

## The new Creative Commons 4.0 licenses

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*This article focuses on the new Creative Commons 4.0 licensing suite in the context of enabling open access to grey literature and the re-use thereof. Firstly, the new licenses are presented with regard to any differences in comparison with version 3.0. The limits of the Creative Commons 4.0 licenses are then also identified. Finally, the licenses are briefly assessed from the point of view of the Czech law. Drawing from this analysis, the paper ends with a concise recommendation of what CC 4.0 users should specifically take into account in order to make grey literature more open.*

**Keywords:** Copyright, Sui Generis Database Rights, Public Licenses, Creative Commons 4.0

*This article is an outcome of the "Free Licenses Integration Project" – registration no. P408/12/2210 that has been financially supported by the Czech Science Foundation.*

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### Introduction

The launch of the new Creative Commons 4.0 Public Licenses (hereafter referred to as "CC 4.0") marks yet another important milestone for the development of the Open Content Movement. Introduced by the Creative Commons on 25<sup>th</sup> November 2013<sup>1</sup>, the new licensing suite aims to be an international tool that fosters the development of the semi-commons.<sup>2</sup> Consequently, nothing has changed in the new version with regard to its basic ideology. CC 4.0 continues to enable authors to allow others to share and use their work, albeit with the option of implementing some restrictions on the granted rights. As the idea, scope and functioning of the Creative Commons have been excellently presented elsewhere<sup>3</sup>, this short paper merely focuses on pinpointing the newly adopted elements in the licensing suite (part 1). It then highlights the fundamental problematic issues in CC 4.0 (part 2). Even though it identifies several limits to CC licenses within Czech law, such as the limited enforceability of no warranties & liability limiting clauses and the rights outside copyright (part 3) by following a simple protocol, CC 4.0 licenses are deemed to be viable tool for opening up grey literature (part 4).

### Brave new licenses

The main goals and objectives of the Creative Commons Public Licenses 4.0 have been summed up as internationalization, interoperability and longevity.<sup>4</sup> The specific request of the Data / PSI / Science / Education communities will be addressed later. On a practical level,<sup>5</sup> these uplifting proclamations have been implemented by means of the introduction of a number of major changes regarding the scope of the rights granted and the conditions under which these rights are granted.

The most important **change** involves the significant widening of the scope of the license. Unlike version 3.0, the new licenses cover (in every variant) *sui generis database rights*. Thus the restrictive licensing element prohibiting commercial use and/or the creation of derivative works may also apply to the database as a whole, if the database creator so chooses (Section 4 of CC 4.0). In the context of

<sup>1</sup> CREATIVE COMMONS. 4.0 [online]. [Accessed 8 October 2014]. Available from: <https://wiki.creativecommons.org/4.0>.

<sup>2</sup> It must be noted that not all the CC licenses fulfill the revamped Open Definition 2.0 ("Open means anyone can freely access, use, modify and share for any purpose (subject, at most, to requirements that preserve provenance and openness)"). The restrictive licensing elements prohibiting the creation of derivative works (ND) and commercial use (NC) effectively negate the aforementioned definition and as such these licenses cannot be deemed to be "open". These considerations shall be taken into account by the potential licensors which would like to make grey literature "open" or to license a directory as open.

<sup>3</sup> LESSIG, Lawrence. The Creative Commons. *Montana Law Review* [online]. 1 January 2004. Vol. 65, no. 1. [Accessed 8 October 2014]. Available from: <http://scholarship.law.umt.edu/mlr/vol65/iss1/1>. LESSIG, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*. 1st. New York: Random House. ISBN 0-375-50578-4. LESSIG, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York : Penguin Press. ISBN 1594200068.

<sup>4</sup> CREATIVE COMMONS. *What's New in 4.0 - Creative Commons* [online]. [Accessed 8 October 2014]. Available from: <https://creativecommons.org/version4>.

