

Evaluation of the Creative Commons Buma/Stemra pilot

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This article contains an evaluation of a pilot project undertaken by the Dutch Creative Commons jurisdiction project (www.creativecommons.nl) and the Dutch Collecting Society for authors of musical works Buma/Stemra (www.bumastemra.nl).

Creative Commons Netherlands is a joint venture between KnowledgeLand, Waag Society and the Institute for Information Law (IViR) in cooperation with Creative Commons, a not-for-profit organization, founded in 2001, that promotes the creative re-use of intellectual and artistic works.

Buma/Stemra represents the interests of domestic and foreign music authors and publishers in the Netherlands. Buma/Stemra's core task is to exploit music copyrights (i.e. collect and distribute royalties) and manage them for its affiliated (and represented foreign) composers, lyricists and music publishers.

Objectives

The principal reason for the pilot described here is to offer authors more flexibility in distributing their works. The pilot is meant as a test to see whether it is useful in practice to combine the systems of Buma/Stemra and Creative Commons.

The pilot enables members of Buma/Stemra to use Creative Commons licenses to promote their works. Until the start of this pilot project this had been not possible and the Dutch pilot is the first attempt to combine the individual licensing under open content licenses and collective rights management outside of the United States of America¹.

The pilot between Buma/Stemra and Creative Commons Netherlands was announced on the 23rd of August 2007 for the period of one year and has been extended three times for 12 month periods. The current pilot period will end on the 22nd of August 2011. The effects of the pilot have been evaluated between November 2009 and January 2010 and Buma/Stemra and Creative Commons Netherlands are currently studying ways to improve the opportunities offered to Buma/Stemra members through the pilot.

History of the pilot

The situation that Buma/Stemra members are not allowed to use Creative Commons licenses to promote their own works has been an issue known to both Buma/Stemra and Creative Commons Netherlands since the introduction of the Creative Commons licenses in the Netherlands on the 18th of June 2004².

The reason for this inability to use Creative Commons licenses lies in the fact that upon joining Buma/Stemra members of Buma/Stemra exclusively assign all their rights in all of their works to Buma/Stemra. This exclusive assignment of rights (which is in line with the practices of Collective Rights Management Organisations (CROs) in all other European countries) means that the rights in these works are henceforth controlled by Buma/Stemra and these members can no longer issue licenses that allow third parties to use their works anymore. From the perspective of Buma/Stemra this exclusive assignment of rights represents an operational requirement that allows the collective to effectively manage the rights of the individual members.

¹ Unlike in the rest of the world, the collective rights management organisations operating in the US are banned from obtaining exclusive assignments of rights from their members. This means that members of collective rights management organisations in the US are free to make individual licensing agreements (for example by freely licensing works under a creative commons license) that complement the activities of the CROs.

² The relation between Creative Commons licensing and Collective Rights Management had been the dominant topic of debate during the panel discussion at the launch event of Creative Commons in the Netherlands. A Dutch summary of this event and the debate is available at: <http://creativecommons.nl/2004/06/18/launch-nl-versie-van-de-creative-commons-licenties/>

From the perspective of Creative Commons this situation represents an unwelcome anomaly: members of collecting societies such as BUMA/STEMRA are kept from using the Creative Commons licenses to promote their own works. Authors of musical works in the Netherlands cannot combine the benefits of collective management of rights with the flexibility offered by Creative Commons licenses and self-distribution of their works via the Internet.

Right from the start of the availability of the Creative Commons licenses in Netherlands there was a small but very vocal group of Dutch authors who have demanded a solution for the problem that members of BUMA/STEMRA could not make use of Creative Commons Licenses. The group consisted mainly of non-members of BUMA/STEMRA some of whom were considering to join BUMA/STEMRA but were unwilling to do so if this meant that they would not be able to make use of the Creative Commons licenses for their own works anymore.

In the fall of the 2004 this situation was discussed during a first meeting between representatives of BUMA/STEMRA and Creative Commons Netherlands. At that time BUMA/STEMRA indicated that from their perspective this was how the system was supposed to work and that therefore there was no need to change it.

In 2005 Creative Commons Netherlands organized a number of meetings with authors in order to discuss the possibilities for Creative Commons licenses in the field of music. These meetings (BUMA/STEMRA was not involved) were dominated by complaints about the inability of BUMA/STEMRA members to use Creative Commons licenses to promote their own works.

