

- 21 Consequently, the next question when evaluating the Creative Commons licenses in terms of moral rights is whether those rights should be waived or not. Since most jurisdictions throughout the world grant moral rights to authors, but only some of them allow for a waiver, the issue of a potential waiver presents a challenge for Creative Commons licenses. Many users within the community are in favor of a license that permits creators to “completely” waive moral rights, because only such a license would ensure that the freedom to create derivatives and build upon another’s work can be exercised to the fullest extent possible. On the other hand, it has again been argued that the Creative Commons licenses would face the risk of being vulnerable to judicial validity should the respective national copyright legislation conceive moral rights as “inalienable” and therefore proscribe any assignment or waiver of such rights. Thus, the policy question to be evaluated is which uncertainty is more tolerable: the one brought about by the possibility of claims against (downstream) users for integrity rights violation or the uncertainty brought about by having the licenses per se vulnerable to attack for providing moral rights waiver.⁴⁶
- 22 To make it even more complicated, not only does this question have to be discussed on a national level for each respective jurisdiction license; it also has an impact on an international level, since all Creative Commons licenses have to work globally as well. When drafting the moral rights wording for a national version of the Creative Commons licenses while at the same time looking at the different regulations for moral rights in different jurisdictions, the question of applicable law becomes relevant. Will the respective national copyright legislation necessarily always provide the basis for discussions and interpretation of the moral rights section of that particular associated Creative Commons license? Hence, the issue about moral rights proves perfectly how almost every legal question regarding Creative Commons licenses coincides with rules of Private International Law. In the case of moral rights, after careful consideration and consultation with the international legal network, it was agreed that most jurisdictions should implement a simple wording stating that moral rights remain untouched by the respective Creative Commons license so as to ensure validity of the license but allow for the exercise of the rights provided by the license to the fullest extent permitted by applicable law in order to respect the freedom to modify the work as broadly as possible. For most of the national jurisdiction licenses, the following simple wording served as a basis for discussion during the porting process: *“Moral Rights remain unaffected to the extent they are recognized and not waivable by applicable law.”*
- 23 This approach⁴⁷ allows the user to exercise the rights under the license to the fullest extent possible, while also protecting the license from any challenge and potential risk of invalidity based on an improper or void waiver. It also leaves enough room for interpretation at the respective national level and at the same time fits perfectly into the overall international harmonization efforts of the global porting project.
- 24 *Neighboring Rights and especially the European Database Directive:* In addition to the traditional protection of “copyrightable works”, most European copyright systems⁴⁸ also provide protection for “related rights” (“neighboring rights”) and through the European Database Directive⁴⁹ for databases (“sui generis database protection”).⁵⁰ Similar to the argumentation for the protection of neighboring rights, the Database Directive allows for the special protection of a database “which shows that there has been qualitatively and/or quantitatively a substantial *investment* in either obtaining, verification or presentation of the contents to prevent extraction and/reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.”⁵¹ Obviously, the rationale behind protection is not the personal intellectual creation, as it is the prerequisite for copyright protection in most European jurisdictions,⁵² but rather the *investment* shown by the maker of a database.⁵³
- 25 In the past, some of the European localized and translated versions of Creative Commons licenses (see Belgium, France, Germany and the Netherlands) contained a reference to the respective national legislation passed pursuant to the Database Directive by defining a “work” to include databases protected