Creative Commons

Attribution-NonCommercial-ShareAlike Draft ZA 1.0

CREATIVE COMMONS CORPORATION IS NOT A LAW FIRM AND DOES NOT PROVIDE LEGAL SERVICES. DISTRIBUTION OF THIS LICENSE DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP. CREATIVE COMMONS PROVIDES THIS INFORMATION ON AN "AS-IS" BASIS. CREATIVE COMMONS MAKES NO WARRANTIES REGARDING THE INFORMATION PROVIDED, AND DISCLAIMS LIABILITY FOR DAMAGES RESULTING FROM ITS USE.

The phrase "as is" is not generally used in South African law so the phrase "CREATIVE COMMONS PROVIDES THIS INFORMATION ON AN "AS-IS" BASIS? that appears in the universal licence is omitted from the preceding paragraph.

License

THE WORK (AS DEFINED BELOW) IS PROVIDED UNDER THE TERMS OF THIS CREATIVE COMMONS PUBLIC LICENSE ("CCPL" OR "LICENSE"). THE WORK IS PROTECTED BY COPYRIGHT, PERFORMERS PROTECTION AND/OR OTHER APPLICABLE LAW. ANY USE OF THE WORK OTHER THAN AS AUTHORIZED UNDER THIS LICENSE OR COPYRIGHT LAW IS PROHIBITED.

In South African law performances are protected by separate legislation, the Performers' Protection Act 11 of 1967. Since that Act does not refer to works or copies but fixations, and creates a separate category of rights it is best to refer specifically to it in the licence, since otherwise the phrase "other applicable law" might be too narrowly construed.

BY EXERCISING ANY RIGHTS TO THE WORK PROVIDED HERE, YOU ACCEPT AND AGREE TO BE BOUND BY THE TERMS OF THIS LICENSE. THE LICENSOR GRANTS YOU THE RIGHTS CONTAINED HERE IN CONSIDERATION OF YOUR ACCEPTANCE OF SUCH TERMS AND CONDITIONS.

The phrase "THE LICENSOR GRANTS YOU THE RIGHTS CONTAINED HERE IN CONSIDERATION OF YOUR ACCEPTANCE OF SUCH TERMS AND CONDITIONS? that appears in the universal licence has been omitted. Consideration is not required to form a binding agreement in Roman Dutch common law

1. Definitions

a. "Collective Work" means a work, such as a periodical issue, anthology or encyclopedia, in which the Work in its entirety in unmodified form, along with a number of other contributions, constituting separate and independent works in themselves, are assembled into a collective whole. A work that constitutes a Collective Work will not be considered a Derivative Work (as defined below) for the purposes of this License.

b. "Derivative Work" means a work based upon the Work or upon the Work and other pre-existing works, such as an adaptation translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this License. For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image ("synching") will be considered a Derivative Work for the purpose of this License.
Adaptation is a statutory term in South African copyright law, defined to include specific instances such as translation. It is suggested that it be included in but not replace the term “derivative work” as defined in the licence. This will ensure that the sense of adaptation is included in the term “derivative work,” but that it will not be unduly restricted by the statutory definition of “adaptation.”

a. “Entity” includes a legal person or a number of persons acting together, such as a partnership or an unincorporated association and where appropriate the State or an international organisation.

Since the word “individual” refers to a natural person “entity” might be taken, in contra-distinction, to refer only to a legal person such as a company and not the other possible holders of copyright mentioned in the inserted definition. Thus it is necessary to fully define entity. According to sections 5 and 21 of the South African Copyright Act 98 of 1978 the State and international organisations can where appropriate hold copyright. Since persons producing a joint work are considered co-authors and co-owners (section 21 of the Copyright Act), it is important that the definition of Licensor, and Original Author also be wide enough to include joint authors.

b. "Licensor" means the individual or entity that offers the Work under the terms of this License.

c. "Original Author" means the individual or entity who created the Work.

d. "Work" means the copyrightable work of authorship offered under the terms of this License, including literary, musical and artistic works; cinematograph films; sound recordings; broadcasts; programme-carrying signals; published editions and computer programs, and includes a fixation of a performance. The definition of work specifically includes the various types of work enumerated in the Copyright Act. The definition also refers to the fixation of a performance, protected by the Performers’ Protection Act 11 of 1967.

e. "You" means an individual or entity exercising rights under this License who has not previously violated the terms of this License with respect to the Work, or who has received express permission from the Licensor to exercise rights under this License despite a previous violation.

f. "License Elements" means the following high-level license attributes as selected by Licensor and indicated in the title of this License: Attribution, Noncommercial, ShareAlike.

2. Fair Use Rights. Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use dealing, first sale the general exceptions to protection of copyright works or other limitations on the exclusive rights of the copyright owner or performer under copyright, performers protection law or other applicable laws.

