

Chapter Five

Legal transparency through multi-layered drafting

Having your cake and eating it too?

By Emma Carpenter

1 Introduction

Law is often left out of discussions about transparency. Huge amounts are said and written about transparency in business, government and even social interactions (Hood 2006 p.6-7); but law is usually ignored. Why is that?

Perhaps the answer is that we assume that law is already transparent, because transparency is the core formal principle of law. Law has strong formal transparency: statutes, regulations and important caselaw are always published; if they are not published, according to the principle of legality, they are not law. Individuals, in certain situations, have non-derogable rights to legal information. The rule that ignorance of the law is no excuse for illegal activity is premised on the idea that ignorance of the law is a choice, and that any person who wishes to educate themselves about their rights and obligations can do so.

Despite this, law often fails to create effective transparency; that is, transparency which actually communicates information from a source to a receptor, with the information then being processed and understood by the receptor (Heald 2006 p.35). It is safe to say that no-one – not even lawyers – are actually aware of more than a fraction of the rights and duties they possess. To some degree, this is an inevitable result of the size and complexity of law: it is also in part a result of the inherently uncertain nature of law – legislative, jurisprudential, implementation and social changes constantly alter the meaning of laws.

Despite these challenges, transparency is central to law. Since the 1970s, a prominent approach in enhancing transparency has been that of the plain language movement, demanding a more straightforward, comprehensible and logical style of language and structure in legal instruments. However, this method has limitations, is still not uncontroversial, and is criticised as being of more use to lawyers than to anyone else. It is also a somewhat restricted approach, focussing as it does solely on the language and structure of legal documents.

In a separate, and relatively isolated, area of law, the Creative Commons initiative has created an innovative mode of legal communication based on the concept of multi-layered instruments: copyright licences consisting of a legal code drafted in 'traditional' legal style and a 'human-readable' deed drafted in plain language and containing a simplified version of the code's substantive content.

This paper assesses whether, and to what extent, the Creative Commons multi-layered drafting practise has the potential to circumvent the limitations of traditional plain drafting, thereby increasing legal transparency at the level of individual instruments.

The first part examines the plain language movement, its intentions, and the strongest criticisms which have been levelled against it. The second part assesses the Creative Commons licences, especially their multi-layered nature. As multi-layered drafting is very rarely the subject of scholarship on the Creative Commons, only one significant criticism has emerged – that of a potential disconnect between the legal code and the plain deed – which is discussed as part of the final section, which compares the features of multi-layered instruments to the failures of plain language, and suggests settings in which multi-layered instruments can increase transparency beyond what can be achieved by plain language alone.

2 The Plain Language Movement

2.1 Background

The plain language movement is an attempt by lawyers to escape the (justified) reputation of law and lawyers as using language to needlessly obfuscate legal information. Availability of information is a central aspect of transparency, but information is worthless unless it is clear and comprehensible to the intended beneficiaries of the transparency (Heald 2006 p.35). The plain language movement is inextricably wedded to these ideas: Bekink defines plain legal language as 'legal communication that is clear, understandable, accessible and user-friendly' (Bekink & Botha 2007 p.37). The plain language movement in law is focussed on the style and structure to be used when writing legal documents: it will be notable later that Creative Commons has not adopted a strong approach of plain language in drafting its 'lawyer-readable' codes.

The idea that law should be simplified started to take hold as a 'movement' during the 1970s, (Penman 1992 p.1) with an initial focus on government-produced documents – legislation, regulations, explanatory notes etc. – and on consumer contracts (Assy 2011 p.337).

The plain language movement's influence was first felt in the US, (Bekink & Botha 2007 p.39; Penman 1992 p.1) and has since spread to various other jurisdictions, including Australia (Butt 2002 p.178; Penman 1992 p.1), South Africa (Bekink & Botha 2007 p.42), and the EU in its SLIM initiative.²¹ There is also an increasing trend among private organisations such as banks to simplify the language in their consumer contracts and internal documents (Assy 2011 p.338), and a related increase in governments simplifying non-legal public information, such as that seen in the US Plain Writing Act of 2010.

The plain language movement is motivated by the above-mentioned considerations of legality, alongside democratic values which demand that law, as a product of government, should be readily open to public scrutiny (Assy 2011 p.378). In addition, there are important practical concerns: the impact of plain language documents on lay readers has not been reliably tested, (Assy 2011 p.387) it has been demonstrated that the use of plain legal language makes the work of lawyers more efficient (Butt 2002 p.783). Judges have also expressed a preference for simpler, more comprehensible submissions (Campbell 1990 p.15-16; Butt 2002 p.184). Finally, some lawyers wish to combat a perceived suspicion among clients that lawyers deliberately make communication difficult in order to rake in more fees (Butt 2002 p.185).

2.2 Plain Language Rules

The plain language movement is characterised by a multiplicity of differing summaries of best practise and writing rules: the following is merely a general summary of these, to give a broad view of plain language's principles.

The rules of plain legal language tend to focus on two aspects of writing: vocabulary and overall style. Traditional legal vocabulary is subjected to especially vicious criticism, and was the original target of the movement (Penman 1992 p.9). Many uses of language are discouraged, including archaic, uncommon or Latin terms; common words with uncommon meanings (such as 'shall' as an imperative) (Assy 2011 p.399); and strings of synonyms (Butt 2002 p.175, 180). Terms of art and jargon are also criticised, although more cautiously, for fear of losing the specific meanings which are attached to such terms (Assy 2011 p.399; Butt 2002 p.182-183).

