalise a socially accepted and widespread behaviour, the Crown Prosecution Service (Circular 1/2006) established that, for the purposes of article 270 of the Penal Code, the profit motive would be strictly interpreted as "commercial profit" (to obtain some kind of economic benefit). Consequently, the common use of P2P systems is not considered to be a behaviour listed in article 270 of the Penal Code because there the typical element of the profit motive does not apply; various decisions have already followed this criterion and have refused to treat such behaviour as a criminal offence.[15]

Having ruled out, therefore, the criminal channel, which allowed rightholders, by means of precautionary measures, to obtain personal information on presumed offenders in order to be able to sue them[16], they now find it very difficult to pursue these offences only by civil means and have managed to get the government to establish a *sui generis* system (different to ordinary jurisdiction) to combat this. Act 2/2011, of 4 March, on the sustainable economy, amended article 158 of the TRLPI and created a second section within the already existing intellectual property Commission (which had previously carried out the functions of mediation and arbitration, essentially), which must take charge of "safeguarding the rights of intellectual property against their violation by those responsible for information society services [...]". Specifically, this section may adopt measures to interrupt the provision of the offending service or to remove the offending content "as long as the supplier, directly or indirectly, acts with a profit motive or has caused [...] property damage". Before adopting these measures, the supplier has a period of time to remove or suspend this kind of content voluntarily (and therefore the proceedings are ended) or to make allegations and present evidence; in this case, the Commission will consider them and rule "according to the principles of objectivity and proportionality". Before carrying out these measures, however, prior judicial authorisation is required. In principle, this process is expected to act not against the "offending" users of P2P systems but rather against those providing these services (in other words, against the owner of a website with links to P2P files, etc); however, its effectiveness is highly debatable as there continues to be a basic problem: when is it considered that the rights of intellectual property have been violated? Is it enough to make a link to violating content? When will there be a "profit motive", etc? We will have to wait and see how useful this new channel turns out to be.

4. The limits to intellectual property: private copying and how to compensate it

As we were saying, intellectual property is not limitless: in specific cases, the author's monopoly disappears in the case of other interests in general or of third parties considered to be as or more important than the interests of the author him or herself. As the definitions of exclusive rights are extended, limits become increasingly important. Unfortunately, to date this has not been a priority of the legislator. Quite the opposite, as the legislative changes of the last 15 years have weakened legal limitations. On the one hand, they have gradually lost the imperative nature that characterised them and the exercise of some remains subject to the will of the author or rightholder, either directly (in the case, for example, of the limit to press clipping introduced by point 1 of article 32 of the TRLPI) or indirectly (by incorporating technological measures that prevent the act from being carried out *de facto* which would be permitted by the legal limit, as in citation, parody, etc.). On the other hand, within the framework of the European Union the space for possible limitations has been reduced to an exhaustive enumeration made about 10 years ago now (instead of allowing legislation to adapt to the needs of technology and the real situation, as had always been the case) and its application has been subjected to a restrictive criterion of interpretation called the "three stage test" (see article 40 *bis* or point 5 of article 5 of Directive 2001/29/EC): legal limitations cannot be interpreted in such a way that their application unreasonably prejudices the legitimate interests of the author or prejudice the normal exploitation of the work. The definition of when this is unreasonably prejudiced and when it prejudices the normal exploitation of the work are key concepts that are complex to evaluate if not case by case.

Having made these general considerations in order to point out the evident imbalance (at least in formal terms) between rights of exploitation and legal limits, we shall deal with one of these limits in particular that has generated quite a lot of debate recently: private copying and how to compensate it.

Point 2 of article 31 of the TRLPI allows private copying (including digital), i.e. the author cannot prevent it.[17] The limitation to private copying arises, once again, from technology: the

appearance of photocopiers, analogue sound and video recorders and, more recently, in digital format. The justification for this limitation, which is normally explained as not to prohibit *de lege* what cannot be prevented *de facto,* entered into crisis with the arrival of digital technology, to the point that many (particularly the music and film industry) predicted its end.[18] Finally, the legislator did not accept this petition and opted to allow, *a priori*, private copying also on digital formats.

