

Overview of CS specific provisions in the Creative Commons Licenses

The purpose of this document is to provide an overview of language in the Creative Commons (“CC”) licenses that deals with Collective Rights Management.

1. Background

The CC licenses were first drafted based on US law. Version 1.0 of the licenses (called the “generic”) was released to the public in December 2002 and did not contain any language that expressly mentioned collecting societies (“CS”). When the licenses were versioned up to 2.0 in May 2004, it was decided to include specific language in the licenses that addressed the issue of CS because CC was receiving many questions about how CC licenses interacted with collective rights management.

Consequently, provisions expressly dealing with CS were introduced to clarify what CC assumed to already be the case, namely that where the CC licensor authorized the public to make commercial uses of their work (Attribution, Attribution-ShareAlike, Attribution-NoDerivatives) the licensor waived the right to collect royalties from collecting societies.

Where the licensor authorized the public to only make noncommercial uses and reserve to themselves commercial rights (ie. BY-NC, BY-NC-SA, BY-NC-ND) the license stated that the licensor reserves the right to collect from CS for commercial uses of the work.

2. Four Different Approaches

When the licenses started being “ported” to different jurisdictions, the implementation of these provisions differed according to the advice of local legal project leads based on national laws and the local collecting society arrangements. The reason for the different treatments of CS in the licenses was based in part on the different levels of hope of relevant project teams at the time of porting, of their ability to negotiate a solution with their local CS. This has resulted in a situation where we have 4 different treatments of the collective rights management Issue in the 30+ jurisdiction specific licenses:

2.1 The ‘Coexistence’ approach (also see section 3.1 for implementation examples):

The Coexistence approach was drafted based on the situation that exists in the United States. In the US, collecting societies take only a non-exclusive license from their members, members of US collecting societies can use CC licenses for their works. Under the Coexistence approach, the licensor waives the right to collect royalties via collecting societies when using non-NonCommercial licenses (ie. when using licenses that permit others to make commercial use of their works) and reserves this right when using a license with the NonCommercial (or “NC”) element (ie. when using licenses that permit others only to make noncommercial uses of their work). This approach seeks to reflect what is assumed to be the licensor’s intent when choosing whether to permit members of the public to make uses of their work under the terms of the Creative Commons license.

Jurisdictions: US, ‘Generic’

2.2 The ‘Optimistic Coexistence’ approach (also see section 3.2): these jurisdiction licenses contain very similar clarification language to the Coexistence approach. In short, the licensor waives the right to collect royalties *individually or via collecting societies* when using a license that permits commercial use (ie. one without an NC license restriction) and reserves the right to collect royalties when using a license that permits only noncommercial uses (ie. one which contains an NC license restriction). The difference between this approach and the Coexistence scenario lies in the fact that creators who reside in those jurisdictions to which the license has been ported are currently legally unable to use CC licenses when they are a member of their local CS because the local CS takes an exclusive license or assignment of rights in the creator’s work. The reason for adopting this approach in these jurisdictions was to ensure maximum consistency with the coexistence approach chosen for the US licenses.

Jurisdictions: Malaysia, Colombia, South Africa, Australia, England & Wales, Malta, Scotland, Spain, Italy

2.3 The ‘Compulsory Only’ approach (also see section 3.3): the CC jurisdiction licenses that reflect this approach contain only a clause that addresses compulsory collective management (in both sets of licenses, namely those which permit the public to make commercial uses of their work and those that limit public use of their work to noncommercial uses only). These jurisdiction licenses do not contain any language that covers voluntary collective rights management. The rationale for adopting this approach twofold: firstly because it was felt, given the inability of local CS members to use CC licenses, that it would be misleading to include express language dealing with the collection of voluntary CS royalties. Secondly this approach was chosen to accommodate for the fact that in France, some collective management is compulsory even if right-holders are not members of a collective management society (cable, reprography, private copy tax on blank media, etc.). Whereas in other cases, collective management is voluntary and governed by societies membership agreements in these cases rights holder cannot waive this exclusive right. Therefore there is no corresponding waiver present in the licenses permitting commercial uses of the licensed works.