21 Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, [1993] OJ C 116/1, para. 1.

Having been criticised for oversimplification in focusing on ‘bad words’, (Penman 1992) plain language advocates now argue for the use of clear document structures, including clearly demarcated sections and tables of contents; and a logical ordering of points, intended to make navigation easy (Bekink & Botha 2007 p.38; Butt 2002 p.179). Guidance also exists on sentence structure and punctuation (Bekink & Botha 2007 p.28-39; Butt 2002 p.179-180). The most significant element for our purposes, however, is the following: lawyers are told to write for their audience, but to avoid excluding other audiences (Butt 2002 p.178-179).

2.3 Criticisms

The criticisms of the plain language movement can be grouped, for our purposes, into three broad – sometimes overlapping – categories. The categories reveal distinct limitations of plain legal language, which can serve as ‘targets’ in assessing the effectiveness of the Creative Commons’ multi-layered model.

The first category argues that plain language reduces the constitutive value of the legal document. This is particularly important in law: while incompleteness or lack of clarity usually results in readers not obtaining all the information they sought, the same defects in a legal instrument may result in a legally binding obligation, entitlement or agreement being substantively distorted. The second category argues that even after legal instruments have been ‘simplified’, their content is still not intelligible to large parts of their audience. Connected to this is the third category: contextual meaning. These criticisms argue that regardless of how well a reader understands the contents of the instrument, they will still not be properly appraised of the legal situation, since only a lawyer can have sufficient contextual knowledge to truly understand the situation.

2.3.1 Constitutive Quality

The first aspect of constitutive criticisms focuses on the necessity of tradition. The plain language rules above highlight legal conservatism: legal drafting tends to use terms, phrases and structures which are archaic or unusual (Assy 2011 p.399). These standard forms provide lawyers and clients with security: as they have been litigated over in the past, it is easy to predict how courts will interpret them in future (Campbell 1990 p.16).

In addition, critics are generally sceptical of the claim that significantly simpler language than the norm can create sufficiently precise law. Assy argues that using simpler language inevitably involves making meanings vague or ambiguous. This is presented as a result of the abandonment of technical terms, opening the way for subjective interpretation of ‘ordinary’ terms (Assy 2011 p.393). However, even supposedly clear

technical terms are still subject to dispute and litigation over their meanings (Butt 2002 p.175): language is fundamentally uncertain, and it is impossible to ensure that all readers understand a text in the way that the author understood it (Penman 1992 p.14).

This vagueness of meaning is itself detrimental to transparency: if a clause is ambiguous, then it is impossible for anyone to perceive its 'true' meaning no matter the language employed. This increases the chance of miscommunication, litigation, and needless cost and difficulty. It would be cheaper and easier to hire a lawyer to explain the original, non-plain instrument.

2.3.2 Lack of Comprehensibility

Lack of legal clarity, discussed above, obviously impacts the comprehensibility of an instrument. However, another aspect of in clarity is also relevant: even if the legal meaning is clear – to a lawyer, or a judge – despite the same vague language being used (a difficult thing to imagine, but necessary to frame the problem in a manner which is relevant to multi-layered drafting), the subjective meaning of 'ordinary' words can still lead to confusion for readers.

There is also a much-debated question of pitching. The instruction to 'write for [your] audience, but to avoid excluding other audiences' (Butt 2002 p.178-179) is a difficult proposition. In many cases, such as legislation, the potential audience of an instrument is very wide; the decision on how simple the drafting should be has thus been described as striving for the lowest common denominator (Assy 2011 p.381), implying that if an instrument is accessible to an incomplete majority of its audience, it fails to be truly transparent. Although this is an extreme claim, it is true that pitching is a difficult question of degree, and some readers will inevitably be excluded.

2.3.3 Necessity of Contextual Understanding

Finally, some criticisms argue that no matter how clear the instrument, it is impossible to understand one's position fully without having knowledge of the legal context. Several factors contribute to the necessity of this contextual knowledge.

Firstly, the arguments around technical terms also fit into this category. The specific meaning of a technical term is a matter of contextual understanding; they can only be understood by reference to other sources, such as caselaw and other related concepts (Assy 2011 p.395). Those legal rules which are commonly referred to by the name of the

case which established them, such as Francovich liability²², are a paradigmatic example. Secondly, a user must have enough knowledge of the sources of law, and the relationships and hierarchies between them, to allow her to correctly determine which instruments apply to her situation (Assy 2011 p.394).

Thirdly, it is sometimes argued that understanding the contents of the instrument is worthless if the reader is unable to enforce or defend against the instrument in court (Assy 2011 p.394). This relates, firstly, to procedural law knowledge which is necessary for navigating court proceedings; and secondly, to other rules of substantive law, as well as e.g. rules of statutory interpretation, which should be included in a strong self-represented legal argument. This criticism assumes that legal knowledge which does not create the ability to win a court case is essentially worthless.

2.4 Limits of the Criticisms

Criticisms of plain language are often strongly idealistic in nature. As evident from the arguments surrounding knowledge of procedural law, the goal of plain language is taken to be that of enabling absolutely anyone to successfully enforce their rights in court, entirely without representation (e.g. Assy 2011 p.382-383). This goal is inevitably unrealistic, and more importantly, the plain language project should not be dismissed simply because it cannot achieve this utopian goal.

