

Creative Commons Licensing

A Practical Guidance® Practice Note by Chad A. Rutkowski, BakerHostetler



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This practice note discusses Creative Commons (CC) licensing, including the different types of template licenses and key issues to consider when counseling clients on licensing copyrighted works via a CC license, such as irrevocability, attribution, the nature and scope of “share alike” obligations, warranty disclaimers, the suitability of licensing software source code, and the impact of a CC license on the value of a work.

For a related checklist, see [Creative Commons Licensing Checklist](#).

Why Use a Creative Commons License?

The Copyright Act gives a copyright owner the exclusive rights to reproduce the copyrighted work; create derivative works; distribute copies of the work by sale, lease, or other transfer of ownership; perform the work publicly; and display the work publicly. See 17 U.S.C. § 106 and [Exclusive Rights of Copyright Owners](#). Each of these rights may be separately transferred or licensed, generally in exchange for some form of compensation (such as royalties). For more on copyright transfers, see [Transfers of Copyright Ownership](#).

However, not all copyright owners wish to exploit all the exclusive rights of a copyright. For example, new artists who want to increase their notoriety might want to grant others permission to use their creative works so long as they receive credit as the author (such as photographers or artists trying to get the attention of galleries and curators). Or, to give another example, participants in open innovation communities (such as medical researchers and data scientists) may wish to share information to prompt sharing by others and ensure dissemination of important information. For such copyright owners, a CC license may be a desirable alternative to a traditional copyright license.

CC licenses are a set of template licenses that foster the sharing of copyrighted content. The different licenses share several features, but most fundamentally they grant to the general public the right to copy and distribute a work without compensation in return for providing attribution to the author. Beyond this baseline requirement, a licensor has several options for placing restrictions on the use of the work. These include:

- Granting or denying the licensee the right to make derivative works of the licensed work
- Requiring the creator of any derivative work to similarly license that derivative under the same CC license
- Permitting or denying commercial use of the licensed work

For more on the various types of CC licenses, see [Types of Creative Commons Licenses](#) below.

CC licenses are provided by the [Creative Commons Corporation](#), a nonprofit organization that aims to “overcome legal obstacles to the sharing of knowledge and creativity to address the world’s pressing challenges.” While CC licenses were developed primarily as a means of fostering a richer culture of expression in the digital age, they have emerged as an important driver of open innovation in many technical, industrial, and scientific fields.

Types of Creative Commons Licenses

There are six core CC licenses, plus a “non-license” public domain dedication. Each core license is an agreement between the copyright owner (licensor) and any member of the public who wishes to use the license in accordance with its terms (licensee); the Creative Commons Corporation is not a party. The licenses, from most to least permissive, are:

- **Attribution (CC BY).** This [license](#) allows distribution, remixes, and adaptations—commercially or noncommercially—so long as the original creator is credited.
- **Attribution-ShareAlike (CC BY-SA).** This [license](#) is the same as CC BY, except that new creations must be licensed under identical terms. In other words, every new work based on the original must have the same license. The CC BY-SA license is often compared to “copyleft” and open source software licenses. For more information on open source licenses, see [Free and Open Source Software \(FOSS\) Fundamentals](#), [Open Source License Considerations](#), and [Open Source Software License Compliance Checklist](#).
- **Attribution-NonCommercial (CC BY-NC).** This [license](#) is the same as CC BY but can only be used noncommercially.
- **Attribution-NonCommercial-ShareAlike (CC BY-NC-SA).** This [license](#) is the same as CC BY-SA except that works licensed under it, and any derivatives created thereunder, can only be used noncommercially.
- **Attribution-NoDerivatives (CC BY-ND).** This [license](#) requires attribution and prohibits the creation of derivatives of the licensed work.

- **Attribution-NonCommercial-NoDerivatives (CC BY-NC-ND).** This [license](#) requires attribution and prohibits both the creation of derivative works and use of the licensed work for commercial purposes.
- **Creative Commons Zero.** This designation is not so much a license, but rather a disavowal of copyright protection and dedication to the public domain. No attribution is required, and the work can be used and sold in any fashion. For more on the public domain, see [Public Domain and Orphan Works Checklist](#).

Aside from the differences noted above, all six core licenses share many common features. They apply worldwide, last for the duration of the work’s copyright, and are nonexclusive and irrevocable (for more on copyright duration, see [Copyright Duration Chart](#) and [Copyright Duration Flowchart](#)). They allow licensees, at least noncommercially, to reproduce and distribute the work, publicly perform or display the work, create digital public performances of the work, and shift the work into another format as a verbatim copy.