On the 29th of November 2005 Creative Commons Netherlands organized a public discussion evening about Creative Commons for music authors that was attended by more than 40 participants among them representatives of BUMA/STEMRA. This discussion evening was once more dominated by the 'BUMA-question'. Shortly after this discussion evening BUMA/STEMRA and Creative Commons Netherlands agreed to a series of regular talks to examine the issues at hand and - if possible - find solutions. For period of one and a half years meetings were held roughly every 3 months.

After four of these meetings a number of issues had been identified and the outline of the later pilot started to take shape.

Structure of the pilot

Creative Commons and BUMA/STEMRA agreed that it would be beneficial to offer authors more flexibility in distributing their works. BUMA/STEMRA argued that from their perspective it would only make sense to allow authors to license works under licenses that only allowed for non-commercial use of the licensed work.

This meant that authors would be enabled to pick one of the three non-commercial licenses offered by Creative Commons Netherlands and that the three licenses that also allow for commercial uses of licensed works would remain off limits for members of BUMA/STEMRA. The main argument for this limitation is that BUMA/STEMRA's main mission is to generate revenue in the form of royalties for its members and that it therefore cannot allow free commercial uses of the works of their members. For the self-promotion of their members, licenses that only allow for non-commercial use of the licensed works are deemed to be sufficient.

Given the above argument, which was accepted by Creative Commons Netherlands, the basic outline of the pilot project was established. BUMA/STEMRA would enable its members to license (some of) their works under those Creative Commons licenses that only allow non-commercial uses of the licensed work. BUMA/STEMRA would continue to collect royalties for commercial uses of these works.

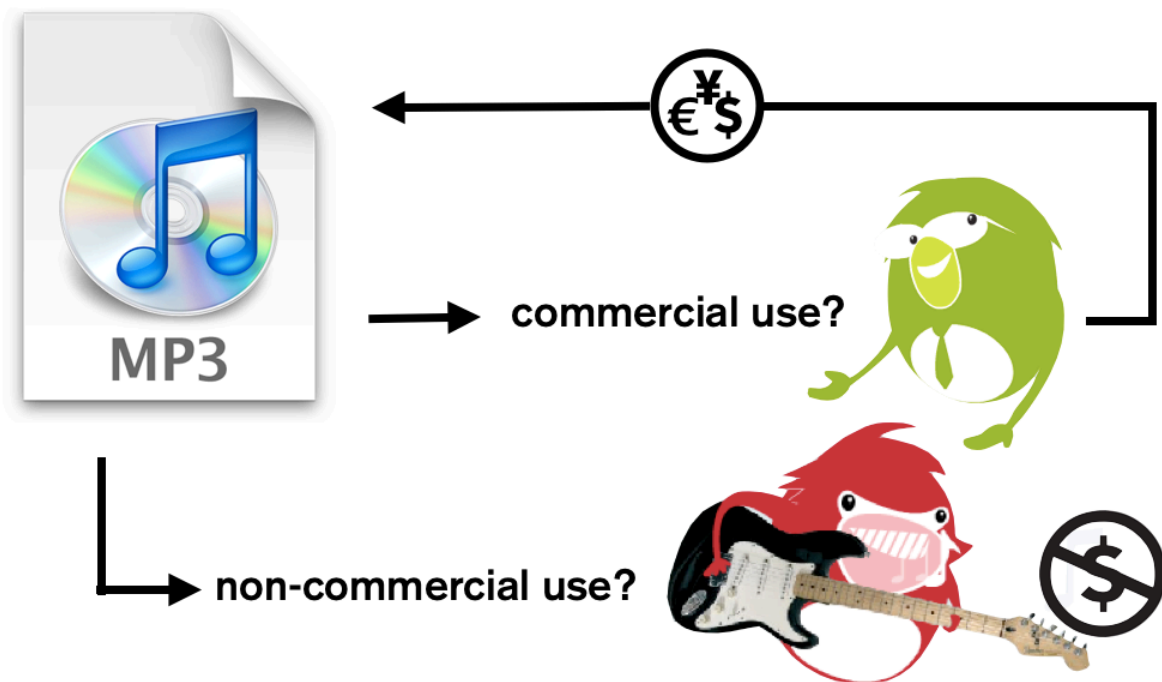


figure 1: commercial use of a work is licensed via Buma/Stemra's regular arrangements, non commercial uses are freely licensed through one of three Creative Commons licenses

In order to implement such a scenario five main issues needed to be addressed by Creative Commons Netherlands and Buma/Stemra.