The heroic picture of an individual representing themselves in court is not the only, or even the primary, setting which legal transparency should address. Max Weber's conception of modern legal systems was that they are 'gapless', in such a way that every single interaction in society is either an application, and infringement or an enforcement of the law (Weber 1978 p.657). This idea eloquently makes the point that the function of law extends far beyond the courts. Legal transparency is no less valuable if its greatest impact is in informing individuals of their rights and obligations in the context of ordinary circumstances and everyday legal choices. Such information can also allow individuals to make more informed decisions, avoid problematic legal interactions, and perhaps forestall litigation altogether. Legal transparency initiatives, then, should be assessed in the light of the multiple settings in which beneficiaries wish to use them.

22 Named for the case *C-6/90 Francovich v Italy* [1991] ECR I-05357, which first established the right of citizens to sue their governments for damages caused by breaches of EU law; the term now encompasses various later rules on when such a remedy is or is not available.

In addition to multiple settings, another complicating factor is that of multiple audiences. Again, critics of plain language have sometimes taken an extremist view of this: only if plain language makes legal information immediately accessible to a perfectly naïve reader is it successful. This, too, is an unduly limited view. Studies have suggested that plain language drafting can create significant efficiency benefits for legal professionals (Assy 2011 p.383). Even returning to the typical lay audience, individuals themselves have varying pre-existing levels of knowledge, both of (certain areas of) law and of the sometimes complex factual issues which law addresses: a person who has managed large businesses, for example, will likely find the law on corporate groups easier to understand than a person who has not, even if neither of them has any legal experience.

These observations about audience are superficial. Creating from them a clear, defined set of goals for legal transparency, based on identifying and measuring the distinct audience segments which legal information should serve, would be exceedingly beneficial, potentially impossible, and far beyond this author's abilities. Even in the absence of such a classification, however, it can and should be borne in mind that that legal instruments serve multiple audiences, and that those audiences are more complex than 'lawyers' and 'everyone else'.

2.5 Conclusion

The plain language movement, then, is a useful and influential tool in improving the transparency of legal instruments. Much of its advice has a certain character of being 'merely' common sense (and good grammar), but the fact that the drafting methods it advocates are so commonly absent in legal instruments demonstrates that these are common sense rules which are worth discussing academically.

However, the plain language movement has been harshly criticised. Although criticisms are sometimes overstated, and sometimes take a very narrow view of the concept of transparency in law, they are nonetheless valid, and do illustrate that the approach of plain language, while very valuable, has limitations. In the following sections, the multi-layered drafting model of the Creative Commons will be examined, and ultimately tested against the limitations of the plain language movement. In short, these limitations are:

- The potential for plain language instruments to be of insufficient legal quality and clarity to fulfil their constitutive role.
- The problem of even plain language drafting failing to make the content of the instrument fully comprehensible to the reader.
- The problem of the reader being left with incomplete understanding, regardless

of the quality of the instrument's drafting, due to the necessity of contextual understanding.

These limitations must furthermore be considered in the light of the importance of the multiple settings in which legal instruments are used, and of multiple audiences.

3 Creative Commons

3.1 Copyright Law

Copyright law is not the focus of this analysis, but as multi-layered drafting has been pioneered in the copyright area, it is useful to briefly address some of most salient features of copyright law.

One of the most unusual aspects of copyright law is its degree of global harmonisation. The 164-member Berne Convention, first ratified in 1908, (Torremans 2010 p.32) became hugely important with the accession of the US in 1989 (MacQueen et al 2011 p.40.); its influence has been extended even further by the World Trade Organisation's TRIPS treaty, which mirrors the main substance of the Berne Convention (Torremans 2010 p.29-33).

The Berne Convention provides relatively comprehensive regulation of certain aspects of copyright law: it requires automatic copyrighting of all published works (Art. 5(2)) and a minimum copyright term of the author's lifespan plus fifty years; gives authors a non-transferable, non-derogable right to attribution of works, (Art. 10*bis*) and allows for fair dealing or fair use exceptions, although the content of these exceptions is left to national law (Art. 9). The Berne Convention has thus created a very homogeneous environment globally: apart from a few issues which are regulated by national law and some non-compliance by Berne members such as the US, (Corbett 2011 p.521) there is general alignment between different jurisdictions' copyright law. This is particularly important in relation to Creative Commons licences, as a global, online project used in hundreds of jurisdictions (Creative Commons (Website): Licence Ports by Jurisdiction).

Secondly, relationships between licensors and licensees are essentially contractual, (Goss 2007 p.964) and there is almost total freedom for parties to determine their license terms. This freedom is counterposed by the default 'all rights reserved' rule, under which, unless an author licences their work, all copying, distribution or reuse of works is prohibited

(Boyle 2008 p.181). There are two exceptions to the freedom of licensors. Under the Berne Convention and most national law, authors have limited moral rights which cannot be 'licensed away', the most important of which is the right to attribution as above. National laws also provide exceptions for fair dealing and fair use, although the definitions of these terms vary (MacQueen et al 2011 p.40).

Related to this freedom is the fact that the copyright system has been set up in such a way that engagement by authors is optional. Unlike many other areas of law, in which individuals must 'claim' their rights before those rights can be effective, authors acquire copyright without any action on their part.