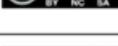
Additionally, all six core CC licenses require licensees to:

- Get the licensor’s permission to engage in any restricted uses
- Keep any copyright notice intact on all copies of the work (for more on copyright notice, see [Copyright Notice Checklist](#))
- Link to the original license from copies of the work
- Not alter the terms of the license
- Not use technology to restrict other licensees’ uses of the work

The chart below sets forth key attributes of each CC license. The last two columns reflect the compatibility of specific CC licenses with definitional designations used by other open innovation and open knowledge organizations, namely:

- Freedom Defined’s [definition](#) of “Free Cultural Works”
- Open Knowledge Foundation’s [definition](#) of “Open Definition”

The colors represent the degree to which the license imposes obligations (with red being the most restrictive, yellow being minimally restrictive, and green being the least restrictive).

Icon	Name/Description	Shorthand	Attribution Required?	Allows Remix Culture?	Allows Commercial Use?	Allows Free Cultural Works?	Meets the Open Knowledge Foundation's "Open Definition"?
	CC0/Public Domain	CC0	No	Yes	Yes	Yes	Yes
	Attribution	BY	Yes	Yes	Yes	Yes	Yes
	Attribution + ShareAlike	BY-SA	Yes	Yes	Yes	Yes	Yes
	Attribution + Noncommercial	BY-NC	Yes	Yes	No	No	No
	Attribution + Noncommercial + ShareAlike	BY-NC-SA	Yes	Yes	No	No	No
	Attribution + No Derivatives	BY-ND	Yes	No	Yes	No	No
	Attribution + No Derivatives + Noncommercial	BY-ND-NC	Yes	No	No	No	No

License Layers

Creative Commons Corporation disseminates each license in three "layers," as follows:

- **Legal Code.** The text of the license itself.
- **Commons Deed.** A layman's summary of some of the most important terms and conditions, in a user-friendly interface.
- **Machine readable code.** Metadata that summarizes the key freedoms and obligations written into a format (the CC Rights Expression Language) that various technologies can understand.

One could perhaps question the wisdom of formulating in this fashion what is really just a license, a layman's summary, and metadata, as the formulation suggests each is binding in its own way, and variances in one or the other might be read to create an ambiguity. Similarly, the choice of nomenclature is somewhat confusing, as "code" commonly refers to statutory material and/or software code and a "deed" relates to real property.

Regardless, for the practitioner, these distinctions are largely inconsequential. The legally enforceable layer is the Legal Code, and all cases that have interpreted (and enforced) the licenses have addressed only this layer.

Key Licensing Considerations

When counseling clients on whether to apply a CC license to a copyrighted work, or whether to use a work covered by a CC license, key issues to consider include:

- Ramifications of irrevocability
- The right to share versus the right to sublicense
- Enforceability of attribution obligation
- Warranty disclaimers (including ramifications in data usage and technical uses)
- Whether the listed source of CC-licensed content is accurate
- Whether a CC license may be used with software source code
- The scope of derivative works for "share alike" licenses (including special rules for databases)
- Exclusion of patent and trademark rights
- How a CC license will impact the value of the work
- The licensee's right to authorize third-party vendors to exercise its rights

Each is discussed in more detail below.

Ramifications of Irrevocability

Copyright owners considering applying a CC license to a work should engage in a robust assessment of all possible future uses of the content that they are distributing under the license. Authors occasionally intend to distribute content only **initially** under a CC license to spur consumption or adoption, but then wish to change the license to charge for or otherwise monetize the content. Or a copyright owner might initially distribute content under a CC license to support other business goals, but then realize too late that a competitor is also using and distributing the content as a CC licensee.

It is technically possible to cease distribution of a work provided under a CC license and redistribute it under a new proprietary license. However, the CC license is irrevocable vis-à-vis those recipients who already received the content under the CC license. This point is emphasized in the termination provision of the licenses, which provides as follows: “For the avoidance of doubt, the Licensor may also offer the Licensed Material under separate terms or conditions or stop distributing the Licensed Material at any time; however, doing so will not terminate this Public License.”

Thus, while new users accessing a work post termination may do so under a proprietary license, old users have an irrevocable right not only to access and use the content themselves but also to “share” the content, as that term is specifically defined in the template licenses. Well-known distribution hubs for CC-licensed content, such as [Wikimedia Commons](#), will often refuse requests to take down content whose license has changed, based in part on the irrevocable nature of the licenses.

