Free licensing as a means to revise copyright

By Elli Velissaropoulos

1. Introduction : Copyright law as a Social Contract

Prior to any copyright legislation, the need to control printed editions of books had appeared during the XVI century. The system which was found in some countries consisted of monopolies granted to booksellers by public authorities in order to control their trade. This system was later replaced with the first copyright legislations during the XVIII century (for instance, the United Kingdom's Statute of Anne of 1710, the United States' Copyright Act of 1790 and the French revolutionary decree of 1793).
Copyright law is an instrument which was devised to strike a balance between the rights of the authors and the interests of the public, as well as those of publishers. It aims at preserving the author's freedom of creation towards the monarch, but also at contributing to the enrichment of the public domain to a social advantage. In that sense, copyright has always encompassed a social function [Geiger, 2006].

Nowadays, this balance between the author's and society's interests is expressed in Article 27 of the Universal Declaration of Human Rights which provides that :

1. Everyone has the right freely to participate in the cultural life of the Community, to enjoy the arts and share in scientific advancement and its benefits;
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author.

In other words, this article provides for the freedom of access to culture, but preserves in the same time the authors' rights.

Copyright law derives from different conceptions depending on the legislations. First, it is influenced by romanticism, which dictates that a work is the emanation of the author. As a result, the right of the creator over his or her work is a natural right. This approach is present in France, where the author is in the centre of the protection copyright establishes. Secondly, following Locke's theory on property, copyright is seen as a reward of the author's labour. As any kind of property, the author owns his or her work and should be remunerated for its creation. Following this approach, any investment should be rewarded, that is the investment of intermediaries in the dissemination of one's work too. Thirdly, copyright is the means to allow the promotion of creativity. This utilitarian approach can be found in the Copyright Clause of Article 1, Section 8, Clause 8 of the United States Constitution, in which it is stated that : “Congress shall have the power to promote the progress of science and useful arts”. Copyright is created in order to allow the dissemination of works as a social requirement. It must encourage authors to publish their work in order to enrich the cultural heritage.
In this paper, copyright is seen as a social contract, by which society grants the author an exclusive right for a limited period after which the work falls into the public domain. Apart from the duration of copyright, after which the work is rendered to the society, the most effective way to secure the public's interests is made by providing exceptions and limitations to the author's exclusive rights. As intellectual property rights are themselves exceptions to the general principle of freedom, exceptions and limitations to copyright are meant to strike a fair balance between the author's

interests and those of the collectivity. Thereby, they secure this exceptional nature of intellectual property rights. As a result, some uses of one's work are exempted from requiring any authorization because a fundamental freedom is at stake. For instance, the exceptions about caricature or parody, present in several national laws, respond to the acknowledgement of freedom of expression.

Nowadays, new information and communication technologies have changed the way copyright is perceived by legislators and the public opinion. As copying and distributing a work without authorization has been facilitated by new technologies, laws have been passed in several countries in order to fight against online infringement. This new understanding of copyright has resulted in a higher protection of the authors and intermediaries, notwithstanding the society's claims for a wider dissemination of knowledge. Copyright law has evolved in its scope and term of protection. On the European Union (EU) level for instance, one may consider the 2001/29/EC Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The most striking illustration about this directive is the legal protection against circumvention of Technical Protection Measures (TPM) it provides, prejudicing the exercise of traditional private exemptions, such as private copying. TPMs' mechanisms do not benefit authors *per se*, but economic right-owners in general, since they are entitled to chose whether to use them or not. Another example are the various directives expending copyright's and neighbouring rights' terms of protection (directive 93/98/EEC of 29 October 1993, replaced by the directive 2006/116/EC of 12 December 2006, recently amended by the directive 2011/77/EU of 27 September 2011). Thus, the balance tends to lean more on the authors', but especially on economic intermediaries' interests, since the strong interest of protecting investment has emerged. As copyright laws are more and more restrictive, their result is to hinder creativity. This consequence had already been well explained by the UNESCO, in its Third Medium-Term Plan (1990-1995), adopted in November 1989, §195: "Creation can be encouraged or discouraged, depending on the status assigned to creators by society. Copyright, whose position has been complicated by the development of new technologies, is a decisive factor. The production policies of commercial distribution of works of the mind are determined primarily, and much more strictly than before by market principles. Accordingly, legal standards are being drafted or revised in order to adjust classical copyright laws to the new economic imperatives".

