Büro für informationsrechtliche Expertise

Validity of the Creative Commons Zero 1.0 Universal Public Domain Dedication and its usability for bibliographic metadata from the perspective of German Copyright Law

by Dr. Till Kreutzer, attorney-at-law in Berlin, Germany

i.e. Büro.Berlin
Gneisenaustraße 21
10961 Berlin
Fon. [+49] [30] 756 387-89
Fax. [+49] [30] 756 387-97

www.ie-online.de

Table of Contents

1. Introduction

With regard to the transferability and the waiving of the copyright the German copyright law can be considered as one of the strictest systems in the world. Main reason is the strict monistic approach the German copyright law bases on. Key feature of this approach is the concept that, in principle, the copyright/author's right itself can neither be transferred to another person nor waived by the author herself. The German author's right consists of two parts, the moral rights and the exploitation rights. The moral rights are – as a rule – personal rights that are bound to the person of the creator (or, after her death, her legal heirs), i.e. they can neither be transferred nor waived. Since moral and exploitation rights are considered as inseparable parts of the author's right as a whole (monistic approach) the exploitation rights cannot – in principle – transferred or waived by contract as well. However it is naturally possible to license the use of the work i.e. to transfer rights to use a protected work even on a large scale. Such licenses can practically lead (nearly) to the same result as an assignment or waiver of rights.

The following expertise examines to what extent the "Creative Commons Zero 1.0 Universal Public Domain Dedication" (hereinafter referred to as: CC0[1]) can be regarded as a valid declaration/license that enables the (mostly) unrestricted use of bibliographic metadata under German law.

2. Contents of the CC0

2.1. The Statement of Purpose (preamble)

The first component of the CC0 is a so-called **"Statement of Purpose"** that reflects and elaborates the idea of free usability of works to the most possible extent. This statement can be seen as a preamble that gives the users important information about the intention of the person who associates CC0 with a work (the "Affirmer"). Since the intention of the affirmer is highly relevant for the interpretation of the declaration, the statement of purpose is of legal importance as well.

According to the Statement of Purpose the Affirmer intends to fully abandon all his rights in the work (copyrights, related rights et cetera, see sec. 1). The intended effect is to contribute the re-

[1] http://creativecommons.org/publicdomain/zero/1.0/legalcode.

spective work to the commons (the public domain), i.e. enable anybody to use it without any restrictions for the whole term of protection for whatsoever purpose.

2.2 Rights affected by the CC0: Sec. 1

Sec. 1 contains an open definition of the rights that may be affected by CC0. The waiver/license applies first and foremost to **copyright and related rights**, i.e. any exclusive rights to use the Work in a specific manner (right to reproduce, modify, distribute, display, communicate to the public and to translate). It applies also to the moral rights of the original author. Moreover CC0 affects publicity and privacy rights (pertaining to a person's image), database rights and even rights protecting against unfair competition. Only patent and trademark rights (which do not protect the creative work itself anyway) are not subject to CC0 (see section 4a).

This expertise addresses only copyright and database rights as described in the "mission statement" above. However the publication and use of bibliographical metadata can in special cases affect other issues (like e.g. privacy rights), which are not subject to this analysis.

2.3 The waiver: Sec. 2 CC0

The core of CC0 is the Waiver (sec. 2). The affirmer states that she waives all rights in the work (defined in sec. 1) including all claims and causes for legal action to the maximum extent permitted by the applicable law. If it is valid under the certain copyright regime the waiver results in a total abandonment of all rights in the content for the whole term of their existence, the whole territory of protection and any kind of use (irrespective of the intention of the user). The waiver is not revocable, cannot be cancelled or terminated neither by the original author nor by her heirs or any other (potential) successor in her legal position.