The reason for taking this approach - as opposed to the ‘No Specific Language’ approach - was to raise awareness among licensees that using a CC licensed work according to the license grant might not be fully royalty-free.

Jurisdictions: France, Belgium

2.4 The ‘No Specific Language’ approach: These jurisdiction licenses do not contain any language expressly addressing the issues of voluntary or compulsory Collective Rights Management. Regarding this issue they mirror the structure of the pre-2.0 generic licenses. The reason for not including language regarding voluntary collective management seems to be the wish to avoid a situation where the licenses *imply* that members of Collecting Societies can use Creative Commons Licenses. Language regarding compulsory collective rights management is absent in these licenses as a result of not being present in the pre-2.0 ‘generic’ licenses which have been used as a translation template.

Jurisdictions: Germany, Austria, the Netherlands, Slovenia, Croatia

3. Examples of CS approaches in CC Licenses

3.1 Coexistence approach

Example — CC Attribution 2.5 ('generic' (based on US law)) (license permits the public to make commercial uses of the work)

<http://creativecommons.org/licenses/by/2.5/legalcode>

Section 3 ('License Grant') subsections (e), (f) relevantly read (emphasis added):

(e) For the avoidance of doubt, where the work is a musical composition:

i. Performance Royalties Under Blanket Licenses. Licensor **waives** the exclusive right to collect, whether individually or via a performance rights society (e.g. ASCAP, BMI, SESAC), royalties for the public performance or public digital performance (e.g. webcast) of the Work.

ii. Mechanical Rights and Statutory Royalties. Licensor **waives** the exclusive right to collect, whether individually or via a music rights agency or designated agent (e.g. Harry Fox Agency), royalties for any phonorecord You create from the Work ("cover version") and distribute, subject to the compulsory license created by 17 USC Section 115 of the US Copyright Act (or the equivalent in other jurisdictions).

(f) **Webcasting Rights and Statutory Royalties.** For the avoidance of doubt, where the Work is a sound recording, Licensor **waives** the exclusive right to collect, whether individually or via a performance-rights society (e.g. SoundExchange), royalties for the public digital performance (e.g. webcast) of the Work, subject to the compulsory license created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions).

Compare — CC Attribution-NonCommercial 2.5 ('generic' (based on US law)) (license restricts the public to noncommercial uses of the work only)

<http://creativecommons.org/licenses/by-nc/2.5/legalcode>

Section 3 ('License Grant') reads:

[...] The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats. All rights not expressly granted by Licensor are hereby reserved, including but not limited to the rights set forth in Sections 4(d) and 4(e).

Section 4 ('Restrictions') subsections (d), (e) read (emphasis added):

(d) For the avoidance of doubt, where the Work is a musical composition:

i. Performance Royalties Under Blanket Licenses. Licensor **reserves** the exclusive right to collect, whether individually or via a performance rights society (e.g. ASCAP, BMI, SESAC), royalties for the public performance or public digital performance (e.g. webcast) of the Work if that performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

ii. Mechanical Rights and Statutory Royalties. Licensor **reserves** the exclusive right to collect, whether individually or via a music rights agency or designated agent (e.g. Harry Fox Agency), royalties for any phonorecord You create from the Work ("cover version") and distribute, subject to the compulsory license created by 17 USC Section 115 of the US Copyright Act (or the equivalent in other jurisdictions), if Your distribution of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation.