However, once permitted, it cannot be denied that, at an aggregate level, private copying **competes with the normal exploitation of the work. Consequently, the legislator** grants the author the right to obtain "fair" economic compensation (see article 25 of the TRLPI). In Spain, this compensation is generated by applying **a tax on the price of devices and media** that are "ideal" to use for making private copies (photocopiers, sound and image recorders, tapes, etc.). The price is set according to their potential (copying capacity, duration, etc.) and whether they are analogue (directly regulated by article 25 of the TRLPI)[19] or digital (regulated by Order PRE/1743/2008, of 18 June, recently repealed).[20]

When a consumer acquires these devices or media, a part of the price paid corresponds to this concept.[21]

The limitation to private copying is applicable to all kinds of works (except for computer programs and digital databases, see point 2 of article 31 of the TRLPI), but the compensation only benefits holders of rights to works disseminated in the form of a book (or similar publications), phonograms, videos or other sound, visual or audiovisual media. Consequently, the only beneficiaries of this compensation are authors and artists (singers, performers and actors), producers and the publishers of works exploited in any of the ways indicated.

This is **"fair and unique"** compensation in the sense that a single tax must serve to compensate all rightholders and is established as unrenounceable and non-transferable (it's another matter if the authors don't want to be paid this compensation but collecting societies have to collect it). And the law states that this must be managed collectively: only validly established collecting societies are entitled to (and, in fact, must) collect and distribute this compensation and it must be done jointly. And, finally, this is a compensation.

Consequently, the relationship between "private copying" and "compensation" is not "direct" (nothing is paid/received for making a private copy) but rather is structured around the "idealness" of the media and devices and according to the concept of *fairness*.

Regarding these points, the Decision of the ECJ of 21 October 2010 (C-467/08), the Padawan case (DOCE 18.12.2010, C346/5), has been very clear, arising as it did from a previous issue from the Provincial Court of Barcelona (Section 15a) in the case of SGAE *v.* Padawan (the *Societat General d'Autors i Editors* was suing a commercial establishment for the amounts generated as compensation for private copying for selling digital media): compensation is only "fair" when the devices and media on which the tax is levied will be *predictably* used to make private copies and, therefore, will predictably prejudice authors; this is the case of devices and media acquired by natural persons and, as explained by the court, it is not necessary to prove that private copies have been made or than the author has been prejudiced; predictability is enough. On the other hand, the tax should not be levied on those devices and media acquired by legal persons (companies) or by professionals, as in these cases, predictably, they will not be used to make private copies and, therefore, compensation would not be "fair".

Consequently, it is important to point out that the Decision of the ECJ expressly confirms the Spanish compensatory tax system based on "ideal" devices and media (now with the interpretation of "predictable use") but since Order PRE/1743/2008 did not make this distinction (between natural and legal persons or professionals), it was contrary to law and had to be amended in this respect.[22]

Some months later, on 22 March 2011, the Spanish High Court annulled this order due to reasons of form:[23] since the regulation of private copying compensation is general and normative in nature (it is not merely an executive act), it should have been processed following the formal procedure *ad solemnitatem* established by the law, which includes a prior report by the State Council and the corresponding justificatory reports. Once declared fully null and void (and therefore as if it had never existed), two questions must be asked: it is possible to reclaim the amounts paid during the almost two years this tax was in force? And what is the currently applicable regime to compensate digital private copying until a new regulation is adopted? The first question is difficult to answer: in theory, yes (private individuals can reclaim the amounts paid unduly via ordinary legal proceedings);[24] in practice, however, it seems almost impossible (apart from the fact that it might not be beneficial).[25] And the thing is, in answer to the second question, annulling the Order does not mean that there is no tax applicable to digital devices and media but that the regulatory framework existing before the Order simply becomes valid again. Specifically, although it wasn't until Act 23/2006 was passed (implementing Directive DRRIS) that article 25 of the TRLPI expressly established that the tax should also be applied to digital devices and media. The SGAE, which had already claimed judicially the payment to manufacturers of digital media and in September 2003, with these court decisions upholding its petition, came to an agreement by which ASIMELEC (which grouped together the main manufacturers of digital media, floppies, CDs and DVDs) accepted to pay the compensatory tax for private copying on digital media. These amounts were validated by Act 23/2006, of 7 July (single temporary provision), and were applied up to 20 June 2008 (date when the Order came into force). Now they are valid again.