The "Affirmer" (who applies the CC0 to a work) can be the original author or any other rights holder who is in the legal position to give up the rights in the respective work. Hence the decision can be made either by natural persons as well as institutions or companies. However in order to be valid any third person has to be entitled by the original author or a competent licensor of the author to declare the waiver. Such an entitlement is usually realised through a written contract. Another possibility is that the author himself applies the CC0 to his work before he conveys it to his contractual partner(s) who make it afterwards available to the public.

2.4 The Public License Fallback: Sec. 3 CC0

Should the waiver as such or in parts (e.g. regarding some of the affected rights) be judged invalid under any applicable law, sec. 3 provides for a "fallback position" that makes it possible to (re–) interpret it as a public license. The fallback rule shall guarantee that the will of the affirmer can be realised and executed to the maximum extent irrespective of the particularities of the applicable law. This rule was evidently included with regard to the monistic systems in Germany, Austria and other Continental European countries.

The fallback to the public license has the effect that rights that cannot be waived under the applicable legal regime are publicly licensed. The scope of the license shall be as broad as permitted by the applicable law in order to maintain the will of the author to the most possible extent. Hence the license grants anybody an unconditional, irrevocable, non-exclusive, royalty free license to use the work for any purpose.

2.5 The non-assertion clause: Sec. 3 CC0

As a second fallback position CC0 includes at the end of sec. 3 a declaration of the copyright holder according to which she will not take any actions that prevent a user of the work from exercising rights consistent with the intention of the copyright holder even if the waiver and license do not operate as intended (non-assertion clause).

2.6 Limitations and disclaimers: Sec. 4 CC0

Sec. 4 contains the (for public licenses) typical disclaimers and limitations of warranties and representations.

3. CC0 under German Copyright Law

Analysing the validity of the CC0 under German copyright law regarding bibliographic metadata, we will primarily focus on

- Whether bibliographic metadata can be considered as protected works;
- Whether waivers of copyright are valid under German law;
- If not, whether a similar effect can be realised by application of the fallback position (public license) and to what extent rights can be granted to the users of the metadata through this license;

- And, in case where specific rights cannot be licensed or waived, whether the affirmer can disclaim in a binding manner his right to enforce any claims against certain (potential) uses of the metadata.

3.1. Protectability of metadata under German copyright law

3.1.1. Relevance of the protectability of a certain content/work for the subject matter

The first essential question concerning the validity of a CC0 applied to certain metadata is whether this metadata is copyright protected or not. The main intention of CC0 is to release a protected immaterial good to the public domain, i.e. to change its status of protection to zero.

Therefore "CC0 is intended for use only by authors or holders of copyright and related or neighbouring rights (including sui generis database rights), in connection with works that are still subject to those rights in one or more jurisdictions."[2] If the respective content is not (any more) copyright protected a waiver of rights cannot be legally effective. Where no rights exist that can be waived a waiver comes to nothing.

However the application of a CC0 can even make sense for content (e.g. copyright protected metadata) that is actually not protected. At least it indicates that the person who would be the rights owner (if there would be rights to own) has decided that content/metadata shall not be protected. This in turn indicates for the user that the "affirmer" wants that anybody can use his content/metadata without restriction, thus will at any rate refrain from enforcing any rights that could potentially exist[3].

By all means the application of CC0 to actually non-protected intellectual goods is unproblematic. In such a case the waiver has in fact no legal effect. The result stays the same: the content is free of rights and can be used without any restriction. However the CC0 can then still serve an important purpose since it explains the user what "public domain" actually means.

---

[2] See the CC0 FAQ: http://wiki.creativecommons.org/CC0_FAQ#What_is_the_difference_between_CC0_and_the_Public_Domain_Mark_.28.22PDM.22.29.3F.

[3] Such declaration has, beyond this informal effect, also a legal impact. It can be assumed that it is under all legal regimes difficult to exercise rights against users after the actual rights holder declared his will that his work can be used without restriction. Such contradictory behaviour will usually preclude the enforceability of rights (see e.g. the "estoppel" doctrine in the Common Law or the objection against acting in bad faith in sec. 242 of the German Civil Code).

