

1.1: Creative Commons Licences – Briefing Paper

Naomi Korn and Professor Charles Oppenheim, March 2009

1. Introduction¹

Creative Commons licences (also referred to as CC licences) permit the copying, the reuse, the distribution, and in some cases, the modification of the original owner's creative work without having to get permission every single time from the rights holder. The Creative Commons licence is associated with a broad movement looking for a re-balancing of intellectual property rights legislation.

The purpose of this briefing paper is to provide content creators and other SCA stakeholders with information that can be used to make judgements as to when the use of open content licences, particularly Creative Commons licences, may be appropriate. Examples of such usage might be:

- The creation of e-learning materials by staff
- The display of holdings of museums and galleries
- The dissemination of popular material for the public
- The dissemination of broadcasts
- The output from research work (both data and text)

In addition, organisations need to know when external Creative Commons licensed materials can be used as part of their own materials and what are the limitations on the use of such materials.

This document focuses on Creative Commons licences although there are other open content licence models, including Creative Archives and AShareNet, which have comparable characteristics.

2. Open Content Licences Generally

Open content licensing is a way for the author or rights holder of a copyright work to grant a wide range of permission for use and reuse of their work via a non-transactional copyright licence, while retaining a relatively small set of rights. In other words, permission is pre-granted to the user, without requiring the user to request permission every time they wish to use the work. This style of licensing, like any other, can usually only be used on works by someone who owns the copyright in the work or otherwise has permission to do so. Those who create works can use the licences to protect their works while encouraging certain uses of them.

3. Creative Commons

Creative Commons is a licensing system under which authors or producers of a work offer some of their rights to others to reuse their work under certain specified conditions.

The licence is attached to the content and is available in various forms (see Section 4 below), allowing the rights holder to retain a level of control over how their work is treated.

¹ This paper is based upon a resource published by JISC in March 2009, which was developed by the JISC IPR Consultancy and JISC Legal

Creative Commons licences have various advantages, including ease of use, widespread adoption and familiarity, choice and flexibility, human-readable, machine-readable and symbolic representations of the licences, and a direct link between the resource and its licence.

4. Nuts and Bolts

Works created under Creative Commons (CC) licences can be copied at no charge. Furthermore, there is no fee payable for employing CC licences. They allow creators easily to grant permission for use of their works, by using user-friendly symbols. A simple set of terms and conditions enables users to recognise the types of usage the rights owner is offering.

Creative Commons licences allow rights holders to maintain a basic level of control by offering something between an 'all rights reserved' copyright licence and waiving all of their rights.

The main Creative Commons licences offer a series of 'baseline rights' together with four 'licence elements' that can be mixed and matched to produce a customised licence through a point-and-click web interface:

- Attribution (BY) – you must credit the licensor of the work;
- Non-Commercial (NC) – you can only use the work for non-commercial purposes
- No-Derivatives (ND) – you may not create adaptations of the work
- Share Alike (SA) – you may create adaptations of the work, but these must be under the same licence as this work

Attribution forms a part of all CC licences. These four elements lead to the six basic CC licences, with their common abbreviations in brackets:

- Attribution (BY)
- Attribution – No Derivatives (BY-ND)
- Attribution – Non-Commercial – No Derivatives (BY-NC-ND)
- Attribution – Non-Commercial (BY-NC)
- Attribution – Non-Commercial – Share Alike (BY-NC-SA)
- Attribution – Share Alike (BY-SA)

Jurisdiction-specific licences are available for Scotland, and England and Wales. There is not a variant for Northern Ireland at present.

Creative Commons licences are normally attached to the digital content and authorise anyone who copies the work to use it in accordance with the terms of the licence.

This means that if one user has a copy of a Creative Commons-licensed work, that user can give a copy to a second user and the second user will be authorised to use the work consistent with the original Creative Commons licence. As a consequence of this, the original rights owner has a licence agreement separately with both the first and second user. Further users are similarly able to use the work consistent with the terms of the licence.

For example Creator A authors material, which she marks as licensed as Attribution – Non-Commercial (BY-NC). Author B can use all or parts of A's material to compile their own work so long as the use is non-commercial and is attributed. B must mark his own work as (BY-NC) (or at least the parts that came from Creator A). If Author C plans to use some of B's material that consists of Creator A's work then C's use is also restricted to Attribution – Non-Commercial.

Recent developments in Creative Commons licensing have included the Creative Commons Plus² licence and the Creative Commons Zero³ licence. The Creative Commons Plus licence facilitates the add on of an additional licence on to the Creative Commons licence in order to facilitate the granting of more permissions by the content creator to the user, thus introducing greater flexibility to the type and range of permissions that are granted. Using the Creative Commons Zero licence creators are able to waive all copyrights and related or neighbouring interests that they may have over a work such as moral rights, publicity or privacy rights, rights protecting against unfair competition and any rights protecting the extraction, dissemination and reuse of data. Like all uses of Creative Commons licences, these permissions can only be granted if the creator holds the necessary rights for the work.

