

The Use of Creative Commons Licenses in the Ministry of Justice of the Government of Catalonia

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The world of publishing —whether the publication be on paper or electronic media, text or image— is intimately related to authors' rights and intellectual property because what is published is always the intellectual creation of an author or authors.

There are two kinds of rights for any published work: those of a personal nature (moral rights) and property rights (exploitation). Those of a personal nature belong exclusively to the author, while property rights belong to the publisher (ceded by the author under certain conditions through a publishing contract). It should be remembered that intellectual property rights apply to both the content (text, images) and to their layout (graphic creation). There are a number of limitations and exceptions to these rights.

The various branches of the public Administration often act as publishers (and as creators). The creation and exploitation of works by the Administration raises some legal points concerning creation by individual physical persons and private publishing.

With the consolidation of the Internet and the CITs doubts have arisen concerning the application of legislation applied until now to protect authors' rights, while at the same time making those rights compatible with people's access to knowledge and making it easier for them to share it.

With regard to Web 2.0 tools and Administration's collaborative work platforms, scrupulous care must be taken with material covered by authors' rights when it comes to publishing such content. Today the Internet depends on sharing, co-production, transformation and personalization to create new products and services. In order to create it has to be possible to limitlessly remix existing knowledge and to share the results afterwards. This is the philosophy of innovation which has spread everywhere thanks to the popularization of the technology.

Creative Commons licenses (CC) are legal texts which enable authors to cede some rights over their works for uses which they consider to be suitable. They are, therefore, an alternative for managing authors' rights in a more flexible way.

As a public Administration, the Ministry of Justice of the Government of Catalonia has decided to use CC licenses with the aim of enabling citizens to benefit from the knowledge created by the organization and in order that this knowledge may be reused, thereby stimulating the process of innovation. In this sense CC licenses have been of prime importance in enabling this opening up of knowledge.

Legal framework for intellectual property

The legal framework for intellectual property in Spain is provided by the consolidated text of the Law on intellectual property (TRLPI) approved by Royal Legislative Decree 1/1996, of 12 April and modified by Law 23/2006. Internationally the Berne Convention of 1886 continues to be in force. The Convention defends the territoriality of authors' rights (*lex loci protectionis*) in virtue of which the law applied to authors is the one in force in the State of which they are citizens. The European Union has issued a number of directives to harmonize the legislation of the different member States.

Rights of authorship. Moral rights and exploitation rights

According to some experts on the subject works produced by the Administration should naturally fall within the public domain. In this view the rights of authorship can be understood as an attempt to offset the author's exclusivity over the work for reasons of the general good (to enable universal access to culture).

Article 1 of the Law on intellectual property (TRLPI) states: "The intellectual property of a literary, artistic or scientific work corresponds to its author due to the sole fact of its creation". The work might be that of an individual, it may be a collaborative work (intellectual property rights are shared amongst all the authors) or a collective work.

Article 10.1 of the TRLPI states: "Subject to intellectual property are all literary, artistic or scientific creations expressed by any means or on any media, tangible or intangible, whether now known or yet to be invented."

Intellectual property consists of moral rights and exploitation rights. Moral rights are personal and include the right of attribution (not monetary); they cannot be renounced (for this reason contracts with ghost writers are not legal), and they cannot be ceded. Exploitation rights are property rights (monetary) and are ceded by the author to the publisher by means of a publishing contract. (Article 58 of the TRLPI states, "In publishing contracts the author or the rights-holders cede the right to reproduce and distribute the work to the publisher in return for monetary compensation.")

Moral rights are:

- Attribution (authorship). The author may decide to publish a work anonymously.
- Integrity. Concerns non-authorized modifications that might prejudice the author.
- Dissemination. The Administration may oblige an author's heirs to disseminate a work in the public interest.
- Withdrawal from sale (revocation). This, however, generates compensation rights.

Exploitation rights are:

- Reproduction. Make copies (ephemeral or permanent, tangible or otherwise).
- Distribution. Distribute to the public (sale, rental, loan, etc.).
- Public communication. Make available to the public without prior distribution (performance, display, broadcasting, Internet).
- Transformation. Make derivative works (translation, adaptation, etc.).

