A Legal Analysis of Creative Commons Licenses in Taiwan, Japan and the United States

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1. Introduction

In the digital era it is difficult to use copyrighted material under the fair use doctrine to copyright and licensing mechanism to create free culture, consequently numerous open content licenses are increasing to help to cultivate society's commons. Licenses such as the Creative Commons Licenses, BBC Creative Archive License, Open Content License, Open Publication License, GNU Free Documentation License, Free Art License, and Open Music License are examples of such open content licenses. Besides, in the area of software, because of the mention of source or object code, it is strongly encouraged by Creative Commons to use the licenses made available by the Free Software Foundation or listed at the Open Source Initiative, such as the GNU General Public License, the Berkeley Software Distribution License (BSD) and the Mozilla Public License (MPL).

Nowadays the leading project is Creative Commons (CC). First of all, 1.0 version of the general Creative Commons licenses was released in December 2002 and updated 2.0 versions in May 2004. Later were the versions 2.5, and finally are versions 3.0 now. Furthermore, because of Creative Commons International (CCi)'s dedication to port the core Creative Commons Licenses to different copyright legislations around the world, there are up to 53 countries that completed the process and developed licenses.[1]

2. Basic Concepts of Creative Commons Licenses

The origin of Creative Commons Licenses can be traced to the ideas of free software and open source which are special for the computer program. This free culture movement draws inspiration from free software movement to other copyrighted contents. Free software movement and Creative Commons both emphasize

[1] *See generally*, Website of Creative Commons International, at http://creativecommons.org/international/ (visited on 2010/5/30). These countries include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China Mainland, Colombia, Croatia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Israel, Italy, Japan, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Poland, Portugal, Puerto Rico, Romania, Serbia, Singapore, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, UK: England and Wales, UK: Scotland, the United States and Vietnam.

the importance of freedom[2]. As long as licensees accept the terms and conditions, the licensor grants licensees the rights released by a Creative Commons License. This paper tries to state the main idea of Creative Commons Licenses and also other relevant licenses.

Creative Commons licensing model includes three levels: the human-readable Commons Deed[3], the lawyer-readable Legal Code[4], and the machine-readable Digital Code or metadata[5]. In the human-readable Commons Deed, there are one common term and three optional license terms. Attribution is the common term, so if a licensor wish to release his or her work under a Creative Commons License, "Attribution" must to be chosen. In contrast, a licensor can choose "No Derivatives", "Share Alike", and "No Commercial" by their will. Those four elements could be composed in six kinds of CC licensing choices: Attribution (by), Attribution Share Alike (by-sa), Attribution No Derivatives (by-nd), Attribution Non-commercial (by-nc), Attribution Non-commercial Share Alike (by-nc-sa) and Attribution Non-commercial No Derivatives (by-nc-nd).

2.1 Attribution

2.1.1 Meaning of Attribution

When relating to copyright protection, there is an important distinction between authors' or artists' economic rights and moral rights. This distinction presents a basic divergence between the intellectual property law regimes found in civil law countries like European countries, Japan and Taiwan, and those found in the common law

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[2] *See generally*, Website of GNU Operating System, at http://www.gnu.org/philosophy/free-sw.html/ (visited on 2010/5/30) "Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software. More precisely, it refers to four kinds of freedom, for the users of the software: The freedom to run the program, for any purpose (freedom 0). The freedom to study how the program works, and adapt it to your needs (freedom 1). The freedom to redistribute copies so you can help your neighbor (freedom 2). The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3).

[3] *See generally*, Website of Creative Commons, at http://creativecommons.org/about/license/ (visited on 2010/5/30) "Commons Deed: A plain-language summary of the license, complete with the relevant icons."

[4] *Id.* "Legal Code: The fine print that you need to be sure the license will stand up in court."

[5] *Id.* "Digital Code: A machine-readable translation of the license that helps search engines and other applications identify your work by its terms of use."

countries like the United States.

Many countries in continental Europe recognize that authors and artists have legal interests in their work that exist independently of the legal interest created by copyright laws. These legal interests remain with the authors or artists even after the copyright is transferred to another party and the work is no longer in the hands of the authors or artists. These moral rights include: (1) the right of integrity, under which the artists can prevent alterations in their work; (2) the right of attribution or paternity, under which the artists can insist that their work can be distributed or displayed only if their name is connected with it; (3) the right of disclosure, under which the artists can refuse to expose their work to the public before they feel it is satisfactory; and (4) the right of retraction or withdrawal, under which the artists can withdraw their work even after it has left their hands. For civil law countries, moral rights are inalienable.[6]

In contrast, common law countries such as the United States historically did not recognize the collective moral rights as legal interests. By ignoring the legality of moral rights, the United States effectively renders unenforceable any attempt by an artist to retain such rights in a creation after transferring ownership of their work. In effect, the United States views moral rights as non-economic rights of the artist or author.[7] Since attribution is included by moral rights, how different countries stipulate the provisions concerned about moral rights is important. In paragraph 2.1.2., the moral right related to attribution in copyright law in the U.S., Japan and Taiwan will be discussed in detail.

2.1.2 The Related provisions concerned about moral rights

The following discusses the right related attribution in different jurisdiction: the United States, Japan and Taiwan.

1) The United States

[6] Brandi L. Holland, *Moral Rights Protection in The United States and The Effect of The Family Entertainment and Copyright At of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT'L L., at 219 (2006).
[7] *Id.* at 219.

The Berne Convention, which originally drafted 1886, requires that signatory countries provide protection for moral rights, particularly the rights of paternity and integrity. However for more than 100 years, the United States refused to sign the Berne Convention, because it disagreed with the protections afforded by moral rights clause. In 1989, the United States reversed its position and signed the Berne Convention, claiming that U.S law had evolved to the point where it could provide minimal protection for artists' moral rights required by the Convention.[8]

In order to comply with the international obligations, American Congress partially embraced the tenets of the Berne Convention by passing the Visual Artists Rights Act of 1990 (VARA).[9] VARA recognizes the moral rights of attribution and integrity in the context of a limited class of visual arts and protects both the reputation of visual artists and the works they create. This Act came two years after Congress decided to recognize the moral right as an amendment to the Copyright Act of 1976. VARA, although narrow, brought the United States closer into line with much of the European community.[10]

While the enactment of VARA suggests that America is on its way to recognize the moral right of creative artists, VARA has three distinct shortcomings. First, VARA only protects a specific type of artist.[11] Second, VARA only protects certain types of art[12]. Finally, even if a work meets the VARA definitions of "visual artist" and "visual art," a

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[8] Brandi L. Holland, *supra* note 6, at 230.
[9] 17 U.S.C. § 106A(a)(3)(A)-(B) (1990), available at http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106---A000-.html (visited on 2010/5/30).
[10] Brandi L. Holland, *supra* note 6, at 233-234.
[11] 17 U.S.C. § 106A (b) Rights of certain authors to attribution and integrity- Scope and Exercise of Rights.— Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co owners of the rights conferred by subsection (a) in that work.
[12] 17 U.S.C. §101 Definitions: A “work of visual art” is— (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

number of exceptions may still prevent the artist from protection[13]. One of the exceptions concerns works "made for hire". The relevant part of the Copyright Act defines a work made for hire as "a work prepared by an employee within the scope of his or her employment". This exception will effectively exclude most of the professionals who are seeking to have their work protected.[14]

Although there are provisions related to attribution in American Copyright Law, it provides limited protection in reality. In order to keep authors' or artists' credit, Creative Commons Licenses provide the selection of "attribution" in the first version 1.0, however because most people who chose a Creative Commons License would also choose the element of "Attribution", so since version 2.0, all Creative Commons Licenses require "Attribution".

2) Japan

According to Japanese Copyright Act (JCA), the author's rights comprise moral rights and economic exploitation rights. Whereas copyright as a property right can be transferred, the moral rights are inalienable. The JCA is therefore clearly based on the "dualistic theory".[15] In the 1970s, the legal nature of the author's moral rights was a heatedly debated issue among Japanese experts. Whereas some commentators adhere to the "theory of inseparability" pursuant to which the author's moral rights formed a mere subcategory of the general personality right, others support the "theory of separating" which regards the author's moral rights as separate and independent rights and emphasizes the difference between the author's moral rights and the

[13] 17 U.S.C. § 106A(c) (1)-(3) Rights of certain authors to attribution and integrity-Exceptions: (1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A). (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence. The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).
[14] Brandi L. Holland, *supra* note 6, at 234.
[15] TATSUHIRO UENO, JAPANESE COPYRIGHT LAW, at 41(2005)

general rights. Due to the dualistic JCA, the theory of separating might be better applicable.[16]

Moral rights in the JCA comprise three kinds of rights:(1) the right of making the work public[17], (2) the right of determining the indication of the author's name[18] and (3) the right of preserving the integrity.[19] So, in Japan, the protection of "Attribution" is from JCA Article 19, and Creative Commons Licenses of which version is 2.0 or later just restate this kind of author's right. If a licensee does not abide by the terms of Creative Commons, the rights granted in a Creative Commons license would terminate automatically. In this situation, a licensee also infringes a licensor's moral right; JCA Article 112 provides that a licensor may make a demand for cessation or prevention of such infringements.[20] If a licensee has intentionally or negligently infringed a licensor's attribution right, they shall be liable to compensate any damages resulting in consequence under Civil Code article 709. Besides, a licensor can ask a licensee to take measures necessary to identify him or her as the author, to correct distortions, mutilations, or modifications or to recover his honor or reputation either in place of or

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16 *Id.* at 42.

