



## **CBC, Creative Commons and Caution**

October 13, 2010 by Bob Tarantino

While late to the party, I thought I'd take a moment to provide a legal perspective on last week's blogosphere brouhaha regarding the Canadian Broadcasting Corporation's evident policy of not allowing Creative Commons-licensed music to be used on (at least) its radio broadcasts and podcasts. For background, see [the comments to this post at the CBC's website](#), particularly the comment made by Chris Boyce, who is Programming Director at the CBC; [this post by Michael Geist](#); [this post at the Creative Commons blog](#) (which itself contains numerous links to other sites covering the story); and [this post by Chris Castle](#). I should also note, for what it's worth, that I am an admirer of the Creative Commons effort to create a licensing scheme which facilitates the dissemination of creative works.

If I had to use two phrases to summarize my concerns to a client who asked whether they could or should be using CC-licensed materials on their radio broadcasts or podcasts, it would be these: ease of use; and lack of legal recourse.

To see how we get to those concerns, let's start by looking at how the CBC is currently situated. They have, according to comments left at the CBC website, a bulk licensing arrangement in place with a music provider (APM Music). That arrangement likely provides something along these lines: the CBC pays a license fee, gets access to a huge library of music, and can essentially make whatever use they'd like of the music contained in that library when creating their broadcasts. All they do is give their employees/contractors access to the library and they can have at 'em - find a song you like and stick it into the program, no worries, because it's all covered by the license which a lawyer farther up the chain has vetted and confirmed is acceptable. How does that compare to the situation where someone wants to make use of CC-licensed music? Let's back into the answer to that question by looking at Chris Boyce's comment [emphasis added]:

The issue with our use of Creative Commons music is that **a lot of our content** is readily available on a multitude of platforms, some of which are **deemed to be "commercial" in nature** (e.g. streaming with pre-roll ads, or pay for download on iTunes) and **currently the vast majority of the music available under a Creative Commons license prohibits commercial use**.

In order to ensure that we continue to be in line with current Canadian copyright laws, and given the lack of a wide range of music that has a Creative Commons license allowing for commercial use, we made a decision to use music from our production library in our podcasts as this music has the proper usage rights attached.

As others have pointed out, there is some CC-licensed music which is available for commercial use (though as Boyce notes, the vast majority is not).



Let's look at the explanation offered by the CC wiki:

The majority of music released under a CC license uses one of the licenses that prohibit commercial use (BY-NC, BY-NC-ND, BY-NC-SA). Below are some pointers to finding music that allows commercial use.

If your use also involves adapting the music (including syncing to video), you'll further have to exclude music under Attribution-NoDerivatives (BY-ND; which does allow commercial verbatim use), and either release your work under Attribution-ShareAlike (BY-SA) or also exclude music under that license. This leaves music under plain Attribution (BY) or in the public domain.

Already we're starting to get into some potential wrinkles. We have to exclude all music licensed under an NC license, but what about ND licenses? The wiki explanation says if you want to "adapt" the music, you have to exclude BY-ND licensed music. What does "adapt" mean? Let's look at a Canadian CC BY-ND license: there's no mention of the word "adapt", but it does say that a licensee cannot "alter, transform, or build upon this work". That starts to worry me. What does "alter" mean? Does that mean I can't edit the work (for example, just playing the chorus, or editing the track so that the chorus comes before the verses, or speeding it up, or slowing it down)? What exactly are my radio programmers planning on doing with this track? Are they going to play the entire track as a track so listeners can listen along, or are they planning on using the track in some more innovative way, such as incorporating it into an on-air skit? It's hard for me to predict what someone is going to do with the song, and hence whether the BY-ND license will permit that use - presumably the bulk licensing arrangement already addresses this kind of situation, so that would be one less headache to deal with.

If I drill down further into the full text of BY-ND license, I'm really not any farther ahead - there's still no definition of "adapt", or "alter", and while there's a definition "Derivative Work", the license doesn't actually state that what I'm allowed to do or not do in connection with a "Derivative Work", though it does say that a "Derivative Work" is "a work that produces or reproduces the Work or any substantial part thereof in any material form". Going back to the face-plate of the BY-ND license, it states "No Derivative Works" - which seems to mean that I can't incorporate the licensed Work into any other work, which would preclude me from using the Work in a radio show, which is itself a "work". The full text of the license does include a definition of a "Collective Work", and states that a Collective Work is not a "Derivative Work" - but is a radio broadcast a "Collective Work"? Hard to say - arguably it is, but all of the examples used to illustrate the definition of "Collective Work" are print-based. Again, my bulk license would expressly contemplate using licensed tracks in radio broadcasts, so my concerns there would be minimal.