For more on sharing, see Right to Share versus Right to Sublicense, and Scope of Derivative Works for “Share Alike” Licenses, below.

Right to Share versus Right to Sublicense

All six core CC licenses state that the license grant is not sublicensable but give the licensee the right to “Share” the licensed content. Specifically, the license grant clause provides:

Subject to the terms and conditions of this Public License, the Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material to:

A. reproduce and Share the Licensed Material, in whole or in part; and

B. produce, reproduce, and Share Adapted Material.

See, e.g., Section 2(a)(1) of the [CC BY](#) license.

The licenses define the term “Share” as follows:

Share means to provide material to the public by any means or process that requires permission under the Licensed Rights, such as reproduction, public display, public performance, distribution, dissemination, communication, or importation, and to make material available to the public including in ways that members of the public may access the material from a place and at a time individually chosen by them.

See, e.g., Section 1(i) of the [CC BY](#) license. While some of the CC licenses include additional restrictions (such as preventing Sharing for commercial purposes), each includes the right to Share.

Note that the Share rights under CC licenses are not just distribution rights. Rather, they encompass all the copyright owner’s exclusive rights other than the right to make derivative works (unless otherwise granted), including reproduction, display, and public performance. For more on exclusive rights, see 17 U.S.C. § 106 and [Exclusive Rights of Copyright Owners](#).

Moreover, the CC licenses also expressly state that “(e)very recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License,” and prohibit the licensor from “offer[ing] or impos[ing] any additional or different terms or conditions on, or apply[ing] any Effective Technological Measures to, the Licensed Material if doing so restricts exercise of the Licensed Rights by any recipient of the Licensed Material.” See, e.g., Section 5 of the [CC BY](#) license.

A CC licensor should accordingly expect that its work will be treated as sublicensable, despite the verbiage in the license grant to the contrary. A CC licensee, however, should proceed with caution. Although the licensee would appear to have the better argument that the license, taken as a whole, grants a right to sublicense, an argument might be made that the “non-sublicensable” language should control or, alternatively, that the presence of an ambiguity justifies resort to extrinsic evidence.

Enforceability of Attribution Obligation

The right of attribution is a “moral” right that has a longer history of recognition in jurisdictions outside the United States. U.S. courts do not generally recognize a common-law right of attribution but have enforced such rights where

provided by statute (such as the Visual Artists Rights Act, 17 U.S.C. § 106A) or by contract.

While there is not a robust body of case law addressing the enforceability of contractual attribution obligations, two courts that have addressed the issue have found that the attribution right is a condition precedent to, and not simply a covenant of, a copyright license. Failure to provide the required attribution therefore resulted in copyright infringement liability for the licensee, and not simply a claim for breach of contract. See *Philpot v. Music Times LLC*, 2017 U.S. Dist. LEXIS 48454, at *1 (S.D.N.Y. Mar. 29, 2017) (finding that a CC license attribution requirement was a condition precedent), report and recommendation adopted, 2017 U.S. Dist. LEXIS 70744 (S.D.N.Y. May 9, 2017); *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (treating the attribution right similarly in a non-CC open source software license).

CC licensees should accordingly ensure that they follow attribution directives. Creative Commons Corporation [suggests](#) providing the following information:

- Title
- Author
- Source (include a hyperlink to where the content resides online, if applicable)
- License (name the specific CC license, such as CC BY-SA, and include a link to it)

Note, however, that one court found it acceptable to simply list the name of the author, the title of the work, and the license abbreviation in the back of a printed publication, without providing hyperlinks to either the work's source or the full license text. See *Drauglis v. Kappa Map Grp., LLC*, 128 F. Supp. 3d 46, 56–58 (D.D.C. 2015).

Warranty Disclaimers

It may seem odd for licenses that are commonly used for photographs to disclaim warranties of “merchantability,” “fitness for a particular purpose,” and “absence of latent or other defects.” See, e.g., Section 5(a) of the CC BY license. However, the Creative Commons Corporation envisions the CC licenses being used for all manner of copyrightable content, some of which more readily lends itself to such disclaimers, such as:

- Technical drawings
- Scientific data
- Databases
- Software source code

While the enforceability of these disclaimers and limitations of liability have not been tested, their existence further underscores the importance of the CC license attribution obligations (discussed above). That is, providing proper attribution not only gives the author due credit, but gives downstream users notice of the applicable license terms, including the warranty disclaimers. These legal protections also provide an important incentive to the licensor to freely distribute its content in the first place.