It should be noted that Creative Commons provides for unprotected intellectual goods another tool, the "Public Domain Mark" (PDM)[4]. The PDM is (evidently) not a legal declaration that changes the status of protection but rather a mere indicator to label a certain intellectual good as public domain (i.e. not-protected). Since the status of protection (under any applicable law!) is in many cases not certain and the question of protectability cannot be assessed on a case-to-case basis especially in large multi-stakeholder projects like Europeana, it is from my point of view recommendable to generally use the CC0 rather than the PDM[5].

The preliminary result is that the question of the validity of the waiver/public license is only relevant when metadata is actually protected by copyright or neighbouring rights. However it can be useful (especially as a default option for a large project like Europeana) to apply CC0 also to non-protected metadata.

3.1.2 Protectability of metadata under German Copyright Law

Assessing the question of whether (and for what kind of) metadata a CC0 would be necessary in order to make it freely usable requires initially examining if such metadata is protectable under German copyright law. It shall be noted that the analysis addresses in detail only the protectability of single metadata (i.e. the respective information that is subject to the CC0 waiver/public license) and not the protectability of data collections or whole databases.

Databases can – in special cases – be copyright protected. A copyright protection of a database would require that it is an individual *work*. It is worth noting (because this aspect is oftentimes misapprehended) that the protection of the database and the protection of the data that is stored in the database are separate aspects. Even if the database itself is protected by copyright or the *sui-generis* right for databases (sec. 87a German Copyright Act) this protection does not extend to the individual data. The copyright for databases protects only the individual design of the database, its structure, the selection of the data particularly included et cetera. It rather protects the rights holder against copying the database itself, i.e. "creating" and publishing a more or less identical database that features the same structure, mostly the same elements and so on. Thus the copyright in the database is not infringed by e.g. copying individual elements/metadata out of the

---

4 http://wiki.creativecommons.org/PDM_FAQ.

5 Using the PDM can only be recommended, when the status of protection of the respective immaterial good is absolutely certain. If the assessment of the status of protection is wrong or partly wrong (e.g. concerning particular national legal systems) the intended freedoms cannot be realised. Creative Commons itself therefore recommends to use the PDM only if it is absolutely certain that the respective content is not protected (any more): http://wiki.creativecommons.org/PDM_FAQ#Who_can_apply_the_Public_Domain_Mark_to_a_work.3F. Should any uncertainties about the status of protection remain, the CC0 is beneficial. Is the content actually not protected, it is harmless. Should it be protected the waiver or public license applies and the user can exercise the given freedoms.

database. The effect of the *sui-generis* protection for databases is similar. It does not cover its elements, i.e. the right implies no protection for the metadata included in the database. In short: The potential conclusion that a database is protected does not imply anything about the (for this analysis foremost relevant) question whether and when metadata is protected under German copyright law.

As already mentioned a database can be protected either by copyright or the *sui-generis* right for databases. The copyright protection for databases is rather exceptional. Usually databases will be protected (if at all) by the *sui-generis* (neighbouring) right for databases (sec. 87a German Copyright Act). This neighbouring right differs from the copyright protection in many ways, e.g. concerning the requirements for the protection, its scope and its aims (the *sui-generis* right does not protect individual creations but rather investments in the database).

With regards to the copyright protection of databases the following findings apply thoroughly. With regard to databases that are (only) protected by the *sui-generis* right the situation concerning the validity of the waiver is different (see sec. 3.2 below).

Definition of the term "metadata"

To examine if and what metadata can be copyright protected requires at first to define the term metadata, i.e. the subject matter of the examination.

In the context of this study bibliographic metadata is considered primarily as descriptive facts that give information about a work or its location in a certain collection. In the draft for a "Europeana Data Exchange Agreement", metadata is vaguely defined as "textual information (including hyperlinks) that may serve to identify, discover, interpret and/or manage Content."

Commonly primary and secondary metadata are distinguished.

