

**Creative Commons Final Report:
On the Viability and Development of Springing Licenses**

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With a generous grant from Arcadia, a charitable fund of Lisbet Rausing and Peter Baldwin, Creative Commons conducted a formal exploration and analysis of a proposal to create so-called “springing licenses,” a legal mechanism for granting a license that automatically springs into life at a future date.

Executive Summary¹

This report documents Creative Commons investigation into the viability of creating one or more new legal tools dubbed “springing licenses.” This project is part of CC’s foundational work of enabling authors to exercise choice when publishing their creative works. Based on our research, we uncovered significant legal and technical challenges connected to this project that make continued pursuit of the project unadvisable at this time.

CC conducted this research over the course of three years (July 2015 to July 2018), with the intention of developed and publishing some form of springing license or, alternatively documenting the research conducted and the rationale for not pursuing the project by the end of that time. Included in this report are: an overview of the springing license concept, a summary of the historical background for the idea, a summary of the legal and technical challenges associated with the concept, our reasoning for not recommending pursuit of this legal tool at this time, and finally, an outline of lessons learned over the course of this work.

The Big Idea

The idea motivating the concept is that creators may be willing to give up some control over their work at some point before the long copyright term has ended, even if they will not or cannot do so when they first publish the work.

There are many potential benefits of such a mechanism, including:

1. The mechanism would obviate the need for a licensor to go through the trouble of applying a new license to their work;
2. If technically executed well, all copies of the work distributed on the internet would automatically change the license and/or carry information about the terms of the new

¹ Neither this report or any other document referenced or linked to in this report or on the Creative Commons website where this report and other documentation is found constitutes legal advice. Please consult your own lawyer before relying on any such information.

license, thereby alerting all downstream recipients of the increased permissions and triggering event; and

3. The mechanism would be a means to ease reluctant creators into the idea of granting more access and reuse permissions to their work, but on a timeline that might be more palatable.

There are many potential segments of the copyright community who are or might be interested in such a mechanism, including:

- Commercially successful artists or those who strive for commercial success with their creative work.
- Foundations who want to use the mechanism as a requirement for their grantees.
- User-generated content platforms who want to build into their terms of service as a way of ensuring digital assets do not become orphan works after death.

Historical background

In a wide variety of forms, the springing license concept has been floating in the open community for years.² The Creative Commons community discussed the idea in connection with the 4.0 versioning process.³ Creative Commons staff explored the concept in detail in 2014-2015 as part of a working group that included Wikimedia, Question Copyright, and several others. The purpose of the working group was to explore the concept more concretely and look into the feasibility of creating a new organization -- the Free Culture Trust⁴ -- to steward and promote the tool.⁵

Creative Commons previously pursued a project in a similar vein called [Founder's Copyright](#), where creators would sign a contract agreeing to dedicate their copyrighted works to the public domain after 14 years. The project did not receive much uptake and is no longer active.

Summary of work under the Arcadia grant

Beginning in 2015 with the grant from Arcadia, CC began a formal analysis of the concept and its feasibility as a new legal tool for CC stewardship.

² E.g., <http://lists.ibiblio.org/pipermail/cc-licenses/2011-December/thread.html#6453>

³ See https://wiki.creativecommons.org/wiki/4.0/Sandbox#Time-based_switch_to_more_freedom

⁴ See <http://freeculturetrust.org/fct-concept-paper.pdf> (concept paper) and <https://commons.wikimedia.org/wiki/Commons:Trust> (original thinking that resulted in working group)

⁵ See https://docs.google.com/document/d/1Edlc6t9Lp-Hiovu7aA5CXB_y_-ZD0TRhWeG0CdRfc5w/edit?usp=s_haring (archive of etherpad where work group meeting notes were tracked, etc.)

There are endless possibilities for how the general idea of a springing license might take shape. CC began its evaluation of the concept by narrowing down the formulations of the idea that have been most commonly discussed by the community over the years.