<sup>5</sup> The formal changes include the clarification and improvement of the general legibility of the document.

grey literature, this means that a more unified regimen concerning the potentially covered rights is now feasible. Not only the parts (i.e. the grey documents itself) of a grey repository may be licensed, but also the entire repository itself. This also further increases the possible future areas of application for these public licenses. Up until version 4.0, the Open Data Agenda in Europe lay outside the remit of these licenses. The newest version of the Creative Commons is therefore a viable alternative to the Open Data Commons licenses.<sup>6</sup>

A further modification includes the more natural *attribution* of the author that follows a simple rule of thumb, which could be abbreviated as TASL. Accordingly the (re)user must provide information about the work's Title, Author, Source and License, i.e. the link to the variation of the used License. All of this information should be provided in a manner which is reasonable in relation to the means, medium and context. Furthermore, any modifications (i.e. the cropping of a photograph, the translation of a text) must also be indicated. A simple link with all the necessary information can also fulfill this condition (Section 3(a)(2)).<sup>7</sup>

The new CC 4.0 licenses also provide for a specific request for *anonymization* from the author (Sec. 3(a)(3)). Logically, this is not a clause with an automatic effect like the others and it must be specifically invoked by the author against a user who is making further use of the author's work.

A promising institution inspired by Open Source Software licenses involves the automatic *reinstatement* of the rights to use the licensed material as of the date that any violation has been rectified, provided it has been rectified within 30 days of the discovery of the violation by the licensor (Section 6(b)). However, possible claims arising from any infringements in the non-compliance period are not automatically mitigated and could be brought before the respective courts.

With regard to **unchanged** issues, the definition of noncommercial (NC) remains the same. Noncommercial use is therefore understood to be use that is not primarily intended for or directed towards commercial advantage or monetary compensation. This disputed<sup>8</sup> restrictive condition of the CC licenses has recently been at least partially clarified by the interpretational guidelines published by the Creative Commons.<sup>9</sup> Even though they are not binding, they do attempt to provide at least a basic outline of what should be considered to constitute (non)commercial use. Most importantly, it is not the nature of the subject using CC 4.0, but the nature of the use itself that will be decisive. Therefore, even commercial entities can use works that have been licensed for noncommercial use only. Furthermore, the NC clause does not limit the scope of the limitations and exceptions provided by the respective applicable law. The licensor is also not limited to use the work commercially, i.e. to make use of the dual-licensing. Unfortunately, court rulings on cases related to this condition have not fully comprehended the proper functioning of this clause. In the *Curry v Audax*<sup>10</sup> case, the Amsterdam District Court did not award any damages to Mr. Curry. Interestingly, the court stated that the CC licensed photos had no commercial value. In another Creative Commons related case, *Deutschlandradio*,<sup>11</sup> the German District Court in Cologne deemed that the NC clause was not specific enough and explained it in accordance with the "Zweckübertragungslehre" as "only for private use".<sup>12</sup> However, this decision is not final and it has been already appealed.

Finally, the functioning of the ShareAlike clause also remains unchanged. This condition is therefore only triggered when licensed work is adapted in a manner that requires permission from the original

<sup>6</sup> See: OPEN KNOWLEDGE FOUNDATION. *Licenses | Open Data Commons*. [online], [Accessed 8 October 2014]. Available from: <http://opendatacommons.org/licenses/>.

<sup>7</sup> The Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International Public License is further used as the reference variant of the license. Available from: <https://creativecommons.org/licenses/by-nc-sa/4.0/legalcode> [Accessed 8 October 2014].

<sup>8</sup> See e.g. FREE CULTURE FOUNDATION. *Stop the inclusion: n of proprietary licenses in Creative Commons 4.0*. [online]. [Accessed 8 October 2014]. Available from: <http://freeculture.org/blog/2012/08/27/stop-the-inclusion-of-proprietary-licenses-in-creative-commons-4-0/>; HAGEDORN, Gregor, MIETCHEN, Daniel, MORRIS, Robert, AGOSTI, Donat, PENEV, Lyubomir, BERENDSOHN, Walter and HOBERN, Donald, 2011, Creative Commons licenses and the non-commercial condition: Implications for the re-use of biodiversity information. *ZooKeys* [online]. 28 November 2011. Vol. 150, no. 0, p. 127. [Accessed 8 October 2014]. DOI 10.3897/zookeys.150.2189. Available from: <http://www.pensoft.net/journals/zookeys/article/2189/abstract/creative-commons-licenses-and-the-non-commercial-condition-implications-for-the-re-use-of-biodiversity-information>.

