

Creative Commons Scotland

Public Licence Agreement

Non-Commercial : Attribution : Sharealike

Licence Draft 1.2.4

28 February 2005

Substantive description of legal changes

Introduction

At first sight the Scottish licence may appear to be very different from the generic licence . The differences are however far more in style than in the end effect. They are driven by the following considerations:

(i) Under Scots law, the licence has contractual status; it is not what is described in some of the literature as a “bare licence”. Anglo-American law typically requires consideration for contractual effect, so that CC licences will be non-contractual; Scots law does not, and a CC licence will accordingly be legally enforceable by users according to its terms and the general law.

(ii) CC licences under Scots law will often, probably normally, be subject to the [Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083](#). These require in particular that the licence be in “plain intelligible language”. The Scottish project is strongly of the view that this obligation should be carried out. This requires a rewriting of the licence , although in doing so we have to a very large extent followed the style of licence written by the England and Wales project (to which we have contributed), which itself goes very far towards the use of plain language.

The changes following these considerations fall broadly into three groups.

First, the cutting out of unnecessary and repetitive language, and the use of ordinary clear language in place of legalistic phrases (many of which have no clear meaning to us as Scottish lawyers); thus, as examples, in defining commercial use we have substituted ‘payment’ for ‘private monetary compensation’, and throughout we have substituted ‘person’ for ‘individual or entity’.

Second, the order of provisions is recast (following the order of the England and Wales licence) so that for example the restriction to non-commercial use is in the grant of the licence itself, rather than in a much later clause.

Changes falling into these two groups are not usually individually noted below.

Third, to avoid any argument as to incompatibility (although we do not think there is any incompatibility anyway) we have included a clause, 6.5, which provides that the license must be read compatibly with the generic licence .

Other changes are noted where they occur.

Links to background sites:

- [1. Creative Commons Scotland page on International Commons site.](#)
- [2. Further material on Creative Commons Scotland on Jonathan Mitchell's site.](#)

This Creative Commons Scotland public licence enables You (*all capitalised terms are defined below*) to Use Works worldwide for Non-Commercial purposes provided that You credit the Author under the terms of this Licence.

‘The Licensor’ [a Person offering the Work under the terms and conditions of this Licence]

and

‘You’ [a Person acquiring rights under this Licence] *this deletes the exclusion of persons in breach of licence terms, which would have the odd effect that the terms of the licence would not be binding on a person already in breach.*

agree as follows:

1. Definitions

"Collective Work" means a work made up of the Work in its entirety in unmodified form, along with other work assembled into a collective whole. *The collective work may be the work plus one other piece of work; there need not be more than one other.*

Commercial" means primarily intended for commercial advantage or payment; but exchange for other copyrighted work without monetary compensation is Non-Commercial.

"Derivative Work" means a work that Uses the Work (or any substantial part of the Work) in any material form whatsoever, other than in its entirety in unmodified form; a work that constitutes a Collective Work is not a Derivative Work for the purpose of this Licence.

"Licence" means this agreement.

"Licence Elements" means the following attributes indicated in the title of this Licence: Attribution, Non-Commercial, Share-Alike.

"Non-Commercial" means not primarily intended for commercial advantage or payment.

"Original Author" or "Author" means the person who created the Work.

"Person" includes a body of persons corporate or incorporate. *From the Interpretation Act 1978.*

"Use" includes any form of use whatsoever, such as viewing, copying, editing, adapting, translating, arranging, dramatising, abridging, or creating Collective Work or Derivative Work; whether in the original medium or any other. *Should this list be extended?- for example, by including uses in clause 2.1 c).*

"Work" means the work protected by copyright which is offered under the terms of this Licence.

Words in the singular include the plural. *From the Interpretation Act 1978.*

2. Licence Terms

2.1. The Licensor hereby grants to You a worldwide, royalty-free, non-exclusive, licence for Non-Commercial use, and for the duration of copyright, to Use the Work. *This gives a general right to use, rather than a list of permitted uses, when read with the definition of 'Use' above, but the difference is unlikely to permit anything which could not be done under the generic licence .*

So you may, for example:

- a) copy the Work and/or create Derivative Works and/or Collective Works;
- b) copy Derivative Works and the Work as incorporated in any Collective Work; and
- c) publish, distribute, archive, perform, broadcast, or otherwise disseminate the Work and/or Derivative Works and/or the Work as incorporated in any Collective Work to the public on any platform in any medium whether now known or hereafter created.

HOWEVER, YOU MUST NOT:

- d) impose any terms and/or any digital rights management technology on the Work, the Derivative Work or the Work incorporated in a Collective Work that alter or restrict the terms of this Licence or any rights granted under it or have the effect or intent of restricting the ability of any person to exercise those rights; or
- e) sublicense the Work, except as described in clause 2.3 below.

FINALLY, YOU MUST:

- f) make reference to this Licence (by URL, spoken word or as appropriate to the medium used) on all copies of the Work and/or Derivative Works and/or Collective Works published, distributed, performed or otherwise disseminated or made available to the public by You; this is an important condition of this licence and if you fail to do so you will be in material breach of its terms;
- g) recognise the Original Author's right of attribution in any Work, Derivative Work and/or Collective Work that You publish, distribute, perform or otherwise disseminate to the public and ensure that You credit the Original Author as appropriate to the media used; this is an important condition of this licence and if you fail to do so you will be in material breach of its terms; and
- h) keep intact all notices that refer to this Licence; this is an important condition of this licence and if you fail to do so you will be in material breach of its terms. *The words after the semi-colon are probably implicit in all three cases, but we thought it would be better to spell them out so that there could be no doubt.*

2.2. Each time You publish distribute, perform or otherwise disseminate the Work and/or any Derivative Work and/or the Work as included in a Collective Work, the Licensor offers to the recipient a licence to the Work on the same terms and conditions as this Licence.