5. Creative Commons licences

One of the other important issues in the area of intellectual property on the internet is Creative Commons licences. The

Creative Commons project started in the United States in 2002 in order to provide authors, artists and producers with a range of standardised licences that would allow them to authorise the public, in general, to exploit their works, performances and/or recordings. In the long term, the aim was to construct a fund (the *commons*) of works and performances that are freely available to the public and free of charge. But this commons must not be confused with the "public domain" which, as we have seen, derives only from law (once the protection period for the work has expired). A work licensed under Creative Commons is still protected, although it's true that, depending on the licence chosen, it can be used "as if" it were in the public domain.

Neither should Creative Commons be confused with *copyleft*. Legally, *copyleft* is a contractual clause that states the new "derived" work must be subject to the same licence that has permitted its creation. In this way, an author that has benefited from a public licence "returns" his or her creation to the public under the same conditions. In spite of the play on words, *copyleft*[26] is not contrary to *copyright*: without a law to protect intellectual property there would not be any *copyleft* or public licences because authors and artists would have nothing to license. Creative Commons licences are applicable (with more or less luck) to all kinds of works but not all are ***copyleft***.

Creative Commons licences are available in more than 46 countries in versions translated and adapted to the national laws of intellectual property.[27] Irrespective of the language and the national law regulating it, the interoperability of licences and their easy iconographic interpretation aids the circulation of works around the globe.

Public licences create rights and obligations,[28] both for the author, who is bound by the licence, and for the user, who automatically becomes the licensee and must accept and respect the licence conditions. Creative Commons is merely an intermediary and is therefore not liable for any abuse of this system.

As we were saying, the content of Creative Commons licences is pre-established and cannot be modified. The licence authorises all **rights of exploitation** granted by law to rightholders (reproduction, distribution, transformation and public communication) with the sole condition that reference is made to the name of the author or artist and, if this has been stated, the source where it has been published.[29]

From this point on, **the author can choose** between authorising or excluding the following:

- commercial uses "that principally aim to either secure a mercantile benefit or a monetary exchange";
- modification or transformation of the work, and, if permitted, the author can decide whether to subject it to copyleft or not.

In this way, the author can adjust the **degree of control** he or she can exercise over the work: which rights the author wishes to "reserve" and which he or she wishes to licence to the public.

A Creative Commons licence can only be granted to the holder of the rights being licensed. Often, however, the public of a work in magazines or publications online remains subject to a licence previously chosen by the publisher: if the author accepts publication under this licence, it is understood for all effects as if the author had granted the licence. Consequently, to avoid imposing a licence, institutions and publishers should be ready to make exceptions when requested by the author.

Depending on the options chosen, there are **six different licences** identified by combining four basic icons that explain the conditions established by the author (*Commons Deed*) and which can be understood irrespective of the language used in the licence (*Legal Code*)[30] (see figure 1).

The more symbols, the more restricted the licence (or to put it another way, the fewer the symbols, the broader it is).[31] The most restrictive option (*by-nc-nd*) does not permit commercial use or derivatives of the work. The broadest (*by* and *by-sa*) permits any act of exploitation.

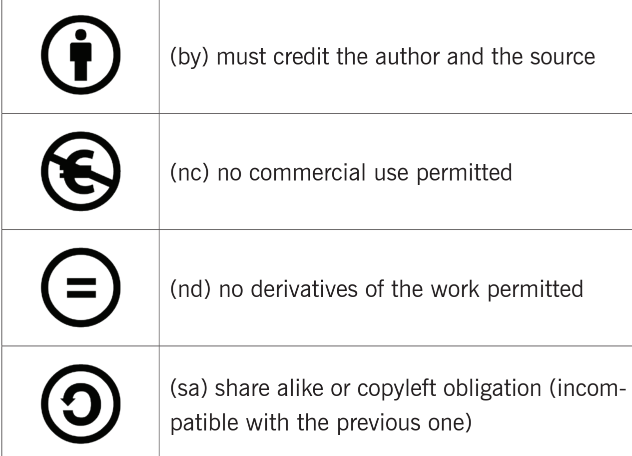
When choosing a licence, the following must be taken into consideration:

- Creative Commons licences cover all types of exploitation[32] and in any medium or format (although the licence is taken out over the internet, it covers all formats of exploitation: digital, paper, DVD or CD, etc.);
- Creative Commons are granted free of charge: the rightholder agrees not to demand payment for the uses licensed, although this does not impede payment (if someone wants to pay for acts of exploitation that everyone can do free of charge) or, although it does not seem coherent, payment of compensation for private copying;
- And they are perpetual (for the whole period of time the work is protected, as established by law). At any time, the author can stop distributing the work with the Creative Commons licence but, once granted, the Creative Commons licence cannot be revoked (except in cases of violation and only with regard to the violating party). Consequently, the exploitation of derivative works or the effects resulting from acts carried out while the work was licensed cannot be stopped.