Finally, copyright law is very poorly understood by the majority of its users. Studies commissioned by Creative Commons in the US have found 80% of individual content creators (mainly hobbyists) to believe that none of their work is copyrighted, and a similar proportion of content reusers to believe that none of the work they have used is copyrighted (Creative Commons 2009 p.45). This is despite the fact that it is not considered legally possible for work to be non-copyrighted unless the life+50 term has expired (Goss 2007 p.970).

3.2 The Creative Commons Project



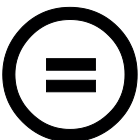

3.2.1 Background

The Creative Commons project was launched in December 2002 (Boyle 2008 p.180) and its founders have all campaigned for the introduction of less restrictive copyright laws (Goss 2007 p.976). However, the Creative Commons copyright licences themselves are relatively neutral, allowing for both permissive and restrictive terms; this has been credited in part for their widespread popularity, including among traditional supporters of restrictive copyright (Boyle 2008 p.183).

Creative Commons licences were created to resolve what the organisation perceives as a gap in US copyright law: the absence of a mechanism allowing authors to unilaterally disclaim all or part of their copyright. Traditionally, copyrights have been "relinquished" through individual licensing contracts; but the transaction costs involved in this process can be high, especially online where many works' authors can be difficult to trace or contact (Corbett 2011 p.509). Creative Commons licences, described by James Boyle, another CC founder, as 'a second-best private law hack' (Boyle 2008 p.183-184) to circumvent the shortcomings of public copyright law, are used by authors to unilaterally licence works for use by anyone.

The Creative Commons project has a heavy focus on ease of use and accessibility. This is due to the social environment in which copyright law now operates, especially online: there is a specific and very strong motivation among actors involved with copyright to encourage content users to engage with the law. Piracy of copyrighted works is a widespread problem perceived as doing significant financial damage to creative industries. Research has shown that the majority of individuals who breach copyright law do so knowingly, (Russi 2011 p.126; Heitanen et al 2008 p.38-39) and there is a heightened fear around Creative Commons licences that any kind of legal complexity will put users off, leading them to ignore the existence of copyright altogether and use works in whatever way they wish (Seshadri 2007 p.5) Although the financial impact of copyright violations is debated, it is generally accepted that law should not be allowed to become dead letter, and so simplicity is pursued to make legal licensing as accessible as possible.

3.2.2 Licences

 BY	<p>The BY term is included in all CC licences, and requires attribution for the author of the original work in any redistribution or reuse.</p>
 NC	<p>The NC (non-commercial) term is included in three of the six licences, and prohibits redistribution or reuse of the work 'in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.'</p>
 ND	<p>The ND (no derivatives) term is included in two of the six licences, and allows redistribution of the work in its original form, but prohibits alterations of the work.</p>
 SA	<p>The SA (share-alike) term is included in two of the licences, and requires any derivative works to be licensed under the same, or similar, terms as the original work. It cannot therefore be used alongside ND.</p>

There are six Creative Commons licences, which are all worldwide, royalty-free, non-exclusive and perpetual (Corbett 2011 p.512). They are constructed out of up to four modular permissions, shown above, which are intended to cover the vast majority of potential uses:

These four terms can be combined in whatever way the licensor wishes, except that BY cannot be omitted, and ND and SA are mutually exclusive. Thus, there are six possible combinations and six corresponding licences. Through these limited options, the goal of making the licences as straightforward as possible is certainly achieved. The most complex Creative Commons licence available contains only five core terms in its 'human-readable' deed:

"You are free:

to Share – *to copy, distribute and transmit the work*

to Remix – *to adapt the work*

Under the following conditions:

Attribution – *You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).*

Noncommercial – *You may not use this work for commercial purposes.*

Share Alike – *If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.*"²³

If simplicity is believed to promote understanding of legal terms by laypeople, then it is hard to imagine a more comprehensible licence. There are also practical motivations for the Creative Commons organisation to keep the number of licence terms low: each new term which is added increases the number of separate licences – each with three layers of drafting – which must be maintained and, eventually, translated and adapted for the 70 legal systems involved in the Commons porting project (Creative Commons (Website): Licence Ports by Jurisdiction). This concern was a factor in the retirement of all licences not including the BY term in 2004, which were eliminated due to low demand (Otis Brown 2004).

The second characteristic feature of Creative Commons licences is their triple-layered drafting. Each licence consists of three elements: a legal code, written in 'legalese', and

23 CC BY-NC-SA 3.0 Unported (international) commons deed, retrieved from: <http://creativecommons.org/licenses/by-nc-sa/3.0/>

closely resembling any other licence or contract; a Commons deed, written in ‘human-readable’ language (as reproduced above), which is reduced from the legal code down to a few bullet points; and metadata, which is embedded into webpages containing Creative Commons licensed works, and allows search engines to search for content released under a specific licence. Founder James Boyle has described the intention behind this as ensuring that the licences ‘can be read by two groups that normal licenses exclude – human beings (rather than just lawyers) and computers.’ (Boyle 2008 p.179-181)

Although the metadata is an important element, it will be set aside here. The first thing that a comparison of the legal codes and the commons deeds reveals is the use of a very extreme form of plain language drafting in the deeds: the deed is written in the active voice (‘You are free to...’), technical terms – with the exception of ‘moral rights’ and ‘fair use’ – are largely avoided, and the deed is well structured, with the sections clearly delineated and identified.