Those are, in no particular order:

- (1) a license that springs into effect upon the death of the creator,
- (2) a license that springs into effect after the work has recouped its creation costs and/or generated a predetermined amount of money in the market, and
- (3) a license that springs into effect on a fixed date or after a preset period of time.

There are also many different conceptions of precisely what type of legal tool would spring into effect. For example:

- a particular license condition is eliminated after time (e.g., a BY-NC-SA work becomes available under BY-SA)
- all license conditions are eliminated after time (e.g., a work under any CC license becomes available under the CC0 public domain dedication)

In its evaluation, CC looked at the legal and practical challenges associated with the springing license concept.

→ **Legal challenges**

In order to be serve its purpose as a legally binding commitment, a springing license would need to be irrevocable, like all other CC legal tools. This poses serious enforceability challenges.

By definition, a springing license creates a time gap between the moment the creator grants the permissions and the moment the public is allowed to exercise them. During that time, licensors may forget or change their minds about the springing license. They might enter into other licensing arrangements or include them in the estate governed by their will. Those later-signed agreements or wills could conflict with the terms of the springing license.

With the help of the Berkman Klein Center for Internet & Society, CC conducted research on how to navigate the enforceability challenge as a matter of U.S. law.⁶ Promises to grant a future gift are not enforceable agreements under U.S. law. Accordingly, in order to be legally binding against a conflicting future agreement or will, a springing license would need to be structured as a present grant of rights (e.g., “licensor hereby grants”). This means, as a legal matter, the license would not actually spring to life at a future time. Instead, the license would be granted to the beneficiaries when it was applied, even though the beneficiaries would not be able to exercise their rights until the specified triggering event or date.

⁶ To date, Creative Commons has only had the resources to research the legal implications under U.S. law. There are undoubtedly parallel and likely supplementary concerns about enforceability in other jurisdictions.

The particular mechanism used to trigger the license to spring into effect has important implications on the legal analysis. A license that is not effective until the death of the creator introduces the complexities related to trusts and estate law, including the legal formalities required for testamentary gifts. Also, as noted previously, in order to be enforceable against a conflicting will, the springing license would have to be structured as a present transfer of rights during the creator's life (with rights that were not exercisable by the beneficiaries until the creator's death).

A license tied to a future event poses its own challenges. If the triggering event is uncertain (e.g., the work generating a certain amount of profit), it is unclear whether a present grant of rights is actually possible and/or whether it would be enforceable against a conflicting agreement, particularly before the triggering event under the license occurred.

A license tied to a specified future date or period of time poses the fewest legal complications. It provides certainty as to when the future permissions are triggered, which would make it easier to draft a present grant of licensed rights. It also avoids having to venture into the complexities of the law surrounding testamentary dispositions.

The legal research helped to identify key enforceability challenges associated with the springing licenses concept. It also helped unearth new legal questions, such as:

- How literal must the present grant of future permissions be in order to be enforceable? For example, would the licensor have to actually grant the springing rights at the time they use the springing mechanism and then simply state that a condition of exercising those rights is that reusers wait until the specified date to actually exercise those permissions?
- Is it possible to presently grant something around an uncertain trigger, or would the license have to spring into effect upon a date or event that is inevitable?
- Is it possible for the springing mechanism to involve CC0, or would this make the creator who applies it no longer the copyright holder at the time they granted the springing rights?

In order to move forward, CC would need to work with its global network to conduct the legal analysis for as many jurisdictions possible in order to internationalize the tool.

→ **Practical challenges**

The practical challenges associated with the springing license concept are arguably more significant than the legal hurdles.

In order to be a useful tool, reusers of a work would have to be notified that a work was subject to a springing license and, once those springing permissions go into effect, be alerted that the conditions of reuse have changed. Creative Commons currently has no infrastructure for keeping track of when and what licenses are applied and to which works.

