

Creative Commons Licensing – The Key Legal Technology Enabling OER

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Activity 1: Where is copyright?

For the next two minutes:

If possible, *make a brand-new, copyrightable work* – an original work which could be copyrighted (in the United States) if you so chose. You may use anything you have access to in this room: paper and pen/pencil; laptop; phone with its audio and/or video recording capacities; pipe-cleaners and modeling clay you may have in your back pocket....

If it is not possible to create a copyrightable work under these circumstances, write a few sentences, record a video, or otherwise fix in some tangible medium your own original words describing why you cannot do so.

Discussion 1: Copyright is everywhere (in academia)

“...works of original expression fixed in a tangible medium...”

“original” ↗ But very minimal originality suffices. *E.g.*, your vacation snaps are probably boring but copyrightable¹.

“expression” ↗ Not **ideas** [which however may be patentable].
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?

¹ ...probably ... but **IAMNotALawyer** and nothing in this presentation constitutes legal advice!

Activity 2: How to get that “©”

For the next minute:

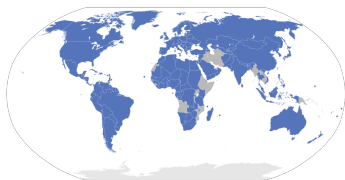
If possible, *get*, or at least, *start the process of getting a legal copyright on the work you just made*. This may involve:

- adding some text to your work [then: do that], or
 - going to a government website [use your phone or laptop: get the URL to share with the class], or
 - filling something out and mailing it [along with something else, perhaps? make a packing list!] somewhere [get the form, or a link to it, and the address, to share with the class], or
 - something else?
- ↪ If you must pay a fee as part of this process, wait at the place where you have to enter in your credit card number, and we'll all share that in the discussion to follow.

Discussion 2: The “©” is automatic!

Under the [Berne Convention](#) – originally signed in 1886; today it has 177 signatories and is overseen by the [World Intellectual Property Organization \[WIPO\]](#)² – *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). For this reason, for academics not to know something about copyright would be like a doctor who knows nothing of liability law....

² [Cory Doctorow](#) says that WIPO “bears the same relationship to bad copyright law that Mordor has to evil in Middle Earth”

³ “[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](#).

Activity 3: What is copyright good for?

In the next minute, write down four things:

1. something you can do with a work whose copyright you own
2. something you can do with a work whose copyright you **do not own**
3. something you cannot do with a work whose copyright you own
4. something you cannot do with a work whose copyright you **do not own**

Bonus round: What do time and space have to do with it?

- ↪ Do any of your answers above change if you and the other party involved – the copyright owner or person performing the dis/allowed action – are separated in time and/or space? If so, by how much or by what kind of border or line?

Discussion 3: 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 other parties to do so, for payment.

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.

Activity 4: Is copyright all-powerful?

Do you know of any limitations to copyright? Based on situation, time, location, use...?

Two activities to explore that:

Think of (and write down) something a user could do with a copyrighted work that the copyright owner might not like, but could prevent. (Your examples may differ depending upon the kind of work being used and the legal jurisdiction....)

Why did earlier slides talk about “copyright owners?” Is there any difference between *copyright owner* and *author/artist/creator*?

Discussion 4: 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.”⁴

⁴The rules are more complicated for works-for-hire, and any work created before 1978.

Discussion 4 (cont): A useful limitation to copyright.

“.. the Fair use⁵ 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.”*

§107 of the [Copyright Act](#)

⁵ a closely related concept in Commonwealth countries is called **fair dealing** there.

Activity 5: Why all this copyright power?

Why would anyone set up a legal system which puts this kind of exclusive control in the hands of copyright owners?

Take three minutes to brainstorm with folks around you to come up with some reasons why such a system might make sense.

You might classify your reasons as to whether they are **utilitarian** [centered on the consequences – often economic – of actions] or **deontological** [based on rules, often coming from an abstract notion of the moral sanctity of the act of artistic creation].

Discussion 5: The Founders had an answer

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*⁶ by 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 their ownership of the intellectual property in their respective Writings and Discoveries.

⁶Not 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.