17 JCA Article 18(1) ("The author shall have the rights to offer to and to make available to the public his work which has not yet been made public (including a work which has been made public without his consent; the same shall apply in this Article). The author shall have the same right with respect to works derived from his work which has not yet been made public.")（公表権）, available at http://www.cric.or.jp/cric_e/clj/clj.html/ (visited on 2010/5/30).

18 JCA Article 19 (1) ("The author shall have the right to determine whether his true name or pseudonym should be indicated or not, as the name of the author, on the original of his work or when his work is offered to or made available to the public. The author shall have the same right with respect to the indication of his name when works derived form his work are offered to or made available to the public.")（氏名表示権）.

19 JCA Article 20(1) ("The author shall have the right to preserve the integrity of his work and its title against any distortion, mutilation or other modification against his will.")（同一性保持権）.

20 JCA Article 112 (1) ("Against those who infringe or are likely to infringe moral rights of authors, copyright, right of publication, moral rights of performers or neighboring rights, the author, the performer or the owner of copyright, right of publication or neighboring rights may make a demand for cessation or prevention of such infringements. (2) In making such demand, the author, the performer or the owner of copyright, right of publication or neighboring rights may demand to take measures necessary to effect such cessation or prevention of infringement, such as the abandonment of objects the making of which constituted an infringement, objects made by an act of infringement or implements and tools used solely for an infringement.")

together with indemnification of damages under JCA article 115.

Under Creative Commons version1.0, a licensor can choose “Attribution” if he or she is willing to do so. If a licensor does not choose “Attribution”, does it mean that he or she waives his or her moral right by agreeing on the Creative Commons License? This relates to one usual question which is often asked by people “Can moral rights be waived by contract?” As already mentioned above, the moral rights of the author are exclusively personal to him or her and are inalienable. Even after the author has transferred his or her copyright, the moral rights remain with him or her, so that the author may exercise them in a manner prejudicial to the smooth work exploitation by the transferee. For this reason, many copyright contracts contain clauses in which the author declares in advance that he or she will not exercise his or her moral rights with respect to the licensed exploitation. The validity of such clauses is not unanimously accepted, however. To the majority of commentators, at least blanket waivers are invalid as they offend the public order and good morals pursuant to Article 90 of the Civil Code.[21] Others expressly affirm the validity of blanket waivers. The discussion whether or to what extent the waiver of moral rights should be allowed has not yet found a satisfactory solution.[22]

3) Taiwan

Taiwan also belongs to civil law regimes as Japan. The author’s rights comprise moral rights and economic exploitation rights. The “Attribution right” relates to the moral right in Copyright,[23] also the name’s right in Civil Code.[24] According to the principle of the applicability of special law prior to general law, when licensees infringe a licensor’s attribution right, the licensor can demand removal of infringement under

[21] Article 90 of the Japanese Civil Code: (“A juristic act with any purpose which is against public policy is void.”)
[22] TATSUHIRO UENO, *supra* note 15, at 42-43.
[23] Article 16 of the Taiwan’s Copyright Law (“The author of a work shall have the right to indicate its name, a pseudonym, or no name on the original or copies of the work, or when the work is publicly released. The author has the same right to a derivative work based on its work.”).
[24] Article 18 of the Taiwan’s Civil Code (“If one's right to use his name is infringed, one may apply to the court for removing of infringement and for damages for emotional distress.”).

Article 84 of Taiwan's Copyright Law,[25] and also can demand the licensees to be liable for damages and may claim a commensurate amount of compensation in the event of non-pecuniary injury under Article 85 of Taiwan's Copyright.[26]

In Taiwan, the question about "Can moral rights be waived or not to be exercised by contract?" is also widely discussed. According to the explanation of Ministry of the Interior, it affirms that going through contracts can limit the author not to exercise his or her moral rights,[27] and there are some scholars who regard this opinion positively.[28] However, other scholars argue about this, and claim that moral rights can not be waived by contract, because moral rights are inalienable.[29] There is also a compromising opinion that is taken by scholars that by observing different types of rights, the rights of publication and the rights of determining the indication of the author's name can be limited by contracts; however the right of preserving the integrity cannot be limited by contracts.[30]

In the case of Creative Commons License version 1.0, both in Japan and in Taiwan, when a licensor does not choose "Attribution", it does not necessarily mean that the licensor waives his or her attribution right. It can be explained that the licensor agrees not to exercise his or her "Attribution Right". The licensor just promises to let licensees who abide by the terms and conditions to use his or her work.

2.2 Non-commercial

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[25] Article 84 of the Taiwan's Copyright Law ("The copyright holder or the plate rights holder may demand removal of infringement of its rights. Where there is likelihood of infringement, a demand may be made to prevent such infringement.").

[26] Article 85 of the Taiwan's Copyright Law ("(1) a person who infringes on the moral rights of an author shall be liable for damages. In the event of non-pecuniary injury, the injured party may claim a commensurate amount of compensation. (2)In infringement matters referred to in the preceding paragraph the injured party may demand indication of the author's name or appellation, correction of content, or adoption other appropriate measures necessary for the restoration of its reputation.").

[27]内政部八十一年十月二日台(八一)內著字第八一一八二〇〇號函、內政部八十三年三月十八日台(八三)內著字第八三〇四四〇六號函。

[28] 劉孔中，著作人格權一些新舊問題的檢討，律師雜誌 258 期，2000 年 3 月，頁 28。

[29] 謝銘洋、陳家駿、馮震宇、陳逸南、蔡明誠，著作權法解讀，元照出版有限公司，2001 年 3 月，頁 58。

[30] 羅明通，著作權法論第一冊，台英國際商務法律事務所，2004 年 1 月第五版，頁 389。

2.2.1 Meaning of Noncommercial

The licensors who release their work by Creative Commons Licenses can specifically restrict the commercial use of the work. On the human-readable Commons Deed, it states that "You may not use this work for commercial purposes." Even though on the legal code (full license), the interpretation of "commercial and non-commercial" is not so clear: "You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works."[31]

2.2.2 Interpretation or Guidelines of "Non-commercial"

Until now, there is no legal interpretation which deals directly with the "monetary compensation" for the use of copyrighted works. In practice, the scope of the "commercial use limitation" is up to license interpretation. According to the general contract law, an unclear contract term will be interpreted against the party who was responsible for writing the term. However, the interpretation rules are not very useful in the case of Creative Commons Licenses because they are mass-market licenses granted to the public [32] and also royalty-free. Consequently MIT provides the interpretation and guidelines of "non-commercial" to make its meaning much clearer.

MIT Open Courseware (OCW) is a web-based publication of virtually all MIT course content. OCW is open and available to the world and is a permanent MIT activity. [33] MIT provides all of the contents by Creative Commons License "Attribution-NonCommercial-ShareAlike 3.0 United States".[34]

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[31] *See* Creative Commons, Creative Commons Legal Code, version 3.0. §4(b), at http://creativecommons.org/licenses/by-nc-nd/3.0/us/legalcode/ (visited on 2010/5/30).
[32] HERKKO HIETANEN, VILLE OKSANEN & MIKKO VALIMAKI, COMMUNITY CREATED CONTENT: LAW, BUSINESS AND POLICY, at 55 (2007).
[33] *See* MIT Open Courseware, at http://ocw.mit.edu/OcwWeb/web/about/about/index.htm (visited on 2010/5/30).
[34] *Id.*

In order to make clear the meaning of “Non-commercial”, MIT clarifies the commercial element in its website as the following.

> “Non-commercial use” means that users may not sell, profit from, or commercialize OCW materials or works derived from them. The guidelines below are intended to help users determine whether or not their use of OCW materials would be permitted by MIT under the "non-commercial" restriction.[35]
>
> 1. Commercialization is prohibited: Users may not directly sell or profit from OCW materials or from works derived from OCW materials, for example: a commercial education or training business may not offer courses based on OCW materials if students pay a fee for those courses and the business intend to profit as a result.
>
> 2. Determination of commercial vs. non-commercial purpose is based on the use, not the user: Materials may be used by individuals, institutions, governments, corporations, or other business whether for-profit or non-profit so long as the use itself is not a commercialization of the materials or a use that is directly intended to generate sales or profit, for example: a corporation may use OCW materials for internal professional development and training purposes.
>
> 3. Incidental charges to recover reasonable reproduction costs may be permitted: Recovery of nominal actual costs for copying small amounts (under 1000 copies) of OCW content on paper or CDs is allowed for educational purposes so long as there is no profit motive and so long as the intended use of the copies is in compliance with all license terms. Students must be informed that the materials are freely available on the OCW Web site and that their purchase of copied materials is optional, for example: an institution in a remote area has limited Internet access and limited network infrastructure on campus, and a professor offers to create CDs of OCW materials relevant to her course. The professor may recover the costs of creating the CDs.

2.3 No Derivatives Works 

[35] *Id.*

The licensors who release their work by Creative Commons Licenses can specifically prohibit modification or derivative works. On the human-readable Commons Deed, it states that "You may not alter, transform, or build upon this work." In the definition of "Derivative Work"[36], it means a work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a collective work will not be considered a derivative work for the purpose of the license. For the avoidance of doubt, where the work is a musical composition or sound recording, the synchronization of the work in timed-relation with a moving image ("synching") will be considered a derivative work for the purpose of the license.