Protecting authors' rights and the limits to protection

The Law grants authors of works exclusive rights to reproduce, distribute, communicate to the public and to transform so that they may control the exploitation and use made of their works to carry out any of these actions. There are two basic kinds of limitation to intellectual property: time limits and exceptions. Time limits concern the period of protection, which is 70 years *post mortem auctoris* (*pma*), or 70 years from publication (in the case of collective works). The Spanish law of 1879 establishes a period of 80 years *pma* and is applicable to works published during the period the law was in force and in the case of authors who died before 7 December 1987. Once these periods have lapsed the work passes into the public domain.

The TRLPI also covers situations —known as exceptions— in which it is not necessary to request the consent of the author and in which a specific use is authorized:

- Private copy (art. 31.2)
- Current affairs and events (right to information, art. 33 and 35.1)
- Parody (freedom of expression, art. 39)
- Citation right (freedom of expression, art. 32)
- Teaching and research (citation right, DB use, reproductions for museums and libraries, art. 32, 34.2b and 37.1).
- Access to culture (right of loan, restriction of post-mortem right to non-publication, art. 37.2 and 40).

Cession of rights

The cession or transmission of authors' rights to publishers can occur *mortis causa* or *inter vivos*. In the latter case the following are possible:

- Cession of exclusive rights. This must be specific and in writing; the cession may be assigned in the invoice document for services rendered. Obtaining a cession of exclusive rights gives the publisher exploitation rights and also the right to license the use of the work to third parties.
- Cession of rights (licenses). Non-exclusive in character (other people, organizations or publishers may obtain rights to the same work). The rights obtained may not be transmitted under any circumstances (art. 50 of the TRLPI). It is advisable to state this in writing, specifying the terms of the cession.
- Transmission of rights of an unsalaried author. Article 51.2 of the TRLPI states, "In the absence of a written agreement, rights of exploitation shall be considered to have been ceded exclusively and to the extent necessary for the exercise of the habitual business at the moment of delivering a work created by virtue of an employer-employee relationship". This does not apply to commissioned works.

Application of authors' rights legislation to the Administration

Specific aspects of general intellectual property law and other legislation applies to the public Administration—the public sector in the widest sense of the word— as a creator of works (author) and publisher (user of works by others with authors' rights).

The public sector is an author when it drafts legislation (for example, the Parliament of Catalonia, Congress of Deputies), when it drafts public information (about public services, regulations, information of general interest, databases, etc.) and also when civil servants in its employ draft works in the course of their employment. It is a publisher when it publishes (regardless of whether the publication is for sale or otherwise) works it has produced itself or works by external authors, on any media.

The specific aspects governing intellectual property in the field of public Administration are as follows:

Legal ordinances and others

Article 13 of the TRLPI states, “Not subject to intellectual property are legal or regulatory ordinances and their corresponding projects, the decisions of jurisdictional organs and the acts, accords, deliberations and dicta of public authorities, nor the official translations of all these texts”.

So such texts drafted by the Administration (or by the legislative or judicial organs) are in the public domain; what is subject to intellectual property law is any publication of them by the Administration or private publishing companies.

Administration authorship

Article 51.2 of the TRLPI mentioned above (transmission of rights of a salaried author) covers civil-service relations (non-spontaneous creation, subordination and alienation of the result).

Article 8 of the TRLPI states, “A collective work is considered to be one created on the initiative and with the coordination of a natural or juridical person who publishes it and distributes it under the name of said natural or juridical person, it being a work consisting of contributions by various authors whose said personal contributions come together in a unique and autonomous creation, to which end the work was devised, it not being possible to attribute rights to any of them separately over the work as a whole. Unless there be an agreement stating otherwise, rights over collective works correspond to the persons who publish and distribute them under their own name”.

Thus the Administration owns all the rights and is the author of all the works drawn up by staff in its employ (and, in the case of collective works, this is also the case for external authors not subject to a contractual relationship).

