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## Dutch Court Upholds Creative Commons License

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For the first time ever, a court has upheld the validity of the "Creative Commons" license. This license, which is similar to licenses used with open source software, was upheld by a Dutch court in a case involving photographs published on a photo sharing website. In its decision, the court confirmed that the Creative Commons license binds anyone who wishes to use such content, even if the user does not expressly consent to the license or, as was the case here, has no actual knowledge of the conditions of the license.

### Background: The Creative Commons License

[Creative Commons](#) (CC) is a nonprofit organization devoted to expanding the range of creative work available to the public in order to allow the sharing, publication and modification of such works. Creative Commons assists copyright holders who want to grant some of their rights to the public while retaining other rights. For this purpose, Creative Commons offers a variety of flexible licensing schemes, as well as tools to implement them. The CC license terms work on the "canvas" of the applicable national copyright law and have been applied to works ranging from photographs to text, audio clips, videos, scientific data and websites.

A copyright holder can add a CC license to his or her creative work (such as a photo posted online) and allow others to use the work as long as the user adheres to the selected [requirements](#). Such conditions can include, for instance, a requirement that the user attribute the work in the manner specified by the author (attribution), and that if the user alters, transforms or builds upon the work, he or she may only distribute the resulting work under an identical license (share alike). A typical, but not obligatory, restriction is that the user be prohibited from using the work for commercial purposes (noncommercial).

### The Audax Case

On March 9, 2006, the District Court of Amsterdam ruled in case number 334492/ KG 06-176 SR (the *Audax case*) that photographs made available on the website [www.flickr.com](http://www.flickr.com) under a Creative Commons Attribution-Noncommercial-Share Alike [license](#) may not be reproduced in a weekly print magazine without the photographer's permission.

In this case, the photographer published photos of family members on flickr.com under a Creative

Commons Attribution-Noncommercial-Share Alike license. The photos were posted with the general notice "This photo is public," next to an icon that linked to the full license terms. Shortly thereafter, the magazine in question reprinted four of these photos without seeking the photographer's consent. The photographer claimed damages and injunctive relief for copyright infringement.

Recognizing that the photographer holds the copyright in the photos, the court held that the photos may only be used subject to the license provisions imposed by the copyright holder. The court also held that the photographer's rights had been violated by the publication of the photos in the magazine, which had used the photos for commercial purposes without the photographer's consent and without granting a "share alike" license.

The court expressly considered whether the magazine's publisher, Audax Publishing B.V., was misled by the notice "This photo is public," under the thumbnail version of the photos, and whether the publisher therefore did not have an obligation to acquaint itself with the license provisions. The court said that a professional print publisher is obliged to conduct thorough research for any applicable license provisions before publishing photos taken from the Internet. If the defendant had conducted such research, it would have found the CC icon next to the words "This photo is public." Also, it would have found the icon next to the full-size version of the photos, accompanied by the express notice "some rights reserved." Clicking on the icon would have led the defendant to the full license terms. If the defendant had still been in doubt about the applicability or scope of the license provisions, it would have been required to contact the person who posted the photos. The court found that Audax clearly failed to conduct such research. Rather, it merely assumed, incorrectly, that the photos could be published in a commercial magazine without asking for the copyright holder's permission.

The court enjoined the defendant from publishing any of the photos in a manner inconsistent with the license provisions.

## **Conclusion**

The *Audax* case is the first reported case anywhere in which a court has ruled on the enforceability of a CC license. This case follows two cases in which courts in Munich, Germany, upheld the validity of the GNU General Public License, which is similar in many ways to the Creative Commons license. It is unclear whether other courts will follow the lead of the Amsterdam court. However, any individual or company planning to use a work that is accompanied by the CC icon--or that may otherwise fall under a CC license--should thoroughly investigate whether the license applies and should abide by the license conditions. Otherwise, the publication or distribution of the work, or any product or other material incorporating the work, may be jeopardized.

For more information on this issue or other technology transactions and licensing matters, please contact the attorneys listed above.

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