

Introduction to Creative Commons Licensing: The Key to Using the 5Rs of OER with Confidence

Jonathan A. Poritz

jonathan@poritz.net

www.poritz.net/jonathan

Center for Teaching and Learning and
Department of Mathematics and Physics
Colorado State University-Pueblo

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The Hewlett Foundation definition of OER

According to the [William and Flora Hewlett Foundation](#)

OER are teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use and re-purposing by others.

In Colorado, the General Assembly put a version of this in [HB18-1331](#)¹:

(6) "OPEN EDUCATIONAL RESOURCES" MEANS HIGH-QUALITY TEACHING, LEARNING, AND RESEARCH RESOURCES THAT RESIDE IN THE PUBLIC DOMAIN OR HAVE BEEN RELEASED UNDER AN INTELLECTUAL PROPERTY LICENSE THAT PERMITS FREE USE OR REPURPOSING BY OTHERS AND MAY INCLUDE OTHER RESOURCES THAT ARE LEGALLY AVAILABLE AND AVAILABLE TO STUDENTS FOR FREE OR VERY LOW COST.

Colorado's version muddies somewhat the waters by leaning on the price, after copying Hewlett's single-minded focus on freedom in use and re-purposing.

¹ the law that created the Colorado OER Council and funded the state OER grant program which began this year

David Wiley's 5Rs

In an extremely influential blog post² from 2014, David Wiley listed the **5Rs of Openness**, the unfettered rights to

- **Retain** - to make, own, and control copies of the content
- **Reuse** - to use the content in a wide range of ways
- **Revise** - to adapt, adjust, modify, or alter the content itself
- **Remix** - to combine the original or revised content with other open content to create something new
- **Redistribute** - to share copies of the original content, your revisions, or your remixes with others

Educational resources are truly OER if and only if they have these 5Rs, as Wiley argues eloquently ... or as should be obvious when academics think about their scholarship.

²The Access Compromise and the 5th R, by David Wiley, released under [CC BY 4.0](#)

A new character joins the cast

The 5Rs are well and good, but they run seriously afoul of copyright law.

...Copyright? you cry, What's copyright got to do with it?

Give me the next 17 minutes of your life, and I'll answer that.

This is actually time well-spent, because copyright law is pretty much the reigning system of laws which apply to the academic life. Therefore, knowing a little bit of copyright law is only prudent for folks who work in academia.

First of all, where do we see copyrights in academia?

Copyright is everywhere in academia

Copyright applies to:

“...original works of authorship fixed in any tangible medium of expression”

17 U.S.C. §102

“original” ~⇒ But **very minimal originality suffices**. *E.g.*, your vacation snaps are probably boring but copyrightable³

“works of authorship” ~⇒ **Not ideas**⁴; called the *idea-expression dichotomy*
Some devilish details: fictional characters **are** copyrightable; recipes and theorems **are not**; some plotlines **are**, others are *scènes à faire* and so **are not** copyrightable....

“fixed ...” ~⇒ *E.g.*, this is why there's always a recorder going in the back of a jazz club – now do you want to record your presentations?

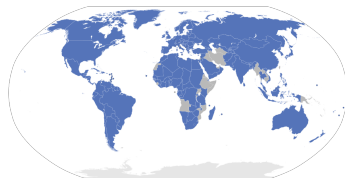
³ ...probably ... but **IAmNotALawyer** and nothing in this presentation constitutes legal advice!

⁴ which, however, may be patentable

The “©” is unnecessary

Under the [Berne Convention](#) – originally signed in 1886; today it has 177 signatories and is overseen by the [World Intellectual Property Organization \[WIPO\]](#)⁵ – *copyright is “frictionless”*, in that it springs into existence the minute the work is fixed.

Of course, this only matters if your work is created or consumed in one of the countries colored blue here:



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Conclusion: Nearly everything faculty, staff, and students create in institutions of higher education is born in chains (of copyright).

Now do you think it is worth knowing something about copyright?

⁵ [Cory Doctorow](#) says that WIPO “bears the same relationship to bad copyright law that Mordor has to evil in Middle Earth”

⁶ “[The signatories of the Berne Convention for the Protection of Literary and Artistic Works](#),” by [User:Conscious](#) was released under a [CC BY-SA 3.0 license](#).

The uses of copyright

A copyright owner has the exclusive right to

- **perform,**
- **display publicly,**
- **copy,**
- **distribute,** and
- **create derivative works** from

the copyrighted work, or to authorize others to do so (e.g., for a fee).