<sup>9</sup> CREATIVE COMMONS. *NonCommercial interpretation - CC Wiki*. [online]. [Accessed 8 October 2014]. Available from: [https://wiki.creativecommons.org/NonCommercial\\_interpretation](https://wiki.creativecommons.org/NonCommercial_interpretation).

<sup>10</sup> For a detailed discussion of this case, see: WEST, Ashley. Little Victories: Promoting Artistic Progress through the Enforcement of Creative Commons Attribution and Share-Alike Licenses. *Florida State University Law Review*. 2009. Vol. 36, p. 903–930.

<sup>11</sup> Judgment of the District Court in Cologne [Landgericht Köln], 5. 3. 2013, file ref. 28 O 232/13.

<sup>12</sup> According to section 31(5) of the German Copyright Act, in the case of doubts or unclear arrangements it is the presumed that the rights have not been granted and remain with the author.

right holder. However, no matter how generally formulated this clause is, it will still be interpreted according to the national law as will be shown in the following section.

#### The Limits of the Creative Commons 4.0

Even though CC 4.0 strives to operate internationally in the case of a dispute, the licenses will ultimately be subject to the interpretation of a national court. The licenses therefore do not operate on a transnational level, but will be applied within national legislations due to the principle of the territoriality of copyright. However, CC 4.0 does not include a choice of jurisdiction/law clause as the local “ported” versions 3.0 of the licenses did. The creation of ported (tailored to the national law) versions of CC 4.0 is not foreseen, so the result is to be decided under the rules of international private law. The first issue at hand is what court will have the jurisdiction to decide the dispute and secondly what law will actually be applicable. The issue becomes even more complicated, if we take into account the fact that public licenses could give rise to copyright infringement issues as well as to contractual issues.<sup>13</sup> In the first case, the competent courts to decide the dispute will be determined<sup>14</sup> on the basis of the general rules set out in Article 2 of the Brussels I Regulation<sup>15</sup> (Article 4 Brussels I bis)<sup>16</sup> Accordingly, the infringer should primarily be sued in the country of its domicile. The right holder may also make use of the special jurisdiction as stipulated in Article 5(3) of Brussels I (or Article 7(2) of Brussels I bis). Consequently, the infringer may be sued in the country where the harmful event occurred or may occur. The substantive body of case law<sup>17</sup> from the Court of Justice of the European Union has further “specified” the right holder’s option of bringing an action for damages in a different jurisdiction. Thus the alleged infringer may be sued for the whole amount in the state where the event giving rise to it occurred or for the locally limited damages in the country where the infringement had its effect (pursuant to the “mosaic theory” formulated in the *Shevill*<sup>18</sup> case). Recently, the Court of Justice of the European Union broadened the criterion in the criticized<sup>19</sup> *Pinckney*<sup>20</sup> decision to include the mere accessibility of a website offering the infringing works. Thus, the legitimate right holder may claim local damages basically in any EU state.<sup>21</sup> The applicable law should be determined according to Article 8 of the Rome II Regulation<sup>22</sup> as the law of the country in which protection is claimed (*lex loci protectionis*). In dealing with contractual issues, the court would also be determined on the basis of the rules laid out in Brussels I (Brussels I bis). The competent courts should be the ones located in the place of performance of the given obligation. The applicable law will be determined pursuant to the

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<sup>13</sup> The legal qualification of public licenses (such as CC 4.0) is not undisputed. See: GUADAMUZ, Andres, 2009, The License/Contract Dichotomy in Open Licenses. *University of La Verne Law Review* [online]. 2009. Vol. 30, no. 2, p. 296–311. [Accessed 1 July 2014]. Available from: <http://law.laverne.edu/wp-content/uploads/2010/04/dichotomy-in-open-licenses296.pdf>.