(e) **Webcasting Rights and Statutory Royalties.** For the avoidance of doubt, where the Work is a sound recording, Licensor **reserves** the exclusive right to collect, whether individually or via a performance-rights society (e.g. SoundExchange), royalties for the public digital performance (e.g. webcast) of the Work, subject to the compulsory license created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions), if Your public digital performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

3.2 Optimistic Coexistence approach

Example — CC Attribution 2.5 (Canada) (license permits the public to make commercial uses of the work)

<http://creativecommons.org/licenses/by/2.5/ca/legalcode>

Section 3 ('License Grant') relevantly reads:

[...] For the avoidance of doubt, where the Work is a musical composition, performer's performance or sound recording:

Performance Royalties Under Blanket Licences. Licensor *waives* the exclusive right to collect, whether individually or via a performance rights society, royalties for the public performance or public digital performance (e.g. webcast) of the musical Work, sound recording or performer's performance if that performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

Mechanical Rights in Musical Works. Licensor *waives* the exclusive right to collect, whether individually or via a music rights agency, collective society, or designated agent, royalties for any soundrecording You create from the musical Work ("cover version") if Your Use of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation. [...]

Compare — CC Attribution-NonCommercial 2.5 (Canada) (license restricts the public to noncommercial uses of the work only)

<http://creativecommons.org/licenses/by-nc/2.5/ca/legalcode>

Section 3 ('License Grant') reads:

[...] All rights not expressly granted by Licensor are hereby reserved, including but not limited to the rights set forth in Section 4(b) and 4(d). [...]

Section 4 ('Restrictions') subsection d reads (emphasis added):

For the avoidance of doubt, where the Work is a musical composition, performer's performance or sound recording:

Performance Royalties Under Blanket Licences. Licensor *reserves* the exclusive right to collect, whether individually or via a performance rights society, royalties for the public performance or public digital performance (e.g. webcast) of the musical Work, sound recording or performer's performance if that performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

Mechanical Rights in Musical Works. Licensor *reserves* the exclusive right to collect, whether individually or via a music rights agency, collective society, or designated agent, royalties for any soundrecording You create from the musical Work ("cover version") if Your Use of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation.

THE FOLLOWING EXAMPLES ARE NOT INTENDED FOR FURTHER CIRCULATION. THEY ARE PURELY INTENDED TO HIGHLIGHT INTERNAL INCONSISTENCIES PRIOR TO VERSIONING TO VERSION 3.0

Furthermore there are a number of jurisdictions that contain collecting society specific language, but do not follow the reserving the right to collect (commercial uses reserved licenses) / waiving the right to collect (commercial uses permitted licenses) dichotomy:

Current England and Wales licenses (2.0):

Attribution 2.0 England and Wales

<http://creativecommons.org/licenses/by/2.0/uk/legalcode>

Section 2.4 reads:

All rights not expressly granted by the Licensor are hereby reserved, including but not limited to, the exclusive right to collect, whether individually or via a licensing body, such as a collecting society, royalties for any use of the Work.

Attribution - Non-Commercial 2.0 England and Wales

<http://creativecommons.org/licenses/by-nc/2.0/uk/legalcode>

Section 2.4 reads:

All rights not expressly granted by the Licensor are hereby reserved, including but not limited to, the exclusive right to collect, whether individually or via a licensing body, such as a collecting society, royalties for any use of the Work.

Note: this implementation makes no sense at all. As a result the licenses permitting commercial uses for England and Wales must be considered broken as they are contradictory in themselves. (The licensor does not give ‘a worldwide, royalty-free, non-exclusive, Licence’ as stated in the first sentence of section 2 of the same licenses

Current Scottish Licenses (2.5)

Attribution 2.5 Scotland

<http://creativecommons.org/licenses/by/2.5/scotland/legalcode>

Section 2.7 reads:

- a. the right to release the Work under different terms, or to stop distributing the Work, is reserved; and
- b. all other rights not expressly granted by the Licensor are reserved.