Furthermore, unless the springing mechanism goes into effect on a specified and certain date, the notification challenges could be quite complex from a technical perspective. For example, if the springing license comes into effect upon death, how would Creative Commons know when a creator had died? Even more challenging, how would Creative Commons know when a work had generated the threshold amount of profits to trigger a springing license? From an implementation standpoint, the formulation of the springing license idea where the additional permissions are triggered after a certain period of time or at a certain date is the most viable option. Unfortunately, based on initial conversations with stakeholders, that is also the least compelling option from a user perspective.

Another challenge is finding a way to ensure that the springing license option is understandable and easy to use. This is important from a legal enforceability perspective but also because it is core to CC's mission and vision. CC discussed the idea of adding a springing license option to the license chooser, but there were concerns about introducing more complexity into the licensing decision. That approach would also limit the potential pool of adopters to those who knew they wanted a springing license add-on at the time they are applying a different CC license. There are many variations of the springing license option that are not limited to that particular audience; for example, authors who want a license to spring into effect upon their all rights reserved works at a future date. These options would require a standalone legal tool.

Finding a way to implement this idea in a way that does not unduly complicate a licensing suite that many people already find complex would require a large investment of resources, probably led by a product designer.

CC's decision and supporting rationale

After undertaking the legal research and exploring different possible formulations of the concept, Creative Commons took the topic to the CC Global Summit in 2016 for discussion. To a group of interested legal and policy experts from the Creative Commons Global Network, CC presented an overview of the various challenges identified and then talked through options, potential use cases, and strategies. It was clear at the Summit that there is still significant demand for this tool in some form. It was also clear that challenges abound.

The legal challenges associated with the concept are complex, especially given that contract and estate law in most jurisdictions is dictated by state and local laws. But it is the technical challenge that poses the most significant hurdle for CC at this time. Without technical infrastructure to track use of the licenses, the springing license concept is largely untenable.

CC is currently in the process of creating such technical infrastructure in connection with a new CC Search tool and other technological products. Once complete, CC will likely reconsider and make a fresh determination about whether to move forward with the idea.

In the meantime, CC welcomes any research or ideas about how to overcome the legal and practical challenges posed by the tool.

Lessons learned

Overall, the research and vetting process undertaken in this project was highly instructive to CC. In addition to the specifics about legal enforceability and technical challenges revealed through the course of our research, CC also had several higher level takeaways from the process of undertaking this project.

- Community receptivity to a concept is not necessarily indicative of clear, sufficient user demand for a new legal tool.
- Upon investigation, the practical hurdles associated with a new legal tool may be just as, if not more, significant than the legal challenges.
- Concepts that sound intuitive in the abstract are likely to receive positive reception when presented to new audiences, but this does not necessarily indicate that the concept is viable in practice.

In a sense, this project has been a microcosm of the multitude of factors at play whenever Creative Commons decides to create new legal tools or update existing legal tools. As is often the case, the springing license concept has some very vocal and influential proponents. The concept also presents wide room for variation, with different audiences imagining different forms the tools could take. This leads to a situation where it is easy to exaggerate the scope of the demand for the tool. As CC engaged in the research and scoping process for the project, it became apparent that there was less practical need for the tool than originally anticipated. Further, in many cases where there is real-life demand, people have found their own way to accomplish the objective. The common embargo periods for open access academic articles are one such example.

Finally, through this work, CC gained a renewed appreciation for the documentation of research and learnings. As explained above, the springing license concept has been discussed and explored in a variety of fora for many years. Yet CC found itself having to revisit many of those previously vetted ideas because there was insufficient record of what was discussed and decided previously, including within CC. Creative Commons provides this extensive report in an effort to avoid this situation in the future if CC or another organization decides to move this project forward in the future.

Compilation of other resources

[CC Global Summit 2017 Presentation](#) by Sarah Hinchliff Pearson

Free Culture Trust

Working Group: <https://commons.wikimedia.org/wiki/Commons:Trust>

Concept Paper: <http://freeculturetrust.org/fct-concept-paper.pdf>

Modified versions of legal research memos (forthcoming)

Discussions during the 4.0 versioning process at Creative Commons

https://wiki.creativecommons.org/wiki/4.0/Sandbox#Time-based_switch_to_more_freedom