The extensiveness of these licences is "mitigated", however, by the fact that they are not exclusive. The author can license the same work and scope of exploitation with different conditions (payment can even be obtained) but exclusivity can never be granted, except (obviously) for the scope reserved when granting the Creative Commons licence. This loss of exclusivity is what had been used, until very recently, by collecting societies to refuse publicly licensed authors and works. Now, however, forced by the European Commission,[33] they are accepting management mandates without exclusivity (for works licensed with a public licence).

We must remember that Creative Commons licences do not affect the private copy compensation payment which, as we have already seen, the law grants for authors and publishers and which cannot be renounced. The author can decide not to claim the payments from the corresponding collection society

Figure 1. Author conditions for Creative Commons licences



	(by) must credit the author and the source
	(nc) no commercial use permitted
	(nd) no derivatives of the work permitted
	(sa) share alike or copyleft obligation (incompatible with the previous one)

Source: Author.

but the Creative Commons licence does not mean that the tax established by law is not levied. On the other hand, licences managed by collection societies on the mandate of authors and rightholders would be affected (when the Creative Commons licence authorises commercial use), such as the licence for public communication in establishments open to the public (discos, music bars, etc.).[34]

Uses permitted directly by law aren't affected either (the so-called "limitations": whatever the licence established, anyone can use the work for a citation, a parody or a news item and for educational or research purposes, as established by law). Neither are the moral rights of authors or artists affected, which are unrenounceable and inalienable (article 14 of the TRLPI).[35]

However, the simplicity of the system (it's easy to use and is not subject to any control or checks) and the appearance of legality it confers (it's understood that it was the author who granted the Creative Commons licence) make it particularly vulnerable: any abuse (due to lack of knowledge or malice) could lead to a chain of violations of good faith that would nonetheless still be violations. Whether it functions properly therefore depends on its correct understanding and use, both on the part of authors and publishers and also the public. If it is not explained properly, the massive success of the project could lead to the misunderstanding that anything that does not have a Creative Commons licence is not protected when, in fact, any original creation is protected irrespective of any formality, registration or obviously licence!

If they are properly understood and employed, these licences can help to distribute works, promote new authors and artists and also alternative exploitation, especially on the internet, to "traditional" channels. But not all Creative Commons licences are ideal for all authors or for all works. Each author, artist or producer must know his or her rights and decide which licence (traditional or public) is the best to exploit his or her intellectual contributions and interests.

6. Conclusions

Over the last few centuries, intellectual property has proved itself to be a useful mechanism to encourage creation, ensure payment for authors and artists and, in general, to regulate a specific market (that of the creation and exploitation of works and performances) that requires the predictability of a business model to attract capital investment (and we must not forget that some creations require heavy investment) and avoid unfair behaviour (unfair enrichment) among market agents. Whether the system itself also turns out to be useful for dealing with the needs and possibilities offered by the digital world will depend on how good our solutions are to the questions posed and a correct balance between all interested parties in the conflict, both private and public.

Notes

1. *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.* It therefore provided some security to the growing publishing market and avoided unfair enrichment on the part of other publishers who wished to profit from the success of a work published by another person.
2. Creative industries account for 3% of all employment in Europe. See the European Commission Communication of 24 May 2011, COM (2011) 287 final. <http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf>.
3. This is a simple, readily understandable explanation of the rudiments of the IP regime but the real situation is obviously more diverse and complex than can be explained within the confines of this article.
4. Nevertheless, we often use the word *distribute* (imported from North American legal nomenclature) to refer to acts of exploiting works via the internet. In Europe we should only use the term "public communication" to refer to online exploitation.
5. This expression is used because they do not include the power of exclusivity (to authorise or prohibit) that characterises rights of exploitation but only the power to obtain remuneration in exchange for exploiting the work.
6. See Directive 93/98/EEC, of 29 October, derogated and codified by Directive 2006/116/EC, of 12 December, on the term of protection. We should note that, in Spain, because of the temporary right resulting from the Intellectual Property Act of 1879, works by authors who died before 7 December 1987 are protected by a longer term: 80 years after their death. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0098:EN:NOT> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT>
7. See article 160 to 162 of the TRLPI (Revised Text of Spain's

Intellectual Property Act, approved by Royal Legislative Decree 1/1996, of 12 April, and amended by Acts 5/1998, of 6 March, and 23/2006, of 7 July). Evading these measures is prohibited and directly constitutes a violation of the right of IP, even in those cases where the use in question might be covered by one of the legally established limits.