Primary metadata consist of bibliographic descriptions. A bibliographic description describes a bibliographic resource (articles, monographs, et cetera irrespective whether it is printed or stored in a digital format) in order to identify it within the entirety of all bibliographic resources or to localise it. Usually a description serves both purposes at the same time by informing about: author(s), editor, title, publisher, publishing date and place, identification of the main publication (e.g. a journal), number of pages.

Secondary metadata: A bibliographic description can contain further information that can also be called bibliographic data. These are e.g. format information, identifiers (ISBN, LCCN, OCLC-Numbers et cetera), information about the copyright and license status, information about funding, the storage media, size, administrative data (e.g. last change of the data set), relevant links (on Wikipedia, Google Books, Amazon and so on), indexes, links to digitized extracts of a text (in-

dexes, registers, tables of quoted literature), address and other contact details about the author(s), covers, abstracts, reviews, summaries, indices, subject indexes, notations, user generated tags, signatures.

Protectability of metadata under German copyright law

German copyright law protects *works* of literature, science and art (see Sec. 2 German Copyright Act) if they are individual human creations. This definition restricts the applicability of copyright in (inter alia) two respects: On the one hand neither information nor ideas are themselves protected (since they are no "creation" but mere facts) no matter whether they are incorporated in a protected work or not. Only concrete expressions are protectable. On the other hand, the German copyright law requires a certain level of individuality of the work. The so-called *Gestaltungshoehe* is a *de minimis* rule that prevents every day intellectual achievements without or little individual creative effort from protection[6].

To decide whether a creation is individual or original "enough" to be copyright protected must be decided on a case-to-case basis. However there are certain objective aspects (e.g. the length of a text or a composition, whether the creation serves a practical purpose et cetera) that indicate the protectability or non-protectability of the respective intellectual good. The gathering, acquisition or labour costs, investments or other financial efforts that are expended to create intellectual goods or aggregate information are – contrary to a widespread misbelief – irrelevant for the copyright protection according to German law[7]. In other words, it is not relevant for the protectability of metadata (or other information) whether their aggregation or gathering was costly or not.

By applying these principles to bibliographic metadata, it turns out that copyright law usually neither protects single primary metadata nor most of the aforementioned secondary metadata. From the copyright perspective "data" in the literal sense is not protected. This applies to all mere information about the work, author, publication and so on.

However complementary material can be protectable in principle. This applies especially to literary works like summaries, abstracts, reviews or graphical creations like book covers. Even classification systems can be protected (if they represent an individual/original intellectual achievement).

---

6 See: BGH GRUR 1983, 377 (378) – *Brombeermuster*; Wandtke/Bullinger-*Bullinger*, § 2, n. 23.

7 Such costs are only relevant for the *sui-generis* protection of databases. Different from the copyright this neighbouring right does not protect creative achievements but investments.

Concerning textual works the main indicator for their protectability will usually be the length. Short phrases like headlines or work titles[8] will usually not be protected, nor will indexes of contents or subject indexes (that consist either only of single words or of aggregations of the headlines of chapters, sections and so forth). On the other hand, writing an abstract requires summarising the main substantial conclusions of a (usually: much more extensive) text in a few own words. Such a work can thoroughly reach a certain level of originality.

The conclusion is that most kinds of bibliographic metadata will not be protected under German copyright law. This data is already public domain so the status of protection needs not to be changed in order to grant unrestricted freedoms to use. That means, on the other hand that the CC0 is only in special (and in case of doubt rather rare) cases actually needed to release metadata into the public domain. That also means that implying more restrictive license conditions for the use of metadata (e.g. restrictive proprietary end-user licenses as well as quite liberal public licenses like CC-by or even more restrictive variants of CC licenses) is *copyfraud*[9].