<sup>14</sup> For the sake of conciseness I shall further focus on the overview of the EU law in this area. For details see: ROSENKRANZ, Timo, 2011, *Open Contents: eine Untersuchung der Rechtsfragen beim Einsatz “freier” Urheberrechtslizenzmodelle*. Tübingen : Mohr Siebeck. p. 155-231.

<sup>15</sup> Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>16</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>17</sup> Compare: KYSELOVSKÁ, Tereza. Procesní a kolizní problematika práv k duševnímu vlastnictví se zaměřením na judikaturu Soudního dvora EU. *Revue pro právo a technologie*. 2013, vol. 4, n. 8, p. 19-24;

<sup>18</sup> C-68/93, *Shevill and Others v Presse Alliance*, ECLI:EU:C:1995:61.

<sup>19</sup> See: HUSOVEC, Martin. Comment on “Pinckney”: Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 5(3) – Peter Pinckney v. KDG Mediatech AG. *IIC - International Review of Intellectual Property and Competition Law* [online]. May 2014. Vol. 45, no. 3, p. 370–374. [Accessed 8 October 2014]. DOI 10.1007/s40319-014-0192-0. Avail. from: <http://link.springer.com/10.1007/s40319-014-0192-0>.

<sup>20</sup> C-170/12 – *Pinckney*, ECLI:EU:C:2013:635.

<sup>21</sup> As Husovec notes, such an approach raises serious questions as regards the abuse of forum shopping. Even minor claims could also eventually lead to substantive costs on the part of the alleged infringer. See: HUSOVEC, Martin. Comment on “Pinckney”: Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art. 5(3) – Peter Pinckney v. KDG Mediatech AG. *IIC - International Review of Intellectual Property and Competition Law* [online]. May 2014. Vol. 45, no. 3, p. 370–374. [Accessed 8 October 2014]. DOI 10.1007/s40319-014-0192-0. Available from: <http://link.springer.com/10.1007/s40319-014-0192-0>.

<sup>22</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

rules of the Rome I Regulation,<sup>23</sup> i.e. as the law of the country “where the party required to effect the characteristic performance of the contract has its habitual residence”.

On the basis of the aforementioned rules, disputes regarding CC enforceability may end up before different courts and be assessed within different bodies of laws. Despite the global nature of CC licenses, the respective national law will ultimately define the limits of the granted license. However, no irregularities or deviations from the standard principles have yet been observed in analyses of national decisions dealing with the enforceability of CC licenses. The competent courts have been determined pursuant to the general rule (*auctor sequitur forum rei*) and the applicable law has been the *lex loci protectionis*. Moreover, the courts in Germany have also not found the Creative Commons licenses to be invalid merely because of the simple fact that they were available to the infringing party only in English, even though it was not said party’s mother tongue.<sup>24</sup>

The aforementioned issues have a significant impact on another general limitation of CC 4.0 in general, i.e. the maximum possible absence of any warranties and representations whatsoever, as well as maximal limitation of liability. In such a setting, Leeuw<sup>25</sup> aptly remarks that, from the point of view of the licensee, Creative Commons Public Licenses are entirely built upon trust between the parties involved. Unfortunately, there has not yet been any case law dealing with the issue of misrepresentation and the exclusion of liability in relation to Creative Commons Public Licenses; for the time being, the discussion is merely academic.<sup>26</sup> However, as copyright does not take into account the *bona fides* in cases of infringement, such an application leads to the problem that has been aptly characterized by Hietanen, namely that “the legal right holder can sue anyone in the chain of infringement.”<sup>27</sup> In the next section we will present a brief overview of selected CC 4.0 issues in the context of Czech Law.