This simplicity does, however, come with a price. Many details which are present in the code are absent from the deed, such as specific rules on the form of attribution required (CC BY-NC-SA 3.0 Unported Code §4(d)), removal of attribution on request (§4(a)), the exercise of the author’s non-relinquishable moral rights (§4(f)), and the legal consequences of a breach of the licence (§4(e)(ii)). These clauses are considered, debatably, to be sufficiently peripheral or pedantic that their inclusion in the deed is not necessary for readers of the deed to gain a generally sufficient understanding of the terms of the licence. Given that these details are relatively few and not overly complex, they could be included in the deed without significantly impacting comprehensibility – their omission is a sign of the extreme simplifying approach of the Creative Commons.

Another type of information which is omitted from the deed is those common clauses which function largely as legal housekeeping, and which have marginal impact on the substantive content: for example, the largely procedural §8(c) prescribes that, should a particular clause in the licence be deemed invalid by a court, the remainder of the licence will retain its force. The dearth of reported caselaw on the Creative Commons licences suggests that litigation is unlikely to be of major concern to their users, and so the exclusion of §8(c) from the deed is more easily justifiable.²⁴

24 Creative Commons licences have been enforced in a handful of cases, notably *Adam Curry v Audax Publishing B.V.* [2006] ECDR 22; *Sociedad General de Autores y Editores (SGAE) v Owner of Buena Vistilla Club Social*, Madrid Court of Appeal (28th section) 5 July 2007 and *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc* 535 F.3d 1373. The Creative Commons organisation has also assembled a list of nine reported cases with a connection to Creative Commons licences (http://wiki.creativecommons.org/Case_Law); beyond these eleven (with *Curry* also appearing in the online list), the author is not aware of any other relevant caselaw.

Finally, plain language's requirements of explanation of technical terms – 'fair use', 'moral rights' and 'non-commercial' – are not satisfied. Although there are included 'explanations' of fair use and moral rights, they are either vague and very brief – stating that certain protections 'may' apply in 'most jurisdictions' in the US/international, French and Hong Kong deeds²⁵ – or omitted altogether, such as in the case of the Dutch deeds.²⁶ 'Non-commercial' is not defined in any deed, although this is largely because the term has no independent meaning, and even the legal code's definition – precluding 'exercise of ... rights ... in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.' (§4(c)) – has itself been criticised for being too vague (Creative Commons 2009).

3.2.3 Relationship Between Code and Deed

The Creative Commons licences, then, are unique in that they consist of both a legal code and a plain language deed. Compared to traditional legal instruments, which consist of only one 'version', what is the relationship between the code and the deed?

There are two possible approaches which can be taken on this point. The immediately obvious answer is that the code forms the legally binding instrument, while the deed functions as a summary, or an explanatory note, having no legal value in itself. This is the approach which is taken by the Creative Commons organisation; all Creative Commons deeds have the following disclaimer attached:

"The Commons Deed is not a licence. It is simply a handy reference for understanding the Legal Code (the full licence) – it is a human-readable expression of some of its key terms. Think of it as the user-friendly interface to the Legal Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual licence."

This, however, is not the approach which seems to have been intended by the Creative Commons' founders. According to Larry Lessig, '[The] three expressions together – a legal license, a human-readable description, and machine-readable tags – constitute a Creative Commons license.' (Lessig 2004 p.282-283) The code and the deed are not independent of each other: taken together, they form the legally binding instrument. This approach results in the deed itself having a constitutive function: a licensor seeking to enforce a licence could rely on a paragraph of the deed with just as much legal force as they could rely on a section of the code.

25 CC BY-NC-SA 3.0 France deed (<http://creativecommons.org/licenses/by-nc-sa/3.0/fr/>) and CC BY-NC-SA 3.0 Hong Kong deed (<http://creativecommons.org/licenses/by-nc-sa/3.0/hk/>)

26 CC BY-NC-SA 3.0 Netherlands deed (<http://creativecommons.org/licenses/by-nc-sa/3.0/nl/>)

It must be borne in mind that, while an integrated approach which includes the deed as part of the instrument is advocated by Larry Lessig, and will be advocated again here, it does not correspond to the reality of Creative Commons licences today. Currently, Creative Commons deeds have no legal effect.

3.2.4 Adoption

By all accounts, Creative Commons licences have been adopted enthusiastically by authors. Although it is very difficult to give reliable estimates of the number of CC licensed works, best estimates have risen from 1 million online works within 6 months of introduction (Lessig 2004 p.285), to 400m in 2011 (Linksvayer 2011). The licences have attracted strong support from academics (Corbett 2011 p.515), but have also been adopted by a variety of organisations and public bodies.

Various governments, including the Australian federal government and the Obama administration, have applied Creative Commons licences to their publications (Bannister 2011 p.1100; Corbett 2011 p.516); the licences have also been adopted by academic publishers, such as BioMed and the Public Library of Science, wishing to make research information more widely accessible (Corbett 2011 p.516). Educators, both at school and higher education levels, have also adopted CC licensing; with universities such as MIT and organisations such as TED Talks offering online lectures – and in the case of some universities, course materials and even entire courses – for free, under Creative Commons licences (*ibid*).