Attribution - Non-commercial 2.5 Scotland

<http://creativecommons.org/licenses/by-nc/2.5/scotland/legalcode>

Section 2.7 reads:

- a. the right to collect royalties for any commercial use of the Work is reserved;
- b. the right to collect payments via a licensing body or collecting society for any commercial use of the Work is reserved;
- c. the right to collect payments under the Public Lending Right scheme (or any public scheme that provides payment for public borrowing or use) is reserved;
- d. the right to release the Work under different terms, or to stop distributing the Work, is reserved; and
- e. all other rights not expressly granted by the Licensor are reserved.

Note: The commercial uses permitted Scottish licenses do not contain any language that clarifies that the licensor waives her right to collect royalties through CS resulting in a unclear situation for works licensed under these licenses.

Current Maltese Licenses (2.5)**Attribution-NonCommercial 2.5**

<http://creativecommons.org/licenses/by/2.5/mt/legalcode>

Section 4d ('Restrictions') reads:

For the avoidance of doubt, Licensor reserves the right to collect, whether individually or via a collecting society, royalties for use of the Work if such use is primarily intended for direct or indirect commercial advantage or private monetary compensation. Where the Work includes a sound recording published for commercial purposes or a reproduction thereof, and You use it for broadcasting by wireless means or for any communication to the public, You must pay the royalties to the collecting society representing both the performers and producers or, in the absence of such a collecting society, to the producer of sound recordings.

Note: There is no collecting society specific language (waiving of the right to collect) present in the Maltese licenses permitting commercial use. Section 3 of these licenses does however refer to non-existing subsections of section 4. This needs to be fixed.

Current Australian Licenses (2.5)

CC Attribution 2.5 (Australia)

<http://creativecommons.org/licenses/by/2.5/au/legalcode>

Section 3 ('License Grant') subsections e, f read:

For the avoidance of doubt, where the Work is a musical composition:

Performance Royalties Under Blanket Licences. Licensor will not collect, whether individually or via a performance rights society, royalties for Your communication to the public, broadcast, public performance or public digital performance (e.g. webcast) of the Work.

Mechanical Rights and Statutory Royalties. Licensor will not collect, whether individually or via a music rights agency, designated agent or a music publisher, royalties for any record You create from the Work ("cover version") and distribute, subject to the compulsory licence created by 17 USC Section 115 of the US Copyright Act (or an equivalent statutory licence under the Australian Copyright Act or in other jurisdictions).

Webcasting Rights and Statutory Royalties. For the avoidance of doubt, where the Work is a sound recording, Licensor will not collect, whether individually or via a performance-rights society, royalties for Your public digital performance (e.g. webcast) of the Work, subject to the compulsory licence created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions).

The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats. All rights not expressly granted by Licensor under this Licence are hereby reserved.

CC Attribution-NonCommercial 2.5 (Australia)

<http://creativecommons.org/licenses/by-nc/2.5/au/legalcode>

Section 4 ('Restrictions') subsections d, e read:

For the avoidance of doubt, where the Work is a musical composition:

Performance Royalties Under Blanket Licences. Licensor reserves the exclusive right to collect, whether individually or via a performance rights society, royalties for Your communication to the public, broadcast, public performance or public digital performance (e.g. webcast) of the Work if Your communication to the public, broadcast, public performance or public digital performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

Mechanical Rights and Statutory Royalties. Licensor reserves the exclusive right to collect, whether individually or via a music rights agency, designated agent or a music publisher, royalties for any record You create from the Work ("cover version") and distribute, subject to the compulsory licence created by 17 USC Section 115 of the US Copyright Act (or an equivalent statutory licence under the Australian Copyright Act or in other jurisdictions), if Your distribution of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation.

Webcasting Rights and Statutory Royalties. For the avoidance of doubt, where the Work is a sound recording, Licensor reserves the exclusive right to collect, whether individually or via a performance-rights society, royalties for Your public digital performance (e.g. webcast) of the Work, subject to the compulsory licence created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions), if Your public digital performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

Note: this implementation is different from the other ones in this approach in so far as it explicitly refers to compulsory licenses as defined by the US copyright act (next to the equivalents in the Australian copyright act and in legislation in other jurisdictions). In the current situation this implementation seems confusing.