Meanwhile, the digital environment sets up a new deal and intermediaries are no longer necessitated in order to disseminate the work. It is the so-called phenomenon of "online disintermediation" [Carroll, 2006]. The internet is used as a means to disseminate knowledge and foster creativity. The information society leads to several problems as regards the protection of intellectual property. Besides pirates, known for being against copyright monopolies, other movements are emerging, which use intellectual property, especially copyright law, to re-appropriate it in the public's interest. It is in this context that appeared the free culture movement. This movement uses free licences applied to literary and artistic works, not only to create a new type of works : the free cultural works - defined in short as "works or expressions which can be freely studied, applied, copied and/or modified, by anyone, for any purpose" [www.freedomdefined.org / accessed 26/05/2012] - but also to revise the foundations of copyright by using it in a subversive way. Confronted with this digital phenomenon, many academics, but also public entities try to find legal means to acknowledge the validity of this kind of practice, in order to allow the wide dissemination of works for the general benefit of society. Free culture invites us to revise the current copyright regime.

This paper is going to present the emergence of free culture movement in the literary and artistic field by focusing specifically on two free licences and the creation of free cultural works they lead to. It is going to study afterwards the legal uncertainties of this private ordering practice and the eventual solutions that have been proposed in order to resolve this problem with other legal means.

2. The Emergence of Free Licensing

Free culture is a social movement which emerged in the field of computer programs with the free software movement and expended to all fields of literary and artistic works. Different communities fall within the free culture movement, two of which are going to be studied in this paper : the Creative Commons organization and the Copyleft Attitude. These communities have created several free licences in order to promote the free creation and flow of information.

2.1 Principles Governing the Free Culture Movement

The first to use the expression of Free Culture is Professor Lawrence Lessig, founder of the Creative Commons organization, in his book which develops on “an effect of the Internet beyond the Internet itself : an effect upon how culture is made” [2004, p.10].
Distinguishing between “commercial culture” and “non-commercial culture”, he observes that the latter was traditionally free, because the law initially did not regulate it. This freedom consisted in a “building upon the past”. As the law started to expand its scope on “non-commercial culture”, it led society to a “permission culture” where there is less and less content left free. Professor Lessig fears that the war against pirates is going to have an impact on this “right to build freely upon the past”. As a result, he considers the right thing to do is “to revolt against the extreme claims made today on behalf of 'intellectual property'” [Lessig, 2004, pp.10-13].

Rather than revolting against intellectual property itself, free licences use copyright in a subversive way in order to stimulate its revisal. The re-emergence of free culture is inevitable today, because it is the main effect of the digitalization of the world's culture via practices that are proper to the internet [Moreau, 2009]. Free licences establish a different manner of exercising intellectual property in a way to enhance free culture, by sharing and reusing works. The idea behind them is to create a commons in which everyone is entitled to use and distribute works and create upon them, as long as they grant the same freedoms to others. This final requirement constitutes the so-called “copyleft” (the share-alike requirement in a Creative Commons' language), as opposed to copyright which entitles the author to the *exclusive* use of her work. Thus, copyleft has a viral effect by imposing the preservation of the above-mentioned freedoms for the modified versions of the original work. In this scheme, contributors, may they be authors or only users, are peers. This illustrates well the fact that, under the free culture movement, reciprocity is a requirement for equity. Consequently, copyleft is the key element of free licensing.
As a result of the participative web (Web 2.0), any user is *a priori* invited to use, distribute and transform the work, without discrimination. Thus, the line between professionals and amateurs has become too thin and may cause some difficulties in drawing solutions (see *infra* 3.2). Free licences can be licensing models for user-generated content, but they are not limited to it. User-created content is defined as the “content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices” [OECD, 2007, p.4], while free licensing, following a specific ideology, permits the creation of free cultural works which are under free culture licences or which are in the public domain. Even though many licences are mentioned as free, only those which allow the free use, distribution and transformation of the work, combined with an obligation to grant the same freedoms to subsequent authors are considered as free in the present paper, because they are the only ones that preserve the work from any future misappropriation.