Maybe I'll just avoid the potential confusion and, as the CC wiki recommends, limit myself to songs which are licensed under a BY (Attribution) license. (The BY-SA (Share Alike) license is a non-starter since it would mean that the resulting work (ie the radio broadcast) would itself need to be licensed on a CC BY-SA basis, and I'm assuming that the client isn't willing to contemplate - maybe they are, but that's going to get into policy considerations which are beyond the scope of this exercise.)



So, the edict goes forth: employees, you can use music licensed under a CC BY licenses. Have at 'em!

The CC wiki, in addition to pointing to a variety of other sites which contain CC licensed music which allows for commercial use, contains this information:

As of October 2010 Jamendo hosts 7414 albums under BY-SA, 1607 albums under BY, and 987 albums under BY-ND.

Clicking on the middle link takes us here, and since we're patriotic Canadians we're going to filter for Canadian music, which takes us here. Clicking on the first album in the search results reveals a critical flaw - the album is actually licensed under a BY-SA license, not just a BY license (it's also licensed under a US version of the CC license, not a Canadian version, but let's set that aside for the moment). So, as a lawyer, I'm already getting worried for my client - it seems that every time one of their employees tries to find a simple BY licensed song, they're going to have to investigate whether the search engine their using is actually pulling up only BY licenses, or BY+ licenses. The second album is also BY-SA, but when I get to the third album, I discover that it is a simple BY license. Taking a spin through the full text of the Attribution 3.0 license, it's looking good (setting aside for the moment that it is a US form of the license, not a Canadian one) - no concerns about restrictions on use, no real issues at all, frankly, until we get to this:

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.

Here's my legal take on that: um, no.

Even better/worse, at the bottom of the license is this:

Creative Commons is not a party to this License, and makes no warranty whatsoever in connection with the Work. Creative Commons will 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.

Here's my legal take on the combination of those two quotes: no, no, no, no, no.

My client, the licensee, could take no comfort from these licenses whatsoever.





What assurances do I have that the person who is putting up this music and tagging it with a CC license has any rights whatsoever to do so? I have no idea whether this person owns the music they claim to own. Creative Commons (understandably) is also refusing to make any representations about the rights in the song. So if it turns out that the person who is purporting to make this song available under a CC license does not, in fact, have the right to do that, then the licensee is left with no obvious legal recourse - can't sue the person who put up the song (since the license disclaims representations and liability) and can't sue CC itself (since the license disclaims representations and liability). If I use a bulk licensing service and something goes wrong, I can sue them (i.e., an entity with actual assets) for breach of the representations and warranties in their license with me - and the onus is on them to ensure that they have properly licensed the rights they are claiming to grant to me. A CC license, on the other hand, expressly states that it contains *no* representations and warranties, and that the licensors are *not* liable for damages.

So we get back to my concerns expressed above. In comparison to a bulk licensing service, the CC approach contains a number of drawbacks: a comparatively limited selection of music; high transaction costs in that each potential track will not only need to be paid for, but someone will need to actively review each license for compliance with the strict BY requirement (as distinct from the bulk licensing scheme where only one license per provider is reviewed); a lack of certainty regarding ownership of the rights which are purportedly being licensed; and a lack of meaningful legal recourse if it turns out that the "licensor" did not own the necessary rights.

As I alluded to above, I think the Creative Commons licensing scheme is an innovative and productive undertaking, one which places an enormous amount of power in the hands of licensors and licensees who use the licenses in an informed manner. But the concerns outlined above illustrate that an enormous amount of caution is warranted in making the decision to use such licenses, particularly for large commercial or public broadcasters. (As an aside, I note that Chris Boyce's original comment indicated that while the CBC would not be using CC-licensed music, it would continue to use other CC-licensed works such as photographs - I don't think that the analysis outlined in this post differs all that much when it comes to the use of works other than music.)

UPDATE: I neglected to make mention of Tony Duarte's incisive post at IPilogue which examines CC-type licenses for film and TV productions, and which raises some concerns of broader application when reviewing such licenses - [The Hazards of Mass Licensed Internet Digital Content For Film and Television Reuse](#).

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