3.2. Validity of the waiver in sec. 2 CC0

According to sec. 2 CC0 all copyright and related rights shall be waived. It reads:

To the greatest extent permitted by, but not in contravention of, applicable law, Affirmer hereby overtly, fully, permanently, irrevocably and unconditionally waives, abandons, and surrenders all of Affirmer's Copyright and Related Rights [...]."

A waiver of the author's right as such is not valid under German copyright law. This results from the monistic concept of the German copyright law, which does not allow for a transfer of the author's right as such (Art. 29 para. 1 of the German Copyright Act)[10]. Accordingly, as concerning the copyright, the waiver in sec. 2 of the CC0 is not legally effective under German copyright law.

---

8 Wandtke/Bullinger-*Bullinger*, § 2, n. 65, with examples.

9 The term *copyfraud* refers to the improper practise to claim copyrights on or to restrict the use of actually non-protected intellectual goods. See http://en.wikipedia.org/wiki/Copyfraud.

10 BGH [Federal Court of Justice] GRUR 1995, 673, 676 – *Berliner Mauer*; Wandtke/Bullinger-*Wandtke/Grunert*; § 29 n. 15; Schricker/Loewenheim-*Nordemann*; § 23, n. 6 with further examples. The copyright as such can be transferred only by testamentary disposition or by the settlement of an estate. This is considered as an exemption to the general rule of non-transferability that is necessary because of the post-mortem protection of works copyright.

With regard to certain related rights the situation is different. Especially the *sui generis* database protection right – as a mere protection of investments – includes no personal rights aspects. Thus it can be transferred as a whole as well as waived by the rights owner[11].

3.3. Public License Fallback

The Public License Fallback in sec. 3 CC0 serves as an alternative to the waiver in cases where a full waiver of some or all rights in the work is not possible under the respective applicable law. The clause's intention is to preserve the waiver (or its legal effect respectively) to the maximum extent permitted by the applicable law. That in turn is necessary to safeguard the affirmer's intention to release his work into the public domain as well as the user's interest to use the work unrestrictedly.

The fallback addresses inter alia the German legal system. Since the waiver is not valid concerning author's rights the fallback position comes into effect under German copyright law. The effect is that the affirmer "grants to each affected person a royalty-free, non transferable, non sublicensable, non exclusive, irrevocable and unconditional license to exercise Affirmer's Copyright and Related Rights in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "License")."

According to the German judicature and the prevailing opinion among the commentators such public licenses are valid under German contract and copyright law. From the legal perspective a public license means that the rights holder submits an offer to the general public to use his work in accordance with the license terms[12]. When the work is used in way that would require a license,[13] a license contract between the user and the rights holder comes into effect automatically. Hence the terms of the respective license text become legally binding.

Whether the license is valid or the extent to which it is valid, is inter alia governed by the Civil Law rules concerning the use of standard terms and conditions (sec. 305 – 310 German Civil

---

11 See inter alia Schricker/Loewenheim-*Vogel*, vor §§ 87a ff., n. 32.

12 Landgericht [District Court] Frankfurt/Main CR 2006, 729, 731.

13 The licenses do not cover forms of use that are allowed by legal statute. If a person for example copies the work for private purposes according to the private copying rule in sec. 53 German Copyright Act no license is required since the act of use is permitted by law. The license comes into effect only when the user conducts uses that would require a license, esp. acts of distribution or communication to the public.

Code). Public licenses (like Open Source and Open Content licenses) are considered as standard terms and conditions according to sec. 305 German Civil Code[14].

The rules concerning standard terms and conditions intend to protect contracting parties who are not able to negotiate the terms of the contract (especially consumers). Standard terms are – inter alia – considered invalid, when they "unreasonably disadvantage the other party to the contract" (sec. 307 para 1 German Civil Code). According to sec. 307 para 2 "an unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision (1) is not compatible with essential principles of the statutory provision from which it deviates, or (2) limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised."