The concept of "derivative works" relates to the reproduction right or adaption right of economic right in civil law regimes and common law regimes, and also the integrity right of moral right in civil law regimes.

1) The United States

According to the American Copyright Act, a "derivative work" is defined as follows: a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work.[37]

The copyright in the derivative work never extends to the portion of the work that incorporates the material from the base work, but only extends to the new material. This keeps the base work author's rights fixed and rewards only the creativity in the derivative author's additions. Besides, the derivative work must differ from the base

[36] *See* Creative Commons, Creative Commons Legal Code, version 3.0 §1(b), at http://creativecommons.org/licenses/by-nc-nd/3.0/us/legalcode (visited on 2010/5/30).
[37] 17 U.S.C. § 101.

work, otherwise it is merely a reproduction. It is defined by court that a derivative work must be "substantially different" from the base work.[38]

2) Japan

According to JCA Article 2(1) (xi) "derivative work" means a work created by translating, arranging musically, or transforming, or dramatizing, cinematizing or otherwise adapting a pre-existing work. The original author is entitled to decide about the publication of a derivative work under JCA Article 18, and share the copyright in it with the adapter under JCA Article 28.[39] Therefore, for example, the exploitation of the main character of a comic series by the illustrator without asking permission of the author of the original stories infringes the copyright of the latter. In addition, according to JCA Article 11,[40] the copyright in the derivative works shall not prejudice the rights of the author in the original work. The provision clarifies that the adapter's copyright in a derivative work persists irrespective of whether it was created with authorization of the original author or not, but the derivative work cannot be freely exploited to the detriment of the author of the original work.[41]

In the version 3.0-CCi Affiliate Checklist, it mentions the inclusion of an express moral rights acknowledgement. If it is not possible to make any change to a work without infringement moral rights, which is the case in Japan, Creative Commons International (CCi) suggests to include an additional statement in those licenses that permits derivative works, such as BY, BY-SA, BY-NC, or BY-NC-SA, similar to those included in the Unported license, but with adjustments in accordance with the jurisdiction. Specifically, an example of such statement is: "Licensor agrees that in the those jurisdiction (e.g., Japan), in which any exercise of the right granted in clause 3(b) of this License (the right to make Adaptions) would be deemed to be a distortion, mutilation, modification or other derogatory action prejudicial to the original author's honor and reputation, the licensor will waive or not assert, as appropriate, this clause,

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[38] Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, CHI.-KENT J. INTELL. PROP. 87

[39] JCA Article 28 ("In connection with the exploitation of a derivative work, the author of the original work shall have exclusive rights of the same types as those possessed by the author of the derivative work under the provisions of this Subsection.").

[40] JCA Article 11 ("The protection granted by this Act to derivative works shall not affect the rights of an author to the original work.").

[41] TATSUHIRO UENO, *supra* note 15, at 27-28.

to the fullest extend permitted by the applicable national law, to enable You to reasonably exercise Your right under clause 3(b) of this License (right to make adaptations) but not others."

3) Taiwan

According to Article 3 of Taiwan's Copyright Law, "Adaptation" means to create another work based upon a pre-existing work by translation, musical arrangement, revision, filming, or other means, and in the same way as in Japan and the U.S., a derivative work shall be protected as an independent work. Protection of a derivative work shall not affect the copyright in the pre-existing work.[42] In addition, Taiwan is one of the jurisdictions that entitle authors' moral rights, so Creative Commons International suggests that to make sure to include an express acknowledgement that moral rights are retained along lines similar to the one included in the Unported license version 3.0. This should be included as a new subparagraph to section 4 as follows: "Except as otherwise agreed in writing by the Licensor or as may be otherwise permitted by applicable, if you reproduce, distribute or publicly perform the work or any adaptations or collections, you must not distort, mutilate, modify or take other derogatory action in relation to the work which would be prejudicial to the original author's honor or reputation."

2.4 Share Alike

2.4.1 The meaning of "Share Alike"

Share Alike means that if licensors alter, transform, or build upon this work, they may distribute the resulting work only under the same or similar license to this one.[43] It is regarded as a kind of "copyleft" which is a general method for making a program or other work free, and requiring all modified and extended versions of the program or other work to be free as well. It doesn't mean abandoning the copyright; in fact, doing

[42] Taiwan's Copyright Law §6
[43] *See* Creative Commons, Attribution-Noncommercial-Share Alike 3.0 Unported, at http://creativecommons.org/licenses/by-nc-sa/3.0/ (visited on 2010/5/30)

so would make copyleft impossible.[44]

2.4.2 The Change of the Version with “Share Alike”

At first, in the version 1.0, when licensors release their work under a Creative Commons License with “Share Alike”, it means that licensees may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License.[45]

In Creative Commons License Version 2.0 and 2.5, the conditions of “Share Alike” are no longer limited to the terms of this License, but also include the restrictions contained in “a later version of this License with the same License Elements as this License, or a Creative Commons iCommons license that contains the same License Elements as this License.[46]

Until now, in the version 3.0 unported, it describes “a Creative Commons iCommons license that contains the same License Elements as this License” much more clearly to “a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License”. In addition, it also increases one more choice for licensees that are the fourth one “a Creative Commons Compatible License”.[47]

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[44] *See* GNU Operating System, at http://www.gnu.org/copyleft/ (visited on 2010/5/30) The word “left” in “copyleft” is not a reference to the verb “to leave” — only to the direction which is the inverse of “right”.

[45] *See* Creative Commons, Attribution-Noncommercial-Share Alike 1.0, at http://creativecommons.org/licenses/by-nc-sa/1.0/legalcode (visited on 2010/5/30)

[46] *See* Creative Commons, Attribution-Noncommercial-Share Alike 2.0, at http://creativecommons.org/licenses/by-nc-sa/2.0/legalcode (visited on 2010/5/30)

[47] *See* Creative Commons, Attribution -Share Alike 3.0, at http://creativecommons.org/licenses/by-sa/3.0/legalcode (visited on 2010/5/30) “You may Distribute or Publicly Perform an Adaptation only under: (i) the terms of this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-NonCommercial-ShareAlike 3.0 US) ("Applicable License"); (iv) a Creative Commons Compatible License. If you license the Adaptation under one of the licenses mentioned in (iv), you must comply with the terms of that license. If you license the Adaptation under the terms of any of the licenses mentioned in (i), (ii) or (iii) (the "Applicable License"), you must comply with the terms of the Applicable License generally and the following provisions.”

2.4.3 The Contradictions of “Share Alike” and “No derivative works”

It needs to be noticed that because the element “No derivative works” means that Creative Commons Licensors do not permit modifications or derivative works, and the precondition of “Share Alike” is that licensors permit licensees to modify or adapt. Consequently these two elements “Share Alike” and “No derivative works” contradict to each other. It is why there are just six, not eight, kinds of Creative Commons Licensing choices.

3. A Legal Analysis – the Nature of Creative Commons Licenses

Copyright law is specifically enacted for the purposes of protecting the rights and interests of authors with respect to their works, balancing different interests for the common good of society, and promoting the development of national culture.[48] In other words, it creates barriers to the use of creative works for users. For example, it provides owners a set of exclusive rights in their creative works. Non-owners are required to obtain a license for every use of a work that is covered by these rights. There are certain limitation and exceptions of copyright, allowing free use such as “fair use”. The barriers on use are thus effectuated by two separate aspects of copyright: (1) the legal right to restrict use and to seek an injunction in cases of unauthorized use, and (2) the information costs associated with securing a license.[49]

Because the default setting of copyright is “all rights reserved”, users have to get permission to uses of the copyrighted work. This kind of permission to use others’ copyrighted works is “license.”

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[48] Taiwan’s Copyright Law §1

[49] *See* Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering In Facilitating A Creative Commons*, FORDHAM L. REV., Vol.74, at 375 and 379 (2005). “1.It preserves the right of owners to manage or control over some uses of the work in a more flexible, easy and open way without going through intermediate such as collecting societies or lawyers. 2.It leaves the door open for collaboration with market players such as Wikipedia and open software. Maintaining the enthusiasm and the sense of trust among potential contributors could be crucial for the success of Creative Commons. 3. Claiming property rights may allow authors to safeguard their work against abuse.”

3.1 The Relationship between Creative Commons Licenses and Copyright

The strategy of Creative Commons for promoting the share and reuse of informational works makes an innovative use of two traditional common law concepts: property and private ordering (license). There are several advantages to rely on property rights under copyright law.[50] Consequently, Creative Commons Licenses help authors to retain and manage their copyright and also for their enforcement.