Cession of rights to the Administration

With regard to the cession of rights by authors (external) to publishers, in the case of the commissioning of works by the Administration, this occurs automatically in virtue of the

application of art. 277.2 of Law 30/2007, of 30 October, on public sector contracts, which states, “Unless otherwise stated in the administrative stipulation clauses or contractual document, service contracts, the aim of which is the drafting and dissemination of products protected by intellectual or industrial property rights, imply the cession of such rights to the contracting Administration”. Nevertheless, we feel it is recommendable to always include the following clause in the contract:

I, the undersigned, in accordance with the provisions of article 277.2 of Law 30/2007, of 30 October, on public sector contracts, in the event of drafting reports, studies or other works which imply the specific drafting of a work or commissioned material, do cede exclusively to the Ministry of Justice of the Government of Catalonia the intellectual property rights corresponding to the aforementioned work or material, worldwide and in all jurisdictions of applicable authors’ rights, for their reproduction, distribution, public communication and transformation.

Re-use of public information

The re-use of public information is governed by Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 and also by current Spanish law: Law 37/2007, of 16 November on the re-use of public sector information. The preamble to this Law states that the exploitation of public sector information by citizens and private companies to create products and services with added value is an essential instrument for developing the right to knowledge and constitutes a basic principle of democracy.

Article 3.1 of Law 37/2007 states that re-use is understood to mean, “the use of documents that are in the power of the public sector Administrations and bodies by physical or juridical persons for commercial or non-commercial ends providing said use does not constitute a public administration activity”. To this end the Law considers ‘document’ to mean all kinds of information drafted or kept by the Administration regardless of the media it is stored on, the form of its graphic expression and whether it be sound or image. This law does not apply to, amongst other things, documents over which third parties have intellectual property rights; it does not, however, restrict the exercise of the Administration’s intellectual property rights but, rather, establishes that such rights should be exercised in a manner that facilitates the re-use of the documents.

The conditions for re-use (established by article 8 of the Law) are as follows:

- That the content of the information not be altered.
- That the meaning of the information not be denatured.
- That the source be quoted.
- That mention be made of the date on which the data was last updated.

The Administration may choose to place the information at the disposal of the public in one of the following ways:

- Without conditions.
- Upon request.
- With conditions established in a model license.

Licenses must reflect, at least, information concerning the specific final use (commercial or non-commercial), the term, the obligations of the beneficiary and the organization making the

concession, the responsibilities of use and financial modalities and they must state whether the concession is free of charge or, if otherwise, the applicable fee. Licenses must respect the following criteria:

- They must be clear, fair and transparent.
- They must not limit the possibilities for re-use nor hinder competition.
- They must not discriminate between comparable categories of re-use.

Innovating with collective knowledge

After considering authors' rights and intellectual property rights we must ask ourselves if we can innovate with "All rights reserved" on works. The answer is that, in order to be able to innovate with the collective knowledge at its disposal, the Administration must open up the exploitation rights to its works to third parties. That is to say, knowledge must circulate collectively.

With the universal spread of the Internet and the CITs (and the possibilities they present for the massive and immediate distribution of any kind of material), the traditional management of intellectual property and of authors' rights can be seen to be compromised and in many cases to be obsolete. The issue in question is to find a balance between the private interests of the authors and rights-holders to works and the social and public interest in having access to culture and to information. The use of Creative Commons licenses (CC) therefore entails changing the "All rights reserved" of *copyright* (©) to "Some rights reserved".

The specific case of copying digital material

With regard to the copying of digital material (CDs and programs, images and text from the Web) Spanish law states that prior permission must be sought from the author, except in the case of a copy for private use (article 31.2 of the TRLPI).

To copy or reproduce programs, images or articles from the Web:

- One may store a copy on one's personal computer.
- One may link to them from one's Web site (implicit consent is understood).
- But one may only redistribute or republish them with the consent of the author (with the Creative Commons license, in the "conditions of use", with a specific e-mail message).