Free culture underlines different principles that Richard Stallman had applied to the free software movement : the principles of liberty, equality and fraternity. This movement had even discussed to have free software recognized as a heritage of humanity by UNESCO, since the organization and the free software community share the same values :

- Freedom, as one can copy, modify and distribute the software,
- Equality as each user enjoys the same freedoms in a non discriminatory way and
- Fraternity, as this culture is about sharing and collaborating.

The same principles can be applied in creative works under free licences in general.
The most common characteristic of free culture resides in the fact that its members join a community whose aim is the sharing of information. While it can be understandable that a community-type of organization is legitimate in the creation of software, because it has been traditionally collective or collaborative work, the existence of communities is more peculiar regarding the creation of other works in the literary and artistic field. Indeed, a plurality of authors in a novel or a painting is less frequently observed. However, in the information society, free licences organize the establishment of a community, by allowing a user to contribute to the creation of the evolving free cultural work. The user thereby joins a community of contributors to the creation of the work. He becomes an author if his contribution is original.
The motivation of free licensing mainly relies on the wide dissemination of knowledge and the augmentation of the cultural heritage. This consideration is also shared by public institutions. The creation of a fifth community freedom, that is the freedom of knowledge had been considered by the European Commission in its Green Paper of 2007 on the "European Research Area : New Perspectives". This freedom eventually applied in general would imply an effective knowledge-sharing by the free movement of works - a common objective with free culture.

2.2 Free Licensing Used for the Creation of Creative Works
The first free licence appeared in the field of software, after Richard Stallman revolted against the proprietarization of the source code in the 1980s. The feasibility of his GNU project on open source software depended on a licence : the General Public License (GPL) which granted four fundamental freedoms :

- The freedom to execute the software,
- The freedom to study the software and adapt it to one's own needs,
- The freedom to distribute copies of the software,
- The freedom to improve it and make public the modifications, so everyone can benefit from them.

The GPL continues to be the most famous free licence in the field of computer programs. However, several years after the elaboration of this licence, new movements arose whose attempt was to promote free licensing in the field of creative works, that is in literary and artistic works in their traditional understanding. Two movements will be studied : the Creative Commons (CC) and the Copyleft Attitude and their respective licences which may (or may not) be considered as free. Works created under a free licence are called free cultural works. The existence of these works is depending on a proprietary regime, that is the current copyright regime, and rely on contractual organization.

The Creative Commons organization and its CC Attribution-ShareAlike licence
The American Creative Commons organization was founded in 2001. It was created in order to address the public at large as regards non functional works. It proposes different licensing schemes, based on the assumption that authors want to grant more or less access to their works. As a result, CC appears as a new type of intermediary [Carroll, 2006]. Following the freedoms they provide for, six permutations can be created: the "Attribution" (CC BY), "Attribution-NoDerivs" (CC BY-ND), "Attribution-NonCommercial-NoDerivs" (CC BY-NC-ND), "Attribution-NonCommercial" (CC BY-NC), "Attribution-NonCommercial-ShareAlike" (CC BY-NC-SA) and "Attribution-ShareAlike" (CC BY-SA). This leads to a number of licences, some of them which do not even follow any ethical consideration and raises the issue of their compatibility. The compatibility issue is present for CC licences between them, but also compatibility with licences from other movements. Among the proposed CC licences, only one can truly be considered as free in a copyleft understanding : the CC BY-SA. As the concept of free licensing is, according to Stallman, freedom "as in free speech and not as in free beer", this means that freedom applies to the use and building

upon the work only and not to price. Therefore the CC BY-NC-SA is excluded of a free licensing *stricto sensu* understanding.

However, even if the CC BY-SA licence responds to the requirements to be considered as free, it is difficult to admit such a qualification because, taken as a whole, the CC project seems inconsistent with free licensing ideology. Niva Elkin Koren [2006, p.16] points out that "avoiding commitment to a shared notion of freedom leaves the licensing platform with a single principle that is shared by all licensing schemes, that is letting authors govern their works". If CC's ambition was truly to create an alternative for copyright's exercise in a manner to enhance free culture, it would have created licenses which all share a free ideology. Not only this licence does not refer to any free ideology, but it only contains a disclaimer according to which CC can not be held liable for any prejudice committed under this licence. Therefore, it only seems fair to exclude the CC BY-SA licence from the free culture movement, especially when considering that authors who are willing to share the movement's ideology can chose to put their works under other free licences, such as the Free Art Licence.

