

**Porting the CC Licenses 3.0 to Portugal: Explanation of substantial legal changes**  
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This document provides explanations regarding the substantial legal changes introduced to the Attribution-NonCommercial-ShareAlike Portugal Legal Code, when versioning it up to Version 3.0.

The ported version is based on the Attribution-NonCommercial-ShareAlike 3.0 Unported Legal Code, and reflects my own legal view as to how a particular change should be implementing according to the Portuguese laws, namely the Código de Direito de Autor e de Direitos Conexos (“CDADC”).

When implementing the changes I have tried to ensure that the ported version (i) covers all relevant rights and particularities in line with the Portuguese laws (e.g. the moral right of withdrawal) and (ii) does not contain unnecessary changes in relation to the Unported and other ported licenses, which could confuse users (e.g. instead of using a large number of the terms, which would be more accurate according to the Portuguese laws, I have decided to use broad terms consistent with the Unported license and that include each of those required terms in their definition).

**1. Replacing the term “Publicly Perform” by the term “Apresentar ao Público” (“Present to the Public”) and clarifying the definition of the later**

Considering that:

- (i) The term “Publicly Perform” is used in the Unported version to include both the right of communication to the public and the right of making available to the public;
- (ii) The term “Execução Pública” (“Publicly Perform”) is contained in several provisions of the CDADC (cf. e.g. art. 68.º(2)(b) CDADC) and is one of the different rights of exploitation to the public. Therefore, to use it in the Portuguese version with the same broad meaning of the Unported version could confuse the Portuguese users;
- (iii) The CDADC uses the term “Comunicação Pública” (“Public Communication”), but does not give us a definition of it that could be used as a general criterion applicable to the different forms of a general exclusive right to communicate [cf. Cláudia Trabuço, O Direito de Reprodução de Obras Literárias e Artísticas no Ambiente Digital 559, footnote 23 (Coimbra Editora 2006)]; instead, the CDADC creates several rights of exploitation to the public, such as the rights of performance, recitation, exhibition and broadcasting (cf. art. 68.º CDADC);

- (iv) The right to communicate to the public has been defined as the act by which the enjoyment of the work or performance is made accessible to the public independently from the possession of a copy of the same [cf. José de Oliveira Ascensão, *Direito Civil: Direito de Autor e Direitos Conexos* 277 (Coimbra Editora 1992)];
- (v) Some authors consider that the right of making available to the public (“colocar à disposição do público) by wire or wireless means, so that anyone can access the work or performance from a place and time individually chosen by such person (cf. art. 68.º(2)(j) CDADC), is a new right, independent from the right to communicate to the public [cf. Trabuco, *op. cit.* 563];
- (vi) The term “Apresentar ao público” (“Present to the public”) is not contained in any provision of the CDADC, therefore could be easily used to include both the right of communication to the public and the right to make available to the public,

The following substantive legal change has been made:

- A. Definitions:** the term “Publicly Perform” is replaced by the term “Apresentar ao público” (“Present to the public”).

## **2. Replacing the term “Collection” by the term “Compilação” (“Compilation”) and clarifying the definition of the later**

Considering that:

- (i) The Unported version uses the term “Collection” in a way that is compatible with art. 2.º(5) Berne Convention;
- (ii) The term "Compilação" (“Compilation”) is used in art. 3.º(1)(b) CDADC, precisely when referring to those works mentioned in art. 2.º(5) Berne Convention;
- (iii) Under the CDADC, a compilation of protected or unprotected works, such as encyclopaedias and anthologies, which by reason of the selection and arrangement of its contents constitutes an intellectual creation, is a work compared to an original work (cf. art. 3.º(1)(b) CDDAC);
- (iv) The previous Portuguese version (version 2.5) uses the term “Obra Colectiva” (literally “Collective Work”), and not the term “Colecção” (“Collection”) nor the term “Compilação” (“Compilation”);
- (v) “Obra Colectiva” (literally “Collective Work”) is defined in the CDADC as a work created by a plurality of people, organized and directed by a natural or legal person and disclosed under the name of such person. This means that the term “Obra Colectiva” does not refer to a collection of works, but to a single work. Sometimes the personal

contributions of the several people involved can be identified; in such cases, the individual rights can be separately exploited, provided that such exploitation does not affect the exploitation of the "Obra Colectiva". But, again, that does not mean that the definition of "Obra Colectiva" is a collection of several works. [Note: a single work created by a plurality of people can also be classified as a "Obra feita em colaboração" (literally "Work of Collaboration") if it is disclosed under the name of the individual contributors] (cf. art. 16.º CDADC);

- (vi) One can find in other jurisdictions terms that are used with the same purpose as "Obra Colectiva", ie, to solve a question of joint authorship, e.g.: a) in the Brasilien Author's Rights Law, the term "obra em co-autoria" [and not "obra colectiva", which also exists in the Brasilien Law and is sure used with the meaning of a collection] (art. 5.º(VIII)(a)); b) in the French Intellectual Property Code, the term "l'oeuvre collective" (Article L. 113-2); c) in the UK Copyright, Designs and Patents Act, "Works of joint authorship" (Section 10); d) in the German Copyright Act, "Miturheber" (Article 8)...;
- (vii) While the term "Obra Colectiva" cannot match the Unported definition, the term "Compilação" ("Compilation"), for the reasons above stated, could be used to define a work in which the Work is included with one or more Works,

The following substantive legal change has been made:

- A. Definitions:** the term "Collection" is replaced by the term "Compilação" ("Compilation").

