Response to UK & Collecting Society Directive
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Responses to questions are numbered below.

10. What do you consider falls in the scope of "non-commercial"?

The scope of "non-commercial" licensing terms has to allow both for legal certainty and flexibility.

On the one hand, rights-holders and users alike need legal certainty in order to make an informed choice regarding their preferred licensing scheme. On the other hand, in any trans-national licensing scheme, flexibility is also an essential requirement, since:

a. different jurisdictions maintain different concepts of commercial and non-commercial
b. different communities of rights-holders, creators and users have different conceptualisations regarding the boundaries of non-commercial

Creative Commons (CC) is a global nonprofit organization that enables sharing and reuse of creativity and knowledge through the provision of free legal tools [1] having as its core mission to develop, support, and steward legal and technical infrastructure that maximizes digital creativity, sharing, and innovation [2]. Hence, Creative Commons:

a. Shares the core mission of the Directive, i.e. fostering creativity and the use of innovative on-line licensing services supporting a single European market [3]
b. Has an extensive experience in developing and using licences that operate and interact with each other as well as with more traditional licensing schemes, in more than 79 jurisdictions worldwide. CC operates for over ten years a network of over 100 affiliates, including top experts in copyright and collective licensing [4]. In the course of the development of consecutive versions of its licences suite, Creative Commons has had to deal extensively with the issue of non-commercial definition and, for that purpose, has commissioned an in-depth study aiming at presenting the way in which the on-line population both uses and understands the scope and ambit of the term "non-commercial" [5]. The results of this study are used in order to inform our answer to the question of the boundaries of "non-commercial" and how it may be applied in the Collective Management of Rights Context.

The term "non-commercial" is found in a number of licensing schemes in order to ensure that the right-holder reserves the right to commercially exploit the work, either herself or through additional licensing schemes.

Creative Commons uses the term "non-commercial" in three of the six CC licenses: BY-NC [6], BY-NC-SA [7], and BY-NC-ND [8]. The Creative Commons experience is significant, since the last study on the use of CC licences showed that in 2014 over 882 million works were licensed under Creative Commons licences on the internet, 44% of which restrict adaptations

or non-commercial use of the licensed material [9]. This means that CC has one of the greatest licensor and user-basis in the world using licences containing the term “non-commercial”.

The term “non-commercial” is defined in the CC licences as follows:

“NonCommercial means not primarily intended for or directed towards commercial advantage or monetary compensation.” [10]

There are three elements in the aforementioned definition that are useful for the UK transposition of the Collective Management of Rights (CMR) Directive:

a. The definition is intent based, i.e. it focuses on the will of the rights-holder. This is consistent with the copyright and author’s right contract interpretation doctrine in the EU that always interprets contracts in accordance to the will of the rights-holder.
b. The definition is flexible so that it is future-proof and does not exclude any specific business models
c. The inclusion of “primarily” in the definition recognizes that no activity is completely disconnected from commercial activity; it is only the primary purpose of the reuse that needs to be considered.

From our perspective it is absolutely essential that the UK implementation of Article 5(3) of the directive does allow members of the affected Collecting Societies to exercise the right to grant licenses for non-commercial use by licensing their works under a Creative Commons License that contains the NC provisions. As outlined above these Creative Commons licenses are by far the most widely used legal tools for non-commercial licensing. Collecting Societies in the Netherlands, Denmark and France have successfully run pilot projects that allow their members to make use of these three non-commercial Creative Commons licenses. These pilots have shown that the combination of the non-commercial Creative Commons licenses with collective rights management does not impede the functioning of collective licensing arrangements while it allows Creators to exercise their rights in a more flexible manner for example to promote their creations.

Article 5(3) of the directive reflects these successful pilot arrangements and it is important that creators can exercise this right by using standardized tools that are recognized around the globe.

If the UK implementation of the directive requires a definition of the concept of non-commercial then Creative Commons suggests to include the following elements in any “non-commercial” definition [11]:

- **NonCommercial should turn on the use, not the identity of the reuser.**
  The definition of NonCommercial depends on the primary purpose for which the work is used, not on the category or class of reuser. Specifically, a reuser need not be in education, in government, an individual, or a recognized charity/nonprofit in the relevant jurisdiction in order to use an NC-licensed work. A reuser that is not obviously noncommercial in nature

may use NC-licensed content if its use is NonCommercial in accordance with the definition. The context and purpose of the use is relevant when making the determination, but no class of reuser is per se permitted or excluded from using an NC-licensed work.