3.2 Licenses in General

According to Black's Law Dictionary, a "license" is "a revocable permission to commit some act that would otherwise be unlawful," while "licensing" is defined as "the sale of a license authorizing another to use something (such as computer software) protected by copyright, patent, or trademark."[51] In the U.S., the Uniform Computer Information Transactions Act (UCITA) defines the term "a license" more specifically as "a contract that authorizes access to, or use, distribution, performance, modification, or reproduction of, information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information, whether or not the transferee has title to a licensed copy."[52] Therefore, a license is defined as "an agreement the terms of which entail a limited or conditional transfer of information or a grant of limited or restricted contractual rights or permissions to use information."[53] In other words, a license exists (1) if a contract grants greater rights or privileges than a first sale, (2) if it restricts rights or privileges that might otherwise exist, or (3) if it deals with other issues of scope of use.[54]

In Germany, those who need to exploit the copyrighted works (such as employers) must acquire title or interests through individual or labor contracts with the creators under the purpose transfer rule. Therefore, the disposal of rights through so-called

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[50] *Id.* at 397
[51] Black's Law Dictionary 7th edition (1999).
[52] UCITA § 102(a) (40). The term includes an access contract, a lease of a computer program, and a consignment of a copy. The term does not include a reservation or creation of a security interest to the extent the interest is governed by Article 9 of the Uniform Commercial Code ("UCC").
[53] *See* Cheon-Seok Seo, *Licenses and the Uniform Computer Information Transactions Act,* 1 BUFF. INTELL. PROP. L.J., at 146 (2001).
[54] *Id.* at 147.

"Copyright Contract Law" ("Urhebervertragsrecht") has been well developed in Germany. [55] Besides, according to Article 31 of German Copyright Law (Urheberrechtsgesetz, UrhG), "the author may grant a right to another to use the work in a particular manner or in any manner (exploitation right). An exploitation right may be granted as a non-exclusive right or as an exclusive right."[56]

3.3 New Licenses Different From Traditional Licenses

From above, a "license" is traditionally regarded as an agreement, even a contract in the Uniform Computer Information Transactions Act in the U.S. or Copyright Contract Law (Urhebervertragsrecht) in Germany. However, not all of the characters of licenses are the same, especially the appearance of the software licenses (i.e., "shrink-wrap license"), licenses in the internet (i.e., "click-wrap license" and "Browsewap agreement") and also free content licenses (i.e., Creative Commons licenses).

3.3.1 Shrink-wrap, Click-wrap and Browse-wrap Licenses

Makers of personal computer software generally rely upon dealers to sell the software. However, dealers are unwilling and also unable to make buyers sign individual contracts. Because of the regulations of Uniform commercial Code "mass-market licenses are typically enforceable only if the licensee manifests assent to the contract after having an opportunity to review its terms" and the Copyright Act,[57] software manufacturers sought to change their relationship with buyers by contract, and the most common contractual approach is the use of " shrink-wrap" licenses.[58]

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[55] *See* HISAO SHIOMI AND PETER GANEA, CHAPTER VII COPYRIGHT CONTRACT LAW, JAPANESE COPYRIGHT LAW, at 77 (2005).

[56] *See* WIPO, Germany Copyright Law, at http://www.iuscomp.org/gla/statutes/UrhG.htm#31 (Translation provided by the International Bureau of WIPO) (visited on 2010/5/30).

[57] *See* UCITA § 209(b).

[58] *See* PETER B. MAGGS, JOHN T. SOMA AND JAMES A. SPROWL, COMPUTER LAW: CASES-COMMENTS-QUESTIONS, at 384 (1992); *also see* Steven A. Heath, *Contracts, Copyright, and Confusion Revisiting the Enforceability of 'shrinkwrap' licenses*, 5 CHI.-KENT J. INTELL. PROP., at 12 and 15 (2005). "The software manufacturers incorporate the" shrink-wrap" license within the packaging of the purchased software by simple virtue of the fact that it was physically included with the package's cellophane wrapping. Three initial forms are common:(1) the "envelope license", with

Consequently, shrink –wrap licenses are those unsigned “agreements” that are shipped with some types of software. The software manufacturers want to have this kind of contractual protections that are not available without an agreement. Shrink-wrap licenses provide nothing to sign, but create protections for the manufacturers.

In determining the enforceability of shrink-wrap licenses, the courts in the United States generally consider three points: first, whether the license is acceptable to the principles of contract law; second, whether the transfer is in fact a sale; and third, whether federal law preempts the state's contractual regime.[59] It was not until the case of ProCD v. Zeidenberg[60] that a court explicitly enforced a shrink-wrap license applying to mass-marketed software.

The new licensing such as Shrink-wrap licenses, click-wrap licenses and browse-wrap licenses usually seeks for that (1) the grant of a license circumvents the Doctrine of First Sale; (2) the license can include restrictive terms, such as prohibitions against “Fair Use” exceptions for reverse engineering and decompiling; and (3) the license may also purport to disclaim all implied and express warranties in the product.[61]

3.3.2 Creative Commons Licenses

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the license printed on the exterior of a sealed envelope containing the product (usually a CD-ROM or disk); (2) the “box-top” license; read before opening a sealed box containing the product; and (3) the “referral license”, where the user is informed of a license that should be read before the manufacturer's seal is broken. Being an innovative response to change market conditions, the shrink-wrap license has since been refined, as symbolized by the emergence of electronic “click-wrap” and “browse-wrap” licenses.”

[59] Heath, *supra* note 58, at 17.

[60] 86 F.3d 1447 (7th Cir. 1996). *Also see,* Cheon-Seok Seo, *supra* note 53, at 153-154. “The Seventh Circuit, in an opinion by Judge Easterbrook, reversed the district court. [FN63] After finding shrink-wrap licenses generally enforceable, the court held that § 301 of the Copyright Act did not preempt their enforcement. In so holding, the court drew a distinction between the rights conferred by copyright, which are enforceable *154 rights against the entire world regardless of the existence of an agreement, and rights created by contract, the enforceability of which depend on proof of a contractual agreement According to the Seventh Circuit, § 301 does not interfere with private transactions in intellectual property; thus, private parties are free to set up between themselves controlling rights and restrictions that are not equivalent to any of the exclusive rights within the scope of copyright.”

[61] Heath, *supra* note 58, at 15-16.

Different to those new licenses above, Creative Commons "Licenses" are used by authors to actively release their work to public without royalties. In addition, those licensors do not want to circumvent the Doctrine of First Sale, and either are they intended to reduce, limit, or restrict any uses free from copyright or rights arising from limitations or exceptions that are provided for in connection with the copyright protection under copyright law or other applicable laws.[62] However, after Creative Commons License version 2.0, taking into account of balance of royalties free and licensors' responsibilities, unless otherwise mutually agreed to by the parties in writing, a licensor offers the work as-is and makes no representations or warranties of any kind concerning the work, express, implied, statutory or otherwise, including, without limitation, warranties of title, merchantability, fitness for a particular purpose, no infringement, or the absence of latent or other defects or errors, whether or not discoverable.[63]

The proclaimed goal of Creative Commons is to change the default rule created by copyright law. It provides a legal and technological infrastructure that arguably overcomes the impediment to access to informational works. Creative Commons seeks to expand the variety of defaults by facilitating new options for release of works under less restrictive terms: "some rights reserved" or sometimes "no rights reserved".[64]

Two more different characters that a shrink-wrap license or a click-wrap license does not have are that (1) users (or licensees) are not required to do anything, such as tearing shrink packages or clicking buttons, so there is no way to ascertain the users and the time when the formation of license is; (2) the purpose of licensing to the public is for public welfare, and to devote to create free culture, so Creative Commons Licenses are royalty-free, worldwide, non-exclusive and this permission is perpetual (for the duration of the applicable copyright).[65]

Creative Commons Licenses were born to struggle against "click-wrap" or "shrink-wrap" licensing. In those contexts, contracts are often used to get the consumer

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[62] *See* Creative Commons, at http://creativecommons.org/licenses/by/3.0/legalcode , §2 (visited on 2010/5/30)
[63] *Id.* §5
[64] *See* Niva Elkin-Koren, *supra* note 49, at 383.
[65] *See* Creative Commons, at http://creativecommons.org/licenses/by/3.0/legalcode , §3 (visited on 2010/5/30)

to waive important consumer rights. These rights, established by the law as defaults, are effectively modified by devices that condition access to important resources on waiving these default rights.[66]

Because of several differences between traditional licenses and Creative Commons Licenses, and also between software licenses and Creative Commons Licenses, it is necessary to consider the nature of Creative Commons Licenses much more cautiously.

3.4 The Nature of Creative Commons Licenses

In the academia and practice, there are different sounds to explain the nature of Creative Commons Licenses and Open Source Licenses. As Creative Commons Licenses were modeled after General Public License (GPL), the literature written on GPL is helpful when analyzing Creative Commons Licenses.[67] There are some scholars who regard Creative Commons Licenses and Open Source Licenses as contracts[68]; there are also other scholars who regard Creative Commons Licenses and Open Source Licenses as pure licenses.[69] Besides, there is also other scholar's suspect

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[66] *See* Lawrence Lessig, *Re-Crafting A Public Domain*, 18 YALE J.L. & HUMAN., at 56, 81 (2006).