The aim of the rules concerning standard terms and conditions to protect the other contracting party has particularly to be taken into consideration when assessing the validity of public licenses. This is especially true for licenses that unconditionally grant unlimited rights to the licensees (like the fallback public license in sec. 3 CC0). Since such licenses are entirely beneficial for the licensee there is generally no need to protect the contracting partner. Quite the contrary: the validity of the license is perfectly in the user's interest. If the license were invalid the user would acquire no rights to use the work. Any use not covered by statutory exceptions and limitations would then be a copyright infringement.

Thus in all of the publicly known court decisions about public licenses, the licenses were deemed legally valid[15] inter alia regarding the grant of rights. Although all known decisions of the German courts concerned the Open Source GNU Public License (GPL), the relevant arguments for the general validity of public licenses under German Law are applicable to Open Content licenses (like the CC0 fallback license) as well. The Creative Commons licenses, in particular the CC0 fallback public license, can be considered as a valid and legally binding license contract[16]. This result reflects the interests of both parties. On the one hand, the (potential) licensor – the affirmer – just intends to unconditionally grant rights to the most possible extent. The effectiveness of the license is hence in his interest. The same is true, on the other hand, for the interests of the

---

14 Sec. 305 para 1 reads: „(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties."

15 See e.g. LG München GRUR-RR 2004, 350-351; LG Berlin CR 2006, 735; LG Frankfurt/Main CR 2006, 735.

16 *Mantz*, GRURInt 2008, 20, 24; *Schöttler*, jurisAnwZert ITR 9/2009.

licensee who wants to use the work under the terms of the license, what requires the license to be valid.

Whereas the license is therefore basically valid, the German Copyright Act incorporates some detailed restrictions concerning contracts about particular legal positions. This applies e.g. to some rights to remuneration. Sec. 31c of the German Copyright Act grants the author for example a right to remuneration for types of use that were unknown at the time a license contract was concluded. The author can generally not waive this right in advance by contractual agreements.

However when implementing this rule in 2008 the German legislator took into account the special interests involved in public licensing. Therefore sec. 32c para 3 of the German Copyright Act provides for a special exemption from the mandatory right to remuneration in cases where the author grants a non-exclusive and royalty-free license to the public. With this and other special exemptions[17] (which are also known as "Linux Clauses") the German legislator has explicitly acknowledged the compatibility of public licenses with the German copyright law.

Further restrictions, however, apply to contracts concerning moral rights. The CC0 fallback license grants inter alia the unlimited right to modify the work. The user is also not obliged to name the author. The moral rights cannot be waived or transferred without restriction under German Copyright. According to the prevailing opinion among the German commentators global and unrestricted disclaimers about moral rights positions are invalid[18].

The effect, however, is not that the license itself is void. It rather means that the author could - notwithstanding the insofar unlimited authorisation in the license – for example prohibit distortions of his work[19]. This result is in accordance with the wording of and the intention behind the fallback license in sec. 3 CC0. The clause reads: „Should any part of the Waiver for any reason be judged legally invalid or ineffective under applicable law, then the Waiver **shall be preserved to the maximum extent permitted**…" and then: "Should any part of the License for any reason be judged legally invalid or ineffective under applicable law, such partial invalidity or ineffectiveness shall not invalidate the remainder of the License …".

The bottom line is that the CC0 license fallback is – according to my opinion – legally effective. It is especially possible to grant the users "a royalty-free, non transferable, non sublicensable, non exclusive, irrevocable and unconditional license" in accordance with sec. 3 CC0.

---

17 Similar rules that relate to other generally mandatory rights to remuneration are stipulated in sec. 32 para 3 sentence 3 and sec. 32a para 3 sentence 3.

18 *Jaeger/Metzger*, Open Source Software, 434.

19 *Jaeger/Metzger*, Open Source Software, 434.

It is worth noting that the result would stay the same if CC0 would not even contain such an explicit fallback rule. According to the prevailing opinion of the legal scholars, public domain licenses (which cannot be interpreted as a waiver of rights under the German copyright, see above) are reinterpreted as unconditional, unlimited, non-exclusive (i.e. public) licenses[20].