- **Reusers may make NonCommercial uses only, even when reusing NC material with other works.**
  The "non-commercial" term limits reusers to NonCommercial uses of the work only, which includes when the work is used in a collection or when it is adapted. For example, an NC essay may not be included as part of a collection in a commercially distributed book of essays, even if it is only a small portion of the book. For an example of an adaptation, an NC song may be used as the basis for a video where the visual elements are under a different license such as the BY license. When the music video is distributed as a whole, it may not be used commercially because of the NC license of the song.
- **The NonCommercial term should not limit uses otherwise allowed by limitations and exceptions to copyright.**
  Nothing in the NC term should control or conditions uses—even commercial uses—covered by an exception or limitation to copyright or similar rights, or otherwise control any activity for which no permission under such rights is required. For example, a person may commercially use an NC-licensed work for purposes of criticism in jurisdictions where this is a fair use or otherwise covered by an exception to copyright. Similarly, because posting a link to a work does not require permission under copyright, a for-profit university may still include a link to NC-licensed courseware in a syllabus or on its paywalled website. In such cases, the CC license never comes into play and the NC restriction (and other limitations or conditions contained in the license) may be disregarded.
- **The NonCommercial term should ideally be used in non-exclusive licences.**
  This should allow the licensor to use dual/ multiple licensing schemes in order to license their work to different audiences and accordingly choose different forms of compensation and conditions depending on the value she wishes to create.

Summarizing our position, we suggest that:

a. Any non-commercial definition follows the principles set by the Creative Commons NC element definition. This would allow interoperability with the 880 million works currently licensed under Creative Commons licences.
b. Non-commercial should be defined on the basis of the licensor's intent, with emphasis on exclusion of primary monetary compensation in a technology neutral and future proof fashion
c. It is important to ensure that the non-commercial licensing schemes do not eradicate copyright limitations and exceptions

[1] https://wiki.creativecommons.org/FAQ#What_is_Creative_Commons_and_what_do_you_do.3F
[2] http://creativecommons.org/about

[3] See recital (1) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market: ““The Union Directives which have been adopted in the area of copyright and related rights already provide a high level of protection for rightholders and thereby a framework wherein the exploitation of content protected by those rights can take place. Those Directives contribute to the development and maintenance of creativity. In an internal market where competition is not distorted, protecting innovation and intellectual creation also encourages investment in innovative services and products.” http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0026&from=EN

[4] https://wiki.creativecommons.org/CC_Affiliate_Network

[5] https://wiki.creativecommons.org/Defining_Noncommercial

[6] http://creativecommons.org/licenses/by-nc/4.0/legalcode

[7] http://creativecommons.org/licenses/by-nc-sa/4.0/legalcode

[8] http://creativecommons.org/licenses/by-nc-nd/4.0/legalcode

[9] https://stateof.creativecommons.org/?utm_campaign=2014fund&utm_source=carousel&utm_medium=web

[10] https://wiki.creativecommons.org/NonCommercial_interpretation#The_NonCommercial_license_element

[11]: https://wiki.creativecommons.org/NonCommercial_interpretation#Key_points_about_the_NonCommercial_licenses

[12] For a similar discussion in a different context, see the Public Sector Directive 2013 licensing guidelines, where the obligation to provide commercial as well as non-commercial licensing schemes is supported with practical licensing guidelines https://ec.europa.eu/digital-agenda/en/news/commission-notice-guidelines-recommended-standard-licences-datasets-and-charging-re-use

12. What will be the impact of allowing rightholders to remove rights or works from the repertoire?

Rights-holders increasingly realise that there is no such as thing as “one-size fits all” model for rights-licensing. It is, hence, necessary for the rights holders to be able to choose the works they wish to release under all rights and some rights reserved licensing schemes.