[67] Herkko Hietanen, *A License or a Contract ; Analyzing the Nature of Creative Commons Licenses*, NIR, NORDIC INTELLECTUAL PROPERTY LAW REVIEW (2007), available at SSRN: http://ssrn.com/abstract=1029366, at 2 (visited on 2010/5/30)

[68] *See* Niva Elkin-Koren, *supra* note 49, at 74. *Also see* Christopher J. Falkowski, *An Innovation in Contract Drafting Open Source Licensing*, 84-MAY MICH. B.J. 30, p.30; *See also* Welte v Sitecom Deutschland GmbH, No. 21 O 6123/04(District Court of Munich-LG MunchenI), *at* http://www.jbb.de/judgment_dc_munich_gpl.pdf > (visited on 2010/5/30)

[69] *See* Lawrence Lessig; *supra* note 66 "For again, a copyright license is not, at its core, a contract."*See also*, James Boyle, *Cultural Environmentalism and Beyond* , 70 SPG LAW & CONTEMP. PROBS. 5, 10. "There are the questions this raises about rules on alienability and the effect on third parties and the differences between contract and license." *See* Eben Moglen, The GPL Is a License, not a Contract, at http://lwn.net/Articles/61292/ (visited on 2010/5/30) "The word 'license' has, and has had for hundreds of years, a specific technical meaning in the law of property. A license is a unilateral permission to use someone else's property. The traditional example given in the first-year law school Property course is an invitation to come to dinner at my house. If, when you cross my threshold, I sue you for trespass, you plead my 'license,' that is, my unilateral permission to enter on and use my property." *See* New report released by OAK Law Project and Legal Framework for e-Research Project, at http://www.oaklaw.qut.edu.au/files/Data_Report_final_web.pdf (visited on 2010/5/30) at 137-138 "A license can be contractual or non-contractual." *See also,*Eben Moglen,

of the nature of Creative Commons Licenses and Open Source Licenses instead of affirming that they are contracts or licenses.[70] Conditional licenses further blur the line between a pure license and a contract.[71]

3.4.1 Contract

Contract law has developed over the centuries as a means of facilitating economic exchanges. It can help to reduce transaction costs by providing transactors with information on normal exchange conditions and on rules that reply.[72] However the formation of contract in common law system and civil law (continental law) system is different as followings.

Freeing the Mind: Free Software And The Death Of Proprietary Culture, 56 ME. L. REV. 1, 6. "The GPL says: We construct a protected commons, in which by a trick, an irony, and the phenomena of commons are adduced through the phenomena of copyright, restricted ownership is employed to create non-restricted self-protected commons. The GPL, whose language you have been referred to, is not quite as elegant a license as I would like but is pretty short; yet I can put it more simply for you. It says: "Take this software; do what you want with it--copy, modify, redistribute. But if you distribute, modified or unmodified, do not attempt to give anybody to whom you distribute fewer rights than you had in the material with which you began. Have a nice day!" That is all. It requires no acceptance. It requires no contractual obligation. It says you are permitted to do, just don't try to reduce anybody else's rights. The result is a commons that protects itself: Appropriation may be made in an unlimited way, providing that each modification of goods in commons is returned to commons. Anyone making non-commons use of the material is infringing. Contract, on the other hand, is an exchange of obligations, either of promises for promises or of promises of future performance for present performance or payment. The idea that 'licenses' to use patents or copyrights must be contracts is an artifact of twentieth-century practice, in which licensors offered an exchange of promises with users: 'We will give you a copy of our copyrighted work,' in essence, 'if you pay us and promise to enter into certain obligations concerning the work.' With respect to software, those obligations by users include promises not to decompile or reverse-engineer the software, and not to transfer the software."

[70] *See* Herkko Hietanen, *supra* note 67, at 31-32; *also see* Christian H. Nadan, *Open Source Licensing: Virus or Virtue?* 10 TEX. INTELL. PROP. L.J. at 349. ("Open source licensing tries to make the license formation simpler for the licensor to implement. Rather than requiring acceptance of a click wrap agreement for downloads from a website, acceptance of a click wrap license that pops up during installation of the code, or acceptance of a shrink-wrap license included in the packaging, the open source licenses just require that a notice about the license be provided in or with the code. No manifestation of assent is required to prove the licensee agreed to the terms, and indeed the user can access the code without ever seeing the license, let alone agreeing to it. This greatly increases the risk that no license agreement has been formed.").

[71] *Id.* at 32.

[72] *See* WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 130 (2nd ed. 1988).

3.4.1.1 Common Law

A contract in common law system is a promissory agreement for a future exchange done freely and voluntarily. The core concept of contracts that are enforceable is "consideration," and a legal term for the judicial inquiry of whether value has been exchanged between parties. The doctrine does not test the fairness of the exchange or the equality of the value exchanged. It seeks merely to ascertain whether an exchange of value has occurred. The maxim is that the law only tests to see if consideration, that is, exchange for value, exists. The parties to the exchange value their respective contributions to the transaction autonomously, and the law only determines whether an exchange has occurred.[73]

Under the traditional consideration doctrine, a promise is only legally enforceable if it is made in exchange for something of value. This doctrine lies at the heart of contract law, known as the consideration doctrine: the law will not enforce unilateral promises, but promises exchanged for something of value become legally binding contracts. There are many exceptions to this doctrine. Other rules such as "the doctrine of promissory estoppel" can make a promise legally binding, and not all promises backed by consideration are legally enforceable. Nevertheless, the consideration doctrine remains the most important rule for distinguishing between unenforceable promises and contracts backed by law.[74]

3.4.1.2 Continental Law

Instead of consideration, "*causa* or reason" is needed in continental law system.The eminent Roman jurist Labeo describes the contract of Roman law as being *ultrocitroque obligatio quod Graeci synal-lagma.vocanti.* In conjunction herewith it is helpful to consult a passage from Justinian's Digest of which a translation is as follows: "If there is a *causa* then, according to Ariosto's well-expressed reply to Celsus, there is an obligation formed."[75]

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[73] *Id.* at 129-130.

[74] *See* David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. at1299 (2006).

[75] *See* Melius de Villiers, *The Roman Contract According to Labeo*, 35 YALE L. J. at 292.

The characteristic feature of a contract was thus that an obligation to do or to give something was called into being on the part of each of the parties to the contract. An obligation on one side implies a corresponding right on the other side, and thus mutual rights as well as mutual obligations were created. The feature of mutuality was that which distinguished a contract from a donation.[76]

One scholar has ever raised the suspicion that "[i]t has sometimes been thought and said that in Roman law no consideration was required for the validity of a contract. It is difficult to conceive how such an idea could ever have arisen in the face of Labeo's language cited above." And the scholar concluded that "Causa in its essential features was thus but the English consideration."[77]

In Taiwan, generally speaking, when the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted.[78] However, in cases where according to customs or owing to the nature of the affair, a notice of acceptance is not necessary, the contract shall be constituted when, within a reasonable time, there is a fact, which may be considered as an acceptance of the offer. Consequently, even though there is no mutually change of consent with each other, it still can be regarded as contract if due to the custom or owing to the nature of the affair, the notice of acceptance is not necessary. Almost all of the scholars adopt this kind of view, and therefore regard Creative Commons Licenses as Contracts.[79]

3.4.2 Pure License

"Pure licenses" and "unilateral licenses" are used to describe non-contractual licenses, such as software license agreements[80] or open content licenses.[81]

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[76] *Id.*
[77] *Id.* at 293.
[78] Taiwan's Civil Code, Article §153
[79] 賴文智，自由軟體之著作權問題研究，智慧財 產權月刊第99 期，2007 年 3 月，頁 70-71; 陳人傑，開放原始碼授權條款之法律分析－以通用公共授權為中心（下），科技法律透析，2002 年 7 月，頁 57-58; 盧文祥，著作財產權創新授權模式法律問題之研析，法令月刊第五十七卷第七期，頁 87；呂佩芳，開放性授權契約對著作利用之影響，國立臺灣大學法律學研究所碩士論文，2006 年 7 月，頁 118-122。
[80] *See* Niva Elkin-Koren, *Copyright Policy and The Limits of Freedom of Contract,* 12 BERKELEY TECH. L.J. 93, at 107 (1997). *See also*, Darren C. Baker, *Procd V. Zeidenberg:*

According to explanation of a report released by OAK Law Project and Legal Framework for e-Research Project in Australia, "[a] contractual license, as the name implies, operates like a standard contract. This allows the copyright owner to not only give permission for use of the material, but also impose restrictions or additional conditions on its use. However, a non-contractual license is essentially a bare permission to use the material for certain purpose. An increasingly common form of non-contractual licensing is the open content license."[82]

According to Black's Law Dictionary, a "license" is "a revocable permission to commit some act that would otherwise be unlawful." A license places no conditions on the licensee, but can be revoked by the licensor at any time.[83]

Under the non-contractual interpretation, Creative Commons Licenses are unilateral grant of rights, without users' consent. However, Creative Commons grant the users conditional permissions such as permission to copy, redistribute and modify the work. These permissions are intended to protect a user from copyright infringement if the work is used in accordance with the permissions. The permissions are not intended to create contractual obligations on either party. But it is criticized that the nature of non-contractual has failed to account for the fact that licenses, by definition, are "a revocable permission."[84]

Commercial Reality, Flexibility In Contract Formation, and Notions of Manifested Assent in The Arena of Shrink-wrap Licenses, 92 NW. U. L. REV. at 379, 389-390 ("Indeed, the face-to-face bargaining model has now become impossible for mass-marketed software. To be useful in the mass market, software license agreements cannot be individually negotiated, but rather, must be standardized and concise. Thus, software manufacturers resorted to unilateral license agreements to maintain control over the copy of the software after its transfer to the consumer.").

[81] *See* New report released by OAK Law Project and Legal Framework for e-Research Project, at http://www.oaklaw.qut.edu.au/files/Data_Report_final_web.pdf (visited on2010/5/30) at 137-138.