The Copyleft Attitude and its Free Art Licence

The Free Art Licence (FAL) was created by the Copyleft Attitude in July 2000. The latter consists in a group of artists, lawyers and computer engineers, who gathered in order to create a licence which provided for the same requirements as the GNU GPL. The goal of the Copyleft Attitude was to consecrate the copyleft principle for artistic practices (see for instance Moreau's *peinture de peintres* at www.antoinemoreau.org / last accessed 25/05/2012). The creators of the FAL felt that art is by excellence the exercise of freedom [Moreau 2005]. The FAL grants the freedoms to copy, distribute and transform the creative work. Whereas the GNU GPL focuses on a project relating to software, the FAL is focusing on the evolution of the work in question as time passes by. In this context, next to ethical considerations, free licensing follows artistic considerations too. Copyleft is used as an experiment of a work's evolution by its continuous transmission to different contributors.

This licence has the intrinsic specificity to contribute to the increased production of literary and artistic works, as well as authors. Indeed, a copy of the original work is made and a notice of the authors' names is kept, in order to enable the creation of subsequent works without losing track of the previous ones.

Finally, this practice illustrate one fundamental principle underlying free cultural works : a principle of movement, that is the ever-changing evolution of the work and of the composition of its creators. Thus, the essential issue is to protect the work against misappropriation, because it must remain free for future users. This is the reason why the freedoms granted by the licence must be maintained, that is copyleft is the key element for free licences.

3. The Discussions on the Acknowledgement of Free Cultural Works

Because free culture's private ordering is a fragile phenomenon, several discussions are made acknowledging a need to palliate to copyright's excessive scope hindering creation. Indeed, as Barbara A. Ringer [1974, p.5] had pointed out, "like any other law, copyright is a pragmatic response to certain felt needs of society and, like any other law, must change in scope and direction as these needs change". Resuming, the law must follow sociological changes and in this context it could take into account free culture's claims.

3.1 The Uncertainties Raised by Free Licensing

Two problems will be discussed concerning uncertainties free licences create. First is the legal uncertainty. Free licences can be considered valid, as long as the author has given a free and informed consent by putting his or her works under this kind of licence. Even though their validity can be discussed in the light of contract law, it is under copyright that these licences seem to be more problematic, especially regarding moral rights. Second there is the issue of licensing compatibility since too many licences consider themselves free, but prove not to be. This

proliferation of licences can actually block the process of creation of a free cultural work.

The Uncertainty of Free Licences' Validity Regarding Moral Rights

The issue of moral rights is raised only under legislations where these rights exist. However, what is curious is that in legislations which do not provide such rights, free licensing is used as a means to palliate this lack by establishing some sort of moral rights. This phenomenon can be observed in the U.S.A. where free licences appeared for the first time. Indeed, in the U.S.A. moral rights do not exist, except for those provided in the Visual Artists Rights Act (VARA) of 1990 which applies to visual works defined very narrowly. Nevertheless, as CC licences apply to all kind of works, one can observe the contractual constitution of moral rights by means of free licensing. For instance, even the most permissive licences, such as the CC BY-SA licence and the FAL, provide for an attribution right. Initially, among several CC licences, some did not provide for a right to be credited. As their popularity was very low, these licences have been abolished and replaced by licences which all provide for a right to be named. Thus, they have created a moral right, that is to be attributed. Secondly, one can also consider there is an implicit recognition of a right of integrity. Indeed, since authors grant the freedom to transform the licensed work, it seems they are at the same time recognizing themselves a right to oppose to such modifications, similar to a right of integrity. In other words, in cases where copyright does not provide enough protection for authors, free licensing uses copyright law to recognize to the authors a more protective regime.

Conversely, in Europe, free licences can work as restrictive means depending on the legislation. This is specifically true for the French *droit d'auteur*, which is traditionally perceived as a natural right. As a consequence, moral rights are imprescriptible and inalienable. They include the right of disclosure or divulgation of the work, the right of attribution or paternity, the right of integrity of the work and finally the right of repentance or withdrawal. It is in this situation that free licensing raises the issue of its validity with copyright legislations.

The right of disclosure of the initial author is not subject to any difficulty as he or she is the one to decide whether the work is going to be communicated to the public under a free licence or not. Such a right is problematic regarding the subsequent authors, since they are free to disclose the transformed version of work, but they are also subject to a copyleft requirement, that is they must maintain the freedoms granted by the initial licence. Nevertheless, the copyleft requirement could be considered more as a contractual obligation whose validity is at stake, rather than a moral right issue.