8. See point 1 of article 31 of the TRLPI and point 1 of article 5 of the DRRIS (Directive 2001/29/EC, of 22 May, on the harmonisation of certain aspects of copyright and related rights in the information society). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>

9. See the Ruling given by the European Court of Justice on 7 December 2006 in the case *SGAE* v. *Rafael Hoteles, C-306/05*, which standardises the concept of *public* within the EU (something which the EU legislator did not dare do in the DRRIS) and concludes that private rooms in a hotel are not domestic or private spheres but public ones and, therefore, the fact of placing a television or radio at the user's disposal requires the corresponding licence from collecting societies because public communication can be carried out when the user turns on the devices.

10. There has been a decision in favour of "implicit licence" in various countries, such as *SAIF v. Google*, Tribunal de Grande Instance de Paris, of 20 May 2008, confirmed by the Cour d'Appel de Paris, 26 January 2011, available at *http://www.juriscom.net/documents/caparis20110126.pdf*; *Vorschaubilder*, the Federal Court of Germany (BGH), I ZR 69/08, of 29 April 2010 (there is no licence of rights, per se, but there is consent/permission); and Pedragosa v. Google, Audiència Provincial de Barcelona (Section 15a), of 17 September 2008 – currently under appeal before the Supreme Court. Naturally, if the author/licence holder establishes specific conditions of use (for example, refusing unauthorised links), these prevail over any implicit licence that may be deduced from the acts. Some websites expressly prohibit not only links to home pages but also deep linking (e.g. the Encyclopaedia Britannica website at *www.britannica.com*).

11. The Provincial Court of Barcelona (Section 15a) has ruled along these lines in two recent cases: the Decision of 7 July 2011 [*indice-web.com*] and the Decision of 24 February 2011 [*Elrincondejesus.com*]. In both cases, it confirms that introducing a link to third party websites that allow downloads (indirectly, as with Megaupload or Rapidshare or directly, links to P2P files) of violating content does not constitute an act of exploitation (nor of reproduction or public communication), although in the case of direct download services [*Elrincondejesus.com*], the court concluded that the action constituted a "contribution" to the infraction.

12. As a result of the amendment introduced by Act 23/2006 (point 2 of article 31 of the TRLPI), which subjected private copying to two conditions: that the work has been "accessed legally" and that "the copy is not used collectively or for profit", this limit is unlikely to be able to cover downloads carried out via P2P systems.

13. Von Lohmann, F. *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing* [Online]. Electronic Frontier Foundation, April 2008. <http://www.eff.org/share/collective_lic_wp.php>

14. Decision by the Provincial Court of Barcelona (Section 15a) of 24 February 2011 [*Elrincondejesus.com*].

15. See the Decision given by the Provincial Court of Cantabria (Section 1a) of 18 February 2008 (although this case did not deal specifically with P2P exchange but the use of messages and chats, the court refused to allow that there had been a commercial profit motive in the sense of article 270 of the Penal Code).

16. Article 12 of the LSSICE (Spanish Information Society Services Act) establishes that the suppliers of internet services are only obliged to give personal information regarding their users in criminal proceedings (see Act 34/2002, of 11 July, on information society services and electronic commerce, amended by Act 32/2003, of 3 November, on telecommunications and Act 57/2007, of 28 December, on measures to foster the development of the information society) and the ECJ (see the Decision of 29 January 2008, Promusicae *v.* Telefónica, C-275/06) endorsed the option chosen by the Spanish legislator: pursuant to article 15 of Directive 2000/31/EC on electronic commerce, member states can restrict the obligation of service providers to give personal information on users only in criminal proceedings.