On top of these, the more stereotypical users of Creative Commons licences, online artists, are well-represented; various free media-sharing communities such as Flickr have Creative Commons licensing built into their basic design (Boyle 2008 p.179-180), and there are also several for-profit music sharing websites which make use of CC+, such as those run by Magnatune, Beatpick and Jamendo (Russi 2011).

4 Analysis

4.1 A Constitutive Deed

Earlier, I stated a preference for an integrated approach to the deed, which considers the deed as an inextricable part of the instrument, with its own legally binding, constitutive nature. As well as being important in regard to the goals given at the end of part two, this idea is connected to the criticism that Creative Commons licences risk a disconnect

between the contents of the code and of the deed (Seshadri 2007 p.29).

Under the current system, under which the deed functions as a summary with no legal effect, any conflict between the code and the deed will be resolved by reference to the code. This could result in parties not being bound by a term they expected to be bound by, or vice versa; or in a party's reasonable interpretation of a deed term being ignored because it is incompatible with the code's wording. Although the Creative Commons licences do not contain such conflicts, if multi-layered drafting becomes more widely used, it is inevitable that such a conflict will arise at some point.

Under a constitutive deed approach, the licence would be interpreted by reference to both the code and the deed, ensuring that a user's understanding of the deed would not be automatically excluded by different language in the code. Thus, the potential risks of a disconnect would be largely eliminated.

Although this has the potential to complicate the interpretation of the instrument as a whole, it is a complication which has long been managed in law: international and regional courts have to deal constantly with instruments which exist in multiple languages, and frequently consider official translations alongside the authoritative text. Similar techniques could easily be applied to multi-layered instruments, with the deed and code being examined together in order to determine the most reasonable interpretation of the instrument as a whole. In order to avoid problems should an irreconcilable conflict arise, it would be necessary to designate one layer of the instrument to take precedence. The obvious choice would be the legal code, as it is more complete than the deed, and lends itself more to traditional legal analysis. The constitutive deed approach thus allows for multi-layered drafting without significant risks arising from mismatches, while assigning precedence to the code provides a reliable method of resolving conflicts between the code and the deed.

4.2 Are the Problems Solved?

Based on the above analysis of Creative Commons licences, and the concept of the constitutive deed, it can now be asked whether or not the layered form of the licences can resolve or circumvent the problems identified with plain language drafting in part 3; and, more interestingly, whether a similar layered drafting approach be valuable in other areas of law.

The problems were organised into three categories: constitutive criticisms, according to which the use of plain language degrades the legal quality of the instrument;

comprehensibility criticisms, according to which even plain language cannot illuminate the meaning of the instrument's contents to most readers; and criticisms surrounding the question of contextual knowledge, without which, it has been argued, no single instrument can ever truly inform its reader.

4.2.1 Constitutive Quality

The Creative Commons licences avoid the problem of plain language degrading the legal quality of the instrument, by reducing clarity and detaching from terms their defined legal meaning. Although the deed is in plain language, the code is written in a traditional legal style: the code therefore retains all the traditional, supposedly clear, characteristics of traditional legal language.

Any other legal instrument drafted using multiple layers could equally circumvent the problem of plain language degrading legal quality simply by not using plain language in the code. Even if it is argued that the code itself should be as accessible as possible, a code which uses plain language to a limited or incomplete degree would retain its legal quality with no detriment to transparency – because the transparency is primarily provided by the deed.

The deed, on the other hand, is written in plain language; and following the constitutive deed approach, this means that a constitutive part of the instrument is still written in plain language, with any weaknesses that entails. However, the constitutive deed approach calls for the deed and code to act mutually as interpretative guides, so any confusion caused by the plain language of the deed can be resolved by reference to the code.

4.2.2 Lack of Comprehensibility

If vagueness and ambiguity is avoided in the legal code by using traditional language, aren't these problems simply transferred into the plain language deed, to the detriment of its comprehensibility? This criticism relates not to legal vagueness, but to vagueness of communication – the idea that the obligations are clear, because they are stated clearly in the code; but the communication of these obligations to the reader of the deed is not, because the reader has only read the 'vague' terms of the deed. This criticism is not addressed by multi-layered drafting. The intention is that the majority of users should only have to read the deed in order to acquire precise legal information. If the terms which are used, in the deed, to replace technical terms are indeed vague, then the reader receives vague information.

However, it is not reliably established that plain language substitutes are necessarily vaguer than technical terms. Although there is no strict distinction between 'technical terms' and 'normal terms', the Creative Commons codes contain very few overtly technical

terms. One example is 'fair dealing', in §2. The term, unhelpfully for this analysis, is reproduced as-is in the deeds. If, however, the Creative Commons were to replace the term 'fair dealing' in their deeds with a phrase such as 'your right to reproduce the work for purposes such as criticism, comment, news reporting, teaching, scholarship or research' (definition taken from Goss 2007 p.989), such a substitution would necessarily be clearer to readers who do not know what fair dealing means, which is the majority of the deed's audience (Corbett 2011 p.511). Those users who are more familiar with copyright law may choose to refer to the code for the technical term 'fair dealing', and all the precise legal meaning which is attached to that term.