3.4. Exclusion of legal actions

As another means to protect the authors will, sec. 3 of the CC0 additionally provides a disclaimer (non-assertion clause) according to which the affirmer warrants not to enforce any potential claims arising from his copyright or related rights against the user, even if the license should not be effective under a certain applicable law to its full extent.

Sec. 3, sentence 4 reads:

[...] **Affirmer hereby affirms that he or she will not (i) exercise any of his or her remaining Copyright and Related Rights in the Work or (ii) assert any associated claims and causes of action with respect to the Work, in either case contrary to Affirmer's express Statement of Purpose.**

Regardless of the extent of a possible transfer of rights under German law such affirmation can be considered as a valid and binding assurance to desist from taking legal actions. Such a declaration can be interpreted either as an offer to conclude a so-called "contract of forgiveness" (sec. 397 para 1 German Civil Code) or as an offer to a so-called *pactum de non petendo*.

According to sec. 397 para. 1 German Civil Code a contract of forgiveness causes an expiration of a certain obligation. Such a declaration can also apply to copyright claims[21]. In a *pactum de non petendo* (a kind of "non-aggression pact") a contract party agrees not to assert concrete or potential claims against his contract partner[22]. The declaration does not cause the respective claim to cease. However in a lawsuit the opponent can assert a defence that would preclude the claimant to enforce the claim. This in turn can lead to counter claims of the defendant: he can hold the claimant liable for any damages that arise from the (unjustified) lawsuit.

4. Conclusion

---

20 See Wandtke/Bullinger-*Grützmacher*, § 69c, n. 69; Schricker/Loewenheim-*Spindler*, vor §§ 69a ff., n. 19; *Jaeger/Metzger*, Open Source Software, 6.

21 See Loewenheim-*A. Nordemann*, § 23, n. 9

22 Palandt-*Grüneberg*, § 397, n. 4.

- Bibliographic metadata are generally not copyright protected under German copyright law. Primary and secondary metadata (as defined in 3.1.1 above) that consist of mere information are never copyright protected. However complementary "metadata" like abstracts, forewords, reviews, covers and other works can and will in many cases be copyright protected.
- Notwithstanding there are good reasons to publish bibliographic metadata under the CC0 rather than using the Creative Commons "Public Domain Mark". Since the Mark is no contractual declaration, especially no offer to grant a license to use actually copyright protected works, its use makes sense only if the worldwide legal status of the respective intellectual good as "free of rights" is definite.
- Applying CC0 per default for all bibliographic metadata to be released by Europeana has the benefit that it is needless to examine the legal status of any data under all copyright regimes in the world. Applying the CC0 to actually unprotected metadata is unproblematic since it does not affect the legal situation (if the content is free, it stays free, the CC0 has no legal effect). Furthermore the CC0 can – even if the particular content is not protected – be useful since it informs the user that the affirmer wants his content to be used without restriction, hence will (and can) in case of doubt not enforce potential rights. Additionally the license text of the CC0 helps the users to understand what the meaning of public domain actually is.
- Under German copyright the CC0 waiver itself is – insofar it relates to the author's rights – not legally valid.
- However the public license fallback in sec. 3 CC0 leads to the (almost) same effect. Since the license can effectively be concluded according to German copyright and contract law, works published under CC0 can be used without restrictions, free of license costs, for the whole term of protection and in all territories.
- Concerning legal positions that can (exceptionally) neither licensed nor otherwise disclaimed the affirmer declares in sec. 3 CC0 a – from my point of view valid and legally binding – *pactum de non petendo* that would prevent him from enforcing these rights anyway.
- Against this background the CC0 is under German law an effective means to release bibliographic metadata into the *commons* and to allow for their maximum usability by the general public.

