

# Choose and Use Creative Commons Licenses for Open Educational Resources

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## Intro: Land acknowledgement

Before we begin, I must acknowledge that I am physically located at this moment within the unceded territory of the Ute Peoples. The earliest documented people in this area also include the Apache, Arapaho, Comanche, and Cheyenne. An extended list of tribes with a legacy of occupation in this area can be found here: [Colorado Tribal Acknowledgement List](#).

## What are we doing here?

This presentation is part part of an effort to help folks in higher education (in the US, mostly) become comfortable choosing and using Creative Commons licenses in their work.

The overall approach is quite like a flipped classroom. This presentation video is intended to provide a little context, motivation, and overview. At the end, there are links to four additional readings, each focused on a particular part of the picture, with which you are encouraged to spend some time – they are each fairly short, but they do contain technicalities.

Later, in our synchronous session or via any asynchronous method you prefer, we can discuss whatever in the readings was unclear or particularly new to you, and there will be chances to work on applications of the ideas around CC licensing in situations which matter to you.

## The UNESCO OER Definition

UNESCO unanimously adopted its [OER Recommendation](#) on 25 November 2019.

That Recommendation includes the definitions

- “1. Open Educational Resources (OER) are learning, teaching and research materials in any format and medium that reside in the public domain or are under copyright that have been released under an open license, that permit no-cost access, re-use, re-purpose, adaptation and redistribution by others.*
- 2. Open license refers to a license that respects the intellectual property rights of the copyright owner and provides permissions granting the public the rights to access, re-use, repurpose, adapt and redistribute educational materials.”*

After a confusion of different definitions due to the [William and Flora Hewlett Foundation](#), [Creative Commons](#), and others, we should take this definition as canonical: 193 countries' diplomats can't be wrong!

This is quite reminiscent of another famous perspective on OER, the fabulous “5Rs.”

In an extremely influential blog post<sup>1</sup> 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 pedagogy and scholarship.

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<sup>1</sup>The Access Compromise and the 5th R, by David Wiley, released under [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/)

## We have to talk about copyright ... because it is **everywhere** in academia

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?*

Well, copyright applies to:

“...original works of authorship fixed in any tangible medium of expression”<sup>2</sup>

“original”    ~>    But **very minimal originality suffices**. *E.g.*, your vacation snaps are probably boring but copyrightable<sup>3</sup>.

“works of authorship”    ~>    **Not ideas**<sup>4</sup>; 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?

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<sup>2</sup>This is from §102 of the US Copyright Act

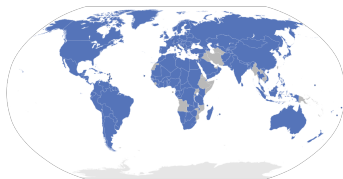
<sup>3</sup>...probably ... but **IAmNotALawyer** and nothing in this presentation constitutes legal advice!

<sup>4</sup>which, however, may be patentable

## The “©” is unnecessary

Under the [Berne Convention](#) – originally signed in 1886; today it has 179 signatories and is overseen by the [World Intellectual Property Organization \[WIPO\]](#)<sup>5</sup> – *copyright is “frictionless”*, in that it springs into existence the minute the work is fixed – no registration with the government or other formalities are required!<sup>6</sup>

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



**Conclusion:** Nearly everything faculty, staff, and students create or use in institutions of higher education is under copyright!

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

<sup>6</sup> Registration *is* necessary if you want to go to court to protect your copyright. Note also that the fixation requirement exists in the US but not in a majority of Berne Convention countries, so in most places around the world you only have to create your work or share it to have a copyright, and no fixation is needed.

<sup>7</sup> “[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 ... for a fee, one imagines.

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.

## Why is copyright given all this power?

Copyright 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*<sup>8</sup>, 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.

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<sup>8</sup>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 longstanding<sup>9</sup> 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, and create *licenses*.

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](https://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.

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<sup>9</sup>Don't mention Pythagoras vs Euclid in this context unless you want to witness an unhinged mathematical rant.



## Your Homework

Hopefully you now have some context on

- How ubiquitous and powerful copyright is, but how the all-rights-reserved version is at odds with the culture of higher education and particularly with the 5Rs.
- How Creative Commons licenses enable academics to share their work despite copyright law, with fine-grained control over the kinds of sharing allowed.

To be an open education practitioner fluent in CC licenses, you likely will need to learn

- A bit more background on copyright: the details matter!  
↪ see [Copyright Cheat Sheet for Higher Education \[in the US\]](#)
- More background on Creative Commons licenses, including how to apply them to your work and how to use others' CC-licensed work.  
↪ see [Creative Commons Cheat Sheet for Higher Education \[in the US\]](#)
- Arguments for which CC license to choose for your open ed work  
↪ see [Licensing Considerations for Your OER: An Argument for \*Virality\*](#)
- How to license an adaptation/remix, which is core to open educational practice  
↪ see [New Charts for Adaptation and Remix](#)

Please read those resources (or skim if you are familiar with the topic). We will discuss all related ideas and do application examples relevant to your work soon.