Another related criticism of plain legal language is that a truly transparent instrument must be immediately understandable to every potential reader, and this is impossible. The potential audience of a legal instrument contains varying levels of pre-existing knowledge, both legal and factual, of language proficiency and of literacy, to name but a few; no single document will ever be perfectly comprehensible to every person in such an audience. Given the impossibility of universal comprehensibility, the question becomes one of how wide a band of potential readers an instrument should attempt to communicate with.

The Creative Commons licences' dual-layered drafting is specifically designed to address this question. Their design essentially breaks the (human) audience down into two segments: lawyers and everyone else. This is a common division, especially in plain language literature, although it is facetious: 'everyone else' is hardly a homogeneous category, and there are likely to be those who don't fall into the 'lawyer' category but would nonetheless prefer to read the code rather than the deed. However, despite this shortcoming, the existence of two documents, communicating the same information but in different styles and with different amounts of explanation and reliance on contextual knowledge, necessarily increases the range of people who will be able to quickly and easily understand at least one version. Dual-layered drafting, then, has potential to increase the range of people to whom an instrument is accessible. However, this usefulness is limited by the necessity of clearly defining segments of the audience, and by the fact that even two versions of an instrument still cannot cater to the full diversity of the audience.

Having created a precedent for multiple layers, however, multiple deeds could be drafted for a single instrument, targeting different audiences. There are problems inherent in such an attempt: in many cases the difficulty of defining audience segments would make it impossible to create truly constructive 'extra' deeds. On the other hand, it could be tempting to produce a multitude of deeds, each aimed at a different segment of

the audience; and in doing so create much extra work for uncertain benefit; increase the likelihood of mistakes and inconsistencies, which are especially damaging if the deed is constitutive; and reduce the credibility of the deeds.

However, in those cases where a predictable audience exists, with a few easily identifiable and relatively homogeneous segments, the creation of two or even three deeds could increase the potential for a multi-layered instrument to communicate effectively. Such a situation might, for example, arise during the drafting of legislation regulating healthcare provision: one deed might be aimed at healthcare providers, focussing on internal regulations with little relevance to patients (such as paperwork requirements) and assuming a high level of medical knowledge in the reader; a second deed might be aimed at patients, prioritising those provisions relevant to the 'output' stages of care (although not excluding other provisions more than is necessary), and explaining medical concepts more carefully.

4.2.3 Necessity of Contextual Understanding

The final limitation of plain language which must be addressed is its inability to remove the barriers to understanding which may be created by readers lacking necessary contextual understanding of the law. By itself, multi-layered drafting does not solve this problem; however, it is more practical for a deed to explain necessary contextual information than it is for a legal code, or an unlayered instrument, to do so.

Above, three types of contextual understanding were highlighted. The first type, knowledge of which instrument is applicable to an individual's situation, is inapplicable to Creative Commons licences. Licensors choose the licence they prefer; licensees are offered only one instrument.

In general, too, multi-layered drafting does not solve this problem. A deed may allow a reader to very quickly ascertain whether or not the instrument she has found is the relevant one, but it does not help with the initial search.

Secondly, understanding of procedural law was claimed to be necessary for successful self-represented litigation. The relevance of litigation has already been questioned – a count of eleven 'prominent' Creative Commons cases²⁷ set against 400m Creative Commons licenced works (Linksvayer 2011) suggests a very low incidence of self-represented litigation.

27 Creative Commons licences have been enforced in a handful of cases, notably *Adam Curry v Audax Publishing B.V.* [2006] ECDR 22; *Sociedad General de Autores y Editores (SGAE) v Owner of Buena Vistilla Club Social*, Madrid Court of Appeal (28th section) 5 July 2007 and *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc* 535 F.3d 1373. The Creative Commons organisation has also assembled a list of nine reported cases with a connection to Creative Commons licences (http://wiki.creativecommons.org/Case_Law); beyond these eleven (with *Curry* also appearing in the online list), the author is not aware of any other relevant caselaw.

Nonetheless, it is true that multi-layered drafting does not provide contextual information about procedural law, and it would not be practical for it to do so.

Thirdly, it was argued that understanding of substantive rules outside of the instrument's scope is necessary for a user to understand the instrument fully.

As the Creative Commons licences take the form of contracts which are largely self-contained, the amount of substantive contextual knowledge needed to understand them is limited. The two main external legal rules which are embedded in Creative Commons licences are the concepts of fair use/fair dealing and moral rights. Both of these create exceptions to the terms of the licences – fair dealing allows uses which the licence appears to prohibit, while moral rights prohibit uses, such as reproduction without attribution, which the licence may appear to allow – and studies have shown that both are poorly understood by CC users (Corbett 2011 p.511).

Unfortunately, the Creative Commons deeds do a poor job of explaining these concepts, relying on deliberately vague formulations:

“In addition to the right of licensors to request removal of their name from the work when used in a derivative or collective they don't like, copyright laws in most jurisdictions around the world (with the notable exception of the US except in very limited circumstances) grant creators “moral rights” which may provide some redress if a derivative work represents a “derogatory treatment” of the licensor's work.”

This vagueness reflects the desire to explain concepts in a way which is applicable to multiple jurisdictions, which the majority of legal instruments do not have to contend with; but there are other factors which impact the plausibility of explaining context in a deed.