5. The Licence Agreement

The contractual status of Creative Commons licences differs by jurisdiction. In Scotland, Creative Commons licences are regarded as a contract.⁴ In England and Wales, for a licence to have contractual force, some form of consideration is normally necessary. Consideration ‘...may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other’ (*Currie v. Misa* (1875) L. R. 10 Ex. 153, 162). The English and Welsh licence itself specifies that:

‘...the licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.’
(<http://creativecommons.org/licenses/by-nc/2.0/uk/legalcode>)

The text of the licence itself does not refer to contract law. A valid contract in English law requires an agreement (consisting of an offer and acceptance). Acceptance is usually established by the signing of an agreement. However, even without a signature, acceptance can be inferred by the conduct of the person who has been made the offer. So, if that person carries out their side of the agreement, then a valid acceptance can be implied and a contract is formed.

Whether the acceptance and consideration criteria are met in any particular case will depend upon the actions of the parties involved. If it is tested in court and it is determined that the conditions are not sufficient to have formed a valid contract, it is likely that the Creative Commons licence will be unenforceable.

6. A Policy Decision

Organisations need to be able to both license-in materials from outside as well as to control how their own materials are used.

Sharing resources amongst similar organisations makes sense financially, and there are many policy reasons to do so. Digital resources produced by publicly funded organisations are a valuable asset to the community. Many people in the sector believe that access to and use of these digital resources could be better and that the wider use of open content licences would help to improve the situation.

Creative Commons licences enable organisations to release electronic materials to the wider community. This attitude of creating and sharing knowledge resonates with the culture of the sector.

7. What Your Organisation Should Know

Below is a non-exhaustive list of factors to be considered before deciding to implement the use of Creative Commons licences for materials produced by staff, volunteers or other third parties.

The Benefits/Advantages of Using Creative Commons Licences:

² <http://wiki.creativecommons.org/Ccplus>

³ <http://labs.creativecommons.org/license/zero>

⁴ www.jonathanmitchell.info/cc/cc_sco_licence.html

- **Simple Legally** – They provide a quick solution to the complexities of content licensing by content creators and rights holders

For example Content creator Z can attach symbols to the electronic version of his work and those who access the content will know what rights they have to copy and then use the material.

- **Easy Sharing and Re-use of Information and Resources** – SCA members may need to adapt and develop resources to meet different requirements from that intended by their original creators. The Creative Commons derivative work licence allows materials to be reused in this way
- **Flexibility** – Creative Commons licences are available in three formats, including machine-readable code, which can be processed by search engines. This is also useful for tracking licence usage
- **Improved Access** – Digital resources produced by publicly funded organisations are a valuable asset to many communities. Access to, and easy use of, these digital resources could be better; the wider use of open content licences would help to improve the situation
- **Administrative Simplicity** – One of the benefits of Creative Commons licences lies in their ability to be clearly and simply administered. Creative Commons licences allow some level of control, but without introducing a need to manage complex variants. The flexibility of the Creative Commons icons system enables individual works within a large collection to carry different licence terms. This avoids having to grant a licence for all items in a collection and means some components can be more freely used than those governed by more restrictive licences. This removes the need for lengthy negotiations. Creative Commons licences are also non-transactional and so using content issued under a Creative Commons licence removes the requirement for requesting permission from the rights holders every time a work is used

The case against:

- **Uses and Reuses** – Creative Commons licences may be unsuitable for certain types of outputs. Organisations may wish to permit certain types of reuse of the licensed material but not necessarily all. Unfortunately, the Creative Commons licences do not make such subtle distinctions. The non-derivative licences do permit incorporation of material into larger works, but once a licence grants derivative use, there is no control over subsequent reuse
- **Third-party Content** – Creative Commons licences cannot be used to make material available for which third parties own the rights, unless they have explicitly granted permission for this use. Where there is unauthorised use of third-party content, this will invalidate the licences. Because of the viral nature of Creative Commons licence distribution, an organisation that has made outputs available under a Creative Commons licence may find it difficult or even impossible to withdraw this material if an infringement of this type has occurred, and possibly face penalties. These additional risks will need to be assessed and managed
- **Uncertain Legal Status** – There is some lack of clarity with regard to the enforceability of CC licences. A licence must satisfy local law and its validity will vary according to the legal jurisdiction by which it is tested. There is also some uncertainty about the legality of using Creative Commons licences in the context of authenticated or restricted access services
- **Modification** – The consequence of permitting others to use materials within the terms of the Creative Commons licence is that they will be able to copy, use and adapt the work. Risks arise that the work might be substantially modified in ways that the creator or licensor feels would undermine the work's integrity. CC licences offer a stark choice – permit no reuse or agree to unlimited reuse
- **'Commercial' or 'Non-commercial'** – One of the main issues with Creative Commons licences is whether a resource can be used for 'commercial' or 'non-commercial' purposes. Unfortunately, the licence itself does not clearly distinguish the difference. Organisations providing purely commercial services need to clarify whether material licensed in this way will be available to them. If an organisation plans to sell materials at some date in the future, it should not offer them with a CC licence at any stage
- **Irrevocability** – The irrevocability of the Creative Commons licences represents another lack of flexibility for institutions that might otherwise adopt these licences. There are a number of scenarios where rights owners initially made available a resource on the basis of a Creative Commons licence and subsequently wished that all copies had been licensed in accordance with a different licensing regime. If this scenario is a real possibility, then CC licences should not be used

- **Databases** – The Database Right is not explicitly covered in the Creative Commons licence, which might cut off a range of resources to this form of licensing. The Creative Commons licences are not entirely clear about whether extraction from databases is permitted or not. A great deal of the reuse of material is for this purpose, and this may operate as a constraint on the adoption of Creative Commons licences in some circumstances.