The term “fair dealing” has been substituted for the term “fair use” appearing in the universal licence. The term fair dealing is used in South African law to denote the approximate equivalent of fair use. The reference to first sale in the universal licence has been removed as the doctrine is unknown in South African law.

It also seems advisable to make references to the general exceptions to protection of copyright works, invoking the language of the Act to make the point abundantly clear. Once again there is specific reference to performers’ rights.

3. License Grant. Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual for the duration of the applicable copyright license to exercise the rights in the Work as stated below:

The phrase “perpetual” appearing in the universal licence is not in general use in South African law and has been omitted, and the words “for the duration of the applicable copyright” retained as
sufficient.

a. to reproduce the Work, to incorporate the Work into one or more Collective Works, and to reproduce the Work as incorporated in the Collective Works;

b. to create and reproduce Derivative Works;

c. to distribute copies or phonorecords of, display publicly, (and) perform publicly, and perform publicly by means of a digital audio transmission the Work including as incorporated in Collective Works;

d. to distribute copies or phonorecords of, display publicly, (and) perform publicly, and perform publicly by means of a digital audio transmission Derivative Works;

The terms ?or phonorecords? are unnecessary in South African law and has been omitted since the term 'copy' as defined in the Copyright Act ?means a reproduction of a work, and, in the case of a literary, musical or artistic work, a cinematograph film or a computer program, also an adaptation thereof? and is considered wide enough to included phonogram records. The term ?digital audio transmission? has also been omitted.

The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats. All rights not expressly granted by Licensor are hereby reserved, including but not limited to the rights set forth in Sections 4(e) and 4(f).

4. Restrictions. The license granted in Section 3 above is expressly made subject to and limited by the following restrictions:

a. You may distribute, publicly display, publicly perform, or publicly digitally perform the Work only under the terms of this License, and You must include a copy of, or the Uniform Resource Identifier for, this License with every copy or phonorecord of the Work You distribute, publicly display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Work that alter or restrict the terms of this License or the recipients' exercise of the rights granted hereunder. You may not sublicense the Work. You must keep intact all notices that refer to this License and to the disclaimer of warranties. You may not distribute, publicly display, publicly perform, or publicly digitally perform the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this License Agreement. The above applies to the Work as incorporated in a Collective Work, but this does not require the Collective Work apart from the Work itself to be made subject to the terms of this License. If You create a Collective Work, upon notice from any Licensor You must, to the extent practicable, remove from the Collective Work any reference to such Licensor or the Original Author, as requested. If You create a Derivative Work, upon notice from any Licensor You must, to the extent practicable, remove from the Derivative Work any reference to such Licensor or the Original Author, as requested.

b. You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License, a later version of this License with the same License Elements as this License, or a Creative Commons iCommons license that contains the same License Elements as this License (e.g. Attribution-NonCommercial-ShareAlike 2.0 Japan). You must include a copy of, or the Uniform Resource Identifier for, this License or other license specified in the previous sentence with every copy or phonorecord of each Derivative Work You distribute, publicly display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Derivative Works that alter or restrict the terms of this License or the recipients' exercise of the rights granted hereunder, and You must keep intact all notices that refer to this License and to the disclaimer of warranties. You may not distribute, publicly display, publicly perform, or publicly digitally perform the Derivative Work with any technological
measures that control access or use of the Work in a manner inconsistent with the terms of this License Agreement. The above applies to the Derivative Work as incorporated in a Collective Work, but this does not require the Collective Work apart from the Derivative Work itself to be made subject to the terms of this License.

c. You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

d. If you distribute, publicly display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must keep intact all copyright notices for the Work and give the Original Author credit reasonable to the medium or means You are utilizing by conveying the name (or pseudonym if applicable) of the Original Author if supplied; the title of the Work if supplied; to the extent reasonably practicable, the Uniform Resource Identifier, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and in the case of a Derivative Work, a credit identifying the use of the Work in the Derivative Work (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author"). Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.

e. For the avoidance of doubt, where the Work is a musical composition:

i. Performance Royalties Under Blanket Licenses. Licensor reserves the exclusive right to collect, whether individually or via a performance rights society (e.g. ASCAP, BMI, SESAC, SAMRO, NORM) royalties for the public performance or public digital performance (e.g. webcast) of the Work if that performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

ii. Mechanical Rights and Statutory Royalties. Licensor reserves the exclusive right to collect, whether individually or via a music rights agency (SARRAL) or designated agent (e.g. Harry Fox Agency), royalties for any phonorecord record of a musical work You create from the Work ("cover version") and distribute, subject to the compulsory license created by 17 USC Section 115 of the US Copyright Act section 14 of the South African Copyright Act (or the equivalent in other jurisdictions), if Your distribution of such cover version is primarily intended for or directed toward commercial advantage or private monetary compensation. Section 14 creates a compulsory licensing scheme for records of musical works that were previously made or imported for retail sale.

