

Screenrights is a non-profit company which administers copyright licences in Australia and New Zealand and collects similar royalties from Europe and North America for its 2,200 members from 51 countries.

July 2006

Feature: Creative Commons and filmmakers

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This is an online newsletter. You can subscribe by emailing ota@screenrights.org

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Feature: Creative Commons and filmmakers

By Ian McDonald & Helen Dakin from The Australian Copyright Council

There's been quite a bit of buzz over the past eighteen months in relation to Creative Commons ("CC") licences—particularly since a set of CC licences adapted for Australian conditions was launched, supposedly for the benefit of creators and users of copyright material. But does this new form of licensing offer any advantages for filmmakers? **Ian McDonald and Helen Dakin**, Legal Officers with **The Australian Copyright Council**, discuss the implications of CC licences for the film industry.

What are CC licences?

The CC licences are a set of standardised licences which are being promoted as a way for creators to allow people to use their material for free, subject to varying levels of restriction, without those people having to contact the creator for specific permissions: users can simply refer to the terms of the relevant licence on the various CC websites.

There are six licences offered by CC in Australia:

- "Attribution" (which imposes very few limits on the use of the material, other than that the creator be attributed);
- "Attribution-ShareAlike" (which allows transformation and alteration of the material, provided any material into which it is incorporated is licensed on the same conditions);
- "Attribution-NonCommercial" (which allows other people to use your material and make "derivative works", but only for what are described as non-commercial purposes);
- "Attribution-NonCommercial-ShareAlike" (which combines these three licence attributes);
- "Attribution-NoDerivs" (which isn't supposed to allow people to incorporate your material into their material); and
- "Attribution-NonCommercial-NoDerivs" (which combines these three licence attributes).

The detailed terms and conditions of the licences are set out in what CC refers to as the "Legal Code"; the above shorthand descriptions of the licences are described as "human readable" summaries. In addition, each licence is represented by an icon that lets people know which licence applies.

Potential problems

A major problem with the CC licences is that, for four of the licences, both the shorthand symbols and the "human readable" summaries are very misleading.

The two "NoDerivs" licences only prohibit people from making derivative works if the derivative work is an "adaptation" under Australian copyright law. Contrary to what is suggested in the "human readable summary", this will still generally allow people to incorporate "NoDerivs" licenced material into their own work.

The prohibition in the two "NonCommercial" licences relates only to use "in a manner that is **primarily** intended or directed toward commercial advantage or private monetary compensation" (emphasis added). This wording still allows—without payment—any business or corporation to use something licensed under a CC licence in their business in ways that are incidentally or indirectly related to commercial advantage or profit. This would allow, for example: screenings in aircraft, bars and clubs; broadcast on the ABC and SBS; posting to commercial websites for free access and downloads; and hotels and motels giving access to guests via in-house video.

Filmmaking is an expensive business, and we can see no reason in principle why, as a general rule, practising film-makers and other people involved in film and TV would want effectively to subsidise people and organisations well able to pay for licences.

While talking about money, it's also worth noting that the licences have other potential financial downsides.

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For example, if you're a member of Screenrights, you would expect to get payments from Screenrights from time to time as a result of schools, universities, and other educational institutions copying your work from TV or radio, making further copies and "communicating" them (for example, posting your work to an intranet, or emailing copies to students). Down the track, you may get similar payments via Screenrights from governments and as a result of pay TV stations retransmitting free-to-air broadcasts. However, you will not be entitled to **any** payments from Screenrights if you have licensed your work under **any** of the CC licences.

Will CC licences help get your work known?

CC suggests that licensing creative material under a CC licence is a good way of bringing work to the attention of the general public. However, a CC licence by itself is unlikely to bring much attention to someone. Just licensing your work with a broad licence attached won't make anyone aware that it exists. Try doing a search for CC licensed material relating to a topic you're interested in, and you might get hundreds of thousands or even millions of hits.

Creators will still need to solve the perennial problem of finding promotional strategies to get their material noticed and generate income-producing opportunities—offering your work with a CC licence deprives them of large slices of licensing income which normally would go to recoup costs and generate profit.

Are you in a position to license your work using a CC licence?

In many cases, you will not legally be in a position to offer a CC licence over a film or documentary you have made. Reasons for this could include:

- you may not own copyright (often, the producer, production company or the funding body will own copyright);
- your licences to use third party material, such as music, recordings and clips included in your film or documentary, may effectively rule out licensing your work under a CC licence (either because they are not extensive enough, or they require you to pay royalties for third-party use); and
- your contracts with actors and others involved may similarly effectively rule out granting a CC licence over the film or documentary.

Can you revoke a CC licence if you change your mind?

All CC licences last for the term of copyright and, in practical terms, will be difficult to revoke.

This is because, although the licences may be just "bare" licences which could normally, as a legal matter, be revoked by the person granting the licence:

- there is no way of identifying all the people who might be using the CC-licensed material in order to notify them that the licence has been revoked; and
- for those people who can be identified and contacted, any investment of time or money they have made in reliance on the licence might enable them to argue that they can continue to rely on it (this is an area of law known as "estoppel").

