Creative Commons

Creative Commons (**CC**) is a non-profit organisation which provides a set of free, generic licences which creators of intellectual property can use to distribute their work to the public digitally. It was launched in the United States in 2001 founded on the concept that people can contribute to a shared 'commons' of creative works by effectively giving up certain rights in a copyright work and allowing others freely to use, adapt, modify and distribute this work.

What is Creative Commons?

Creative Commons (**CC**) is an international non-profit organisation which provides a set of free, generic licences which creators of intellectual property can use to distribute their work to the public. It works on the idea of a shared digital "commons" of creative works for which the default is "some rights reserved" rather than "all rights reserved."

CC was founded in 2001 in the United States of America and has since established a presence in over 80 countries. In Australia it operates as Creative Commons Australia and is hosted at the Queensland University of Technology. CC licences have been used around the world by artists, educational institutions, governments, and international organisations, including in Australia by the Australian Bureau of Statistics, the Australian Electoral Commission, the National Library of Australia, and the Australian Parliament.

It is important to note that CC is not an alternative to copyright, nor does the use of a CC licence mean that a creator gives up copyright or puts their work in the public domain. Rather, CC works with copyright protection to enable copyright owners to licence and manage their creative works in a certain way. For more information on copyright and licensing in general, see Arts Law Information Sheet on Copyright.

What types of CC licences are there?

There are currently six types of CC licences available for use in Australia. Each of the six types currently comes in two versions: the Version 3.0 CC Australia licences launched in June 2010, and the Version 4.0 CC International licences launched in November 2013.

The Version 4.0 CC International licences are largely based on international copyright treaties and focus on international enforceability, and require a creator to waive their moral rights to an extent. The Version 3.0 CC Australia licences are also effective internationally, however have been written to Australian drafting practice and make specific reference to Australian laws and jurisdiction, including a non-waiver of moral rights. Both versions achieve the same result: the granting of a CC licence by the copyright owner to a user or licensee.

All CC licences are non-revocable and last for the full copyright term (life of the creator plus seventy years in most cases). All CC licences allow a licensee, in all media and formats, to:

- copy and reproduce the work (including by downloading and printing);
- perform the work; and
- distribute and communicate the work (such as e-mailing or uploading it to the licensee's blog).

A summary of each of the six types of CC licences and their symbols currently used as of 2014 now follows.

CREATIVE COMMONS LICENCE TYPES

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CC licence type	Description (in addition to the above common rights granted)
Attribution (**CC BY**)	• can be for commercial use • can adapt and make derivative work • can licence to others, as long as the original creator is credited
Attribution — Share Alike (**CC BY-SA**)	• non-commercial use only • can adapt and make derivative work • the licensee must license his or her new derivative work under the same terms as the original licence
Attribution — No Derivative Works (**CC BY-ND**)	• can be for commercial use • cannot adapt and make derivative work • can distribute a verbatim copy of the work only and must not make a derivative work • can license to others as long as the original creator is credited
Attribution — Non-commercial (**CC BY-NC**)	• non-commercial use only • can adapt and make derivative work • can license to others, as long as the original creator is credited
Attribution — Non-commercial Share Alike (**CC BY-NC-SA**)	• non-commercial use only • can adapt and make derivative work • the licensee must license his or her new derivative work under the same terms as the original licence
Attribution — Non-commercial — No Derivatives (**CC BY-NC-ND**)	• non-commercial use only • cannot adapt and make derivative work • can distribute a verbatim copy of the work only • can license to others as long as the original creator is credited

Attribution

A Creative Commons licence requires the user of the work to attribute (credit) the original creator.

All of the six creative commons licences require the same information to be presented when attributing the work to the creator. To achieve best practice you should:

- Credit the original creator;
- Provide the title of the created work (version 4.0 CC does not require this but it is still highly recommended);
- Provide the URL where the work is originally hosted;
- Indicate the type of creative commons licence it is available under and provide a link to the licence (so that other users can find out the particular CC licence terms); and

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Keep intact any copyright notice associated with the work.

When attributing a person's work, it is important to check if they have asked to be attributed in a particular way. The creator may have instructions on how they wish to be attributed on the copyright page of their personal website or on their profile page for a media sharing site. When crediting the original creator it is important to credit any other parties listed such as co-creators, sponsors or publishers. If you are unable to find the creator's legal name, you may attribute their pseudonym or public username.

You should check to seek whether the attribution requirements of the CC licence of a work you want to use are consistent with how you want to use the work. For example the CC licence may require the credit for the author of the work to be placed next to the work, whereas you may want to place the attribution of the creator in a list of author credits. If your intended use of the work is not consistent with the attribution requirements of the CC licence you should contact the author to get written permission to provide the attribution in your chosen format.