### **3. Replacing the term "Original Author" by the term "Titular Originário" ("Original Rightholder") and clarifying the definition of the later, and including an express moral rights acknowledgment**

Considering that:

- (i) The Portuguese system is an author's rights systems; it makes a distinction between those who create a literary or artistic work and those who do artistic or investment achievements in relation to works;
- (ii) The Portuguese definition of "Autor" ("Author") is limited to the natural person who has created the work (cf. art. 27.º(1) CDADC); nevertheless, references to "Author" in the CDADC include, where applicable, the heirs and descendents of the Author (cf. art. 27.º(3) CDADC) as well as the original owner of economic rights other than the Author (cf. art. 11º CDADC);

- (iii) The moral rights initially vest in the Author and cannot be signed nor waived – the intellectual creator is the only one that has e.g. the moral right of integrity (cf. art. 56.º CDADC); nevertheless, the Author’s heirs and descendants can also exercise those moral rights (cf. 27.º(3) and art. 57.º(1) CDADC);
- (iv) The economic rights belong originally to the Author (cf. art. 11.º CDADC), with some exceptions: a) “Obra Colectiva” (literally “Collective Work”) – the economic rights shall vest in the natural or legal person who organized and directed the creation and under whose name the work has been disclosed (cf. art. 16.º(1)(b) and art. 19.º CDADC); b) “Obra feita por encomenda ou por conta de outrem” (literally “Work made to order or to another person”) – the economic rights might vest, in certain circumstances, in the natural or legal person for whom the work has been made (cf. art. 14.º CDADC);
- (v) Performers, Producers (of phonograms, audiovisual recordings or films) and Broadcast Organizations hold neighbouring rights in relation to their works; such rights are of an economic nature, except for the “Artista intérprete ou executante” (“Performer”) who also retains certain moral rights, such as the moral right of integrity (cf. art. 182.º CDADC);
- (vi) One can, thus, conclude that if we decided to use the term “Autor Original” (“Original Author”) in the ported version, the Portuguese users could misunderstand it;
- (vii) The term “Titular Originário” (“Original Rightholder”) is not contained in any provision of the Portuguese law, therefore could be used to include both the “Autor” (“Author”) and others author's original rightholders, as well as the “Artista intérprete ou executante” (“Performer”) and other neighbouring rightholders,

The following substantive legal changes have been made:

- A. Definitions:** the term “Original Author” is replaced by the term “Titular Originário” (“Original Rightholder”).
- B. Restrictions:** in clause 4(g), the moral rights provided both to the “Autor” (“Author”) and to the “Artista intérprete ou executante” (“Performer”) under the Applicable Law, including but not limited to the right of integrity, are retained.
- C. Termination:** in clause 7, a number 3 is added, in order to reflect the moral right of withdrawal provided to the “Autor” (“Author”) under the Applicable Law.

#### **4. Replacing the term “Obra” (“Work”) by the term “Trabalho” (“Work”) and clarifying the definition of the later**

Considering that:

- (i) The CDADC limits the use of the term “Obra” (“Work”) to the literary and/or artistic works protected by author’s rights (cf. art. 1.º and 2.º CDADC);
- (ii) The CDADC uses the term “Prestação” (“Performance”) when referring to works protected by neighbouring rights;
- (iii) One can, thus, conclude that to maintain the term “Obra” (“Work”) in the Portuguese version could confuse the Portuguese users as to the types of works covered by the license;
- (iv) The term “Trabalho” (“Work”) is not contained in any provision of the Portuguese law therefore could be used with a broad meaning to include both a “Obra” (“Work”) and a “Prestação” (“Performance”);
- (v) The Law Decree 122/2000 of July 4, which implemented in the Portuguese legal order the Council Directive 96/9/CE of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, extends the author’s right protection to databases;
- (vi) The Law Decree 252/94 of October 20, which implemented in the Portuguese legal order the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, protects computer programs, by author’s right, as literary works;

The following substantive legal changes have been made:

- A. Definitions:** the term “Work” is maintained but translated as “Trabalho” and not as “Obra”, in order to include both (i) the literary and/or artistic works (“Obras”) (including databases and computer programs, provided that they are protected under the Applicable Law and (ii) and the works produced by the holders of neighbouring rights (“Prestações”).
- B. License Grant:** at the end of section 3 is added an unconditional waiver of the sui generis database rights, in accordance with the CC guidelines.
- C. Restrictions:** section 4(e) makes the clarification of such waiver, in accordance with the CC guidelines.