Annex – Bibliography

Jaeger, Till/*Metzger*, Axel	Open Content-Lizenzen nach deutschem Recht [Open Content Licenses According to German Law], MMR 2003, pp. 431-438
Jaeger, Till/Metzger, Axel	Open Source Software, 2nd ed. 2006.
Loewenheim, Ulrich	Handbuch des Urheberrechts [Handbook of Copyright Law], 2nd ed., Munich 2010
Mantz, Reto	Creative Commons-Lizenzen im Spiegel internationaler Gerichtsverfahren [Creative Commons Licenses in the reflection of International Court proceedings], GRURInt 2008, pp. 20-24
Palandt, Otto	Bürgerliches Gesetzbuch, Kommentar [Civil Code, commentary], 70th ed. Munich 2011
Schöttler, Ingo	Rechtliche Anmerkungen zur Creative Commons Null (CC0) [Legal Annotations to the Creative Commons Zero (CC0)], jurisAnwZert ITR 9/2009, n. 2
Wandtke, Artur-Axel/ *Bullinger*, Winfried	Praxiskommentar zum Urheberrecht [Practice Commentary to the Copyright Law], 3rd ed., Munich 2010

Part 2: Effectiveness of the licensing clauses in Sec. 3, subsection 2 and 3 of the draft for an "Europeana Data Exchange Agreement" dating 5 May 2011

The draft agreement contains two clauses that shall ensure that Europeana can make all metadata conveyed by its partner institutions available to the public under CC0. They read as follows:

2. Europeana shall publish all Metadata, including the Metadata provided by the Data Provider prior to the Effective Date, under the terms of the CC0 1.0 Universal Public Domain Declaration and is hereby authorized by the Data Provider to do so. The Data Provider recognizes that it hereby waives – to the greatest extent permitted by, but not in contravention of, applicable law – all Intellectual Property Rights in the Metadata it has provided and will provide to Europeana.

3. In as far as the Data Provider has provided or will provide Europeana with Metadata that it has aggregated from Third Parties or that otherwise originate from Third Parties, the Data Provider shall ensure that these Third Parties have authorized the Data Provider to authorize Europeana in accordance with paragraph 2 of this article.

According to my opinion the clause is valid and binding under German law. I would only suggest some minor modifications and propose the following wording:

2. Europeana shall publish all Metadata, including the Metadata provided by the Data Provider prior to the Effective Date, under the terms of the CC0 Universal Public Domain Declaration, **vers. 1.0 (http://creativecommons.org/publicdomain/zero/1.0/legalcode) or any later version (hereinafter: CC0)** and is hereby authorized by the Data Provider to do so. The Data Provider recognizes that it hereby waives – to the greatest extent permitted by, but not in contravention of, applicable law – all Intellectual Property Rights in the Metadata it has provided and will provide to Europeana. **If – according to the applicable law – such waivers are not legally binding in particular territories the "Public License Fallback" in sec. 3 CC0 will apply, and the Metadata provided by the Data Provider is licensed non-exclusively, unconditionally, free-of-charge for all types of use and for all territories to the public. For details about the waiver/public license see the Text of the CC0 under the abovementioned URL.**

Reasoning: The background of the modification proposals is especially that the clause should name both the waiver and the fallback public licensing option. Additionally the clause should refer to the CC0 text in order to guarantee transparency concerning its effect. The indication to "any later version" shall ensure a change to newer versions of the

CC0 in case of their release. Without such addition the contract would have to be changed and potentially concluded again with all the partners should the change to a newer version seem reasonable.

3. In as far as the Data Provider has provided or will provide Europeana with Metadata that it has aggregated from Third Parties or that otherwise originate from Third Parties, the Data Provider **warrants** that these Third Parties have authorized the Data Provider to authorize Europeana in accordance with paragraph 2 of this article.

Reasoning: The initial formulation in the draft concerning the obligation of the Data Provider is quite weak. From the German law's perspective it is not even definite that the phrase "shall ensure" is a real obligation or rather "soft law" without a binding effect.