The following examples of Artists using permissive licences in order to gain value are indicative of the value of being able to remove specific works or rights from a CMO:

a. Christopher Willits is a prominent experimental musician from the San Francisco Bay area. After finding out about CC licenses through a friend, Christopher had some misconceptions about what it meant to release his material in that manner. But after perusing the wealth of information on the Creative Commons website Christopher was able to make his informed decision to choose the CC:BY-NC for his work. This is how Christopher sees the CC license playing a role in his music: “I use CC license to define my intention of sharing and the commercial use of my music. With a simple by-nc license i am telling everyone that it is free to listen and share this music at will (while at the same time trusting my audience to buy my cds, pay for downloads, come to my live shows, etc), but, when it comes to making money, please do not reap any monetary benefits without my consent, and you need to pay me.” “There is a lot of trust involved in this, I trust that people will support my work because they love it and enjoy it, and I trust that the karma police will haunt those pushing against my intentions.” Christopher Willits participates in a couple prominent online communities for musicians. One being overlap.org, which he runs and the other being ccmixter.org. On both of these sites artists and fans are encouraged to download the musicians' music and share it with others. CCMixter especially encourages the use of the material to create remixes and then reposting those to the site. These services encourage the community to create new and more inclusive musical productions. “I believe that if you live your love and passion, and if you open up the exposure to your work in creative ways, like using CC to communicate your intentions of sharing, you will see the benefits and the effects that your creativity has on the world.” These online projects which Christopher participates enable him to promote himself to those who would otherwise not have a chance to experience his live shows. For an artist like Christopher, the music is but one part of the overall experience and the music he makes available for other to listen to will just inspire them to come to one of his live shows around the world. Being an artist that tours constantly, Christopher Willits is able to support his music while at the same time supporting his fans. [1]
b. Ancient Free Gardeners is an indie-rock band in Melbourne, Australia, using Creative Commons licences to distribute their music**.**For the existing release from Ancient Free Gardeners, the Creative Commons Attribution-Noncommercial-ShareAlike 2.5 Australia licence was used. When a pressing of the five-track self-titled EP was almost completely sold out and the expenses still outweighed the revenue, the band tried another angle for the distribution of the same songs, and so chose to adopt the Creative Commons licence

to facilitate the EP's distribution. The entire EP is available for either free download as a zip file or as streaming mp3s on the band's web site, as well as on the Creative Commons distribution platform Jamendo. The EP is also available for download at the iTunes music store, and visitors to the band's website are given the option of paying for the download if they want to. Though no statistics are available for downloads, the band derived very little benefit from the availability of its music on iTunes and other online music retailers, and has seen a significant number of downloads since uploading the EP to its own website and to Jamendo. The move to open content licensing was a very recent one, so the band has not yet experienced any significant benefits from licensing its music under Creative Commons, but looks forward to the experiment. [2]

c. C3S is a collecting society focusing on cultural commons works, primarily licensed under Creative Commons licences.. C3S aims at spawning a new, international and mainly online based market. It is an opportunity for musicians who will not or cannot join traditional collecting societies to monetise their work without having to give up their way of licensing. Giving way to a regionally less constrained model, C3S in the long run is to offer subsidiaries in all European countries providing one streamlined licensing model. Free distribution for non-commercial use is always promoted by C3S, but may be restricted by the intention and licence of choice of the creator. Membership is going to be limited to creators only to avoid distortion of discussion topics by objectives of legal successors and publishers. Enabling the introduction to music and musical production, and promoting new ways in creation of cultural works, C3S will be open to all kinds of creators: professionals, semi-professionals and prosumers. Additionally, cultural projects and educational programmes addressing copyright issues will be supported [3]..

[1] https://wiki.creativecommons.org/Christopher_Willits

[2] https://wiki.creativecommons.org/Ancient_Free_Gardeners

[3] https://www.c3s.cc/en/

13. Under what circumstances would it be appropriate for a CMO to refuse membership to a rightholder i.e. what constitutes "objective, transparent and non- discriminatory behaviour"?

Under no circumstances should a CMO refuse membership to a rights-holder that opts for permissive, open licences, such as Creative Commons. The cases presented in Questions 10-12, as well as the growing number of rights-holders choosing Creative Commons as the preferred licensing vehicle highlights the need to ensure non-exclusivity as a founding principle for any CMO licensing scheme.