8. Issues for Staff and Employers

- Staff are often in favour of people reusing their material. However, often it is not clear whether or not their employer owns the copyright in the work. Some staff see themselves as the owners of the rights because of the way content is created. If the organisation has a policy of using Creative Commons licences for work produced by staff, this might go some way to resolving these issues. Uncertainty can largely be avoided by the organisation having an intellectual property policy that provides clarification with regard to the ownership of rights in staff-produced work
- Where staff-produced work involves collaboration with commercial partners, it is likely that agreements will have been reached in advance with the commercial partner with regard to the ownership of the intellectual property rights created as a result of this work. This may restrict what sharing can subsequently be done by means of Creative Commons licences. Materials that are expected to generate commercial gain are unlikely to be suitable for Creative Commons licensing. Equally, because some Creative Commons licensed material may already be restricted to non-commercial use, it is necessary to ensure that third-party materials obtained through a CC licence to be used for commercial activities are indeed available for such commercial use
- Funding bodies may insist that output from funded work is made freely available, and the Creative Commons licences offer a way of complying with such a requirement
- The licences reflect a different spirit to many other forms of licences. They allow minimal levels of control over freedoms to use copyright works, rather than allowing limited permissions. This fits well with the general ethical and philosophical stance of the SCA community, and is a significant reason why Creative Commons has penetrated the sector both in terms of finding support and of the usage of CC licences by rights holders
- One of the main attractions of Creative Commons licences is their simplicity. The ease with which they can be placed on digital materials will help people who create such materials
- When someone who is developing content wants to incorporate material that has been licensed under Creative Commons into their own materials, it is essential that the anticipated reuse complies with the terms of the licence. If it is expected that these materials will be put to non-Creative Commons licensed use, it may be appropriate to use another form of licence arrangement for the materials or to use home-made materials
- A Creative Commons licence cannot make infringing material lawful. If a section of material is included in Creative Commons licensed work for which there was no licence or other permission to use it in the first place, then this may be copyright infringement. The Creative Commons licence is invalid with respect to the infringing elements of the licensed work and any additional use of the infringing elements is likely to be a further breach of copyright.

Conclusion

Creative Commons and similar licensing frameworks are a significant development and have valuable potential application in fulfilling the need for wide and unobstructed access to electronic materials as well as a flexible and enabling approach to the use and reuse of outputs and materials.

Although Creative Commons may be suitable for many applications, this may not be the case where commercial considerations and third-party rights issues are present.

It is recommended that organisations should evaluate the use of Creative Commons licences carefully case-by-case, and should not assume that it is automatically the right or wrong solution. At the operational level, those who are using the licences need to understand copyright issues and rights management. Getting the right version of the licence for the particular material is important and the way ahead, it is suggested, is to experiment through practical usage, while closely monitoring the outcomes and the risks that arise along the way.

At a strategic level, committing to the irrevocable terms of Creative Commons licences raises issues of broader access and commercial goals for organisations. The use of Creative Commons licences should be a policy decision and should form part of the overall intellectual property policy of organisations, where the full implications can be examined and understood.

Further Reading

Sources used in the compilation of this briefing paper include:

- Study into the use of Creative Commons licences and similar model licences within HE and FE contexts – Final Report – commissioned by the Joint Information Systems Committee (JISC) and produced by Rightscom and managed by the IPR Consultancy/Rightscom Limited – 24 February 2007.
- The Common Information Environment and Creative Commons: Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences (Intrallect Ltd and AHRC Research Centre for Studies in Intellectual Property and Technology Law, The University of Edinburgh October 2005) – www.intrallect.com/cie-study.
- Creative Commons Licences in Higher and Further Education: Do We Care? Naomi Korn and Charles Oppenheim discuss the history and merits of using Creative Commons licences whilst questioning whether these licences are indeed a panacea – www.ariadne.ac.uk/issue49/korn-oppenheim.
- Intellectual Property Rights in e-Learning Programmes: Good practice Guidance for Senior Managers (July 2006) – Higher Education Funding Council for England (HEFCE) – www.hefce.ac.uk/pubs/hefce/2006/06_20.
- Snapshot Study on the Use of Open Content Licences in the UK Cultural Heritage Sector (November 2007) – Eduserv – www.eduserv.org.uk/foundation/studies/cc2007.
- TrustDR: Trust in Digital Repositories <http://trustdr.ulster.ac.uk>

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