Free licences

In the 1970s the term *copyleft* was coined, in contrast with *copyright* (all rights reserved). The copyleft philosophy received an impetus in the 1980s as a result of the creation of the GNU free operating system by Richard Stallman. The basic license of the copyleft movement is the GPL (General Public License), which applies to software; the equivalent license for content is the GFDL (GNU Free Documentation License).

Once the copyleft philosophy became widespread, many similar projects for the flexible cession of rights began to appear; the most important of these (particularly in publishing) are the Creative Commons licences (CC), which made it possible to share works while protecting creativity, that is, neither "All rights reserved" nor "No rights".

It is worth emphasizing that free licences are based on the intellectual property regime: without prior recognition of that property by the law, authors would not be able to grant licences.

Creative Commons licences (CC)

The Creative Commons licences (CC) are legal texts that enable authors to cede certain rights on their work for the uses they consider appropriate. Created by Lawrence Lessig in December 2002 (<http://creativecommons.org/>), CC licences let the authors decide how the public may reproduce their works, on the basis of the exclusive authors' rights which are granted under Spanish intellectual property law. Hence, use is authorized under certain conditions. They are ideal for those who do not wish to reserve all rights over the work for themselves, but would like to cede certain rights under certain conditions.

Why were the licences devised? Traditionally, intellectual property distinguishes between use (private, non-profit) and exploitation (public, for profit). However, in the digital realm, to use a work (book, song, play, film, blog, file, program, etc.) it must be reproduced, and any reproduction constitutes an act of exploitation. Use becomes *public*.

Copying or reproduction, distribution and public communication are always permitted as long as the author is credited, but commercial use or the possibility of making derivative works may be limited, or conditional on the terms of the license under which the derivative work is distributed being the same as those that govern the original work. CC licences, then, afford some rights to third parties under certain conditions:

- Attribution (*by*): the material created by an author may be distributed, copied and exhibited by third parties as long as the author is credited.
- Non-commercial (*nc*): the original material and derivative works may be distributed, copied and exhibited as long as it is not for commercial use.
- No Derivative Works (*nd*): the material created by an author may be distributed, copied and exhibited but not used to create work derived from the original.
- Share Alike (*sa*): the material created by an author may be modified and distributed, as long as it is under the same license as that which regulates the original material.

By combining these four conditions we arrive at the six standard CC licences:

- Attribution (*by*): the commercial use of the work and any possible derivative works is permitted, and the generation and distribution of such works is also permitted without restriction.
- Attribution-Non-commercial (*by-nc*): derivative works may be made as long as no commercial use is made of them nor may the original work be used for commercial purposes.
- Attribution-Non-commercial-Share Alike (*by-nc-sa*): no commercial use may be made of the original work or of possible derivative works, and such derivative works must be distributed under the same license as that which regulates the original material.
- Attribution-Non-commercial -No Derivatives (*by-nc-nd*): commercial use of the original work is not permitted nor is the generation of derivative works.
- Attribution-Share Alike (*by-sa*): commercial use of the original work and of any possible derivative works is permitted, and such derivative works must be distributed under the same license as that which regulates the original work.
- Attribution-No Derivatives (*by-nd*): commercial use of the work is permitted, but not the generation of derivative works.

In Spain, the University of Barcelona is the institution affiliated to Creative Commons, and it is responsible for adapting the licences to Spanish legislation on intellectual property. Thanks to advice from Creative Commons Catalunya, the Catalan Ministry of Justice has been able to implement a project to open up knowledge to society.

The Ministry of Justice and opening up knowledge to society

As we have seen, the Administration always owns the rights to all the material it publishes. Given that the Administration's function is to serve the public, and that Law 37/2007 and Directive 2003/98/EC have already declared the public status of the information generated by the public sector so that it can be reused by the citizens, companies and other Administrations, the Catalan Ministry of Justice considered that the best way of managing the rights to the Administration's publications would be through CC licences: a way of returning to society the work that had been paid for by its taxes, and of helping to ensure the right to knowledge and of actively managing it: knowledge which in turn generates more knowledge.