Some devilish details:

- ↪ Is *streaming* the same thing as *copying*, legally? Because **it is, technically.**
- ↪ Is putting a link to a work the same as copying or distributing it?
- ↪ What constitutes a derivative work is tricky! *Correct typos: no; translate: yes; change file format: no; write a sequel: yes; put in anthology: no; etc.*
- ↪ In the OER/CC world, the concepts of a *remix* and a *derivative work* have an ... unfortunate relationship.

Copyright and the 5Rs

There seems to be some serious conflict here:

Copyright:

...the exclusive right to

- **perform,**
- **display publicly,**
- **copy,**
- **distribute, and**
- **create derivative works**



5Rs:

...unfettered rights to

- **Retain**
- **Reuse**
- **Revise**
- **Remix**
- **Redistribute**

Conclusion: Traditional [“all rights reserved”] copyright is antithetical to defining characteristics of OER.

Limitations to copyright

Works-for-hire: the copyrights to works produced as part of someone's employment belong to the employer, not the employee.

~> *Academic exception-to-the-exception:* Traditionally, academics are exempt from the *works-for-hire* doctrine – but check your contracts!

US Federal exemption: works which would fall under the *works-for-hire* doctrine with the US federal government as employer are automatically free of copyright – they are born directly into the **public domain**.

Limited duration: the exclusive control vested in a copyright owner only lasts for a finite period of time: in the US, 70 years after the death of the author, the works “fall into the public domain.”⁷

⁷ The rules are more complicated for works-for-hire, and any work created before 1978.

Another (very useful) limitation to copyright

“.. the Fair use⁸ of a copyrighted work, including such use by reproduction ..., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”*

17 U.S.C. §107

⁸ a closely related concept in Commonwealth countries is called **fair dealing** there.

Why is copyright given all this power?

Copyright – in fact, all intellectual property [IP] law – in the United States stems from [Article I, Section 8 of the US Constitution](#), which gives Congress the power to enact laws

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Here, the Founders were following *classical liberalism*⁹, assuming that creators could be seduced to greater creative production of Science and useful Arts by the lure of monopoly profits, for limited Times, coming from ownership of the intellectual property in their Writings and Discoveries.

Other countries base their copyright laws instead, or also, on the concept of *author's or moral rights* ... a mystical connection that is viewed as existing between creator and creation.

⁹ Not to be confused the the more modern **neoliberalism**, which much more relentlessly thinks of *everything* in human life in purely market terms and which is the “free-market fundamentalism” behind many of today's problems in higher ed and beyond.

The authors of the U.S. Constitution were not academics

The [neo]liberal view of how to motivate creative activity is, I assert, manifestly in tension with the longstanding¹⁰ values and practices of the academic world. We've already noticed the tension with Wiley's 5Rs.

So how can we deal with the automatic creation of restrictive and entirely anti-academic copyrights?

Fortunately, some lawyers were inspired by both Richard Stallman's GPL license for free software and by a case they lost which had questioned the constitutionality of the [Mickey Mouse Protection Act](#), to found the Creative Commons in 2001.

The key legal idea here is to use the powers of copyright to subvert their implications from within.

¹⁰ Don't mention Pythagoras vs Euclid in this context unless you want to witness an unhinged mathematical rant.

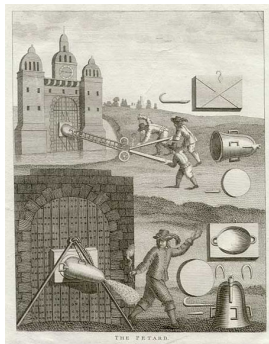
Common CC license misconception ... *Hamlet* quote

Creative Commons licenses do not *reject copyright* or *give up on copyright*. Rather, they are entirely dependent upon copyright to bestow the power on creators to subvert the goals of exclusive control in traditional copyright in favor of *legally enforced openness*.

This is the very archetype of being
hoist by your own petard:

*There's letters seal'd: and my two schoolfellows,
Whom I will trust as I will adders fang'd,
They bear the mandate; they must sweep my way,
And marshal me to knavery. Let it work;
For 'tis the sport to have the engineer
Hoist with his own petard: and't shall go hard
But I will delve one yard below their mines,
And blow them at the moon.*

Hamlet, Act III, Scene IV



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¹¹ From *Military Antiquities Respecting a History of The English Army from Conquest to the Present Time* (1812) by Francis Grose Esquire which is in the public domain in its country of origin and other countries and areas where the copyright term is the author's life plus 70 years or less. Downloaded from [Wikimedia Commons](https://commons.wikimedia.org/wiki/File:Petard.jpg).