1. There needed to be a good definition of what constitutes commercial use and what constitutes non-commercial use. The definition contained in the Creative Commons licenses themselves does not provide sufficient clarity for the purpose of a pilot project.
2. The Dutch versions of the Creative Commons licenses needed to contain specific language highlighting the relationship between the rights granted through the licenses and the mechanisms used for collective rights management.
3. The summaries of the CC licenses (the so called license deeds) needed to provide a mechanism to indicate that all additional rights are managed by Buma/Stemra.
4. Buma/Stemra needed to find a mechanism that allowed them to re-assign the non-commercial use rights to members who wanted to participate in the pilot.
5. Given the experimental nature of the pilot there needed to be a mechanism for limiting the license grants in time

Of these five issues the definition of non-commercial use proved to be the most difficult to solve. The other four issues could be resolved relatively easily:

- The release of the 3.0 version of the Dutch CC licenses on 31.07.2007 contained the necessary clarifications regarding collective rights management³

³ For the three non-commercial incenses CC licenses the following clarification was included at the end of section 3 of the licenses:

for the avoidance of doubt it is stated that:

(iii) Collective Rights management: the licensor waives the right to collect royalties (individually or in case that the licensor is a member of a collecting society, through that organisation) for non-commercial uses of the work. The licensor reserves the right to collect royalties (individually or in case that the licensor is a member of a collecting society, through that organisation) for commercial uses of the work

- It was decided to use the newly introduced Creative Commons plus (CC+) additional rights infrastructure⁴ to indicate that all other rights in works licensed in the context of the pilot are managed by BUMA/STEMRA
- the re-transfer of the necessary rights from BUMA/STEMRA to the participating authors was implemented through a set of additional conditions that BUMA/STEMRA members have to agree on the BUMA/STEMRA website prior to licensing material under CC licenses.
- With regard to limiting license grants in time both parties agreed to place an additional clarification next to the Creative Commons license buttons but not to alter the licenses themselves which state that the license is valid for the duration of the underlying copyrights

With regards to the definition of 'commercial use'⁵ Creative Commons Netherlands and BUMA/STEMRA struggled for a long time to find a definition that was precise enough to be used as the basis of the pilot and acceptable to both parties. BUMA/STEMRA argued for a relatively limited conception of non-commercial activities, while Creative Commons attempted to preserve a definition that would not be out of line with practices established by existing Creative Communities. In the end both parties agreed on the following clarification:

Within the scope of the pilot between Creative Commons Netherlands and BUMA/STEMRA, 'commercial use' should be taken to mean the following:

Every use of the Work by for-profit institutions is qualified as 'commercial use'.

In addition, within the scope of the pilot, distributing or publicly performing or making available online the Work against payment or other financial compensation (including the use of the work in combination with ads, publicity actions or other similar activities intended to generate income for the user or a third party) is qualified as 'commercial use'.

Within the scope of the pilot, 'commercial use' also includes the distribution or public performance or having broadcasting organisations make the Work available online, as well as using the Work in hotel and catering establishments, work, sales and retail spaces. This also applies to organisations that use music in or in addition to the performance of their duties, such as, for example, churches, schools (including dancing schools), institutions for welfare work, etc. Separate licenses are available from BUMA/STEMRA for such kinds of use.

While this definition is much more precise than the standard language contained in the Creative Commons licenses (use in 'any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation') it is clearly more restrictive as well.

How the pilot works in practice

With all the issues described above solved, the pilot was launched on the 23rd of August 2007. Since then BUMA/STEMRA members who want to license some of their works under a non-commercial Creative Commons license can do so after completing the following steps:

1. The author has to ensure that (s)he has obtained the permission of all rights holders in the works that are to be licensed. Aside from the composer and/or the lyricist (the BUMA/STEMRA member) there may be all kind of rights holders, such as co-authors, arrangers or publishers and performing artists or musicians. Work may only be distributed under a CC license subject to the permission of all rights holders.
2. The author has to agree to the additional conditions for the pilot. This can be done on the website of BUMA/STEMRA. These additional conditions contain a license back provision for the non-commercial rights in the works that are to be licensed and include the definition of commercial use.

⁴ For more information see: <http://wiki.creativecommons.org/CCPlus>

⁵ Creative Commons International had a strong preference to define the meaning of commercial use, so that everything not covered under this definition could be considered non-commercial. In subsequent pilots this approach was reversed in order to give non commercial users more clarity.

