

Association Littéraire et Artistique Internationale (ALAI) MEMORANDUM ON CREATIVE COMMONS LICENSES

January 2006

ALAI, as an organization devoted to the effective international protection of authors' rights, offers the following observations concerning the Creative Commons licensing program. These observations are presented in two parts: an initial discussion directed toward a general audience of authors and non copyright specialists; and a more detailed legal analysis thereafter.

ALAI supports technological and juridical innovations that enable authors to disseminate their works, to be recognized as the authors of their works, and to maintain control over the integrity and exploitation of their works. ALAI also encourages the development of mechanisms which will enable authors to be paid for their works. At the same time, ALAI believes that the promotion of broad access to and availability to works of authorship furthers a desirable balance of interests between the authors whose works are disseminated and the public at large, including other authors who would build on those works. Creative Commons licenses may further some, but not all, of these objectives. ALAI accordingly believes that it is essential for authors and their representatives to understand both the advantages and the shortcomings of the license in order to make an informed judgment concerning whether, and, if so, to what extent, to disseminate their work under a Creative Commons license.

I General Observations

Although CC-licenses seek to enhance the availability and to promote the sharing of works of authorship, the CC mechanism is not a repudiation of copyright. CC-licenses allow the author who places her work under a CC-license to reserve a range of rights. Thus, the license allows the author to retain copyright but also to permit the licensee – the public at large -- to engage in certain indicated types of use of the work, such as making and distributing copies or adaptations of the work, which would otherwise infringe the copyright. (For the details of the various licenses, see discussion further, Part II.)

Core features of CC-licenses are:

- (1) the simplicity of their standardised terms (with a corresponding simplicity of selection of which rights to grant and which to retain with regard to an individual work)
- (2) instant authorization of the permitted uses to any member of the public accessing the licensed work
- (3) increased potential for broad distribution of the work, notably because of the ease of location of CC-licensed works through certain search engines

However, an author, before choosing between licensing any of her works under a traditional or a CC-license, should be aware of certain consequences of CC-licenses, namely:

- **You won't be paid**

CC-licenses do not provide for direct remuneration for the uses made of a work under a CC-license. It follows that CC-licenses are appropriate where the author wants broad distribution of her work but does not seek to receive royalties or other monetary compensation for the licensed uses.

- **You can't both make exclusive deals and grant CC licenses**

The non-exclusive CC-licenses and exclusive licensing are mutually exclusive. In other words: once a particular work has been exclusively licensed to a third party (for example, a conventional publisher, or in some countries, a collective licensing society), the author can no longer place the same work under a non-exclusive CC-license. Similarly, once a work has been placed under a non-exclusive CC-license, the author no longer has the possibility to grant an exclusive license to anybody else. The inability to offer an exclusive deal may make the work less desirable to commercial entities with which the author may now or later wish to contract.

- **You can't change your mind**

It must be emphasized that once a CC-license has been granted by the author, it cannot be revoked. This means that there is no going back: once CC-licensed copies are made available, they will generate more licensed copies, and it will be too late to call them back.

- **You won't get any help from CC if the rights you retained are violated**

CC does not provide any means to vindicate the author's rights if the user of a work placed under a CC-license violates any of the rights retained by the author, such as the right of name attribution and/or of commercial exploitation. Therefore, as a practical matter, for most authors, any violation of the terms of a CC-license is unlikely to be redressed.

These aspects of the CC license lead ALAI to stress: ***Caveat auctor!*** **Let the author beware before she chooses!** A CC license may be appropriate and desirable for some authors, particularly academics, but, given the dangers the license poses to authors' prospects for control over and compensation for their works, the decision to license should be made with a full appreciation of the possible consequences.²

II Further, detailed, analysis

² See also "Things to think about before you apply a Creative Commons license to your work" at <http://creativecommons.org/about/think>

Creative Commons (CC) licensing (as well as similar types of licensing, e.g., “open source”) promotes the sharing of works of authorship. The most far-reaching method of sharing works is to make them publicly available without any restrictions as to the use that will subsequently be made of them. CC licensing does not, however, forego all restrictions. CC offers six kinds of licenses applicable to digitally-disseminated works; most of these preserve author-ownership of the copyright, and present a choice between various forms of more or less restrictive licenses. Thus, the author retains copyright but is willing to allow the licensee to engage in certain indicated types of use of the work which would otherwise infringe the copyright.

The six main licenses cover the following types of use of the work which correspond to the traditional restricted acts or prerogatives of the copyright owner.¹ The licenses are, from most to least restrictive:

(a) Attribution Non-commercial No Derivatives

The user may reproduce and communicate the work, but must credit authorship, may not make commercial uses, and may not make derivative works (adaptations, translations, other alterations). The attribution may be to a legal entity as well as to a human author.