It is extremely important to include the details of the CC licence that the work has been made available under. Listing the details of the CC licence means people are aware that you (and they) have permission to use the works and understand the conditions attached to the use. You can attribute the licence type by listing the full licence name (e.g. Creative Commons Attribution-non-commercial Australia 3.0), you may use the abbreviated form of the licence name (e.g. CC BY NC Aus 3.0) or you can use the licence buttons (pictured below).

If licencing online material it is also very important to provide a link to the original work. This can be done by creating a hyperlink (perhaps on the licence button or the title of the work) or by providing the URL.

Where you might be attributing a work in an offline medium such as a book or magazine it is important to provide in full the licence type and any URL's in full. **When remixing the original work:**

If you make changes to an original work you are adapting the original and making a derivative work. You must always attribute the original work or works in any derivative work.

What do I need to consider?

Although CC licenses have been in use for over ten years, like any system it is continuously undergoing development. In deciding whether or not a CC licence is right for you and your particular needs as an artist, you need to carefully consider its current state and implications. A few key considerations follow.

CC licences are irrevocable

CC licences are irrevocable and in their present form can only be for the full length of copyright (that is, your lifetime plus 70 years). This means you are giving away certain rights in your work *forever* and you can never change your mind. Even though your original intention in creating a work was to provide something that others can enjoy, you may ultimately find that you have the opportunity to turn it into a source of income if a publisher/record company becomes interested. As such, a decision that lasts forever isn't one you should make lightly, particularly if you are just starting out as a writer, or a composer, or a graphic designer, because you don't know what the future holds. You don't want to surrender your rights prematurely.

The reason CC licences are irrevocable is because while you can stop having your work available to the public under a CC licence, you can't restrain a licensee (or any sub-licensees) who already has a copy of your work from using it under the terms of that licence. A CC licence will only be terminated if the licensee breaches the conditions of the CC licence (e.g., by failing to attribute the creator). However, under the Version 4.0 CC International licences if the licensee corrects the breach within 30 days of discovering it (either by themselves or by having the breach brought to their attention), the licence will be automatically reinstated. This automatic reinstatement does not exist in the Version 3.0 CC Australia licences.

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Ability to exclusively exploit your work

If you want to be able to exploit your work exclusively, CC licences are not for you. This is because of their inherent incompatibility with the full and unfettered rights a publisher (or a record company) would want you to have, and would expect you to grant to them. Most publishers want to be able to exploit and market the work exclusively to derive a profit. Why would a publisher invest money into publishing a work if people can obtain a copy of it for free?

If you are a member of a collection agency such as APRA or Viscopy, attaching a CC licence to your work may result in conflict. Collection agencies typically take an exclusive licence over your work in order to negotiate and manage licences and collect royalties on your behalf. If you have already granted a licence over your work through CC, you are no longer able to grant an exclusive licence over the work and may not be able to use a collection agency for those same works.

Who owns what?

There is a high potential for legal complications to arise from an 'overlap' of rights from CC licences which allow derivative works to be made. Under copyright law, you, as the creator of a work, have the exclusive right to adapt the work, and you own the copyright in that adaptation. However, the ownership of a derivative work under a CC licence is not clear, and is not expressly set out in those CC licences which allow derivative works to be made. Once you have a number of interconnected derivative works (each containing various proportions of the preceding work) all licensed under the *Attribution* (CC BY) licence for example, it creates a conceptual problem if ever you need to work out the chain of title to these derivative works. Even if you are not concerned with 'ownership', once you get a few steps removed from the 'original work' identifying the 'original author' and all other relevant parties for attribution becomes increasingly difficult.

Furthermore, CC works are meant to be 'synthetic' in the sense that licensees can 'mix' up existing works to create new ones. But what happens when a person combines a work with an *Attribution-Share Alike* (CC BY-SA) licence with a non-CC work? It could mean that the derivative product then has to be licensed under an *Attribution-Share Alike* (CC BY-SA) licence, to the possible detriment of the author of the non-CC original work.

Moral rights

Moral rights add to this complexity. Under Australian law artists have moral rights in their work which are treated differently or not recognised in other countries. As such, although the Version 3.0 CC Australia licences specifically recognise and do not waive moral rights, the Version 4.0 CC International licences have been drafted to minimise the effect of moral rights while the older versions of the CC international licences do not address moral rights at all. Other jurisdiction-specific CC licences can operate differently again in this respect. This means a CC licensee may still face the possibility of an original creator taking issue with an objecting to a derivative work on the ground that it constitutes a 'derogatory treatment' of his/her work, or if the derivative work utilises two or more original works, that an original creator may have their moral rights detrimentally affected as a result of having their work remixed with a work subject to a different CC licence.