3. The author has to indicate to Buma/Stemra the particular work(s) (s)he intends to publish under a Creative Commons license. This can be done via a form on the Buma/Stemra website and the information is registered by Buma/Stemra
4. Via a special licensing interface on the www.creativecommons.nl the author can generate special license buttons that mark works as licensed in the context of the pilot and contain special metadata indicating that all other rights are administrated via Buma/Stemra.
5. Now the works in question can be made available under the terms of the non-commercial Creative Commons license chosen by the author.

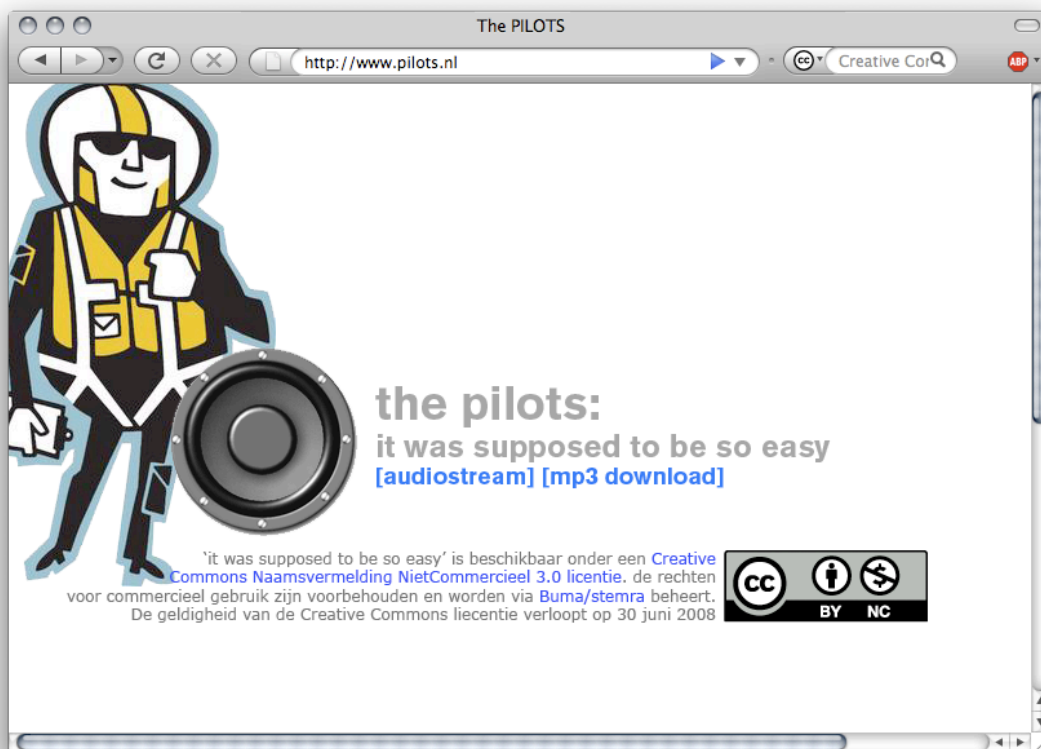


figure 2: license button with additional information about the pilot and a link to Buma/Stemra website

Uptake of the pilot

While the launch of the pilot created a lot of media interest and was closely watched by Collecting Societies and Creative Commons projects in other countries the actual use of the pilot has been disappointing: At the end of 2009 there were about 30 different authors participating in the pilot. Together these authors had requested a retransfer of the non-commercial rights for about 100 works. This number is much lower than both Buma/Stemra and Creative Commons Netherlands had expected on the basis of the amount of discussion about the inability of Buma/Stemra members to use Creative Commons licenses that preceded the launch of the pilot. The lower than expected utilisation of the pilot came combined with a number of arguments criticising parts of the pilot.

1. The definition of non-commercial use was too strict to allow meaningful uses of works licensed under the pilot. Two potential scenarios were singled out here:
 - a. Reuse on private blogs or websites that contained small amounts of advertisements for example in the form of Google ads, where the advertising revenue was less than the operating costs.
 - b. Distribution of the works via music sharing platforms specializing in freely licensed music such as jamendo.com or simuze.nl

Under the definition of commercial use of the pilot both uses of licensed works are clearly considered to be commercial. This means that these forms of distribution require a regular license from BUMA/STEMRA.