[82] *Id.*

[83] *See,* Sapna Kumar, *Enforcing the GNU GPL*, 2006 U. ILL. J.L. TECH. & POL'Y 1, at 12. *See also*, Carson v. Dynegy, Inc., 344 F.3d, at 446, 452 (5th Cir. 2003) ("... that a nonexclusive license was created, whether such a license was irrevocable rests solely with whether [the plaintiff] received consideration…"). *See also* I.A.E., Inc. v. Shaver, 74 F.3d, at 768, 775-76 (7th Cir. 1996) (discussing the existence of explicit and implied non-exclusive non-contractual licenses).

[84] *See,* Kumar, *supra* note 83, at 13.

Even though the function of Creative Commons Licenses is to deal with the problem of "a revocable permission" by stating that "Licensor hereby grants you a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work,"[85] but merely stating that the license is irrevocable or perpetual does not make it so. Consequently, there are scholars who discuss how "doctrine of estoppel, " " the principle of good faith" and "principle of forbidding abuse of right" could be used to bridge this gap.[86]

3.4.3 Conclusion

Because the lack of consideration in common law system, and probably also lack of *causa* in continental law system, Creative Commons Licenses can not be regarded as contract, but they are regarded as unilateral permissions to let licensees to use someone else's property. They do not require users and licensors to exchange mutually things of value. Besides, since the restrictions under Article 4 of Creative Commons License are not out of the range of what copyright law originally sets for the users, it is not necessary to regard Creative Commons Licenses as contracts (private ordering) to expand authors' rights out of the scope of copyright. In fact, authors limit their own rights to give the public (everyone) the permission to use their work.

However, in Taiwan, this kind of conditional licenses can be regarded as contracts, according the custom and the nature of the affair. In this paper, it is necessary to review one more time what is the influence of regarding Creative Commons Licenses as contracts or licenses, and whether the nature is contract or license can help to get to the purpose of Creative Commons Licenses – "Free Culture."

3.5 The Differences to be regarded as Contract or Pure License in Taiwan

3.5.1 The Timing of Contract and License to Be Constituted

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[85] *See* Creative Commons License version 3.0 unported §3. *See also,* Draft 2 of GPL v.3 (attempting to deal with this possibility by stating that "[a]all rights granted under this License are granted for the term of copyright on the Program, and are irrevocable provided the stated conditions are met.").

[86] *See* Kumar, *supra* note 83, at 13. *See also*, ローレンス・レッシグ, 林紘一郎, 椙山敬士,若槻絵美, 上村圭介,土屋大洋, クリエイティブ・コモンズ:デジタル時代の知的財産権, at 92-93 (2005).

The timing of Creative Commons Licenses to be constituted influences whether can the licensee make against the third parties or not. The following is the analysis of the timing of contract and license to be constituted.

3.5.1.1 Contract

According to Article 153 of Taiwan's Civil Code, "[w]hen the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted." And in special condition (due to customs or owing to the nature of the affair), the contract shall be constituted when, within a reasonable time, there is a "fact", which may be considered as an acceptance of the offer according to Article 161 of Taiwan's Civil Code.

If Creative Commons Licenses are regarded as contracts, the timing of contract to be constituted is when the users comply to the license and use the licensed work, and it is the "fact" that may be considered as an acceptance of the offer.

3.5.1.2 License

If Creative Commons Licenses are regarded as pure licenses or unilateral licenses, the timing of licenses to be constituted is when the authors release his work by Creative Commons License to the public.

3.5.2 Formation

An author is automatically entitled to all copyrights in the work and to any derivative works around the world. However, in America, there are some special and unique systems such as "evidentiary weight of notice", "voluntary registration" and "recordation" which are not seen in copyright laws of Japan and Taiwan. This paper will analyze what is the influence of these systems on Creative Commons Licenses.

3.5.2.1 Copyright in General

Under the Berne Convention, copyrights for creative works are automatically in

force upon their creation without being asserted or declared. An author does not need to "register" or "apply for" a copyright in countries adhering to the Convention.[87] In Taiwan, the system of recordation for author to get copyright was abolished in 1998. Now according to Article 10 of Taiwan's Copyright Law, "the author of a work shall enjoy copyright upon completion of the work." Also in Japan, it is the same according to Article 17 (2) of Japanese Copyright Law which provides that "enjoyment of the moral rights of author and copyrights shall not be subject to any formality."

Copyright under the Berne Convention must be automatic, and it is prohibited to require formal registration. However, even though the United States joined the Convention in 1988, it continued to have copyright notice, deposit and registration system. For example, if a notice of copyright in the form and position specified in the law appears on the published copy or copies, "no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages" (17 U.S.C. §401(d)) Although it is not necessary to register to get copyright, the American Copyright Act[88] provides some incentives for an author to register his or her copyright in a sense that (1) until registration of the copyright claim has been made, action to infringement of the copyright in any American work shall not be instituted;[89] (2) in any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate;[90] and (3) attorney's fees and statutory damages are available

[87] In some countries including the U.S., fixation is required for the protection of copyright. Such a system is permitted under Article 2 (2) of the Berne Convention.
[88] 17 U.S.C. §401(d) "Evidentiary Weight of Notice.—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c) (2)."
[89] 17 U.S.C. §411(a) ("Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action of infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title.").
[90] 17 U.S.C. §410(c) (" In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence Of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.").

only for registered works.[91]

In the case of Creative Commons Licenses, it is very hard to confirm whether the Creative Commons licensor is the real author or not in Taiwan and Japan, so there is high possibility for licensees for being sued by the real copyright holder (author) if the Creative Commons licensor is not the real author. However, in the United States, if the authors treasure their copyrighted work and worry about infringement in the future, as long as they think the loss of infringement is higher than registration fee, they will choose to register in advance. This may be a problem that licensees can not confirm about who is the real right holder in Creative Commons Licensed work because there is no system of registration provided in Taiwan and Japan.

3.5.2.2 The Formation of License or Contract

There are different requirements for the formation of license and contract in the United States, Japan and Taiwan. The followings will discuss the offer and acceptance, and the competency and capacity of both parties

3.5.2.2.1　Offer and Acceptance

1)　Contract

A contract generally requires an offer and an acceptance. Both sides must agree to the same terms. An offer is an indication by one person to another of his or her willingness to contract on certain terms without further negotiations. A contract comes into existence when an acceptance of an offer has been indicated to the offeror by the offered.[92]

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[91] 17 U.S.C. §412 ("In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—
(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.")

[92] *See* Herkko Hietanen, *supra* note 67, at 9.

2)　License

If licensing can be seen as a unilateral act, it does not require acceptance. A licensor just creates an exception to his or her exclusive rights by giving a license (permission) to the licensee. In addition, because a licensee does not have any obligation beyond copyright law, there is no need to accept the license.[93]

3.5.2.2.2　Competency and Capacity of Both Parties

1)　Contract

Contracts require certain abilities from contracting parties. Both parties must have the competency and capacity to understand the contract in order to form it. By requiring competency and capacity from the parties, the legal system protects parties that may not be capable of understanding the consequences of their actions. This is why children and mentally disabled people have no or only a limited capability to form contracts.[94]

For example, in Taiwan, majority is attained upon reaching the twentieth year of age[95]. The minor, who has not reached their seventh year of age, has no capacity to make juridical acts; the minor, who is over seven years of age, has a limited capacity to make juridical acts.[96] The expression of intent which is made by a person who has no capacity is void.[97] Consequently, a person who has no capacity to make juridical acts shall be represented by his or her guardian for making or receiving an expression of intent.[98] Besides, the making or receiving of an expression of intent of a person who is limited in capacity to make juridical acts must be approved by his or her guardian, except when the expression of intent relates to the pure acquisition of a legal advantage, or to the necessaries of life according to his or her age and status.[99]

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[93] *Id.*
[94] *Id.*
[95] Taiwan's Civil Code §12.
[96] Taiwan's Civil Code §13 (1) and (2).
[97] Taiwan's Civil Code §75.
[98] Taiwan's Civil Code §76.
[99] Taiwan's Civil Code §77.

From above, minors who have not reached their seventh year of age have no capacity to be Creative Commons licensors and licensees except when they are represented by their guardians for making the offer or receiving the acceptance. Those minors, who are over seven but have not reached the twentieth year of age, must be approved by their guardians to be Creative Commons licensors and licensees. From the viewpoint of protecting minors, it is reasonable to restrict the qualification of being a licensor (although it still leaves the problem of instability for the Creative Commons licensees), but it does not seem to make sense to restrict the qualification of being a licensee. According to the usage of internet, more and more teenagers spend a lot of time to surf the internet and use the materials they find on the internet. If every action to use the Creative Commons licensed work needs to be represented or approved by teenagers' guardians, the purpose of Creative Commons – free culture – would leave one exception to teenagers, and this paper does not agree with this kind of conclusion.

2) License

Granting a license usually requires the same competency and capacity as forming a contract does. However, because licensors give permission to the public, licensees do not need to afford any obligation, so licensors need to have competency and capability to limit their rights and create liabilities. On the contrary, there is no need for licensees to have competency and capability. Consequently, even children can be Creative Commons licensees. This is a much more reasonable treatment for achieving the purpose of free culture.

3.5.3 Priority between Conflicting Transfer of Ownership and Nonexclusive License

3.5.3.1 Registration and Written

1) The United States

In the United States, any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation. In other words, it is not a compulsory obligation or formation for

recordation of the transfers and other documents. However, as between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice.[100] This kind of notice can be in conformity with the principle of public announcement.