14. What should "fair and balanced" representation in Article 6(3) look like in practice?

- Fair and balanced representation should follow the same principles followed by Public Sector Bodies (PSBs) that are publically funded.

- It is highly recommended that representation of Art. 6(3) follows the three main principles established in the context of the Open Government Partnership (OGP) regarding PSBs, i.e.: transparency, participation and accountability [1].
- While such principles have been primarily designed for governments and PSBs, it is essential that we adopt a version of these for CMOs at least with regards to the way in which their members have access to their decision making process.
- One practical measure to achieve this objective is to adopt a mechanism of transparent reporting similar to the one adopted for PSBs budgets. Particularly useful is the International Budgets Initiative mechanisms of the Open Budget Survey, which ensure that there is enough transparency in the budgeting of the relevant organisations [2]
- Another practical measure would be to provide a responsive regulation mechanism for CMOs that would ask them to voluntarily open their financial data through a pre-specified API in the form of OpenCorporates having as an incentive less regulatory intervention [3]

[1] http://www.opengovpartnership.org/about/open-government-declaration
[2] http://internationalbudget.org/what-we-do/open-budget-survey/
[3] https://opencorporates.com/

26. Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?

- This is mostly a transparency problem. It may be resolved by adopting an open regulation model, similar to the one suggested in question 14. It would mean that CMOs should be obliged to open all their data regarding to the rights managed under representation agreements:
    - either to the broader public in the form of an open API, e.g. similar to the ones used by PSBs in the data.gov.uk portal [1]; or
    - to their members and the National Authorities through a walled-garden API, e.g. in the form of Office of National Statistics Secure Lab [2]
- This is a win-win approach that could substantially reduce costs for the regulatory authorities, the rights-holders and the users.

[1] http://data.gov.uk/
[2] http://ukdataservice.ac.uk/get-data/how-to-access/accesssecurelab.aspx

27. What do you consider should be the "necessary information" CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?

- Overall, the information obligations both on the side of the CMOs and the Users should be symmetrical, i.e. to the extent possible, the users should provide data regarding number of users, type of uses (particularly with regards to the rights involved) and extent of use (to the degree that it is relevant to the CMOs licensing schemes). However, such information should be provided only in tandem with CMOs providing open data regarding their licensing schemes, costs and rewarding of the artists. In an era where increased transparency at all levels is an essential requirement for trust to be developed, the users want to know how the artists are compensated through the CMOs licensing schemes.
- Such an effort may succeed only if the users have available an infrastructure that allows them to provide such data at a low cost and standards that are open enough to allow them to choose the technology providers best suited to their needs.
- Data exchanged between users and CMOs do not necessarily need to be fully open, though this would be the optimal solution, but could be exchanged using a trust protocol similar to the ONS Data Service. [1]

[1] http://ukdataservice.ac.uk/get-data/how-to-access/accesssecurelab.aspx

28. What format do you think the user obligation should take and how might it be enforced? What is "relevant information" for the purpose of user reporting?

Using an open/shared data scheme in the form described in questions 14 and 26

33. What standards are currently used for unique identifiers to identify rightholders and musical works? Which of these are voluntary industry standards?

International Standard Music Work Code (ISO Standard 15707) is in current use by reporting societies. International Standard Audiovisual Number (ISO 15706) is used to report audiovisual works which may contain music.

34. What would you consider to be a "duly justified request for information"? (Article 25(1)) What is not?

See answers in question 35

35. What would you consider to be "reasonable measures" for a CMO to take to protect data (Article 25(2))? What would be an unreasonable ground to withhold information on repertoires?

- Defining reasonable measures requires performing a balancing exercise between the different stakeholders interests and consideration. The key principles for such an exercise would be:
    - not to use information asymmetry (or not to create an artificial one) in order to deprive artists and users from access to permissive (e.g Creative Commons) licensing schemes
    - not to use “protect data” as an excuse to reduce transparency in the operation of CMOs, particularly to reduce obligations of open or shared financial and rights data as described in questions 14 and 26.
    - only limit access to data on grounds of personal data protection, and confidentiality agreements
    - provide expressed and specific reasons for refusing access to data
    - use open standards for protecting data and avoid using vendor lock in for righs-holders
    - allow data portability for rights holders that are members of a CMO