The first issue relates to the fact that every clause in a legal instrument creates law. If constitutive instruments define legal concepts in a manner other than that which exists in law at large, there is a clear tension, which may even result in the instrument being nullified. This is perhaps less of a concern for private instruments such as contracts, but if, for example, a statute were to include an explanation of a rule laid down by a previous statute, the potential for confusion would be great, and legal certainty would be seriously damaged.

Multi-layered instruments, however, are less susceptible to this problem. Although both the code and deed are constitutive, the code is the primary instrument with legal force. It could even be argued that the deed should not be allowed to create provisions which do not exist in the code. This allows for explanations of existing law, clearly marked as such in order to avoid confusion for readers, to be included in the deed without creating conflicts with statute or other law.

The second factor to be considered is the length and complexity of the requisite explanations. The Creative Commons deeds are exceedingly short, but this is due to their focus on ease of use, and is not a necessary characteristic for all multi-layered instruments. Nonetheless, there are certainly limits to what can be achieved by explanation, and in some cases, there will be too many relevant doctrines to explain, or it will not be possible to explain those doctrines briefly. However, with judicious selection of what is explained – determined by the most prominent audience and use for the instrument – many layered instruments could still benefit.

Contrary to the importance of constitutive consistency mentioned above, the Australian Creative Commons licences demonstrate this approach in their legal code, which provides, under §4E:²⁸

“Moral rights remain unaffected to the extent they are recognised and nonwaivable at law. In this clause 4E, “moral rights” means the personal rights granted by law to the Original Author of a copyright work. For example, Part IX of the Copyright Act 1968 (Cth) grants authors the right of integrity of authorship, the right of attribution of authorship, and the right not to have authorship falsely attributed.”

If combined with the generic explanation which is, strangely, still used in the Australian deed, the result might be something like the following:

“In addition to the right of licensors to request removal of their name from the work when used in a derivative or collective they don’t like, the Copyright Act 1968 grant creators “moral rights” which provide redress if a derivative work represents a derogatory treatment of the licensor’s work.”

This would satisfy the demands of clarity and completeness – the issues of attribution and false attribution are omitted, as the former is already addressed in the deed and the latter is not particularly relevant – and would not add an undue burden of length or complexity to the Creative Commons deed.

The third factor to be considered when attempting to explain contextual issues in a deed is that of the omnipresence of legal uncertainty. This is very relevant to the Creative Commons licences: fair use, moral rights (Corbett 2011 p.517-520) and non-commercial use (Creative Commons 2009) are not clearly defined in law. Where such uncertainty exists, no mode of communication can ever precisely inform a reader as to what that legal concept means for their situation.

28 CC BY-NC-SA 3.0 Australia code (<http://creativecommons.org/licenses/by-nc-sa/3.0/au/legalcode>)

On balance, then, it is more often practical for a multi-layered instrument to circumvent the problem of contextual knowledge than for a single-layered instrument to do so, but it is still not always possible. Contextual knowledge needed to select instruments or to conduct court proceedings cannot easily be provided by multi-layered drafting. However, substantive context can be explained to some degree: constitutive concerns are avoided by the restriction of explanations to clearly marked sections of the deed; and while length and complexity is a concern, in cases where careful selection of information can result in a relatively short list of contextual issues which need explaining, explanation is practical. However, where legal uncertainty appears, it is far more difficult to communicate contextual information in any meaningful way.

5 Conclusion

Effective legal transparency is a crucially important goal, but one which is no less fraught with problems that transparency in government or other areas.

The plain language movement has made significant progress but has limitations: it is accused of reducing the quality of legal instruments as sources of law; of creating vagueness for readers; of failing to consistently produce instruments which are intelligible to everyone; and of failing to communicate necessary contextual information.

The Creative Commons project has also been very successful. In the context of the Berne Convention's harmonisation, Creative Commons licences have been used worldwide, and their multi-layered drafting is an innovative and apparently successful means of encouraging individuals to opt into the Creative Commons system.

On the basis of these two initiatives, I have advocated a model of multi-layered drafting which considers the plain language deed to be an integral, constitutive part of the instrument. The deed and code act as mutual interpretive guides, meaning that users are not unduly disadvantaged by relying on the deed in order to understand their rights and obligations. On the rare occasion that an irreconcilable conflict arises between the deed and the code, the code's provisions take precedence.

This model circumvents several of the barriers to legal transparency which plain language has been unable to remove. Concerns about the constitutive quality of the instrument are resolved, as the traditional, reliable legalese is preserved in the code. Vagueness is, theoretically, also preserved in the deed; but the vagueness of plain language is primarily related to the substitution of technical terms, which are in any

case not generally clear to a lay reader. In those cases where vagueness is caused by legal uncertainty, little can be done save changing the law. Multi-layered instruments do not succeed in ‘writing for every audience’, but they are able to come much closer than non-layered instruments can, and the potential for drafters to – cautiously – create more than one deed may make instruments accessible to even wider audiences. Problems of contextual understanding around instrument selection and procedural law are not resolved, but those surrounding substantive issues may be, to a not unlimited degree, by the possibilities created for including explanations within the instrument without creating messy legal consequences.

On the basis of this, then, multi-layered drafting has great potential, at the level of individual instruments beyond copyright licences, to improve legal transparency. This potential can be realised most easily when applied to instruments which are more substantively self-contained, which rely less on legally uncertain concepts, and which are more often used by readers wishing to ascertain their substantive rights and obligations than readers wishing to litigate.