See the Arts Law information sheet: Moral Rights

Lack of control

With the speed of online distribution it doesn't take long for your work to end up being used by people all over the world. If such uses are all online (and assuming there is proper attribution or adequate copyright notice) there may be some hope of tracking your work, but it would be virtually impossible to know how the work is being used offline. CC is not a collection agency; it doesn't monitor use of CC works, nor does it commence action on behalf of CC licensors or give legal advice about the licences. In using CC licences without independent legal advice, you're on your own.

Lack of warranties

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When it comes to licensing intellectual property your protection is only as good as the warranties you obtain from the licensor. At present CC licences expressly exclude any warranties, including that the work licensed is non-infringing. This means that the work you choose to use (as the CC licensee) may be of dubious origin, and not actually the property of the CC licensor. If you wish to ask for a warranty or guarantee for a particular work, you should get in contact with the licensor.

What exactly does 'non-commercial' mean?

There is disagreement about exactly where the line between 'commercial' and 'non-commercial' lies. 'Commercial' is currently defined as 'primarily intended for, or directed towards, commercial advantage or private monetary compensation'. However, it is not hard to imagine scenarios where a CC licensee can still indirectly derive income through using a CC work. For example:

- Film footage shot under a non-commercial CC licence is used by a filmmaker in his short-film, which is then screened at a not-for-profit film festival. Although the filmmaker did not directly derive any money from using the footage, his production company did attract investors as a result of the exposure from the film festival.
- Images taken and used under a non-commercial CC licence are used on a blog. The blogger is not paid for writing content however the blog margins do contain web advertisements that generate income for the blog-hosting website.
- Music licensed out under a non-commercial CC license is used as background music in a fashion boutique. The sole business of the boutique is selling clothes but the background music does help attract customers and encourage them to browse the wares.

In all examples the CC licensed work isn't generating money itself but it is contributing in some way to a commercial outcome. It is unclear whether or not this is permitted within the scope of a CC non-commercial licence. A better definition (and some judicial guidance) of the distinction between 'commercial' and 'non-commercial' in a CC context is needed to ensure that the system is less susceptible to exploitation by dubious licensees.

Is there an alternative?

If you want to get the fruits of your creativity 'out there' and gain exposure as an artist, but you're not sure exactly what you want to do with your works in the future (e.g. whether or not you're serious about deriving an income from them), you could perhaps set up your own website and upload your works (streamed or in a low-resolution format). Prospective licensees can then contact you directly for a simple copyright licence, which you can negotiate on a one-on-one basis to ensure that each licence is compatible with your requirements. Importantly also, you can start to develop a working relationship with your licensees which could blossom into a creative partnership.

CC licences and copyright

By its nature, the CC licensing system sits somewhat uncomfortably with the copyright framework which is built on the foundation that the creator's monopoly rights are paramount. It is hard to say whether this tension would ever completely dissipate, even with the continual refinement of the CC licences. It needs to be recognised that the CC licensing system is an *alternative* to conventional copyright licences, *not* a replacement (and nor does it purport to be). It is certainly a viable and effective system if you, as a creator, are interested in distributing your work for educational and other non-commercial purposes, or simply satisfied in knowing that your work is being enjoyed or used in some shape or form.

It is important that you read not just the 'human readable' summary of the CC licence but also the full 'Legal Code' licence before making any decisions. If you are unsure about *anything*, get some legal advice before committing, so that you can make an informed choice about whether CC licences suit your particular circumstances.

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While a CC licence uses contract law to establish how the copyright material may be used and exploited, copyright law also has a role in determining the consequences of a breach of a CC licence. A U.S. appeals court accepted that while contract law is the basis of a CC licence, if you violate the terms and conditions of the CC licence you are infringing copyright in the material. That is, in addition to a CC licence being a contract (in respect of which contract law provides remedies for breach of the contract); a breach of a CC licence will also result in the owner of the copyright material having remedies under the Copyright Act 1968 (Cth).

See the Arts Law information sheet: Copyright

Further information

Australian Copyright Council information sheet: Creative Commons Licenses

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12); sculptures (Ch 13); design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); and tax (Ch 18).

Need more help?

Contact Arts Law if you have questions about a sample agreement or want your agreement reviewed.

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

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