In the case between conflicting transfer of ownership and nonexclusive license, a nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent if (1) the license was taken before execution of the transfer; or (2) the license was taken in good faith before recordation of the transfer and without notice of it.[101]

Under the circumstances of Creative Commons licenses as nonexclusive licenses, there is no enough incentive for licensors and licensees to sign a written instrument. For this reason, there is almost no possibility for having a written instrument of a Creative Commons license in this real world, and it leads to inability for a Creative Commons license to prevail over a conflicting transfer of copyright ownership, even though Creative Commons licenses are claimed perpetual and cannot be revoked.

2)　Japan

In the Japanese Copyright Act, there is a provision for transfer of copyright stating that unless registered, the transfer (other than by inheritance or other universal successions) of the copyright may not be asserted against a third party.[102]

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[100] 17 U.S.C§205(d) ("Priority between Conflicting Transfers.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.").

[101] 17 U.S.C§205(e).

[102] JCP §77 ("Unless registered, the matters set forth in the following items may not be asserted against a third party: (i) the transfer (other than by inheritance or other universal successions; the same shall apply in the next item) of the copyright or a restriction on the disposal of the copyright; (ii) the establishment, transfer, modification or termination of the pledge on a copyright (other than termination by reason of merger or by reason of the termination of the copyright or the claim secured

However there is no provision for registration of nonexclusive license or exclusive license.

Consequently, in Japan, there is no possibility for Creative Commons licensees to be claimed against a third party (conflicting transfer of copyright ownership) by registration.

3)　Taiwan

In Taiwan, the basic concept law originates from the civil law, especially from German law. The juristic acts are called "*Rechtsgeschäft*", which can be divided to "*Verpflichtungsgeschäft*" ("the Act of Right in Personam" or "Juristic Act of Claim")[103] and "*Verfügungsgeschäft*" ("the Act of Right in Rem" or "Juristic Act of Real Right").[104]

However, in common law, it is well-known to distinguish between a "property right," a right in rem which is good against all over the world (including the grantor) and a "contract," a right in personam which is good against the person of the promissory.[105] The concepts of property and contract in common law are not totally equal to "Verpflichtungsgeschäft" (the Act of Right in Personam or Juristic Act of Claim) and "Verfügungsgeschäft" (the Act of Right in Rem or Juristic Act of Real Right) in civil law.

There is an issue about the nature of transfer of copyright and a license of copyright in Taiwan. According to one judgment, it is thought that transfer of copyright belongs to "Verpflichtungsgeschäft" (the Act of Right in Personam or Juristic Act of Claim) and "Verfügungsgeschäft" (the Act of Right in Rem or Juristic Act of Real Right) at the same time, but a license of copyright belongs only to "Verpflichtungsgeschäft" (the Act of Right in Personam or Juristic Act of Claim).[106] On the contrary, some scholars oppose to the above view by the judgment, and advocate that it is necessary to

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by the pledge), or a restriction on the disposal of a pledge established on the copyright.").

[103] In Taiwan, it is called "債權行為" or "負擔行為".

[104] In Taiwan, it is called "物權行為" or "處分行為".

[105] *See* John V. Orth, "*A Frequent Recurrence to Fundamental Principles": A Tribute to Jim Ely*, 16 WM. & MARY BILL RTS. J., at 841, 844.

[106] 臺灣高等法院 85 年度上易字第 3316 號刑事判決、臺灣高等法院 90 年上更（二）字第 391 號刑事判決。

regard that transfer of copyright and a license of copyright have the same nature in law: when a license has been constituted, both Verpflichtungsgeschäft" (the Act of Right in Personam or Juristic Act of Claim) and "Verfügungsgeschäft" (the Act of Right in Rem or Juristic Act of Real Right) happen at the same time[107] to make sure that the protection of licensees against third parties just like the successor of property.

On July 9th, 2003, Article 37 of the Taiwan's Copyright Law was amended as follows: "[t]he economic rights holder may license others to exploit the work…The license referred to in the preceding paragraph shall not be affected by subsequent assignment or further licensing of economic rights by the economic rights holder." Consequently, in certain extent, a license of copyright can be regarded as "quasi juristic act of real right" in Taiwan. In addition, there is no need to register the copyright license, nor it to form in writing in order to make it claimable to against third parties. .

	license		transfer
	nonexclusive	exclusive	
United Stated	O (if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent)	O (if recordation is made)	O (if recordation is made)
Japan	X	X	O (if transfer is registered)
Taiwan	O (base on the nature of TCP §37(2), no need to do anything)	O (base on the nature of TCP §37(2), no need to do anything)	O (base on the nature of "transfer", no need to do anything)

Enforceable (O) or Not (X) Against a Third Party, and Conditions to Claim to Against a Third Party

107 謝銘洋，從相關案例探討智慧財產權與民法之關係，臺灣大學法學論叢第三十三卷第二期，頁 216-221；賴文智，智慧財產權與民法的互動－以專利授權契約為主，國立臺灣大學法律學研究所碩士論文，2000 年 6 月，100-103。

3.5.3.2　Enforceability Against Third Parties－Stability of CC

In common law, property and contracts are two distinct legal mechanisms that together constitute the market. Copyright law is responsible for allocating the initial entitlements, while contract law governs their transfer; copyright law creates rights against the world (in rem), whereas contract law applies only to the parties (in personam). Property rights differ from contract rights in that a property right "runs with the asset," namely; it can be enforced against subsequent transferees of the asset.[108]

However, there are some systems, for example, recordation and written instrument in the United States, which help licensees to claim against the conflicting transfer of ownership or exclusive licensees. In Taiwan, there are no requirements for licensees in order to be effective against the subsequent assignment or further licensing of economic rights. The following is an analysis of enforceability against third parties with the view of Creative Commons License as a contract or a license, especially in Taiwan.

3.5.3.2.1 Contract- in personam

1)　Criticism by Scholars

Although Creative Commons Licenses provide that the license is perpetual (for the duration of the applicable copyright), it is criticized by scholars that it is still unclear to what extent this license binds successors of the copyrights in the licensed works under the view of seeing Creative Commons as contracts.[109] And also reliance on revocable licenses is particularly acute when ownership changes hands, as in bankruptcy, death, or transfer as part of a settlement dispute. Similar issues may arise when rights are purchased and voluntarily transferred to someone else. The new rights holder could deny access to works that were previously authorized and incorporated

[108] *See* Niva Elkin-Koren, *supra* note 49, at 407; *see also* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clauses Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 378-379 (2002);　Niva Elkin-Koren, supra note 80, at 102-104.

[109] *See* Niva Elkin-Koren, *supra* note 49, at 417-418.

into derivative works. In some cases, revoking a license to use a work may constitute a breach of contract, or invoke a reliance interest, entitling the immediate licensee to damages. Revoking the contract may allow the right holder to enforce the copyright against third parties.[110] Enforcing standard licenses against third parties blurs the distinction between property and contracts. It allows distributors, right holders, and possibly others to establish rights in rem through contracts.[111]

2) The Problem in Taiwan

As described above, according to article 37 of Copyright Law, "[t]he economic rights holder may license others to exploit the work", and "[t]he license ... shall not be affected by subsequent assignment or further licensing of economic rights by the economic rights holder."

For example, if one author A released his work under a Creative Commons License on October 1, 2007, later there is a user B who used the licensed work on October 5, 2007. However the author A changed his mind and transferred his economic rights to C on October 10, 2007[112], finally there is another user D used the licensed work on October 15, 2007. According to Taiwan's Copyright Act, who can enforce against C? According to the literal explanation of article 37 of Copyright Law, it seems that B can enforce against C, but D can't enforce against C.

Consequently, if someone who accepts Creative Commons Licenses and also use the CC licensed work before October 10, 2007, he or she can against the subsequent assignment or further licensing of economic rights by the economic rights holder. There is no worry for the users who use the CC licensed work before October 10, 2007, because every "contract is constituted between every users and author, and the timing of contract which is constituted by users who comply with the license and use the licensed work. However, the users who use the CC licensed work after October 10, 2007 will get trouble because they cannot claim against the subsequent assignment or further licensing of economic rights by the economic rights holder according to article

110 *Id.* at 417-418.
111 *Id.* at 407.
112 The same as this situation of transferring the economic rights, the author may probably sign an exclusive licensee to others. (It is no effect to Creative Commons licensees if the licensor sign a non-exclusive licensee to others.)

37 of Copyright Law.

To distinguish the users who use the CC licensed work before October 10, 2007 from those who use it after that date is very difficult, because there is no registration nor is recordation system in Taiwan. Even the subsequent successor or further exclusive licensees take litigation toward Creative Commons licensees; it is still very hard for the licensees to bring the evidence of using the CC licensed work before October 10, 2007 to the court. This result will lead to instability of Creative Commons.