## **5. Replacing the term “Adaptation” by the term “Obra Derivada” (“Derivative Work”) and clarifying the definition of the later**

Considering that:

- (i) Under the CDADC, a work can be classified as “Obra Original” (“Original Work”) or as “Obra equiparada a original” (“Work compared to an Original Work”) (cf. art. 2.º and 3.º CDADC);
- (ii) The term “Derivative Work” is used to name those works defined in art. 3.º(1)(a) CDADC, i.e., any kind of transformations (including adaptations) of the pre-existing work (cf. art. 68.º(2)(g) CDADC) [cf. Luiz Francisco Rebello, Código do Direito de Autor e dos Direitos Conexos Anotado 38 (3.ª Ed., Âncora 2002)];
- (iii) To transform means to create a new and original work based upon the pre-existing work (which remains exactly the same) [cf. Ascensão, op. cit. 253]; a “Derivative Work” is the result of such transformation [cf. Trabuco, op. cit. 226-227];
- (iv) To modify or alter means to create a new version of the pre-existing work itself (cf. Ascensão, cit. 253); the CDADC uses the terms “alteration”/“modification” when referring to the moral right of integrity (cf. articles 56.º(1), 59.º, 15.º(2) and 50.º(2) CDADC);
- (v) An alteration/modification of a work always imply the exercise of the moral right of integrity while a transformation of a work only implies the exercise of an economic right [cf. also Ascensão, op. cit. 254];
- (vi) A derivative work will not likely qualify as an alteration of the original work, but as a transformation of the original work and, thus, cannot be prejudicial to the Author’s reputation or honour;
- (vii) The moral right of integrity can be expressly retained in the Legal Code without blocking the exercise of the derivative works right;
- (viii) The CDADC, following art. 2(3) Berne Convention, states that the protection conferred to the derivative works is made without prejudice to the copyright of the original work. However, it does not say anything about the exploitation of the work, like for instance the German Copyright Act, which states that the exploitation of the derivative work depends on the authorization of the author of the pre-existing work (Section 23);
- (ix) According to Ascensão, the author of the derivative work is the only holder of rights in relation to such work. The author of the pre-existing work only needs to grant him the right to transform the pre-existing work to create a Derivate Work, since any further

exploitations of the derivative work itself are implicitly granted in the right to transform. The only exception to this are those exploitations of the derivative work that would limit the exploitation of the pre-existing work itself. In such cases, the holder of the derivative work still needs the authorization of the holder of rights on the pre-existing work.

- (x) Despite following Ascensão position on this, I consider that, to be on the safe side, we should maintain the explicit grant of the exploitation rights in respect to the Derivative Work by the author of the pre-existing work, and not only the grant of the right to transform the pre-existing work.

The following substantive legal changes have been made:

- A. Definitions:** (a) the term “Adaptation” is replaced by the term “Obra Derivada” (“Derivative Work”), and (b) the term “other alterations” is replaced by the term “outras transformações” (“other transformations”).

## **6. Clarifying the definition of “Reproduction”**

Considering that:

- (i) The first difference between Copyright systems and Authors' rights systems is related with the genesis of copyright. In the copyright systems, one will not have copyright protection unless the work is fixed, while in the Author's rights systems no fixation is needed, since the work is protected from the moment of the exteriorization of the creation. This means that the right to fix is an independent economic right, different from the right to reproduce;
- (ii) The CDADC does not include the term “Fixation” (cf. art. 141.º(1) CDADC) in the definition of “Reproduction” (cf. art. 176.º(7) CDADC);
- (iii) The CDADC defines the term “Fixation” as the embodiment of sounds or images, separately or cumulatively, in a stable and durable material medium, which permits its perception, reproduction or communication by any form, in a non-ephemeral period;
- (iv) The CDADC defines the term “Reproduction” as obtaining one or more copies of a fixed work or performance, direct or indirectly, temporary or permanently, by any means and in any form, from the whole or a part of such fixation [Note: the definition of “Reproduction” in the CDADC is supposed to be in accordance with art. 3(e) Rome Convention. It is true that in Rome “Reproduction” is defined as "the making of a copy or copies of a fixation", nevertheless, the Portuguese legislators did not translate "making" by its literal corresponding "fazer" but by "obtenção" (which literally means "obtention")];

- (v) The protection granted by the right of reproduction goes, thus, beyond the first embodiment of the work or performance in a material support; it is applicable to all the copies produced after the first embodiment [cf. Trabuco, op. cit. 708];
- (vi) Therefore, to be in line with the Portuguese legal concepts, one should reserve the term “Reproduction” to the making of copies after the first embodiment and the term “Fixation” to the first embodiment of a work or performance in a tangible medium;
- (vii) However, in order to preserve a certain uniformity between the ported versions, I consider that one can maintain the right of fixation included in the definition of reproduction, as in the Unported version, without misleading the users, by making a sub-definition of fixation and making it clear that the inclusion is solely for the purposes of this licence,

The following substantive legal changes have been made:

- A. Definitions:** the term “Reproduction” is maintained, and the term “Fixation” is further defined.

## **7. Implementing the new collective royalty collection clauses**

Considering that:

- (i) The remuneration and compensation rights subject to mandatory institutional representation (through a collecting society or another legal entity) cannot be waived,

The following substantive legal changes have been made:

- A. Restrictions** the non-waivable compulsory license scheme clause and the voluntary license schemes clause are implemented, with adaptations.