The right of repentance is also raising difficulties, as exercising such a right is subject to compensating the co-contracting party. As the particularity of free licensing is to invite every user to modify and distribute the free work, even though the contributors' and authors' names are kept in a notice, contacting and compensating all of them can prove to be impossible. It is even more impracticable when the notice includes, for example, nicknames and is often not precise enough to identify and contact the creators.

Finally, the most problematic issue is raised by the right of integrity. Indeed, if moral rights are inalienable, then waiving them in a licence by allowing all modifications of the work is not valid. Under French copyright law, the adaptation of a work can only be made with the original author's consent, on a case-by-case analysis. The only way to admit such a practice is to consider that the author has given a free and informed consent to grant such a right. Because free licensing is a practice between authors and users - who may become authors themselves - it may be argued that moral rights and all violations of copyright law in general must be regarded in a less restrictive way. In other words, because of the specific authors/users relationship in the digital environment, one can argue that a free licence establishes a peer relationship between the co-contractors based on reciprocity. Since reciprocity is fundamental in free licensing, moral rights could be waived in this situation because the authors' interests are not in danger. Moreover, if the free licence is infringed, the authors are placed back into their initial position, that is they fully regain their rights and can invoke the violation of the right of integrity alongside with the violation of economic rights. In

other words, the infringement mechanism that was found for free licences counterbalances their impact on moral rights and might justify their validity.

The Uncertainty Regarding Licensing Compatibility

What is mentioned as a free culture movement, actually includes various movements which all organize their communities with different free licences. Considering that in one single movement, several licences can be created (see for instance the CC organization) and that each one of them can be subject to various versions, a proliferation of free licences is present online. This situation is also aggravated by the issue of the language they are written in. Indeed, many licences have been translated in order to comply with national legislations. Rather than helping the coordination of the different licences, translating them gives rise to new interpretative problems, as words used in the U.S.A. can have different meanings in other countries (see for instance the use of the notion of "copyright" whose translation in French as "*droit d'auteur*" is not correct, because they point out different realities). Thus, the creation of a work can be blocked for compatibility reasons. It happens every time a creator uses different works under different free licences in order to create a derivative one, or in other words every time the creator wants to mashup works under different free licences.

Licensing compatibility in the free culture movement is however a fundamental element to its survival. Since its objective is to let people freely build upon previous works, they have to be able to create free cultural works every time the works they use respond to the free licences' requirements. For example, if a user wanted to incorporate one free cultural work under a FAL to another which is under a CC BY-SA, if the licences were incompatible, then the whole purpose of free culture would have failed. As a response, several movements specifically mention what licences are considered compatible with the ones they have created. The FAL, for instance, provides that a licence is compatible as long as "it gives the right to copy, distribute, and modify copies of the work including for commercial purposes and without any other restrictions than those required by the respect of the other compatibility criteria; it ensures proper attribution of the work to its authors and access to previous versions of the work when possible; it recognizes the Free Art License as compatible (reciprocity); it requires that changes made to the work be subject to the same license of to a license which also meets these compatibility criteria" [www.artlibre.org / last accessed 25/05/2012]. As a result, since both licences grant the same freedoms, the FAL could be compatible with the CC BY-SA, but only if the latter was reciprocal. One the other side, the CC organization claims that its licences are compatible only with CC licences or latter versions of them that provide for the same elements and with licences that it has established as compatible. However, to this date, it has not approved any licenses for compatibility, thereby contributing to the complexity of the free licensing system.

3.2 In Search of Free Cultural Works' Legitimacy

Because free licensing is a private-ordering mechanism, it faces limits regarding its effectiveness. Different solutions can be invoked outside any contractual organization : those which are already provided by some national laws and those which are currently under discussion.