CC licensees should pay attention to these disclaimers. Not only do they provide an “as is,” caveat emptor-type scope of protection when using content for technical or scientific purposes, but they also disclaim warranties of title. That is, the licensee has little recourse if the licensor purports to be the owner of the licensed content but is not. Due diligence should be exercised to ensure the CC licensor is in fact the author of the work or otherwise has proper rights to distribute the work under the CC license. For more on due diligence generally, see [IP Due Diligence](#).

Source of CC-Licensed Content

Many useful and well-meaning sites act as aggregators of CC-licensed content, most prominently the Wikimedia Commons and Wikipedia websites. While the license declarations on these sites are often correct, they are not infallible. Be sure to click through the hyperlinks of the identified sources to ensure the author and license information is accurate.

Use of CC Licenses with Software Source Code

The Creative Commons Corporation [recommends against](#) applying CC licenses to software because, unlike open source licenses, CC licenses:

- Do not expressly address distribution of source code
- Exclude patent rights
- Are not compatible with the major open source licenses

This is true as far as it goes. But some versions of the CC licenses are in fact very similar to some of the canonical open source licenses recognized by the [Open Source Initiative](#) (OSI). There is not, for example, much difference between the terms of the [MIT open source license](#) and the CC BY license applied to software source code.

Moreover, the very nature of CC licenses may make them more desirable to a licensor than the major open source licenses. For instance, to qualify as an open source license recognized by OSI, licensors must not restrict field of use (i.e., commercial vs. noncommercial) or the ability to make derivative works. To avoid such restrictions, a source code

copyright owner might choose a CC license. Note, however, that adoption of the owner's work may be hindered, as the work could not be combined with other open source software assets unless otherwise permitted by the terms governing the other open source software.

For more information on open source software, see [Free and Open Source Software \(FOSS\) Fundamentals](#), [Open Source License Considerations](#), and [Open Source Software License Compliance Checklist](#).

Scope of Derivative Works for “Share Alike” Licenses

For CC licenses with share alike or SA obligations, a key question is what content of the licensee must be shared under the terms of the CC license. Under the colloquial, [Commons Deed summary](#) of SA, “(i)f you remix, transform, or build upon the [licensed] material, you must distribute your contributions under the same license as the original.” However, the Legal Code version provides more clarity, and is arguably narrower than the SA obligation described in the Commons Deed. The Legal Code states:

Adapted Material means material subject to Copyright and Similar Rights that is derived from or based upon the Licensed Material and in which the Licensed Material is translated, altered, arranged, transformed, or otherwise modified in a manner requiring permission under the Copyright and Similar Rights held by the Licensor.

See, e.g., Section 1(a) of the [CC BY](#) license. This language strongly suggests that only those derivative works that implicate the owner's exclusive rights under 17 U.S.C. § 106 are subject to the share alike obligations.

Determining when a resultant work is a “derivative work,” however, is not always clear-cut. In *Drauglis v. Kappa Map Grp., LLC*, 128 F. Supp. 3d 46 (D.D.C. 2015), for instance, an atlas maker used a CC BY-SA licensed photograph as the cover of its atlas. The plaintiff argued that the atlas was a derivative work, while the defendant claimed the atlas was merely a collective work that included the licensed work and other, separately copyrightable works. The court sided with the defendant, finding that defendant did not “recast, transform, or adapt” the photograph, but rather used it “alongside ‘other contributions, constituting separate and independent works.’” *Drauglis*, 128 F. Supp. 3d at 55. Arguably, the Commons Deed formulation of SA might include use in a collective work within its definition, but the Legal Code definition does not. For more on derivative works, see *Nimmer on Copyright* § 3.01. For more on collective works, see *Nimmer on Copyright* § 3.02.

Although laws of jurisdictions outside the United States are beyond the scope of this note, be aware that special rules apply regarding licensed database content in the European Union. Specifically, “if You include all or a substantial portion of the database contents in a database in which You have Sui Generis Database Rights, then the database in which You have Sui Generis Database Rights (but not its individual contents) is Adapted Material.” See, e.g., Section 4(b) of the [CC BY](#) license.

Exclusion of Patent and Trademark Rights

CC licenses state quite simply that “Patent and trademark rights are not licensed under this Public License.” See, e.g., Section 2(b)(2) of the [CC BY](#) license. In other words, a CC licensee may not put the licensed content into practice if doing so would otherwise infringe a patent (or trademark). This stands in contrast to some popular open source licenses, such as the General Public License (GPL) and the Apache License, where licensees are expressly granted the right to use the content under both patent and copyright law.