17. Point 2 of article 31 of the TRLPI: "Author authorisation is not required for the reproduction on any medium of works already disseminated when this is carried out by a physical person for his or her own private use based on works which have been accessed legally and the copy obtained is not the object of collective or lucrative use, [...]."

18. Digital licences and technological measures would allow consumers to graduate the use of and access price for works and would therefore make it unnecessary to limit private copying in digital environments.

19. The amounts for analogue devices and media range from 60 cents per music recorder to 6.61 euros for each video recorder and from 18 cents (per hour) for each music tape to 30 cents (per hour) for each video tape.

20. The amounts for digital devices contained in the order were: 60 cents for CD recorders; 3.40 euros for DVD recorders; 9 euros for scanners; printers and photocopiers between 127 and 227 euros per unit (according to their copying capacity); multifunctional equipment between 7.95 and 10 euros; 30 cents per USB or similar; 12 euros for memory disks; 3.15 euros for MP3 and MP4 units; 1.10 euros for mobile phones and PDA devices. With regard to media: 17 cents (CD-R), 22 cents (CD-RW), 44 cents (DVD-R) and 60 cents (DVD-RW). Computer hard disks were expressly excluded from the tax (article 25(7)(b) of the TRLPI). According to article 25 of the TRLPI, compensation has to take into account whether technological measures exist to control access and copying. These amounts were to be revised every two years.

21. Although, formally, the debtors are the manufacturers and, if applicable, the importers, of these devices and media, the price “is passed on” *de facto* to the distributor and end consumer.
22. This Decision validated the different decisions and petitions made by professionals (as well as lawyers) to secure the return of the amount paid for the tax for acquiring CD-ROMs used to record the hearings of the case, obligatorily imposed by judicial legislation.
23. See the Decision of the Spanish High Court (Section 3a) of 22 March 2011, Westlaw.ES JT2011/202; and another five decisions with the same date and content: Westlaw.ES JUR2011/94692, 94693, 94694, 94695, 94696.
24. In fact, the High Court itself opted not to hear the claim by the plaintiff regarding the backdating of the nullified status with respect to collections made, justifying that this fair compensation is of a legal and private nature and therefore it did not have jurisdiction over this petition.
25. Before the 2008 Order, fewer media came under the tax but the amounts were higher in some cases.
26. *Copyleft* originates in the ***GNU General Public License*** (GPL) for free programs. At present, more than 50% of freeware is created and exploited under a GPL licence. <http://www.fsf.org/licensing/licenses/gpl.html>
27. The Creative Commons website provides access to the different jurisdictions and licences available for each one. <http://creativecommons.org/>
28. Although legal dogma questions whether public licences are really contracts; there is talk of donating or renouncing rights in favour of the public.
29. This option is particularly interesting for publishers and, in general, for derivative rightholders.
30. A small program (*Digital Code*) makes it possible (if the Creative Commons web is copied correctly) to see the icons and licence and also for internet search engines to index and locate the licensed work.
31. The statistics on the use of each licence can be seen at: <http://monitor.creativecommons.org/>. In the world, for 2010, 49% (41%) corresponds to the broadest licences *(by)* and *(by-sa)* and 47% (57%) exclude commercial use *(by-nc)* and *(by-nc-nd)*; 20% (23%) exclude derivatives *(by-nd)* and *(by-nc-nd)* and 47% (41%) force *copyleft (by-sa)* and *(by-nc-sa)*. The results are a little different for Spain (indicated in brackets).
32. In Spain, pursuant to article 43 of the TRLPI, only the types of exploitation existing when the licence is granted are covered.
33. See the European Commission Decision of 16 July 2008, case CISAC, COMP/C2/38.698
34. If the establishment does not use repertory works of the collecting society (i.e. SGAE), but rather works under a Creative Commons licence, the collecting society cannot claim the corresponding licence; ultimately, it’s a question of proof.
35. Recognition is already contained in the licences and the rest remain in effect, although they may not be mentioned. So the author could oppose the mutilation of his or her work, even when authorisation has been given to transform it.

Abbreviations

DRRIS: Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT>

LSSICE: Act 34/2002, of 11 July, on information society services and electronic commerce.

ECJ: European Court of Justice.

TRLPI: Revised text of the intellectual property Act approved by Royal Legislative Decree 1/1996, of 12 April, amended by Acts 5/1998, of 6 March and 23/2006, of 7 July.