f. Webcasting Rights and Statutory Royalties. For the avoidance of doubt, where the Work is a sound recording, Licensor reserves the exclusive right to collect, whether individually or via a performance rights society (e.g. SoundExchange), royalties for the public digital performance (e.g. webcast) of the Work, subject to the compulsory license created by 17 USC Section 114 of the US Copyright Act (or the equivalent in other jurisdictions), if Your public digital performance is primarily intended for or directed toward commercial advantage or private monetary compensation.

South African law does not create a category of "digital public performance". Is this category equivalent to one or more of the categories created by the South African Copyright Act such as broadcasting, transmission in a diffusion service, and communication to the public?
g. You may not exercise any of the rights granted to You in Section 3 above in any manner that violates the moral rights of the author, to be named as author of the Work, and to object to mutilation of the work contrary to the author’s honour. Should an author object compliance with a request to remove the authors’ name from the work in accordance with 4.a above is sufficient to respect the authors’ moral right.

Section 20 of the Copyright Act creates moral rights retained by the author; ownership of these rights cannot be assigned. The insertion of the paragraph is intended to both uphold the rights, by ensuring that the licence is not read as a restriction on them, as well as educating those not familiar with intellectual property agreements. It is also intended to ensure that the rights do not undermine the essential purpose of the licence, that permission be given to people to freely copy and create.

5. Representations, Warranties and Disclaimer

UNLESS OTHERWISE MUTUALLY AGREED TO BY THE PARTIES IN WRITING, LICENSOR OFFERS THE WORK AS-IS AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND CONCERNING THE WORK, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR THE ABSENCE OF LATENT OR OTHER DEFECTS, ACCURACY, OR THE PRESENCE OF ABSENCE OF ERRORS, WHETHER OR NOT DISCOVERABLE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO SUCH EXCLUSION MAY NOT APPLY TO YOU.


6. Limitation on Liability. EXCEPT TO THE EXTENT REQUIRED BY APPLICABLE LAW, IN NO EVENT WILL LICENSOR BE LIABLE TO YOU ON ANY LEGAL THEORY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THIS LICENSE OR THE USE OF THE WORK, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

7. Termination

a. This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License. Individuals or entities who have received Derivative Works or Collective Works from You under this License, however, will not have their licenses terminated provided such individuals or entities remain in full compliance with those licenses. Sections 1, 2, 5, 6, 7, and 8 will survive any termination of this License.

Would it be better in South African law to rephrase this as stating that upon breach by You, of the licence terms, the rights granted under section 3 will be terminated, but the remainder will remain in effect?

b. Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect unless terminated as stated above.

The phrase ?perpetual? appearing in the universal licence is not in general use in South African law and has been omitted, and the words ?for the duration of the applicable copyright? retained as sufficient.
8. Miscellaneous

a. Each time You distribute or publicly digitally perform the Work or a Collective Work, the Licensor offers to the recipient a license to the Work on the same terms and conditions as the license granted to You under this License.

b. Each time You distribute or publicly digitally perform a Derivative Work, Licensor offers to the recipient a license to the original Work on the same terms and conditions as the license granted to You under this License.

c. If any provision of this License is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this License, and without further action by the parties to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable.

d. No term or provision of this License shall be deemed waived and no breach consented to unless such waiver or consent shall be in writing and signed by the party to be charged with such waiver or consent.

e. This License 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. Licensor shall not be bound by any additional provisions that may appear in any communication from You. This License may not be modified without the mutual written agreement of the Licensor and You.

Creative Commons, and Creative Commons ZA are not parties to this License, and makes no warranty whatsoever in connection with the Work. Creative Commons and Creative Commons ZA shall not be liable to You or any party on any legal theory for any damages whatsoever, including without limitation any general, special, incidental or consequential damages arising in connection to this license. Notwithstanding the foregoing two (2) sentences, if Creative Commons or Creative Commons ZA has expressly identified itself as the Licensor hereunder, it shall have all rights and obligations of Licensor.

Except for the limited purpose of indicating to the public that the Work is licensed under the CCPL, neither party will use the trademark "Creative Commons" or any related trademark or logo of Creative Commons without the prior written consent of Creative Commons. Any permitted use will be in compliance with Creative Commons' then-current trademark usage guidelines, as may be published on its website or otherwise made available upon request from time to time.

Creative Commons may be contacted at http://creativecommons.org/.

Creative Commons ZA may be contacted at http://za.creativecommons.org.