For more information on open source licensing, see [Free and Open Source Software \(FOSS\) Fundamentals](#), [Open Source License Considerations](#), and [Open Source Software License Compliance Checklist](#). For overviews of patent and trademark law, see [Patent Fundamentals](#) and [Trademark Fundamentals](#).

Impact of Creative Commons License on Value of Work

At face value, it would seem that offering free distribution of a work via a CC license would destroy any licensing value of the work. This could be an issue in copyright infringement litigation when CC licenses are breached, as arguably no actual damage would be sustained (since the work was given away for free), and even statutory damages are based in part on the work's market value.

However, this might not always be the case. For instance, one court awarded \$5,000 in statutory damages for failure to provide attribution under a CC-licensed work, finding in part that the photograph might have market value despite the plaintiff's failure to put forth supporting evidence. See *Philpot v. Music Times LLC*, 2017 U.S. Dist. LEXIS 48454, at *29 (S.D.N.Y. Mar. 29, 2017), report and recommendation adopted, 2017 U.S. Dist. LEXIS 70744 (S.D.N.Y. May 9, 2017).

Better facts were present in *Artifex Software, Inc. v. Hancorn, Inc.*, 2017 U.S. Dist. LEXIS 147637 (N.D. Cal. Sept. 12, 2017), which involved open source software that

was made available under a dual license regime, where users had three options:

- Obtain a commercial license
- Use the software under the GPL without modifying or distributing it –or–
- Modify or distribute the software under the GPL and make the resulting product open source

Artifex, 2017 U.S. Dist. LEXIS 147637, at *6. Plaintiff licensor sued defendant for copyright infringement and breach of contract after defendant failed to comply with these requirements. In denying defendant's motion for summary judgment, the court noted that it could "use the value of the commercial license as a basis for any damages determination" as to the breach of contract claim. *Artifex*, 2017 U.S. Dist. LEXIS 147637, at *7.

Although *Artifex* did not involve a CC license, open source cases have been cited to by the few courts that have addressed CC licenses. Moreover, the unspoken principle that the decision to distribute for free does not mean that a work lacks intrinsic market value appears to be equally applicable in both types of cases.

Licensee's Use of Third-Party Vendors to Exercise Licensed Rights

One question that was open for some time, but now appears settled, is whether a licensee can employ a third-party contractor to exercise its rights under a CC license without binding the contractor to the license terms. *Great Minds v. FedEx Office & Print Servs., Inc.*, 886 F.3d 91 (2d Cir. 2018) and *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106 (9th Cir. 2019) involved lawsuits filed by the owner of educational content licensed under CC-NC licenses. The licensor sued third-party contractors that charged educational institutions to make course pack copies of its content, claiming that the contractors could make the reproductions only if they themselves agreed to the CC-NC licenses, and that their charging of fees to make the copies violated the licenses.

Both the Second and Ninth Circuits rejected these claims, finding that the vendors were acting as agents of the original licensees and could exercise the granted rights on behalf of the licensees without binding themselves to the terms of the license. Thus, at least in the Second and Ninth Circuits, this practice is permissible, but be sure to monitor how courts in other jurisdictions treat the issue.

Chad A. Rutkowski, Partner, BakerHostetler

Chad Rutkowski's practice focuses on the intersection of copyright and technology. As co-lead of BakerHostetler's Digital Transformation and Data Economy team, he assists clients in the midst of the "digital transformation," helping them identify and capture the intellectual property (IP) in their valuable data, algorithms, and enterprise software. Clients rely on him to help identify their IP, to build internal processes for its management, navigate open source and other open innovation strategies, and to create licensing programs that enable full value realization. He further protects that value in disputes and litigation, whether through enforcing his clients' IP rights or fending off attacks by competitors.

Chad is the principal author of the firm's Beyond Source Code web tool, which digests all court decisions addressing the scope of copyright protection in the non-literal elements of source code. Chad writes and presents regularly on the robust protections afforded by copyright law to software, data, artificial intelligence, and related innovations. He has helped his clients protect innovations in healthcare technology, water management, smart cities, population health management, and online consumer lending.

Chad's interest in how IP law has adapted to digital transformation began in his former role as a founder and business manager of a digital media publisher. Drawing from his professional and legal experiences, he co-leads the firm's Technology & IP Transactions and Outsourcing practice team and contributes regularly to the firm's IP blogs. Additionally, he is an active member of the Copyright Society of the USA and the ABA IP Law Section. Chad is AV Preeminent-rated by Martindale-Hubbell and has been voted by his peers as a Pennsylvania Super Lawyer and Rising Star.

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