#### Creative Commons 4.0 and Czech civil law

Czech Law has acknowledged Creative Commons Public Licenses since 2006. As such, a licensor can make an offer to conclude a licensing agreement with an unspecified circle of users and these users will then enter into the contract as soon as they use the granted rights. Recently, however, the legal nature of “public licenses” has been disputed in the Czech legal doctrine. The debate does not fall within the scope of this paper, however, and CC 4.0 are treated as gratuitous informal (i.e. not written) contracts.<sup>28</sup> The one simple argument that suggests this conclusion is the fact that the Czech Copyright Act<sup>29</sup> only allows the use of copyrighted work by another person upon authorization on a contractual basis.<sup>30</sup>

As a necessary precondition for the seamless functioning of CC 4.0, the licensor must not violate the “*nemo plus iuris ad alium transferre potest quam ipse habet*” maxim, i.e. the licensor must not license more rights than it is actually capable of. If this should happen, Section 5 should shield the licensor from any arising claims regarding the deceived licensee. However this full limitation of liability does not completely apply in the Czech Republic. Firstly, the possible waiver of the licensee’s claims arising from possible defects in the work (Section 1916 of Act no. 89/2012 Coll., the Czech Civil Code – hereafter simply referred to as the “CzCC”) is only valid, if made in writing. Further misrepresentation could be

<sup>23</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>24</sup> Decision of the Landgericht Berlin, 8. 10. 2010, Gerlach vs. DVU, 16 O 458/10. Judgment of the District Court in Cologne [Landgericht Köln], 5. 3. 2013, file ref. 28 O 232/13.

<sup>25</sup> LEEUW, Emerald De, 2012, ID 2328989: *The Creative Commons License: Is Validity Enough? A Review of Liability and Enforceability in Creative Commons Licensing* [online]. SSRN Scholarly Paper. Rochester, NY : Social Science Research Network. [Accessed 31 July 2014]. Available from: <http://papers.ssrn.com/abstract=2328989>.

<sup>26</sup> Cf. DULONG DE ROSNAY, Melanie. Open Content Licenses Without Representation: Can You Give Away More Rights Than You Have? *European Journal of Law and Technology* [online]. 17 September 2013. Vol. 4, no. 3. Available from: <http://ejlt.org//article/view/237>.

<sup>27</sup> HIETANEN, Herkko. *The Pursuit of Efficient Copyright Licensing: How Some Rights Reserved Attempts to Solve the Problems of All Right Reserved*. Lappeenranta : Lappeenranta Teknillinen Yliopisto. ISBN 9789522146557. P. 123.

<sup>28</sup> For an overview of the national debate cf. TELEČEK, Ivo. Souhlas, nebo licenční závazek? *Právní rozhledy*. 2013, vol. 21, n. 13/14, p. 457-462. ISSN 1210-6410. HUSOVEC, Martin. Souhlas, nebo licenční závazek? *Revue pro právo a technologie* [online]. 2013. Vol. 4, no. 8, p. 3-8. Available from: <http://revue.law.muni.cz/dokumenty/25809>. MYŠKA, Matěj. Vybrané právní aspekty otevřeného přístupu k vědeckým publikacím. *Právní rozhledy*. 2014. Vol. 22, no. 18, p. 611-619.

<sup>29</sup> Act no. 121/2000 Sb., Copyright Act, as amended.

<sup>30</sup> As is similarly the case in Germany. See: ROSENKRANZ, Timo, 2011, *Open Contents: eine Untersuchung der Rechtsfragen beim Einsatz “freier” Urheberrechtslizenzmodelle*. Tübingen : Mohr Siebeck. P. 61.

considered to be a legal defect. This does not mean, however, that the licensor cannot be held liable by the legal right holder as noted above. However, section 2065 of the CzCC could also be applied analogously. This section stipulates that the donor will compensate the donee for any damages arising from the willful donation of another party's property and also if the damages resulted from a fault (even a legal one) in the donated property that was known to the donor, if the donor had not warned the donee beforehand. The potential licensor will usually be well aware that it is either using or fraudulently licensing the works of others in the creative process. Therefore, the result is that the user of CC 4.0 licensed works can be sued for copyright infringement, but the user can then sue the "licensor" for compensation of any damages paid.

Finally, Czech licensees should bear in mind that CC 4.0 does not automatically grant all the potential rights needed for the use of the respective work. Prominent examples of such lacking rights include, for example, the personality rights regarding any image of a natural person or protected personal data.

