

EXPLANATION OF BY-NC-SA v. 3.0 LICENSE
PUERTO RICO
WWW.CREATIVECOMMONS.PR



This document explains the relevant changes made to the Creative Commons BY-NC-SA v. 3.0 License in order to port it to the Puerto Rico jurisdiction. A separate Memorandum is available¹ expanding on the themes addressed here.

A. Applicable law and use of United States v. 3.0 license as baseline

Because United States copyright law is applicable to the Commonwealth of Puerto Rico, the Puerto Rico license is based on v.3.0 of the US CC license. For this reason, the PR license is mostly a Spanish translation of the US version.

However, the U.S. Copyright Act only addresses economic interests. Thus, federal preemption occurs only with regards to economic rights and not moral rights which, in the case of Puerto Rico, have their origin in the Spanish colonial era that ended in 1898 when Puerto Rico became a territory of the United States. Thus, Puerto Rico has two copyright regimes: one covering economic rights through US law, in U.S. courts, and another covering moral rights, by way of Puerto Rico law which is informed by the Spanish civil law doctrine, enforceable in local courts.

To the extent that the US CC license does not cover moral rights, it must be revised and amended to take into account Puerto Rico copyright law before porting it to our jurisdiction.

B. Moral Rights in Puerto Rico

It is widely understood that the prospect of moral rights waiver (or the rigidity of such waiver in many jurisdictions) presents a challenge for Creative Commons licenses, especially in the case of its integrity component, since original author's moral rights may inhibit downstream user's creative expression by impeding the production of derivatives from the licensed work.²

The main problem we encountered is that the contours of such rights in Puerto Rico are not clear, either in statute or case law. First, we do not know for certain whether they can be waived and if so, to what extent and under which circumstances. Second, the law and caselaw are also ambiguous as to the circumstances where an infringement of moral

¹ *Moral Rights in Puerto Rico and the Puerto Rico V.3.0 Creative Commons License*, available at the Puerto Rico License Discussion site and at www.creativecommons.pr.

² See <http://www.lessig.org/blog/archives/002449.shtml>;
http://wiki.creativecommons.org/Version_3#International_Harmonization_E2.80.93_Moral_Rights

rights is deemed to occur. We are not certain if any adaptation, without qualification, would be deemed to be prejudicial to the author's honor and reputation and, thus, a violation of the moral right of integrity (as in the case of Japan). This ambiguity is caused by the fact that our local intellectual property statute is vague on many issues and that the PR Supreme Court caselaw is scarce.

To the extent that things are unclear in this realm, and after careful consideration, we have concluded that the best policy seems to be to err in the side of caution leaving moral rights untouched in paragraph 4(g) in order to give stability to the license. Discussion has centered on the desirability of integrity rights waiver (as in the Canadian 2.5 License) and the prospect that such alternative might make PR licenses vulnerable to judicial invalidity. The policy question is, thus, which uncertainty is more tolerable: the one brought by the possibility of claims against downstream users for integrity rights violations when they use the licensed work flexibly or, on the other hand, the uncertainty brought by having the licenses *per se* vulnerable to attack for providing moral rights waiver. This, we expect, should be the focus of the debates when the license is presented for public discussion.

As a result, we propose that the Puerto Rico license address the issue by, first, defining moral rights exactly as it is described in the Puerto Rico statute to avoid further confusion and, second, by retaining author's moral rights (whatever the extent of that protection may be today or defined in the future). This is consistent with iCommons' international harmonization efforts in the context of moral rights.³ This should be the general approach in Puerto Rico, until the Intellectual Property Act is amended to allow waiver (at least integrity rights waivers in open licenses).

Because there are no clear signals as to what kind of alteration would violate the integrity right, the proposed language is silent on the issue; therefore, it does not specifically impede "derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation" as paragraph 4(f) of the unported version 3.0. Instead, it retains the right to protect the work's integrity, but allows the user to exercise the rights under the license to the fullest extent possible.

This shifts the unported license emphasis from things the user *cannot* do (certain "derogatory actions") to, affirmatively, things the user *can* do (to exercise the rights under the license to the fullest extent possible). To the extent that it is unclear what it is exactly that the user can do (as the conditions for infringement are not defined), then the Puerto Rico license would have this vagueness built-in. Although this is somewhat risky, it is a slight risk that does not expose the license *per se* to challenge, but may expose certain *uses* of the licensed work.

With this approach, we are protecting the license from any challenge based on improper waiver (because there is no waiver in any form) but, at the same time, if an individual challenge is presented for violation of integrity rights, then Puerto Rico courts would have the opportunity to define what are the requirements for infringement in the context of

³ http://wiki.creativecommons.org/Version_3#International_Harmonization_E2.80.93_Moral_Rights

open licenses. This approach, we believe, allows a healthy room for interpretation regarding the conditions for infringement.

The license, in short, is designed to accommodate legislative or judicial developments in this area. It also invites legislative reevaluation of moral rights in Puerto Rico and promotes for rethinking the rigidity of, at least, integrity rights in the context of free licenses.

In light of the above, we propose the following language:

Par. 1 (h) Definitions

“Moral rights” are those that permit the author or beneficiary of a literary, scientific, artistic and/or musical work to benefit from it, and to exercise the exclusive prerogatives to attribute to him/herself or retract its authorship, dispose of his/her work, authorize its publication and protect its integrity.

Par. 4(g) Restrictions.

Licensor offers the Work under the terms of this License without prejudice to the Original Author’s moral rights, allowing You to exercise the rights under this License to the fullest extent permitted by the Puerto Rico Intellectual Property Law, as amended.

Aside from these considerations, the Puerto Rico license is a translation of the United States license due to the applicability of federal law. Thus, license porting in other areas has been straightforward and simple.

Hiram A. Meléndez-Juarbe
hmelendez@creativecommons.pr
University of Puerto Rico Cyberlaw Clinic
www.cyberclinic.pr

Carlos González-Yanes
carlos@creativecommons.pr