The Inefficiency of the Existing National Flexibilities

Observing that intellectual property is going through a crisis, Professor Geiger [2006] attempts to demonstrate that constitutionalising intellectual property can be a relevant remedy in order to "secure a just balance of the interests involved". According to him, copyright law fulfils a certain social function. Nevertheless, as he points out, "the social dimension of the law is progressively disappearing in favour of a strictly individualist, even egotistic conception" [2006, p.381]. Confronted by the tendency of copyright's overprotection, he argues that using fundamental rights, especially the freedom of expression (as provided in article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms) can be a useful tool to rebalance the interests of right holders with those of the public. To make his point, he mentions some European case-law [2006,

pp. 389-397], in one of which artistic freedom - as one component of the freedom of expression - prevailed over copyright. In this case, the German Federal Constitutional Court (29 June 2000, Germania 3) had to decide on unauthorized extracts from two works of Bertholt Brecht, which had been used in Heiner Müller's "Germania 3 Gespenster am toten Mann". Even if they were too long to be considered lawful quotations, the Court ruled in favour of the freedom of creation, in the light of article 5(3) of the German Basic Law on artistic freedom, as long as the quotation is "used as a tool or vehicle of an artistic opinion expressed by the author", and it causes only "a small financial loss for the claimants". However, fundamental rights have their limits because they are broad concepts and judges are not eased using them. Consequently, in practice they are not often invoked and there is a need to find intrinsic solutions, rather than relying on external instruments of copyright [Geiger, 2006].

In the common law countries, some uses may be considered as "fair" and not require prior authorization by the right-owner. Nevertheless, they are also of little help in the situation of free licensing. Indeed, in the United Kingdom, sections 29 and 30 of the CDPA 1998 concerning fair dealing allow only four narrow limitations in which it can be invoked : research and private study, criticism, review and news reporting. Not only such situations can not lead to the consecration of the creation of free cultural works *per se*, but the way this defence is interpreted shows there is definitely no room for the use of a copyrighted work for literary or artistic purposes. One case which permits the use of a work following these considerations can be found in the new section 29.21 of the Canadian Copyright Act, which allows the non-commercial use of a publicly available work in order to create a new one. It is the so-called "mash-up clause". Still, too many issues are raised about the non-commercial context requirement and its definition and scope, which lead to the inefficiency of this defence. In the U.S.A., the fair use doctrine (Copyright Act of 1974, 17 U.S.C. §107) is also of little help, even if it is a broader defence. It can be invoked in situations such as parody and satire. All purposes of the use can be invoked as long as they are fair. However, there are several factors to be considered in order to legitimately invoke fair use, like the purpose and character of the use (commercial or non-commercial nature of the use), the nature of the copyrighted work, the amount and substantiality of the portion of the original work and finally the effect on the market of such use regarding the original work.
Finally, some flexibilities may also be present in civil law countries. For instance, article 24 of the German Copyright Act states that "an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work". Under this article, a work of another person may be subject to a free use giving rise to an independent work. Such a free use does not require the original author's consent. However, free use seems also narrowly interpreted by the judges. In the case the German Federal Court of March 11 1993, about an independent work called "Die hysterischen Abenteuer von Isterix" which related adventures of two modern characters similar to Asterix and Obelix, the court ruled there was no free use of the work because the borrowing of the original work was too obvious and there were substantial similarities. The court also noted the independent work was not a parody nor a critic of the original work, but just a mere transformation of the original characters for the purpose of amusement. Concluding, in countries whose legislations allow fair dealing, fair use and free use defences, derivative works may be created only if they are in accordance with the purposes these laws have been drafted for, that is criticism, parody, comment … Free works which do not fall within these categories are not likely to be regularized. One solution for those countries could be to reduce copyright's scope and provide for an open ended defence, similar to the U.S.A. fair use defence but with modified standards.

The Academics' and Institutions' Proposals

Contracts do not give enough legal certainty. Because, contract law as well as copyright have not been harmonized in the EU level, in some cases, the licence can be valid or one obligation at stake can be considered as invalid, while in other cases the whole licence can be void. Because national

laws differ and free licences are, by nature, international, the discussions on the creation of free works are focusing in a solution outside of any private ordering's scope. One thesis, supported by Clément-Fontaine [2008] is specific to free works. It consists in the consecration of a legal status of free works. According to her, free works could be consecrated as a form of collective property, similar to the public domain or the UNESCO's common heritage of mankind. The rule in a collective property is the common enjoyment of the work. In that sense, members of the community are the owners of the work collectively, but none of them can own any specific part of it.

