

ERC INCLUSIVE:

**Exclusivity and the Open Public
Collaborative Creation (OPCC) Model**

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Note to reader:

The following presentation contains a preliminary overview of research that is currently being carried out within the 'INCLUSIVITY' Project, headed by Prof. Séverine Dusollier of the SciencesPo Law School, Paris and funded by the European Research Council.

Therefore, you are kindly requested to refrain from circulating or citing this content without the author's permission.

As this is an ongoing project we very much appreciate and welcome your comments and recommendations. Please send any feedback to the author at the following email address:

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INCLUSIVE

« Inclusive Rights: A New Model to Organize Legal Relations to Shared Resources in Tangible Property and Intellectual Property ».

Principal Investigator:

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Sciences Po, Paris

Project Outline

Sharing and collectively using resources (both tangible and intangible) is an increasing practice. Such shared property models are based on the concept of 'inclusivity'. We define inclusivity as follows,

Inclusivity refers to the quality of (1) **entitlements to benefit** from all or some utilities of a resource (2) held by a number of legal subjects (3) in a **symmetric** and **collective** way (4) **without** any person having **the power to exclude the others** from such benefit or resource.

Two defining features that we refer to as inclusivity indicators.

1. No power to exclude others;
2. Collectiveness of use or sharing.

The project studies the inclusive entitlement in relation to four fields of study that demonstrate various degrees of inclusivity, namely,

- The public domain in IP;
- Copyleft licensing in copyright and patent;
- **Collaborative Authorship (Wiki authorship);**
- Participatory housing (*Habitat Participatif* and Community Land Trust).

Collaborative Authorship (*'Wiki' Authorship*)

Focuses on a specific phenomenon of collaborative authorship in digital media, we term as **'Open Public Collaborative Creation (OPCC).'**

Software



Information



Art



Fiction



Wikipedia

Headnote of page on 'Alexander the Great'

In November 2004, **Participant 'T'** makes the following contribution to the headnote.

...Alexander the Great, **was one of the most successful military commanders of the Ancient world**

In May 2007, **Participant 'U'** develops it as follows.

...Alexander the Great, **was one of the most successful Ancient Greek military commanders**
~~of the Ancient world~~ **in history**

In June 2007, **Participant 'V'** deletes the words 'Ancient Greek' as he feels it confuses the sense of what the sentence seeks to convey,

...Alexander the Great, **was one of the most successful ~~Ancient Greek~~ military commanders**
in history

In September 2009, **Participant 'W'** in working out a new version of the headnote deletes the entire sentence.

~~...Alexander the Great, was one of the most successful military commanders in history~~

In January 2011, **Participant 'X'** re-introduces the sentence to the headnote.

Alexander was known to be undefeated in battle and is considered **one of the most successful commanders of all time**

In November 2011, **Participant 'Y'** changes the syntax of the sentence.

~~Alexander~~ He was ~~known to be~~ undefeated in battle, and is considered **one of the history's most successful commanders of all time.**

In August 2014, **Participant 'Z'** re-introduces the word 'military' to the sentence.

He was undefeated in battle, and is considered **one of history's most successful military commanders**

OPCC Model

Definition:

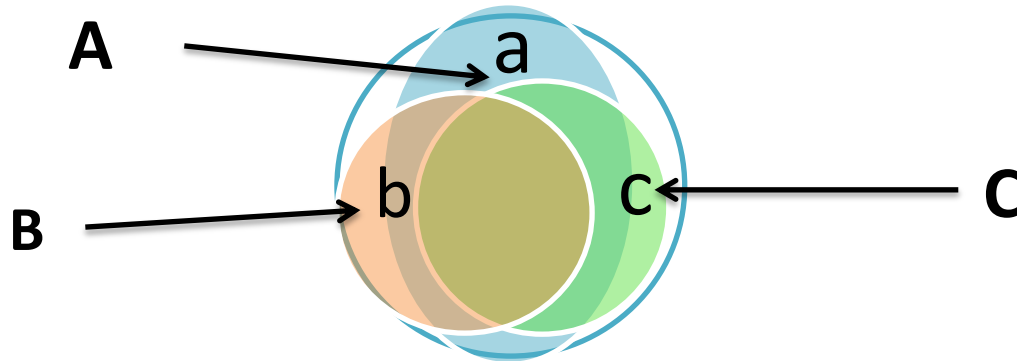
creation taking place,

- through the **contributions of a multiplicity of persons;**
- under a model of **sequential innovation;**
- resulting in the **creation of a literary, artistic or scientific work;**
- which remains in a **continuous state of change and development ;**
- over an **undefined period** of time.

Key features differentiated from traditional model.