2. For authors wishing to participate in the pilot, it remained unclear whether the collective rights management system of SENA (entrusted with the collection and distribution of the neighbouring rights of performers of musical works and phonogram producers) created obstacles for the use of the Creative Commons licenses⁶.
3. A number of those authors who had been calling for a solution for the problem that BUMA/STEMRA members could not use Creative Commons licenses indicated that even though this particular issue had been resolved they still considered becoming a BUMA/STEMRA member undesirable because of other issues.
4. A number of authors pointed out that information about the pilot was relatively difficult to find, that the procedure to take part was complicated and that it was not sufficiently promoted by BUMA/STEMRA and Creative Commons Netherlands.

As part of the second extension of the pilot period in August 2009 Creative Commons Netherlands and BUMA/STEMRA agreed to increase the visibility of information about the pilot on their respective websites and to undertake a formal evaluation survey in order to identify problems with the current setup.

Evaluation Survey

The evaluation survey was undertaken between November 2009 and January 2010 and the results were presented at the annual Noorderslag Conference on 16 January 2010 in Groningen. The survey was aimed at better understanding the needs of music authors with regard to flexible management of their rights. The survey consisted of a qualitative and a quantitative part. For the qualitative part a number of Dutch authors and related experts were invited for an expert session. For the quantitative part a questionnaire was fielded to a representative sample of BUMA/STEMRA members and a small number of non-member music authors.

Three authors and two other experts participated in the expert session, which took place on the 25th of November 2009 in Amsterdam. The purpose of this session was to gather input for formulating the survey. In addition to this the session also provided additional insights into how the pilot is being perceived (and being used) by different actors. Of course, it should be observed that this group of experts is not necessarily representative for the total of BUMA/STEMRA members.

According to these experts there are a number of additional reasons for the relatively low uptake of the pilot:

- No enforcement in cases where BUMA/STEMRA members use Creative Commons licenses outside of the pilot. This means that from the perspective of authors the problem that the pilot attempts to solve is not a real problem (because they can get away with ignoring it). Since participation in the pilot requires extra effort, authors seem to opt for the easier approach of using CC licenses in violation of their exclusive assignment of rights to BUMA/STEMRA.
- Based on the above the experts felt that BUMA/STEMRA needed to communicate more clearly. If the use of CC through the pilot constitutes the only way for members to share their works online for free the pilot needs to be promoted more prominently and violations of the exclusive assignment of rights need to be enforced.
- It is insufficiently clear what third parties can and cannot do with music licensed under the pilot. The suggestion was to work with a list of allowed and disallowed uses instead of the relatively complicated definition of commercial uses. It was also noted that the current definition of commercial use is regarded as too restrictive (see the list below for more detail).

⁶ Interestingly this concern is not mirrored by the experts. In the second half of 2009 there have been contacts between Creative Commons and BUMA/STEMRA with the intention to clarify the position of SENA. This process is still underway.

- The way BUMA/STEMRA currently operates. According to the experts there is too much focus on obtaining royalties for uses of the works managed on behalf of their authors. Instead BUMA/STEMRA should focus on enabling authors to manage their rights offering them flexible options to do so. Licensing some of the works under a CC licenses should be one of these options.
- The general perception is that the way BUMA/STEMRA currently operates is well suited for off-line forms of distribution (radio, television, CDs) especially when they take place out of sight of the authors and less well suited for on-line forms of distributions, which tends to be much more visible to authors.

At the end of the session the experts were asked to identify forms of use of musical works that according to them are either clearly commercial or clearly non-commercial.

Non-commercial uses (according to the participants of the expert meeting):

- Use on the website of the author (or the band)
- Use by small organisations (less than 10 employees)
- All uses directly aimed at promoting the author (or band)
- Uses where the music is secondary to another product (remixes, use in video, sampling)
- Distribution by author/band via file sharing networks
- Distribution by author/band via music distribution platforms (such as jamendo.com)
- Distribution by author/band via social networks
- Use by arts/culture institutions
- Use on CDs in support of charity
- Use by individuals in combination with Google ads

Commercial Uses (according to the participants of the expert meeting):

- Use by bars, cafes restaurants, hotels and the like
- Use by radio and television stations
- Any use that is conditional on monetary compensation
- Any use where the majority of the value is contributed by the music
- Use in connection with Google ad-words that generates a lot of money.

These lists were subsequently used by BUMA/STEMRA and Creative Commons Netherlands as a starting point for formulating parts of the survey that was used during the quantitative part of the evaluation process.