Using CC material in your films

If you have incorporated CC-licensed material into your work and you are contacted by a copyright owner and told that the licence has been revoked, your ability to continue to use the material, and in what ways, will depend on how the law of estoppel applies to your situation.

Secondly, if you rely on a CC licence to incorporate material into something you are working on, you won't have any of the normal warranties from the person who put the CC licence on the material (for example, that the person owns copyright, and is entitled to grant the licence). Nor will you be able to rely on any indemnity to back up a warranty

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(for example, that if you suffer any loss because of a breach of the warranties, the person who gave you the licence will be liable to cover your loss). Indeed, the CC licences expressly seek to **exclude** the licensor's liability.

Thirdly, if you have incorporated any CC-licensed material into your film or documentary (particularly material licensed under one of the "ShareAlike" licences), your ability to exploit your work commercially may be severely limited.

The net effect of these difficulties is that using material in reliance on a CC licence will generally be too risky to be worthwhile. Instead, it would generally be prudent to get any permissions you need directly from the copyright owner, just as you would with any other third party material. Then, you can make the licence binding and not revocable; you can get appropriate warranties and indemnities from the person claiming to be the copyright owner; and you can negotiate for a licence which clearly allows you to exploit your work in the way you wish.

The bottom line

To summarise:

- you may not legally be able to license a film or program you have made under a CC licence; and
- even if you are able to offer your work under a CC licence, it's unlikely to be in your best interests to do so.

We can't see that the CC licences represent any advantage for people involved in making films, documentaries or TV programs.

If you do go ahead with a CC licence, it's important to be absolutely clear in your own mind as to what the implications of a CC licence will be for you and to get advice if you need it.

Australian Copyright Council: www.copyright.org.au

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright; foster co-operation amongst bodies representing creators and owners of copyright.

Record distribution year for Screenrights

With almost \$20 million distributed to copyright owners in film and television from 1 July 2005 to 30 June 2006, Screenrights distribution team has had a record year.

Total payments during this 12 month period were \$19,830,408, compared to the previous highest amount of \$16,006,679 in the 04/05 financial year.

With the deadline for distributing 2000 Australian educational copying royalties now having passed (June 30), the team also achieved excellent results with only 1.05% of this money remaining undistributed. This will now roll over into the following year's distribution pool.

Screenrights Chief Executive Simon Lake said he was particularly pleased with the results.

"Getting the money that we collect into our members' hands is one of the most important aspects of our operations," he said. "I am delighted with how efficiently this is occurring."

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International update

Are you a film producer wanting to improve efficiencies in collecting international royalties? Screenrights International Services Administrator Maha Ismail is conducting individual briefings with members to discuss data requirements, deadlines and other issues relevant to collecting income from the United States, Canada and Europe.

Screenrights collected over \$1 million in international royalties in the 2005/06 financial year. Once you register your title with Screenrights International, this registration can be used wherever blank tape and retransmission royalties are collected. The administration fee for this service is capped at 12%.

If you are interested in a briefing or have queries that you would like to discuss in relation to your international income, you can email maha@screenrights.com

Rewarding teacher librarians working for media literacy

Teacher librarians who have been making an impact on media literacy in their school could soon be rewarded for their efforts with a new award sponsored by enhanceTV and the Australian School Library Association, ASLA.

"With media such as television being a big part of children's lives, it is important to foster their critical viewing skills. Teacher librarians are in a pivotal position to actively promote media literacy and help teachers by providing classroom resources to improve student learning," said Karen Bonanno ASLA Executive Officer. "ASLA is proud to have developed with enhanceTV, the new Teacher Librarian Innovation Award for Media Literacy Enhancement, to recognise excellence in this area."

The national Teacher Librarian Innovation Award for Media Literacy Enhancement is open to qualified Teacher Librarians who belong to one of the ASLA member associations and whose school is licensed by Screenrights.

The award criteria and entry form can be downloaded from www.asla.org.au/advocacy/award/EnhanceTV.htm Entries close on 16 October 2006.

Resource centre opens

The enhanceTV site has now been expanded to allow educational institutions to obtain copies of educational programming, bringing benefits to both teachers and filmmakers.

The non-profit resource centre supplies programs to teachers who may have forgotten to make a copy. Like all of the enhanceTV services, the resource centre aims to encourage educational use of television.

If you would like more information about how the service operates, you can download our Fact Sheet from our website: www.screenrights.org

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ISAN Business Development Manager

ISAN Australasia, the registration agency for a new unique identification number for audiovisual material, is delighted to announce the appointment of Daryl Robinson as Business Development Manager.

Daryl has extensive industry experience, including working for the Film Finance Corporation.

ISAN Australasia, which was launched in June, was established by Screenrights and APRA to make ISANs (International Standard Audiovisual Numbers) available to the audiovisual industries in Australia and New Zealand. The key benefits include:

- Reducing errors and optimising efficiencies between systems
- Facilitating data exchange without translation between proprietary numbering schemes or extensive manual title matching
- Increasing accuracy in managing rights, collections and payments

To find out more about ISAN and how it can benefit you, visit www.australasia-isan.org