The least restrictive license, the Attribution (*by*) license, puts publications in the public domain, under the sole condition of crediting the origin of the original material; it is mainly useful in cases where the intellectual property rights of third parties are not involved. The most restrictive license, the Attribution-Non-commercial-No Derivatives license (*by-nc-nd*), can be used in cases where the need to protect the intellectual property rights of third parties makes it advisable.

This most restrictive license may also be used to ensure that third parties' rights to their own image are not infringed upon, since it prohibits commercial use or the making of derivative works, because material showing third parties in video, image, audio and other formats may be included only if the rights-holder has ceded rights to the provider or has issued an explicit authorization, in accordance with Organic Law 1/1982, of 5 May, concerning citizens' rights to protect their honour, personal and family intimacy and their own image, and Organic Law 15/1999, of 13 December, concerning the protection of personal information. In all cases, the terms and conditions of the cession or authorization must be compatible with the content of the Creative Commons license.

We have seen how CC licences can be applied to works published on paper (books, booklets, informational material) or on digital media (on-line publications, CD-ROMs, DVDs, videos), as well as Web sites. In Creative Commons licences, then, the Catalan government's Ministry of Justice has found one way of enabling all manner of files and knowledge to be shared with the public.

The Ministry's aim is to extend the use of CC licences to all the material it produces and publishes and determine the most suitable type of CC license for each kind of work:

- The Ministry's first experiment with the use of CC licences was for material published on the Web, specifically on the [Web sessions](#) section of its Web site; in this case the *by-sa* (Attribution–Share Alike) license was used.
- Subsequently, another step was taken with the publication on paper and [digitally](#) of the Administration's first work of general interest to be subject to a CC license: the booklet *Centre Penitenciari Brians 2*; in this case the *by-nc-sa* (Attribution–Non-commercial–Share Alike) license was used.

- The process continued with the publication on paper and [digitally](#) of the *Memòria del Departament de Justícia 2006*; in this case the *by* (Attribution) license was used.
- In copublications with other ministries of the Government of Catalonia, the Ministry of Justice is also showing the way with the use of CC licences; this is the case of the booklet *Guia d'ús dels treballs en benefici de la comunitat*, on paper as well as [digitally](#), and the [video](#) *Mesures penals alternatives*. In the latter case the *by-nc-nd* (Attribution–Non-commercial–No Derivatives) license was used.

Furthermore, the Ministry of Justice played a decisive role in applying a CC *by* license to the journal *Funció Pública*, published by the Secretariat for the Civil Service and the Modernization of the Administration which, with a print run of 140,000 copies, has become a bench-mark.

From the start, the Ministry has ensured that all external authors of a commissioned work (book, study, lecture, etc.) sign a clause ceding exploitation rights in favour of the Ministry of Justice, so that the latter may appropriately manage authors' rights on the work by means of CC licences.

Also, a training programme for the staff has been implemented in order to make sure that people who produce content to be published on the Web site or on the platform of collaborative work [e-Catalunya](#) are scrupulously respectful of authors' rights. To be able to license material under CC one has to own all rights and often people do not know that the images and other material they find on the Internet and use for their work are subject to image and intellectual property rights. For this reason, workshops have been organized to explain how to find free-use material on the Internet and how to cite it appropriately.

In parallel with the dissemination of works through institutional channels, the Ministry of Justice has taken a step forward in the socialization of the knowledge it produces by opening new communication channels using the Internet open repositories. It has its own channels on [YouTube](#) and [Sclipo](#) to publish videos; it publishes presentations in [Slideshare](#), images in [Flickr](#) and events in [Google calendar](#). Moreover, it has the blog [Gestió del coneixement](#) that gathers the most innovative experiences in knowledge management and the methodology used by the Ministry through the [Compartim](#) programme.

With these initiatives the Ministry of Justice is promoting a more open and collaborative Administration, both internally and externally, to favour the creation of new knowledge on the basis of the content that it shares. Several terms have been used for this concept: Open Government, Open Administration, [wikiAdministration](#), etc. It is, in short, a matter of not losing the opportunity to collaborate, through flexible social networking, with the public, companies and social organizations.

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