Notes for CC affiliate regional meeting,2012-05-01

by Gisle Hannemyr (CC Norway)

Since I am unable to attend the May 1 meeting in Berlin in person, here are the notes prepared for the meeting.

Summary

I first will like to say that I think v4.0d1 is a great start on making the licenses clearer and more accessible. There is a lot of good work put into simplifying the language of the license.

However, there is also (IMHO) some very problematic aspects of v4.0d1. The attempt to make all sorts of related rights within «scope» of the license by waiving them is overreaching and may even have unintended consequences.

The dropping of the «moral rights clause» from CC BY-SA is not a good idea.

The handling of Licensors' ability to profit from own works has never been handled well, and has become worse in v4.0d1.

Specific notes

I've organized my specific notes under the same points A-H as mentioned in the agenda.

A. Scope and operation of license: copyright, neighbouring rights, moral rights and ancillary rights.

I believe there is a fundamental flaw in v4.0d1 in that it is overreaching in what it tries to do with various rights (some of which does not even exist yet), by inserting a broad blanket waiver, i.e.:

> To the extent possible and necessary to allow You to reasonably exercise the rights granted to You under this Public License, Licensor waives or, where not permissible, agrees not to assert:
>
> (i) Licensor's moral rights in the Licensed Work; *however*, Licensor retains all other moral rights Licensor has in the Licensed Work; and
>
> (ii) other ancillary rights Licensor has in the Licensed Work; *however*, Licensor retains all other ancillary rights Licensor has in the Licensed Work and, for the avoidance of doubt, patent, trademark, privacy, personality and publicity rights shall not be considered ancillary rights.

First: I have problems with the term "ancillary rights". AFAIK, this term has no clear legal definition. What make these rights different from "related rights" or "neighbouring rights"?

Second: What does waiving rights "to the extent possible and necessary" really mean? Waiving something to "the extent possible" usually means waiving it to the extent it is legally permitted (i.e. the "and necessary" bit is redundant). Waiving something "to the extent necessary" is a much more limited waiver – it means that only the rights that prevents the licensee to use the Work as *otherwise* permitted by the CCPL is waived.

Assuming the latter is what is intended, this section should start:

> To the extent necessary to allow You to reasonably exercise the rights granted to You under this Public License, Licensor waives or, where not permissible, agrees not to assert (etc ...)

Second – rights need to be licensed, not waived: Waiving rights just puts them outside the scope of license, prompting people interested in licensing those rights to make their own, incompatible, license. This is what happened when CC put in a waiver of database rights in CC BY-SA (which presumably is why they again are licensed in v4.0d1).

Also, I think it is a really bad idea to drop the moral rights clause that is in CCPL 3.0 from the license. It has (AFAIK) created no practical problems, but serve to remind licensees that moral rights should be respected. I move to reinstate the following in full:

> Except as otherwise agreed in writing by the Licensor or as may be otherwise permitted by applicable law, if You Reproduce, Distribute or Publicly Perform the Work either by itself or as part of any Adaptations or Collections, You must not distort, mutilate, modify or take other derogatory action in relation to the Work which would be prejudicial to the Original Author's honour or reputation.

B. Non-commercial definition.

NonCommercial has always been problematic. It basically says that licensors are forbidden to use the work for profit. However, this is not really what most creators that use CC (all six versions) want. What creators want is to be able to profit from their own work, while at the same time letting the general public enjoy certain freedoms incompatible with ARR type copyright.

Rather than fretting over the definition of NC, I think the CC need to be concerned over how to craft licenses to that rights holders are *not* cut of from possible income streams. Then the NC clause can be dropped altogether.

A good start would be to remove the royalties waiver clause. This clause prevents users of the CC public license in the Nordic countries from receiving royalties generated by the extended collective licences that exist in these jurisdictions.

I happen to believe that the future for funding culture lies in statutory license schemes (e.g. Lawrence Lessig's 2003 proposal for a collective license that should be used to compensate rights holders in return for non-commercial P2P file sharing being permitted[1]). To be future-proof, CC needs to make sure Licensors can benefit financially from such license schemes. This means that CC should *not* stick overreaching waivers of rights to receive compensation into any of its licenses.

[1] http://news.cnet.com/2100-1023-985207.html

C. Attribution.

I think the simplified attribution requirements in v4.0d1 are an improvement.

D. Automatic termination (possible addition of cure period or materiality threshold).

Automatic termination is necessary for the licenses to have any substance. If there is a cure period or materiality threshold, the licenses will become much harder to enforce in a court of law. I.e. we need to keep this as it is.

E. Technical protection measures.

I think this clause, at least in its current form, has outlived it usefulness. There are content channels that impose TPM more or less automatically on any content distributed through them. I do not believe CC or free culture is served by having a clause that forbids sharing through such channels.

As a proposed remedy, it is suggested that non TPM-encumbered "source code" must be available on request. This puts an archival obligation on anyone that shares CC material through certain channels, which is awkward and unenforceable (most users that shares through TPM-encumbered channels are probably not even aware of that they are doing this – they just love their gadgets).

I think the TPM-prevention clause should just be dropped from the license.

F. Additional terms clause.

No comment and the present time.

G. Collecting societies.

See my notes above, in section B, about the problems with an overreaching waiver of royalties. I think that if CC understands that free culture does not gain from users of the CCPL waiving all sorts of royalties, the situation with respect to CSs will sort itself out.

H. Other

No comment and the present time.