The Creative Commons strategy

Creative Commons licenses are declarations that the copyright owner can attach to a work (usually by reference, naming the CC license and giving a link to the full legal text at creativecommons.org), whereby the owner promises not to exercise any of their copyright powers so long as others use their work in specific ways.

These specific allowed ways are laid out in the several variants of CC licenses which exist, which are built up out of several basic clauses. The clauses are easy to understand for academics because they provide legal enforcement of ideas which make a lot of sense in particular academic use cases.

Let's go through the clauses first, then combine them to make the full license variants.

BY is fundamental

All Creative Commons licenses begin “**Creative Commons Attribution**” and have the icons  and . The most basic license looks *in situ* like:



This work is released under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).

[Note **that is not** the license on these slides: it is merely shown here as an example.]

It is good form to put this license statement – *with link to specific CC license web page* – on the title page or at least near the front of the work.

You may freely retain, reuse, and redistribute CC-BY works, but you must always give **attribution**. There are helpful tools, or just remember: **TASL**.

Title: What is the name of the work?

Author: Who owns the work?

Source: Where can it be found? (**Provide link** if possible.)

License: Which license is the work distributed under? (**Provide link to [creativecommons.org](https://creativecommons.org/licenses/by/4.0/) license source.**)

NC and ND

The maximalist economic stance on the benefit of copyright is: the creator wants any profits to be “mine, all mine.” Under CC-BY, the work will be freely shared, so the best this maximalist can do is to insist that at least *dammit, no one else will make any money off of my work!*

This is the **NonCommercial** license adjective, with icons , , or , depending upon jurisdiction.

The maximalist moral rights stance is: the creator doesn't want anyone to mess with their work. Under CC-BY, the work will be freely shared, so the best this maximalist can do is to insist that at least *my work will never be changed – no derivative works will be made from my perfect original!*

This is the **NoDerivatives** license adjective, with icon .

[Note that since version 4.0, the ND adjective only requires that users *may not distribute* any derivative works they make, since it is hard to control what they may do in private.]

Go viral with SA

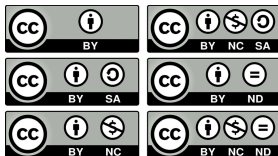
The maximally controlling creator who is (perhaps somewhat hypocritically) interested in freedom continuing into the future, might insist that any derivative works which come from their work should be shared with the same license as theirs was. The attitude here is *I believe in freedom and, dammit, if you are going to remix my work you better believe in that same kind of freedom for your new work!*

This is the **ShareAlike** license adjective, with icon .

Note that since SA is a requirement on how future creators will license derivative works, it doesn't make sense to combine SA with ND, since ND does not allow derivative works to be distributed at all.

Summary of all combined CC licenses

Here are the resulting possible Creative Commons licenses:



To this we should add one more licensing situation: public domain. The Creative Commons has a tool and license called **CC0** [pronounced “C-C-zero”] which gets as close as possible to public domain in all jurisdictions around the world, even with the varying rules that may apply. The corresponding license symbol is  .

Remixing CC licensed works

Licenses on a remix¹² of an existing work with a CC license or in the public domain, the *adapter's license*, are restricted by the original work's license:

Adapter's license chart		Adapter's license						
		BY	BY-NC	BY-NC-ND	BY-NC-SA	BY-ND	BY-SA	PD
Status of original work	PD							
	BY							
	BY-NC							
	BY-NC-ND							
	BY-NC-SA							
	BY-ND							
	BY-SA							

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↪ a permitted adapter's license



↪ technically permitted, but highly discouraged



↪ a forbidden adapter's license

¹² in the CC world, the nouns *remix*, *adaptation*, and *derivative work* all refer to the same thing

¹³ "Adapter's license chart" by Creative Commons was released under a [CC-BY 4.0 license](https://creativecommons.org/licenses/by/4.0/).

Extra credit

Say you want to make a remix combining two different original works. **Fill out the following chart** with a ✓/X if you may/mayn't make a remix, with some license, given the original works' licenses.

Combiner's license chart		License on original work A						
		BY	BY-NC	BY-NC-ND	BY-NC-SA	BY-ND	BY-SA	PD
License on original work B	PD							
	BY							
	BY-NC							
	BY-NC-ND							
	BY-NC-SA							
	BY-ND							
	BY-SA							

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¹⁴ adapted from “Adapter’s license chart” by Creative Commons, which was released under a [CC-BY 4.0 license](https://creativecommons.org/licenses/by/4.0/).

Check your own damn extra credit

Come on, show some independence.

No, really, the idea is to use the *Adapter's license chart* to see if there exists any possible license which could be both an adapter's license for work A and for work B.