Aspect	OPCC Model	Conventional Model
Creator's community	Membership in community open to any member of the public (porous borders), participation in the creation of the work is open to an unlimited and indeterminate number of persons, who are not otherwise known to each other.	Participation in the creation of the work limited to a closed group of determinate persons.
Design of creation process	Random, sporadic and devoid of consensus among contributors as to the nature or content of each contribution. Not aimed at creation of a specified end-product. Absence of dialogue among contributors or between contributors and an entity coordinating creation process as to a scheme of creation/its final outcome.	Systematic and defined, proceeds in accordance with definite and usually pre-agreed scheme of creation. Aimed at realization of a specified end-product (i.e. work). Dialogue between contributors or between contributors and entity coordinating creation process as to scheme of creation and final end-product.
Time frame of creation process	Open-ended, intended to continue indefinitely.	Usually organized within a specified time-frame.
End-product	Dynamic work that constantly evolves and is in a state of flux.	Static representation of final identifiable work.
Incentives to contribute	Usually non-pecuniary. <i>E.g. shared creation ideology.</i>	Usually pecuniary.

Does OPCC trigger an inclusive situation?



Ability of contributors to modify, adapt and to build upon the content created by each other results in their individual contributions becoming inextricably intertwined with each other, (contextually and/or physically). As a consequence, **entitlements held by contributors over their contributions become similarly intertwined.** Common work is subject to a complex web of entitlements and to a **copyright presumably held in common by a great number of persons.**

- Benefitting from utilities of one's own contribution, requires the use of contributions made by others.
- Exercise of exclusive rights by contributors over their individual contributions would result in a situation where no one can make use of common work.

At a practical level, OPCC creation requires collectiveness of use and sharing and the absence of a power of one co-author to exclude another from benefitting from a contribution created by oneself.

How is inclusivity given legal expression within the OPCC model?

Legal regulation of OPCC content falls within the ambit of copyright law, is based on the concept of exclusivity.

Currently the OPCC model makes use of community norms and ethics, contractual provisions and copyleft licensing (e.g. the CC-BY-SA license in *Wikipedia*) as a means of giving expression to the element of inclusivity.

Research Objective

The study affirms the social value of OPCC and the need to give legal recognition and validity to the element of inclusivity that drives OPCC creation.

Taking into account, the disadvantages associated with private regulatory mechanisms such as contract, the study recognizes the need to grant legal protection within an institutional framework, and to formulate a legal entitlement that is enforceable *erga omnes*.

Objective at this stage of project:

To explore whether the existing copyright law framework and copyleft licenses are capable of expressing and enforcing the inclusivity that is inherent within the OPCC process.

Methodology

Test the concepts and rules of,

- copyright law,
- *CC-BY-SA* license;

in relation to three key aspects of the inclusive entitlement i.e.

- enforceability
- sustainability
- adequacy

* Analysis limited to copyright frameworks and *CC-BY-SA* licensing regime in **France**, the **UK** and the **US**.

Fit with Conventional Models of Plural Authorship

Category	France		UK		US	
Joint Work <i>Œuvre de Collaboration</i>	Common inspiration (Spiritual Intimacy) <i>« Le Prince Igor » : sequential creation negates spiritual intimacy.</i>	?	Work produced in prosecution of a pre-concerted common design. <i>Negated by random unsystematic nature of creation.</i>	?	Shared intention to create joint work. <i>Patry: a new work incorporating an existing work cannot be joint work (sequential creation).</i>	?
Collective Work <i>Œuvre Collective</i>	Gathering together of a labour force under a single authority.	X	Contributions must be separate and independent.	X	Contributions must be distinct.	X
Derivative Works <i>Œuvre Composite</i>	A new original work that incorporates a pre-existing work. When std. of originality satisfied.	?	A work that appropriates the original expression of a pre-existing work.	?	A work based on a pre-exst. work that recasts/adapts the authorship with suff. originality.	?

Enforceability

Definition:

Existence of actions and remedies that can be invoked against any person (be it a fellow holder of the inclusive entitlement or a third party) in order to assert and safeguard the inclusive entitlement.

Tested in two ways,

- The ease of the **copyright clearance procedure**, meaning the ability of a user to obtain a license to modify, build upon or adapt existing content.
- The ability of a member of the creator community to take **action against an infringement** of rights relating to the common work.