(b) Attribution No Derivatives

Same as (a) but commercial uses are also permitted

(c) Attribution Non-commercial Share Alike

No restriction on creating derivative works, but any license granted by the prior licensee must be on the same terms as the initial license

(d) Attribution Non-commercial

Same as (c), but no obligations imposed on subsequent licensees down the chain

(e) Attribution Share Alike

Same as (d) but commercial uses permitted

(f) Attribution

No restrictions other than an obligation to credit authorship

In addition to the six main licenses CC offers *other licenses* dealing with a variety of uses running from sampling, to uses by developing countries, to dedication to the public domain.

CC licenses have become available in about 40 countries. However, national laws differ, and it is not quite clear whether, and if so to what extent, domestic implementations may deviate from the mother-licenses in order to comply with applicable national law.

As already indicated, CC licenses do not appear to distinguish between different kinds of right owners. Individual authors may avail themselves of CC licenses, as may

¹ See also “Creative Commons Licenses,” at <http://creativecommons.org/about/licenses/meet-the-licenses>

employers or others vested with initial copyright rights, as well as those who hold rights by transfer from the initial right holder. The social and/or legal status of the licensor can be relevant to the type of license chosen. For example, an individual freelance author may seek more control than would an employed academic.

Although the CC licenses are silent about the capacity of an author or right holder to enter into a CC license, one should recall that, under the domestic law of most countries, a right owner can grant CC licenses only as long as and to the extent that she has not granted exclusive rights in her copyright (in whole or in part) to someone else (the *nemo plus iuris* rule). Most importantly, "someone else" includes collective licensing societies. If the collecting society requires the author to grant it exclusive communication rights, then the author will not be able to enter into a CC license. (This appears to be the case even if the collecting society exercises only communication rights, because CC licenses do not distinguish between reproduction and communication rights.) Also, it should be noted that at least in some countries, collecting societies, according to their by-laws, require that an author entrust *all* of her works to the collection society. Where this is the case, authors cannot have the rights of some of their works exercised by collecting societies and, at the same time, place other of their works under a CC licence. Rather, they are left with the choice only of either having all of their works handled by collecting societies or placing all of their works under a CC-licence.

Because a license is a contractual instrument, in order to be valid, its formation should be in accordance with the respective applicable national law. Thus, the existing rules on offer and acceptance, representation, termination etc. have to be adhered to. The content of CC licenses must also comply with applicable domestic substantive copyright law. Because national copyright laws may differ, for example, with respect to moral rights in general or specific moral rights such as the right of attribution or the right of integrity in particular, as well as with respect to the scope and specification of economic rights an author may grant, this may lead to considerable differences in the scope and enforceability of CC licenses. For example, depending on the applicable national law, the licensor who seeks to ensure that her attribution and integrity rights are respected will in some countries be able to rely both on the contract and on national law, whereas under other national laws the contract will form the only basis for enforcing these interests. As to the practical enforceability of a CC license, see below.

Assessment and Evaluation

In order to make an adequate assessment and evaluation of the CC licenses it seems appropriate to address the relevant questions indicated below. For that aim reference shall be made, where appropriate, to the entry Frequently Asked Questions (FAQ) which can be found on the Creative Commons website:

<http://creativecommons.org/faq>.

1. Legal Capacity of the CC Licensor to enter into subsequent non CC agreements

1.1 Can the right owner as long as a CC license is valid, grant exclusive rights to a work in any kind of use already authorised under a CC license?

It follows from the *nemo plus iuris* rule that the right owner who has used a CC license to disseminate the work cannot grant exclusive rights with respect to any kind of use already authorised under a CC license. Such a position leaves the right owner with only the possibility of granting non-exclusive non-CC licenses which do not affect existing CC licenses

2. Payment or Other Remuneration

2.1 Do CC licenses provide for payment to the copyright owner?

The CC licenses are silent about payment to the copyright owner. The licenses' failure to include a mechanism to provide for such payment (or any other form of remuneration) does not necessarily mean that the author must renounce all opportunity for payment. For example, an author who makes a work available with a CC license from her webpage might, on the webpage, request payment for the uses she has permitted. It is important to note, however, that this request will not be integrated into the license terms, or the license's metadata. As a result, subsequent users may not become aware of the request for payment. Or, users who may obtain the work either directly from the author, for payment, or from another CC-licensed source, without payment, may well prefer the non paid option. Therefore, where an author does seek payment, it would be desirable for the CC licenses to provide for some pass-through mechanism connecting the user to the right owner's web page, to a collective licensing society or to any other addressee in order to obtain the relevant license against payment. At the moment, however, the CC licenses do not provide for this, and authors who do wish to be remunerated should accordingly bear this in mind

This analysis suggests that CC's response to the FAQ concerning authors' remuneration (see below³), may be overoptimistic. Even if, from a legal point of view authors retain non exclusive rights that they may may license for payment, it seems unlikely that any third party would be willing to pay if it knows that other parties have obtained the license for free.

³ FAQ 1.11 Can I still make money from a work I make available under a Creative Commons License(s)?