Results of the quantitative survey

The quantitative survey consisted of an online survey containing 26 multiple-choice questions. The survey was run in the 2nd week of December 2009. In total 3520 individuals were approached by email of whom 524 completed the survey. Among the respondents were 505 members of BUMA/STEMRA and 19 non-members. With regard to the members (18.000 in total) of BUMA/STEMRA the sample can be deemed statistically representative.

Of those responding to the survey 70% identified themselves as singer songwriters (given that BUMA/STEMRA only covers the song writing part this is a surprisingly high percentage) and 83% generates income from their music. We can therefore assume that the majority of the respondents is not dependent on royalties for compositions alone but also generates income from performing own compositions.

On the other hand the Creative Commons licenses are relatively unknown among the respondents. Only 36% of the respondents have ever heard about Creative Commons and as little as 3% of the

respondents make use of music distribution platforms that offer freely licensed music⁷ (while 68% of them communicate about their music via social networking platforms).

In a second part of the survey a number of general attitudes were explored. Respondents could indicate in how far they think that a number of different topics are important to them or not.

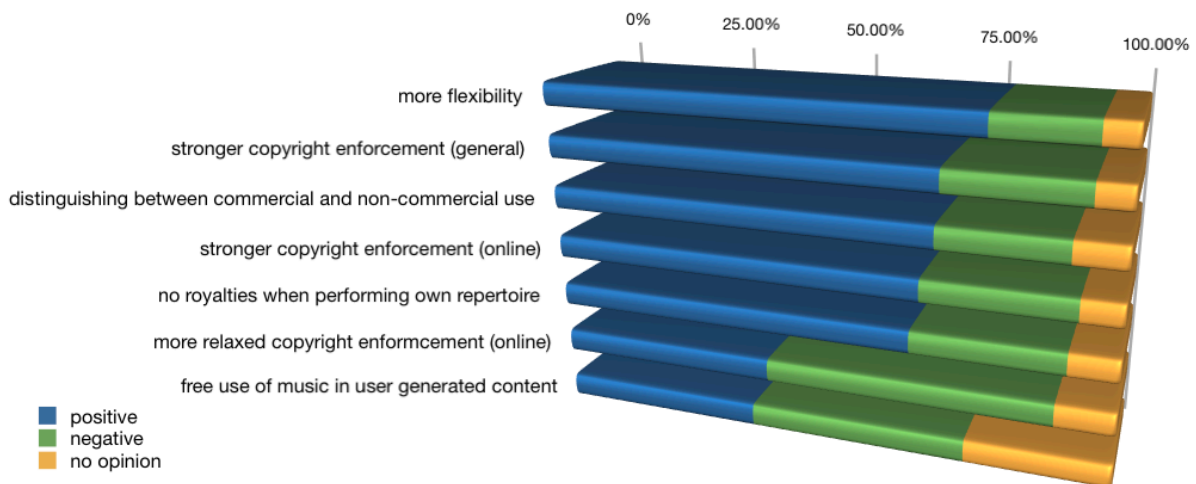


figure 3: selected attitudes among the survey population

What is interesting here that 77.8% of the respondents have a positive attitude with regards to the general objective of the pilot (more flexibility). In addition the attitude towards the primary characteristic of the pilot (differentiating between commercial and non-commercial uses of one's works) is positive for a majority of the Buma/Stemra members (69.8%). When asked specifically about dealing differently with commercial and non-commercial uses, 77% of the respondents consider Buma/Stemra the most suitable party to collect royalties for commercial uses of a work that is freely licensed for non-commercial uses.

Based on these figures we can conclude that among members of Buma/Stemra there is a need for more flexibility along the lines proposed by the pilot.

This observation is supplemented by another finding from the survey: 25% of the respondents indicate that they are interested in participating in the pilot. This is significantly more than the current uptake of the pilot (less than 1% of all Buma/Stemra members).

These findings indicate that there is a *raison d'être* for a construction that enables use of Creative Commons licenses by members of Buma/Stemra, but that the current pilot does not sufficiently fulfil the needs of Buma/Stemra members and that the opportunities created by the pilot have not been promoted enough.

Commercial vs. non-commercial

With regards to the definition of commercial and non-commercial forms of use the survey revealed a surprisingly clear-cut perception. This perception seems to be oriented along the lines of the promotional value of a certain use. Uses that are clearly aimed at promoting the author or band in question are regarded as non-commercial by a bigger share of the respondents than uses that lack such a promotional element. The outcome of the survey suggests that for the authors involved there is an overlap between the concepts of promotional use and non-commercial use.