Copyright Clearance

Copyright law

Work	Key Principles	Fit with inclusivity
Joint work	<p>A co-author owns a share of the copyright in the common property (tenancy in common, co-propriété).</p> <p>In France and UK, consent of each co-author is required for use of common work.</p> <p>In the US the consent of any single co-author is sufficient.</p>	Requiring consent of each co-author not practical in OPCC context. Difficulty in correctly identifying and communicating with all co-authors. Leads to high transaction costs . Can result in OPCC process becoming frozen and unable to function. OPCC process can be obstructed by a co-auth arbitrarily withholding consent.
Derivative work	<p>In all three jurisdictions creation of a second derivative work, based on the existing derivative work requires the authorization of the author of the work as well as all authors of pre-existing works, whose original expression will be incorporated in the new derivative work. In France ability of each author of pre-existing work to invoke moral right to integrity to prevent certain types of modification.</p>	Results in high transaction costs for copyright clearance. Same.

CC-BY-SA license

Key Principles	Fit with inclusivity
Irrevocable public license that authorizes any person to modify a work as authorized under license terms.	Minimal transaction costs. No possibility of obstruction.

Enforceability: Observations

i. Copyright clearance.

Fragmentation of rights among a multiplicity of authors results in an increase in the transaction costs associated with rights clearance, and potential obstruction of re-use.

ii. Action for infringement

Requirement to prove authorship in order to qualify for standing to sue might be difficult in an OPCC context. Process of tweaking makes it difficult to establish authorship under copyright law.

Application of *CC-BY-SA* license, obviates problem of high transaction costs and obstruction of re-use, but operates on idea of separate individual rights held by authors over a common work. So difficulties associated with bringing an action for infringement will persist.

Sustainability

Definition:

Sustainability refers to the **capacity of resilience** of inclusivity in the sense of the ability of inclusive entitlements to resist private appropriation through exclusive claims and thereby to subsist over time and perpetuate along the chain of re-use (i.e. sequential innovation). As inclusivity is a defining feature of the type of creation adopted by contributors in our case studies, its preservation over time is an important objective.

We test the sustainability of inclusivity in relation to the following fact situations,

- i. Exclusive appropriation of content by co-authors acting in concert to opt out of inclusive situation.
- ii. Appropriation of content (without alteration or adaptation) by third party for exclusive use outside platform.

Sustainability: Observations

i. Exclusive appropriation of content by co-authors acting in concert to opt out of inclusive situation.

Each author able to exercise their own free-will and private discretion in either granting or withholding authorization for the use, modification or development of the common work. **Possible for individual author to exercise private discretion in a way that subverts inclusivity process.** Irrevocability of CC-BY-SA license prevents the such opting-out of an inclusive situation by authors acting together in concert.

ii. Appropriation of content (without alteration or adaptation) by third party for his exclusive use outside platform.

The CC-BY-SA license, grants a uniform license to all members of the public to modify and to adapt the common work, while the 'Share-Alike' requirement preserves the sustainability of inclusivity of OPCC authorship along the chain of sequential innovation. But, **'Share-Alike' requirement is limited in scope** and does not seem to apply to situations where OPCC work or portions thereof have been reproduced for exclusive use without alteration.

Adequacy

Definition:

The extent to which the existing legal framework is able to give legal recognition to the concept of inclusivity and its fitness for giving sufficient expression to the inclusive entitlement both at the conceptual and practical levels.

Adequacy

1. Conflation of authorship with ownership.

CC-BY-SA license does not change *status quo*.

2. Focus on individuals as opposed to community.

CC-BY-SA license shifts focus from individual to community as regards the scope of application of the terms of the license, but not beyond that.

3. Determination of rights based on categorization as joint or derivative work.

CC-BY-SA license does not discriminate between different categories of works, so as regards rights clearance, it dispenses with the difficulties arising from such categorization. However, as regards enforcement of rights, different rules apply to different categories of works, and thus a situation would arise where contributors to the same OPCC work have to follow different rules in enforcing their rights over the work.

Adequacy: Observations

The inclusivity based OPCC model is based on a wholly different set of technological, social and economic realities to those on which the conventional exclusivity based model of plural authorship is founded.

Thus the application of legal rules and principles that were designed for (and have since evolved in relation to) the conventional model of plural authorship to OPCC authorship, results in incompatibilities.

While the *CC-BY-SA* license mitigates the severity of the difficulties that arise through those incompatibilities, it is **not capable of giving expression to central aspects of inclusivity such as ‘community’ and ‘collective use and sharing of entitlements’**. As such the *CC-BY-SA* licensing regime does not offer an adequate alternative legal framework for the regulation of inclusivity.

Conclusion:

Existing exclusivity based copyright law framework,

1. is not able to secure the optimal **enforceability** of the inclusive entitlement.
2. is not geared towards securing the **sustainability** of the inclusive entitlement.
3. is **inadequate** in giving full expression to the inclusive entitlement in all its dimensions.
4. The *CC-BY-SA* license mitigates the severity of aforesaid lapses, but does not provide an alternative legal framework that can give full expression to the inclusive entitlement.