2.3. Each time You publish distribute, perform or otherwise disseminate a Derivative Work, You must offer to the recipient a licence to the Derivative Work which must be *either* one with the same terms and conditions as this Licence, *or* a later version of this Licence with the same Licence Elements as this Licence, *or* another Creative Commons licence with the same Licence Elements as this Licence, *or* the BBC Creative Archive general public licence.

2.4. This Licence does not affect any rights that You or any other user may independently have under any applicable law, including fair use, fair dealing or any other legally recognised limitation or exception to copyright infringement, to make any Use of this Work.

2.5. All rights not expressly granted by the Licensor are hereby reserved, including but not limited to the right to collect, whether individually or via a licensing body or collecting society, (such as ALCS, MCPS, PRS, PPL, VPL) or otherwise, royalties for any Commercial use of the Work and payments made under the Public Lending Right scheme. *This adds Public Lending Right (a public scheme for state payments to copyright holders for borrowings from public libraries) to the rights reserved.*

2.6. The Author asserts the right to be identified as Author of the Work in terms of sections 77 and 78

of the Copyright, Design and Patents Act 1988. *This is necessary in United Kingdom jurisdictions because of the terms of [these provisions](#). We are considering whether rights to anonymity, that is the right not to be identified if the author so wishes, and pseudonymity, should be stated here and would welcome views.*

3. Warranties and Disclaimer

3.1. The Work is licensed by the Licensor on an “as is” and “as available” basis and without any warranty of any kind, either express or implied. *For the moment, we are using the language of the England and Wales draft, which was in turn based on the international license, but we are not entirely happy with this language; the phrases “as is” and “as available” have no clear meaning. As at all points, views are welcomed.*

4. Limit of Liability

4.1. Subject to any liability which may not be excluded or limited by law, the Licensor shall not be liable for, and hereby expressly excludes, all liability for loss or damage howsoever and whenever caused to anyone by any Use under this License, whether by you or by anyone else, and whether caused by any fault on the part of the Licensor or not. In the event that any such liability may not be excluded by law, it is limited to actual and direct financial loss to the extent it is caused by proved negligence on the part of the Licensor. *The detailed wording of this clause remains under consideration. It is necessary expressly to deal with liability for negligence; Smith v UMB Chrysler 1978 SC (HL) 1. It is possible (but we think highly unlikely) that the exclusion of liability might be challenged under the [Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083](#), reg. 6; no drafting could entirely exclude this possibility.*

5. Termination

5.1. Any material breach by You of the terms of this licence (for example, by distributing the work licensed without attributing authorship as appropriate) entitles the Licensor to terminate this Licence with immediate effect. Persons who have received the Work, Derivative Works, or Collective Works from You under this Licence, however, will not have their licences terminated provided the use by such persons is in full compliance with a licence complying with Clause 2.2 or 2.3 above. *The generic licence provides for automatic termination in the event of any breach. We do not think this could be accommodated under Scots law, and instead we have provided a conventional right to the licensor to terminate. See also clause 6.3.*

6. General

6.1. If any provision of this Licence is held to be invalid or unenforceable, it shall not affect the validity or enforceability of the remainder of the terms of this Licence.

6.2. This Licence constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here. The Licensor shall not be bound by any additional provisions that may appear in any communication in any form.

6.3. If You are in material breach of the terms of this Licence (for example, by distributing the work licensed without attributing authorship as appropriate) you will not be entitled to rely on the terms of this Licence or to complain of any breach by the Licensor. Neither You, nor anyone else, may enforce any provision of this Licence by specific implement or interdict. *This clause is new; see note to 5.1; under the generic licence the first sentence was not necessary because the licence had ended automatically. The second sentence is because Scots common law, unlike Anglo-American common law, provides for third-party rights to enforce a contract in some circumstances. Specific implement and interdict are the two remedies in Scots law by which a person might seek to enforce a contract. We have provided that no user can use them to enforce a license, even if the user is not in breach; this seems consistent with*

the absence of warranties to be enforced.

6.4. This Licence shall be governed by the law of Scotland and the parties prorogate the exclusive jurisdiction of the Courts of Scotland. *Governing law provision: [Contract \(Applicable Law\) Act 1990](#). Jurisdiction provision: [Civil Jurisdiction and Judgments Act 1982 as amended, schedule 8 paragraph 6 and schedule 4 paragraph 12](#), also [Council Regulation \(EC\) 44/2001, article 23](#) and other international conventions.*

6.5. In the event of any dispute as to the meaning or effect of any provision of this Licence, it must so far as possible be read and given effect in a way that is compatible with the provisions of the current Creative Commons generic license which has the same License Elements. *This is new; its purpose is obvious. The language follows the style of the [Human Rights Act 1998 section 3](#).*

7. On the role of Creative Commons: *This section is lifted from the England and Wales redraft, with the single change of the addition of the last sentence of 7.4 which is to avoid any suggestion that CC is a licensing body in terms of [section 116\(2\) of the Copyright Design and Patents Act 1988](#).*

7.1. Neither the Licensor nor the User may use the Creative Commons logo except to indicate that the Work is licensed under a Creative Commons Licence. Any permitted use has to be in compliance with the Creative Commons' trade mark usage guidelines at the time of use of the Creative Commons trade mark. These guidelines may be found on the Creative Commons website or be otherwise available upon request from time to time.

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