⁷ this particular finding is heavily distorted by the 19 respondents who are not members of Buma-Stemra. If we discount these less than 1% of the Buma/Stemra members uses distribution platforms that offer cc licensed music.

Interestingly this differentiation runs largely in parallel with the distinction between online (promotional) and offline (not seen as promotional) uses. Given this difference between online and offline we have analysed the responses for the youngest age bracket of respondents (20-29 years old) separately. Here the differentiation observed among the overall sample is even more pronounced. The following table contains the responses of the overall sample (left) and the age group between 20 and 29 years (right).

Willing to allow promotional use for free?	yes	no	don't know	yes	no	don't know
	overall			20-29 years old		
listening on own website	88.20%	7.10%	4.70%	96.70%	3.30%	0.00%
promotional CDs	76.90%	17.20%	5.90%	86.70%	11.70%	1.60%
use on site of booking agent	76.30%	16.40%	7.30%	88.30%	6.70%	5.00%
use on site of record company	76.30%	17.60%	6.10%	80.00%	18.30%	1.70%
use for charity	68.70%	22.30%	9.00%	75.00%	20.00%	5.00%
use on site of concert venue	64.90%	26.00%	9.10%	80.00%	20.00%	0.00%
downloads from own website	61.60%	30.00%	8.40%	75.00%	23.30%	1.70%
use on social networking sites	53.10%	36.60%	10.30%	78.30%	16.70%	5.00%
embedding without advertisements	52.30%	33.60%	14.10%	73.30%	16.70%	10.00%
use by radio / TV	39.90%	55.00%	5.10%	35.00%	60.00%	5.00%
use in stores	39.50%	55.30%	5.20%	45.00%	55.00%	0.00%
use in bars/restaurants/hotels etc	34.70%	59.00%	6.30%	40.00%	56.70%	3.30%
use by for profit companies	30.90%	61.60%	7.50%	31.70%	63.30%	5.00%
use for promotion of other products	28.10%	65.10%	6.80%	28.30%	66.70%	5.00%
embedding with advertisements	26.90%	60.90%	12.20%	46.70%	43.30%	10.00%
use on file sharing platforms	24.00%	58.60%	17.40%	36.70%	50.00%	13.30%

table 1: commercial vs. non-commercial for different types of use

If we look at the results that all online uses of works (with the exception of file sharing, use by for-profit companies and embedding with advertisements) are considered to be non-commercial by a majority of the respondents. Uses that can be regarded as purely promotional (use on the sites of record companies, booking agents and venues as well as use own websites) are regarded as commercial by less than 30% of the respondents.

If we look at the responses from the age group between 20 and 29, that can be expected to be much more active in and familiar with the online environment the results are even more striking: all online uses (again with the exception of file sharing, use by for-profit companies and embedding with advertisements) are seen as non-commercial by at least 73.3% of the respondents. There is a very profound change of attitude between these forms of use and the rest (all other uses are considered to be commercial by the majority of respondents from this age group)⁸.

⁸ While there is no compatible data available here we can estimate that the forms of use that are considered as commercial by a majority of respondents represent significantly more than 95% of the royalties collected by Buma/Stemra