3.3 'Compulsory Only' approach

CC Paternité 2.0 (France) (license permits the public to make commercial uses of the work)

<http://creativecommons.org/licenses/by/2.0/fr/legalcode>

Section 3 ('Autorisation) reads:

[...] L'exercice de tous les droits qui ne sont pas expressément autorisés par l'Offrant ou dont il n'aurait pas la gestion demeure réservé, notamment les mécanismes de gestion collective obligatoire applicables décrits à l'article 4(c).

Section 4 ('Restrictions') subsection (c) reads:

Dans le cas où une utilisation de l'Oeuvre serait soumise à un régime légal de gestion collective obligatoire, l'Offrant se réserve le droit exclusif de collecter ces redevances par l'intermédiaire de la société de perception et de répartition des droits compétente. Sont notamment concernés la radiodiffusion et la communication dans un lieu public de phonogrammes publiés à des fins de commerce, certains cas de retransmission par câble et satellite, la copie privée d'Oeuvres fixées sur phonogrammes ou vidéogrammes, la reproduction par reprographie.

CC Paternité - Pas d'Utilisation Commerciale 2.0 (France) (license permits the public to make noncommercial uses of the work only)

<http://creativecommons.org/licenses/by-nc/2.0/fr/legalcode>

Section 3 ('Autorisation) reads:

[...] L'exercice de tous les droits qui ne sont pas expressément autorisés par l'Offrant ou dont il n'aurait pas la gestion demeure réservé, notamment les mécanismes de gestion collective obligatoire applicables décrits à l'article 4(d).

Section 4 ('Restrictions') subsection d reads:

Dans le cas où une utilisation de l'Oeuvre serait soumise à un régime légal de gestion collective obligatoire, l'Offrant se réserve le droit exclusif de collecter ces redevances par l'intermédiaire de la société de perception et de répartition des droits compétente. Sont notamment concernés la radiodiffusion et la communication dans un lieu public de phonogrammes publiés à des fins de commerce, certains cas de retransmission par câble et satellite, la copie privée d'Oeuvres fixées sur phonogrammes ou vidéogrammes, la reproduction par reprographie.

English translation of these clauses:

Section 3 ('Authorisation):

[...] The exercise of all rights that are not expressly granted by the Licensor or on which he would not have the management is hereby reserved, notably those submitted to compulsory license rights described in Section 4 (c/d)

Section 4 ('Restrictions') subsection (c), (d):

In the case where a use of the Work would be submitted by the law to compulsory collective management, the Offeror reserves the exclusive right to collect these royalties by the intermediary of the relevant rights perception and sharing society. Are "notably" concerned cases foreseen by French Intellectual Property Code such as the communication in a public place, the radio broadcast of phonograms (sound recordings) that were published for commercial purposes and the simultaneous retransmission by cable and satellite, private copy of works fixed on phonograms or videograms, reproduction by reprography.

Note: this language is present in all 6 French licenses.

Current Belgian Licenses

(Note: the texts below are from the French language licenses, the structure of the Dutch language licenses is identical)

Attribution 2.0

<http://creativecommons.org/licenses/by/2.0/be/legalcode.fr>

Section 3f ('Etendue de la Licence accordée) reads:

Cette Licence ne modifie en rien le régime de rémunérations équitables éventuellement mis en place en Belgique ou dans d'autres Etats en contrepartie de la reconnaissance légale de licences non volontaires, et n'a aucun effet sur la perception de ces rémunérations.

Attribution - Non Commercial 2.0

<http://creativecommons.org/licenses/by-nc/2.0/be/legalcode.fr>

Section 4d ('Limitations') reads:

Cette Licence ne modifie en rien le régime de rémunérations équitables éventuellement mis en place en Belgique ou dans d'autres Etats en contrepartie de la reconnaissance légale de licences non volontaires, et n'a aucun effet sur la perception de ces rémunérations.