#### **Creative Commons 4.0: handle with care**

The previous sections have expressed a rather skeptical view of CC 4.0 licenses.<sup>31</sup> However, with a little care exercised by both the licensor and licensee, they may well provide a relatively easy way of opening up grey literature to the public.

Firstly, the licensor should be aware of the consequences of applying the License. The licensor must bear in mind that CC 4.0 as such is an attempt to simplify the incomprehensible legal language and that only the full legal code of the licenses is binding<sup>32</sup>. As such, the licensor must not rely on the commons deed (the shortened, easily readable version of the licenses) or even the icons indicating the chosen variant of the license. In order to be able to grant the selected license, the licensor must adequately secure all the necessary rights and obtain the consent to do so from all the potentially involved parties. These especially involve subjects other than the author (the licensor), which may exercise the rights such as those pertaining to an employer or co-authors.

The aforementioned remarks regarding the limited ability to communicate the entire contents of the licenses apply to the licensee *mutatis mutandis*. A diligent preliminary search is advised, especially when using works licensed under CC 4.0 with the restrictive NC element.<sup>33</sup> The CC licensing system is ultimately built upon trust due to the limited warranties and representations. As such, in the case of really substantive and potentially exposed usage, CC 4.0 may ultimately only function in practical use<sup>34</sup> as information about whom to contact in order to truly check the actual status of the granted usage rights. Consequently, CC 4.0 may become practically equal to another alternative tool for dealing with copyright, namely the Konomark.<sup>35</sup> This mark indicates that most rights are sharable and that the licensor is ready to license them for free, but that a request is necessary. Such an interpretation could be regarded, however, as overly protective and in fact goes directly against the basic idea of Creative Commons, i.e. the reduction of transaction costs. In day-to-day practice, the potential licensees should therefore take the risk and trust that the licensor is entitled to issue the licenses. In the Czech Republic, this approach has been reinforced by the provisions of section 7 of the CzCC that presumes that the party that has acted in a certain way has done so honestly and in good faith. Nevertheless they should be ready to face potential infringement claims from the legitimate right holders.

<sup>31</sup> Due to the limited scope, not all of the problematic issues of the CC licenses have been discussed. For further discussion cf. O'SULLIVAN, Maureen. Creative Commons and contemporary copyright: A fitting shoe or "a load of old cobblers"? *First Monday* [online]. 13 January 2008. Vol. 13, no. 1. [Accessed 8 October 2014]. Available from: <http://firstmonday.org/ojs/index.php/fm/article/view/2087>. DULONG DE ROSNAY, Melanie, 2009. *Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions* [online]. 2009. [Accessed 1 July 2014]. Available from: <http://halshs.archives-ouvertes.fr/halshs-00671622>.

<sup>32</sup> However imprecise simplification may undermine the necessary legal certainty. Cf. MYŠKA, Matěj, SMEJKALOVÁ, Terezie, ŠAVELKA, Jaromír and ŠKOP, Martin. Creative Commons and Grand Challenge to Make Legal Language Simple. In: *AI Approaches to the Complexity of Legal Systems. Models and Ethical Challenges for Legal Systems, Legal Language and Legal Ontologies, Argumentation and Software Agents* [online]. Springer Berlin Heidelberg. p. 271–285. Lecture Notes in Computer Science, 7639. [Accessed 8 November 2014]. ISBN 978-3-642-35730-5, 978-3-642-35731-2. Available from: [http://link.springer.com/chapter/10.1007/978-3-642-35731-2\\_19](http://link.springer.com/chapter/10.1007/978-3-642-35731-2_19)

<sup>33</sup> Especially because the interpretation of the NC definition may vary before the respective competent national court.

<sup>34</sup> From the legal point of view, the user of the allegedly CC 4.0 licensed work may sue the fraudulent licensor for the damages that are claimed by the legal right holder. However, such an approach could be considered too risky and burdensome.

<sup>35</sup> Konomark was developed Eric E. Johnson as an alternative to direct licensing. For details see: <http://www.konomark.org/> [Accessed 8 October 2014].

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