Absolutely. Firstly, because our licenses are non-exclusive which means you are not tied down to only make a piece of your content available under a Creative Commons license; you can also enter into other revenue-generating licenses in relation to your work. One of our central goals is to encourage people to experiment with new ways to promote and market their work.

Secondly, the noncommercial license option is an inventive tool designed to allow people to maximize the distribution of their works while keeping control of the commercial aspects of their copyright. To make one thing clear that is sometimes misunderstood: the "noncommercial use" condition applies only to others who use your work, not to you (the licensor). So if you choose to license your work under a Creative Commons license that includes the "noncommercial use" option, you impose the "noncommercial" condition on the users (licensees). However, you, the creator of the work and/or licensor, may at any time decide to use it commercially. People who want to copy or adapt your work, "primarily for monetary compensation or financial gain" must get your separate permission first.

3. Terms and Conditions

3.1. What is non-commercial?

The different versions of the CC licenses do not give guidance as to what is meant by (non-)commercial use. It is assumed that this is true for all national versions. As a consequence, the rather diffuse meaning of (non-)commercial in colloquial parlance may be intended, but this does not help to clarify the scope of the license. As a result, this can lead, as the case may be, to many disputes concerning whether a (potential) user is an appropriate licensee. For example, is “non commercial” synonymous with “non profit”? With any government-funded enterprise? If so, then the principal non private users of many kinds of works may end up being able to exploit CC-licensed works without remunerating the authors. Because the Creative Commons organisation does not include a dispute settlement institution or any enforcement mechanism, it is up to the domestic courts to interpret the licenses to determine the meaning of “non commercial.” This will undoubtedly lead to differing decisions and to uncertainty about what can be licensed. More significantly, if an author who has allowed only non-commercial use of her work under a CC license is of the opinion that a user has engaged in commercial use, the author bears the burden in time and money of seeking judicial relief in the event of a disputed use. The author would, of course, bear this burden in a conventional licensing setting as well. The point is that a CC license may make it easier to grant rights, but it does not put an author in a better position to enforce her rights.

3.2 What is the legal effect of CC licenses' failure to distinguish between reproduction rights and communication rights?

The failure of CC licenses to distinguish between reproduction rights and communication rights may make it impossible to grant one without the other. The license options do not in any event provide for such a distinction, and any additional limitation that the author may impose is unlikely to bind any user who does not obtain the work directly from the author. The difficulty of effectively distinguishing the two rights can lead to rather unwanted consequences such as the right owner's inability to allow audio- or video-streaming without also permitting downloading.

3.3 Can an author protect the integrity of the work?

Any violation of the integrity of a right owner's work will constitute a misuse under a CC license that does not authorize derivative works. It is not clear that a licensor who does authorize the creation of derivative works will retain an integrity right claim. If the license is breached, the breaching party's license terminates, at least in theory. Whether this is meaningful as a practical matter, however, may be doubtful.⁴ See further under 4 Termination and Enforcement.

4. Termination and Enforcement

⁴ FAQ 1.23 What happens if someone misuses my Creative Commons-licensed work?

. . . You have a number of options as to how you can enforce [the termination of the misusing licensee]; you can consider contacting the person and asking them to rectify the situation and/or you can consider consulting a lawyer to act on your behalf.

4.1 Can the author terminate a CC license?

A CC license may, at least in theory, be terminated, but only in cases such as misuse of the license by the licensee. Misuse includes dissemination without attribution or making unauthorised derivative works. It is not clear whether repetitious distributions by users in good faith under CC licenses passed down from the offending user would also constitute grounds for termination. Moreover, it remains to be seen how, in such circumstances, a termination will operate: what remedy or sanction is available here and how can it be enforced? Suing everybody down the chain is probably not meaningful for the right owner.

What of the author who no longer wishes to make the work available through a CC license, or wishes to change the terms of the license, for example to exclude derivative works where once she allowed them? While she can cease to offer the work herself with the license, or can offer a more restrictive CC license directly from her website, she will probably not be able to stop the circulation of copies previously accompanied by prior terms of the license. In that case, it would seem that different versions of CC licenses with regard to the same work might simultaneously be in force.

These consequences are not unanticipated: the CC website states that the licenses are irrevocable.³ Consequently, if the author changes her mind and wants to license a work in the future on different terms and conditions (or not license it at all via CC), this does not affect the already granted licenses. For the same reasons, it appears unlikely that an author may limit the term of a CC license to any period of years shorter than the copyright term.

³ FAQ 1.6 What if I change my mind?

Creative Commons licenses are non-revocable. This means that you cannot stop someone, who has obtained your work under a Creative Commons license, from using the work according to that license. You can stop distributing your work under a Creative Commons license at any time you wish; but this will not withdraw any copies of your work that already exist under a Creative Commons license from circulation, be they verbatim copies, copies included in collective works and/or adaptations of your work. So you need to think carefully when choosing a Creative Commons license to make sure that you are happy for people to be using your work consistent with the terms of the license, even if you later stop distributing your work.