3) The Solution of Difficulties in Taiwan

From the viewpoint of regarding Creative Commons Licenses as contracts and a literal explanation of article 37 of Taiwan's Copyright Law, it seems that the subsequent Creative Commons licensees can not enforce against the successor and exclusive licensees before. However it is a lawful and technical dilemma which occurs when one author releases his or her work wih a Creative Commons License, and then signs an assignment contract or exclusive license to others. As the legislative policy, there are some questions that need to be resolved: (1) is it permitted for those authors who already released his or her work with a Creative Commons License to further sign an assignment contract or exclusive license to others? (2) Even if it is permitted for those authors who already released their work with a Creative Commons License to further sign an assignment contract or exclusive license to others, how can those successors and licensees tell to the public this situation? (3) Even if there is a publication for successors and licensees to tell to the public this situation, it is not correspondent to the purpose of a Creative Commons License that everyone can be very safe to use the Creative Commons Work under the "perpetual" clause. (4) In a technical field, if it is permitted for those authors who already released their work with a Creative Commons License to further sign an assignment contract or exclusive license to others, how should the "attribution" be dealt with?

This paper tries to resolve the problem by the Germany theory "*Zweckübertragungstheorie*" and the principle of abusing of right as followings.

(A) German Theory of "*Zweckübertragungstheorie*"

The German theory "*Zweckübertragungstheorie*"[113] was first advocated by a Germany scholar *Wenzel Goldbaum* in 1921, and accepted by the Supreme Court. In January 1 th1965, the German theory "*Zweckübertragungstheorie*" was enacted in Article 31 (5) of the German Copyright Law as follows. "If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant."[114]

In Taiwan, the Supreme Court also accepts the Germany theory "*Zweckübertragungstheorie.*"[115] Consequently, if both contract parties' intention is clearly stipulated in contract, there would be no argument; but if there are matters which are not clearly stipulated in contract, it becomes necessary to search for the real intention of the parties that are explicitly stipulated or implied in the contract. Under the circumstances of that the real intention cannot be clarified, the German theory "*Zweckübertragungstheorie*" is used to interpret the stipulation in the contract.

Because of the purpose of Creative Commons Licenses is to let everyone without limitation to perpetually use Creative Commons licensed works and promote the circulation of the free culture. Consequently, according to the German theory "*Zweckübertragungstheorie*," even if an assignment contract or an exclusive license has been made, the successors (the person "C" in the example illustrated in p.31-32) can only ask for the compensation for damages of a breach of the contract from the authors (the person "A" in the example illustrated in p.31-32). The successors can not ask for the Creative Commons licensee　(the person "D" in the example illustrated in p.31-32) to stop the use of the Creative Commons Licensed work　or compensation. According to the German theory "*Zweckübertragungstheorie*," it should be ensured that the present and future users can use the Creative Commons licensed work.

(B)　Principle of Abusing of Right

According to Taiwan's Civil Code Article 148, "[a] right cannot be exercised for the

113 The Germany theory "Zweckübertragungstheorie" is translated to 「目的讓與理論」 in Chinese and 「譲渡目的論」 in Japanese.
114 *See* the German Copyright Law (Urheberrechtsgesetz, UrhG), at http://www.iuscomp.org/gla/statutes/UrhG.htm#31 (visited on 2010/5/30).
115 台灣最高法院在八十六年度台上字第七六三號判決中即採目的讓與理論。

main purpose of violating public interests or damaging the others," and "[a] right shall be exercised and a duty shall be performed in accordance with the means of good faith." This is the principle of abusing of right. There is an abuse of right when the exploitation of an individual right injuriously affects the interests of the community.

If it is permitted for those authors who already released their work with Creative Commons Licenses to change their mind or further sign an assignment contract or exclusive license to others, it would cause a large amount of loss by the Creative Commons licensees. Consequently, the action of changing their mind or further sign an assignment contract or exclusive license to others is invalid as right abusing.

3.5.3.2.2 License- in rem

If Creative Commons Licenses are regarded as pure licenses or unilateral licenses, the timing of licenses to be constituted is when the authors release their works with Creative Commons Licenses to the public. Besides, according to Article 37 of the Taiwan's Copyright Law, the successor and exclusive licensees will be always subsequent to the Creative Commons licensees, so the status of Creative Commons licensees would be very stable under the view of Creative Commons Licenses as pure licenses.

3.5.4 Freedom of Contract and Real Right Legalization Principle

3.5.4.1 The freedom of contract

Freedom of contract is the idea that individuals should be free to bargain among themselves the terms of their own contracts, without government interference. The freedom of contract has its roots in economic liberalism. Adam Smith saw that contracting parties value other party's performance more than their own. This is why reasonable individuals should have the means to trade. Freedom of contract can be divided to the following three elements.[116]

(1) The freedom to make contracts (including the freedom not to make

[116] *See* Herkko Hietanen, *supra* note 67, at 4.

contracts).

(2) The freedom to choose parties.

(3) The freedom to choose the content of the contract. Typically, this includes the absence of formal requirements for contracts.

As the view of seeing Creative Commons Licenses as contracts, authors have the freedom to choose to release their copyrighted work or not. However, Creative Commons offers six kinds of customized licenses for authors to choose for release of their work to the public. Also the licensing platform established by Creative Commons provides an automated mechanism that may significantly reduce transaction.[117] Only when authors really understand all of the terms written in Creative Commons Licenses, is it suggested for authors to use this kind of customized licenses. If authors want to release their work with a Creative Commons License, they have to release their work to the public without choosing the parties. Besides, if they do not agree the terms of a Creative Commons License, they cannot alter the content of the license. The action of altering may lead to an infringement of Creative Commons' copyright or trademark, and also defraud the users who believe the Creative Commons License.

3.5.4.2 Real Right Legalization Principle

If Creative Commons Licenses are not contract, can they be seen as the act of right in rem (juristic act of real right)? If the answer is yes, according to Taiwan's Civil Code Article 757, "[n]o rights in rem shall be created unless otherwise provided by the present Code or by other Acts." This is the real right legalization principle (or doctrine), which is considered as a basic principle in traditional real right law in continental law system. This proposition is not only created by scholars of civil laws, but also depends on several legislative patterns of real right. It will be very difficult for viewing Creative Commons License as the act of right in rem (juristic act of real right) without legislation.

4. Conclusion

This paper tries to introduce the basic elements and conditions of Creative

[117] *See* Niva Elkin-Koren,*supra* note 49, at 414.

Commons Licenses in Chapter 2, and also analyzes the nature of these licenses from the perspectives of contract agreement and pure license in Chapter 3. This analysis starts from comparing the traditional license, Shrink-wrap, Click-wrap, Browse-wrap Licenses and Creative Commons Licenses, based on different legal systems, i.e., the systems of the United States, Japan and Taiwan. The analysis then touchs upon individual issues such as formation of the offer and acceptance, the competency and capacity of both parties of the licenses, timing of contract and license to be constituted, and priority between conflicting transfer of ownership and nonexclusive license.

From the viewpoint of Taiwan whose legal system is based on the civil law system, the following can be pointed out.

(1) As to the view which regards Creative Commons Licenses as contracts:

(a) In Taiwan, conditional licenses can still be regarded as contracts, according to the custom and the nature of the affair according to Article 161 of Taiwan's Civil Code.
(b) If Creative Commons Licenses are regarded as contracts, the timing of contract to be constituted is when the user complies to the license and uses the licensed work, and it is the "fact" that may be considered as an acceptance of the offer.
(c) In the status of protecting minors, it is reasonable that why that is necessary to restrict for the qualification of being a licensor, but it leaves the problem of instability for the Creative Commons licensees. For example, more and more teenagers spend a lot of time to surf the internet and use materials they find on the internet. If every action to use the Creative Commons licensed work needs to be represented or approved by teenagers' guardians, the purpose of Creative Commons – free culture - would leave one significant exception of the uses by teenagers.
(d) According to Article 37 of Taiwan's Copyright Law, a license of copyright can be regarded as a "quasi juristic act of real right" in Taiwan. From literal explanation of article 37 of Taiwan's Copyright Law, it seems that the subsequent Creative Commons licensees cannot enforce their right against the successor who obtain the right before. This paper tries to resolve the problem by the German theory "*Zweckübertragungstheorie*" and the principle

of abusing of right.

(2) As to the view which regards Creative Commons Licenses as pure license:

(a) The timing of licenses to be constituted is when the authors release their work with a Creative Commons License to the public. Besides, according to Article 37 of Taiwan's Copyright Law, the successor and exclusive licensees will be always subsequent to the Creative Commons licensees, so the status of Creative Commons licensees would be very stable under the view of Creative Commons Licenses as pure licenses.
(b) Minors can be Creative Commons licensees. This is a much more reasonable explanation for achieving the purpose of free culture.
(c) If Creative Commons Licenses can be seen as the act of right in rem (juristic act of real right), according to Article 757 of Taiwan's Civil Code which provides for the real right legalization principle, it will be very difficult to regard Creative Commons License as the act of right in rem (juristic act of real right) without legislation.

This paper tries to analyze the nature of Creative Commons Licenses, and poses affirmative attitude toward them as tools to create international commons. However, there are still questions that need to be resolved. The best way to answer these questions seems to be to enact special provisions in the copyright law to clarify the rules concerning application of open content policies such as Creative Commons. Even an international convention for that purpose would be worth considering.

（付記）

この論文の執筆者である王珮儀（Wang, Pei-yi）女史は、台湾の出身で、国立台湾大学の法学部及び法学研究科修士課程を修了後、2007 年 9 月から約 1 年、名古屋大学に短期留学され、現在は台北市で弁護士をされている。本稿は、名古屋大学留学中に私（鈴木）の指導のもとで執筆した論文を、要約・改訂したものである。

（名古屋大学大学院法学研究科教授　鈴木將文）