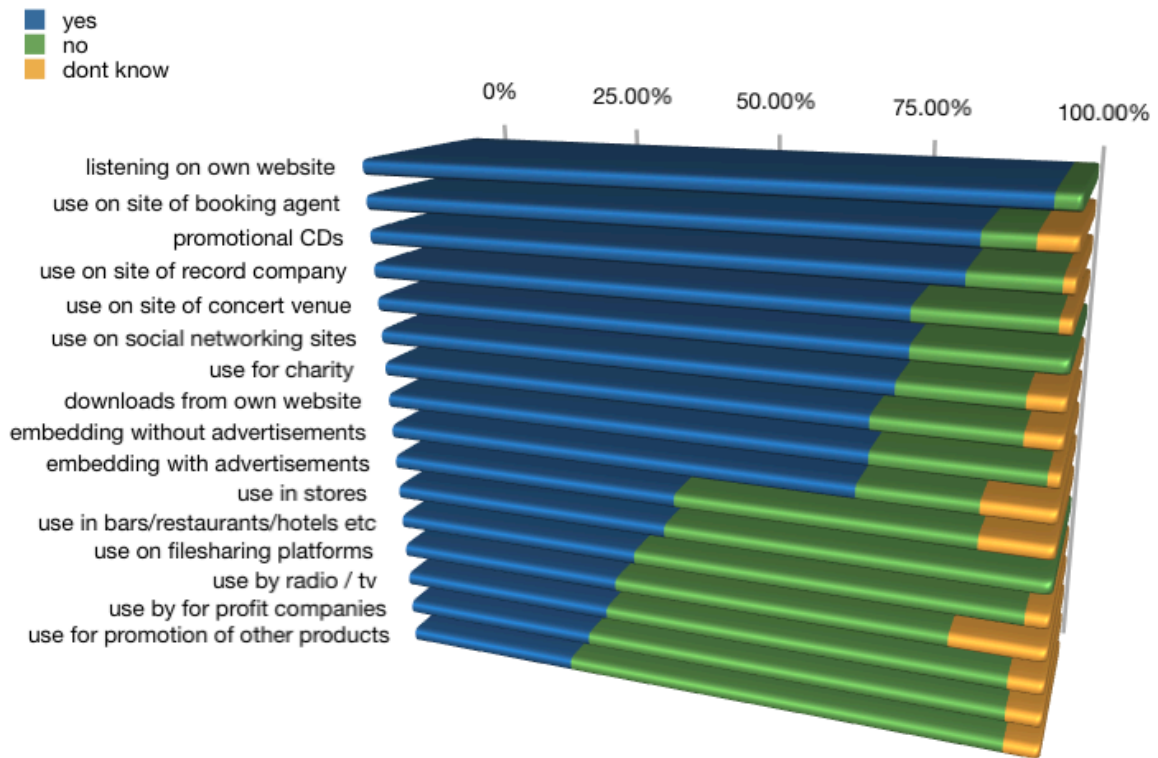


figure 4: commercial vs. non-commercial for different types of use (age 20-29)

Based on these figures we can conclude that there is a large percentage of Buma/Stemra who find it important that they can promote their own works without having to pay royalties. This seems to be especially true in the field of online uses (and there gets more pronounced for younger authors)⁹.

The responses to the survey show that the perceptions of what is considered to be non-commercial use vary a lot but that there are large groups of authors who consider at least some of the uses described here as non-commercial. More importantly the range of uses that is considered to be non-commercial by a majority of the users is much broader than those uses defined as non-commercial under the terms of the pilot. It must be assumed that this disconnect contributes to the fact that while there is considerable interest for the pilot (and support for the basic mechanisms) authors do not use the pilot in its current form.

⁹ The data we have does not allow us to see if this is the result of lifecycle effects or because of generational effects.

Conclusions

When evaluating the pilot between Creative Commons Netherlands and Buma/Stemra two seemingly opposite conclusions can be drawn. On the one hand the pilot taps into a fundamental need: confronted with the possibilities of online distribution and self promotion members of Buma/Stemra are looking for more flexibility to manage their rights in order to promote their works. The basic idea of the pilot - being able to freely license non-commercial uses of selected works while having Buma/Stemra continue to collect for commercial uses of those works enjoys support of a majority of those surveyed here.

On the other hand the current setup of the pilot does not provide members of Buma/Stemra with the tools they are looking for. The primary reason we can identify for this lies in a mismatch between the way non-commercial use is framed in the definition developed for the pilot and forms of use that are considered to be non-commercial among Buma/Stemra members.

Given the above we can conclude that Buma/Stemra members are looking for more flexibility that allows them to make better use of online opportunities for self-promotion. The definition of commercial use that is used for the pilot is the result of negotiations between the Buma/Stemra and Creative Commons and has not been subject to feedback or input from large groups of authors. At the time when the pilot was launched it was an internationally unprecedented attempt at combining collective and individual rights management. One of the primary considerations in designing the pilot had been caution in order to not to disturb the normal exploitation of the work – the core business of collecting societies and also of Buma/Stemra.

The outcome of this evaluation survey seems to support the view that there is a need for adapting the pilot, providing possible directions, so that it better mirrors the needs of members of Buma/Stemra.

In addition it has become clear that (a possibly modified version of) the pilot (which could take the form of a regular option for members of Buma/Stemra) will need to be communicated much more clearly. Buma/Stemra will need to clearly highlight where such a pilot fits into the range of services it offers to its members. In this context it has been suggested by the group of experts that Buma/Stemra will need to start acting against those members who use Creative Commons licenses outside the framework of the pilot.

After the presentation of the results of the evaluation survey at the Noorderslag festival in January 2010 Creative Commons Netherlands and Buma/Stemra have committed to explore modifications of the pilot before the end of 2010.