Discussion 5 (cont): But the Founders were not academics

The [neo]liberal view of how to motivate creative activity is, I assert, manifestly in tension with the longstanding⁷ values of the academic world, in which world David Wiley's [5Rs of Open](#), that anyone should be able to **Retain**, **Reuse**, **Revise**, **Remix**, and **Redistribute** freely and without seeking the creator's permission, seem fundamental and self-evident.

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.

⁷ Don't mention Pythagoras vs Euclid in this context unless you want to witness an unhinged mathematical rant.

Activity 6: The *sine qua non* of a scholarly IP system

Someone shout out the most fundamental required part of an intellectual property system designed for use, re-use, remix, etc.



There are actually two sides to this:

producers of scholarly work: What do scholars most want to happen with their work?

users of scholarly work: What do we insist of downstream users of scholarly work? [This should be easy: we tell it to our students all the time, use software systems to detect its violation, and discipline students when such violations are detected.]

Take a minute to think through and write down some details of this: Who would have to do what, when, including which components, and in what format, to make this work?

Discussion 6: 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](#).

[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.)

Activity 7: Utilitarian and moral rights CC adjectives




Take three minutes to think and/or collaborate on what optional adjectives you might add to CC licenses [like “BY”] so users could choose to retain some of the power of copyright.

As you do this, think about the *why all that copyright power* we discussed in Activity 5, and try to take a maximalist stance for both the *utilitarian* [probably via economics] and the *moral rights* perspectives.

When you think of the copyright power you might want to offer optionally to preserve in CC licensing, make up a two-letter CC adjective which can be added to license (after the basic “CC-BY”). Write down as much detail about how that power would play out for both the creator and a user of the licensed work.

Discussion 7: 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 *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 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.]

Activity 8: Maximalist on the power itself

Take three minutes to think and/or collaborate on the following:


Suppose the power of copyright goes to your head, and you want to use it in a maximalist way ... but to do the good of one of the other CC license adjectives. Think of an adjective which could work in conjunction with those others to make the good last longer.

You may chose to use *viral* open-source software licenses, like the *GNU Public License [GPL]* used in the GNU-Linux operating system, as inspiration here.

Once again, make a two-letter CC adjective code for this idea and describe how it works for creator and user in as much detail as possible.

Discussion 8: Go viral with SA

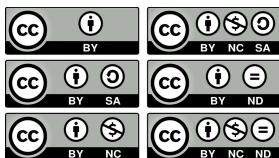
The maximally controlling creator who is (perhaps somewhat hypocritically) interested in freedom continuing into the future, might insist that any derivative works which come from their work should be shared with the same license as theirs was.

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:



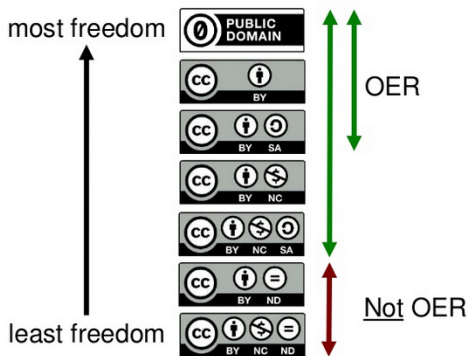
To this we should add one more licensing situation: public domain. The Creative Commons has a tool and license called **CC0** [pronounced “C-C-zero”] which gets as close as possible to public domain in all jurisdictions around the world, even with the varying rules that may apply.

The corresponding license symbol is



Connection to OER

Remembering David Wiley's 5R's for OER, 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](#).]

Activity 9: What can you do NOW with CC licenses?

Take three minutes to think and/or collaborate on the following:

In order immediately to foster open education at your institution with the help of Creative Commons licensing:

What can **you** do?

What can you help your colleagues do?

What can you help your students do?

Write a list of at least five specific actions you can take right away!

Discussion 9: Some ideas for action

- Educate yourself.
- Educate your students.
- Educate your colleagues.
- Use CC licenses on all of your work.
- Use appropriate attribution.
- Encourage policies favoring CC licensed materials.
- Share CC licensed material in editable form.
- Be aware of digital redlining when using CC.
- *etc.*
- *etc.*
- *etc.*

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 fantastic⁸ 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](#)

⁸But 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?

Also feel free to contact me at jonathan@poritz.net .


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⁹ subject to CC-BY-SA