Other academic proposals are made in a general manner, concerning the freedom of creation of derivative works, that would impact free cultural works' status. One of them consists in reintroducing formalities in copyright law [Dussolier, 2011], in order to expand the public domain and therefore allow the use of more creative content. A content, or work would fall into the public domain when a creator neglected to accomplish the required formalities or chose to leave his or her work to the commons. This proposition would have the advantage of being an opt-in mechanism, as opposed to free licensing which opts-out of the exclusive nature of copyright. Nonetheless, regarding the prohibition contained in article 5 of the Berne Convention, introducing formalities to copyright would be violating international obligations and is, for the moment, an unlikely solution.

Finally, another proposal would be to draw up an exception that would allow the use and adaptation of a work for creative and non-professional purposes. This alternative must comply with article 9(2) of the Berne Convention and its three-step test, that is it must be provided in a special case which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. It would also require a reviewal of the 2001/29/EC Directive which provided for a closed list of exceptions to exclusive rights.

Following the OECD initiative on “Participative Web and User-Created Content [2006], the European Commission recognized in its Green Paper “Copyright in the Knowledge Economy” [2008], that consumers are frequently becoming creators of content themselves. It reminds of user-created content's definition and considers the possibility of establishing an exception for “creative, transformative or derivative works” by amending the 2001/29/EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society. In its following communication of 2009, the Commission concludes “it is too early to regulate UGC”, mostly because it is too unclear whether such an exception would include both amateurs and professionals and how a distinction between the two can be made in this context [2009, p.9]. Nevertheless, as many scholars point out [Geiger, et al., 2009], an exception driven by creative considerations, could be established following the spirit of recent jurisprudence and of neighbouring exceptions (see for instance the caricature, parody and pastiche exception of article 5 §3 (k) of the 2001/29/EC Directive). However, they also warn that such an exception could make biased moral rights, since freedom of creation can reveal to be too strong to be limited by any author's right. They therefore suggest that an exception for the purpose of freedom of creation must be limited and precise. Moreover, it must be enacted only after the author's death and be subject to equitable remuneration. Among the different solutions that have been proposed, this one seems currently to be the most likely and most conform to the existing legal regimes, not only of civil law countries, but also of the european copyright law in general.

4. Conclusion: Revising Copyright as a Social Contract

Concluding, free licensing is a means to palliate what is believed to be for the public opinion, copyright's excessive protection towards authors and more accurately economic right-holders. By putting his or her work under a free licence - that is a licence which grants the freedoms to copy, distribute and transform the work and which ensures that these freedoms are preserved in the modified versions - an author puts his or her work into the commons. These commons, which are to distinguished from the public domain, are constituted by the so-called free works, or free cultural works. The movement which characterizes free licensing - meaning a movement in the transformation of the work and movement in the number of authors - follows cultural considerations

for society's welfare and rebalances the interests at stake in favour of the latter. The practice of free licensing is chosen by the authors themselves and is exercised directly by them. Free culture licences *per se* can therefore be considered as a lawful practice whose purpose is to shake up the current copyright regime. However, several issues are raised. Besides free licences incompatibilities among them, they also may infringe copyright legislations, specially in the light of moral rights. To resolve this problem, besides the reliance on fundamental rights on a case-by-case analysis by the jurisprudence and among other proposals, the most efficient solution would be to consecrate an exception which would allow the building on the past in specific circumstances that would preserve the author's rights.

Nonetheless, before relying on any of the several proposals to acknowledge free works in the legal framework, it seems fundamental to understand the message free culture is trying to convey. Indeed, as Niva Elkin Koren [2006, p.9] has duly argued, this movement does not "call, at least not in this initial stage, for a copyright reform. Rather, it advocates exercising rights in a way that would reflect their 'original meaning' ". In that sense, it is not the existence of a copyright regime that is put into question, but its current exercise. By using copyright in a subversive way with the help of new technologies, free culture aims at changing our societal norms, which will eventually end up reforming our copyright law in a more fair and equitable way. Rather than focusing on the specific issue of free cultural works and free licensing, copyright must be rethought as a social contract and replaced in its initial context. It must be kept in mind that this context is one of freedom of expression and creation in which copyright is only an exception to this general rule. It aims at securing the authors' and intermediaries' interests, but only as long as the public eventually benefits from the work. Therefore, there is a need to revise the social contract of copyright by operating a rebalancing of interests. As copyright's function is to provide enough incentive to authors to keep on creating in the prospect of social welfare, copyright law must be rethought in general and not only in the context of the information society.

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