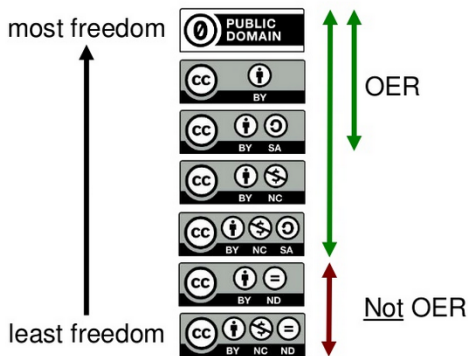
If so, that means your remix can combine those works and use that common adapter's license.

If not, there is no consistent way to put a single valid license on the combined remix, so it is not a valid combination.

[If you are not confident in your work and cannot find me to have a conversation about it, there is a filled-in version of the chart in the [CC FAQ](#).]

Connection to OER

Remembering Wiley's 5Rs, we are left with only some of the possible Creative Commons licenses as being fully OER... although there is clearly room for some debate about exactly where the cut-off lies:



[From [Open licenses](#) by Alek Tarkowski, distributed under a [CC-BY 4.0 license](#).]

Some ideas for action: copyright, 1

About **Copyright**:

- Be scared, be very scared. ... Not really, but do get actual legal advice in any complex situation!
- Use materials under the umbrella of *fair use*, but cautiously! *E.g.*, simple rules of thumb like *It's for education, so it's OK.* or *I'm using less than 10% of the material, so it's OK.* are **almost all wrong**.
- Look into your faculty contract language to see if it states the traditional academic exception to the works-for-hire doctrine. If it does not, you probably do not own the copyright on your works!
- If there is language in your faculty contract about who owns copyrights, make sure it applies to you: frequently, not all employees are treated equally.

Some ideas for action: copyright, 2

If you have the time and energy for more assertive action on **Copyright**:

- If your contract doesn't talk about copyright ownership, or does but not all employees are treated equally, organize and agitate to get that put in and/or corrected.
- Another possible target for organization and activism would be to get a statement into your contract or in some other category of campus policy which favors CC licensing where appropriate. *E.g.*, if you cannot get your administration to give instructors the copyrights in their educational materials (this often happens with non-tenure-line instructors), maybe you can get a promise that such materials will be released with a CC license, perhaps one from the more OER-favorable end of the spectrum.
- Get involved in copyright reform in your country or region: There are scary things happening all over (Canada, the EU, Australia,...).

Some ideas for action: Creative Commons Licensing

Now that you know some more about **Creative Commons Licenses**:

- Get more knowledge! Read more about Creative Commons, take the CC Certificate Course, talk to your campus librarians (they have magical powers in this area, as well).
- Use materials however you want, without the hassle of asking a lawyer if fair use applies in your situation, when those materials have CC licenses.
- Of course, whenever you use CC licensed-materials, get into the habit of giving good **TASL** attributions. [This is just a habit, like always using good MLA or APA citations!]
- Think hard about when you can, and when you feel comfortable about, putting a CC license on your work. Personally, I've ended up with the position that I will put a CC license on everything I create, with only extraordinary circumstances pushing me not to go open.

Resources

Creative Commons:

- main site: creativecommons.org
- FAQ: creativecommons.org/faq
- license chooser: creativecommons.org/choose
- marking your work with a CC license: on the CC wiki [here](#).
- information on the fantastic¹⁵ on-line course leading to a *Certificate of Mastery in Open Licensing*: certificates.creativecommons.org

Misc:

- the [Open Attribution Builder](#) from another state ([Open Washington](#))
- my own [Copyright Cheat Sheet for University Faculty](#)
- my own [Creative Commons Cheat Sheet for University Faculty](#)

¹⁵ But I'm biased: I've taken the course, become a *Master*, and now instruct it – sign up and maybe you'll be in my section!

Questions, Comments, and Contact Info

Questions? Comments?

Email (feel free!): jonathan@poritz.net ; Tweety-bird: [@poritzj](https://twitter.com/poritzj) .

Get these slides at poritz.net/j/share/I2CCLOEAW2019.pdf and all files for remixing¹⁶ at poritz.net/j/share/I2CCLOEAW2019/ .

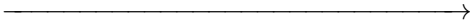
If you don't want to write down that full URL, just remember

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or poritz.net/j [then click **Always SHARE**]

or scan 

[then click **Always SHARE**]



Also, tons of useful stuff at the OER site of the Colorado Department of Higher Education masterplan.highered.colorado.gov/oer-in-colorado/ .

¹⁶ subject to CC-BY-SA