

# *Open licences*

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*A*n open licence, as used in this chapter, is a neutral expression for a licence granted by someone who holds copyright in material allowing anyone to use the material subject to the conditions in the licence but without having to pay a royalty or licence fee.

There are many different open licences, some for computer software and some for other forms of material. Each has its own terms, conditions and vocabulary. This chapter is an introduction to open licence language and to the open licences that are important for authors and educators. It is not legal advice. Individuals or institutions thinking of committing themselves to open licensing should get professional legal advice about the implications of the licences they are considering using.

Supporters of the different licences do not always agree with one another. There are even extremists who, disliking the business practices of some commercial software suppliers and publishing houses, want to use open licences to do away with restrictions on using copyright material. Despite the understandable wish of some open licence supporters to reform copyright law, open licences are legal tools that use the existing copyright law. They rely, in particular, on the exclusive right copyright law gives a copyright holder to licence material with an open licence or any other form of licence.

The chapter starts by looking at software open licences. Software developers working on open licence software will need a more detailed explanation of the different open licences than they will find in this chapter. But even authors and educators with no pretensions to ICT expertise depend on operating systems, word processors, communication packages and online learning software. This part of the chapter aims at providing such users with an introduction to open licence software and its advantages and disadvantages.

Understanding software open licences is also a good introduction to the open licences that apply to other materials and, in particular to Open Educational Resources (OERs). The second part of the chapter looks at these open licences and, in particular, at the Creative Commons licences. The chapter ends by looking briefly at the Access to Knowledge (A2K) movement that aims at making all forms of information more freely available.

### **Software open licences**

#### ***The hacker culture***

Open software licences had their origins in what Eric Raymond calls the hacker culture. (Eric Steven Raymond *How To Become A Hacker* 2001, latest revision 2007 <http://www.catb.org/~esr/faqs/hacker-howto.html>) For Raymond and those who work with open licence software “hacker” has its original meaning of a committed software developer. It does not refer to a criminal who breaches computer security. Hackers share their discoveries and feel free to use the work of other hackers. This leaves hackers free to work on unsolved problems rather than waste creative energy repeating what others have done. Hackers who publish their work, either on the Internet or in other ways, have copyright in it. At first, however, few hackers bothered with copyright. Some were not even concerned with their moral rights, the right to be recognised as the author of original material.

It is not clear how to understand this in terms of copyright law. It could have been argued that this behaviour reflected or created a trade custom among hackers. Or, because hackers often used the Internet to share work, it could have been taken as evidence of an implied licence that allowed members

of the Internet community to use material on the Internet without permission. Certainly, many early Internet users assumed that they were free to use anything they found on the Internet. But it is doubtful that these arguments would have served as a defence if an author had sued for breach of copyright. The second argument reverses the usual legal position in which a copyright holder has to licence another to use the copyright holder's work. And with both arguments it would have been difficult to establish the terms of the licence or custom and who qualified as a member of the community to which it applied. But whatever the exact legal position, this was how it was when software developers were mostly academics or researchers who often used the Internet to share scientific or technical information.

Some developers did claim copyright in software they developed. They did this by making their products available as freeware or shareware. Freeware is copyright material which the copyright holder allows others to use without charge. Shareware is copyright material which the copyright holder allows others to use subject to a small charge or condition. Freeware and shareware are not the same as open licence software because they do not envisage users continuing to develop and distribute the material.

### ***Growth of commercial software***

Some of the lack of interest in ownership in computer software may have been because, in the early days of computers, the software was not seen as distinct from the computers on which it ran. But as computers for ordinary users became popular, particularly after the launch of the IBM PC in 1981, it became clear there was a separate market for software for these computers. This market grew as personal computers became more powerful and able to run more complex software. And it received another boost when, towards the end of the 1990s, ordinary users began to access the Internet through the World Wide Web. From the 1970s onwards most countries recognised copyright in software and in 1996 the WIPO Copyright Treaty made it clear that software fell under copyright law. Some commercial software developers became very wealthy from licensing the software they had developed. Some countries, as will be discussed in another chapter, have even taken the controversial step of giving software added protection by allowing software patents.

Today businesses are always looking out for new and useful software. If they can acquire rights over the software they will invest in marketing it. When they do this they usually allow only those who pay their licence fee to use the software. And they do not usually allow users access to the software's source code. Source code is the human-readable version of the software used to create the computer program. Restricting access to the source code means that in practice only the software owners can develop the software. Software of this sort is known as 'closed software' or 'proprietary software'.

### ***Software open licences***

The hacker community and those who sympathised with their ideals saw the possibility that all software would become closed or proprietary. To stop this happening they developed open licences of which the following are some of the more important.

#### **BSD licences**

The Berkeley Software Distribution (BSD) licence was developed by the University of California, Berkeley and first published in 1989. But some of the BSD software goes back to 1977 and the BSD licence is said to embody the conditions under which this software was released. This means the BSD licence may have been the earliest open licence. Some important software is available under BSD licences including the software that runs many domain name servers and a Unix-like operating system.

Different versions of the BSD licence have developed. BSD licences have few restrictions on how the software may be used. They differ from the GPL, discussed below, in not insisting that developments of BSD software be distributed on the same terms and in not insisting that source code be made available to those to whom the object code is distributed.

#### **GNU licences**

Richard Stallman is a prophetic figure who campaigns for free alternatives to commercial software and, in particular, for a free alternative to the Unix operating system that AT&T, the US telecommunications giant, developed. In 1985 Stallman published the GNU Manifesto (GNU standing for Gnu's Not

Unix) setting out his ideals and established the Free Software Foundation (FSF) to support this work.

In 1989 Stallman published the first version of the GNU General Public Licence (the GPL). There is also a GNU Lesser General Public Licence (LGPL) that allows for linking GPL software and software not published with the GPL and a GNU Free Documentation Licence (FDL) for software development documentation and manuals. The GPL is now in its third version and, about three-quarters of the world's open licence software uses the GPL. This software includes the Linux operating system, an alternative to Unix, that Linus Torvald released under the GPL in 1991. The following are some of the main features of this important licence.

A powerful (and contentious) feature of the GPL is what Stallman calls “copyleft”. Copyleft, shown by a reversed © symbol, means that others are free to develop a GPL work on the condition that any work derived from a copyleft work is distributed subject to a similar condition. This means the GPL licence is what some call “viral”, it tends to take over software originally published under other open licences.

Another feature of the GPL is that GPL software must be conveyed with its source code. This is to make it easier to develop the software. Not every open licence requires this.

To those who think of software open licences as anti-commercial, a striking feature of the GPL is the absence of restrictions on using GPL software to make money. As the preamble to the GPL puts it: “Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for them if you wish). . . .” In the past few years this has begun to happen. Red Hat, for example, is a company listed on the New York Stock Exchange. It develops and distributes a version of Linux, Red Hat Enterprise Linux. Since 2002 IBM has been offering this as an operating system for IBM computers. Dell, a major supplier of personal computers, has previously offered its computers with Linux operating systems and is now selling some computers with Ubuntu Linux. Even a corporation

like Novell that sells software rather than computers, is using a version of Linux, SUSE Linux, as an operating system.

The advantage to these and other corporations of using open licence software is that they do not have to develop this software themselves or pay licence fees for software others have developed. They get the benefit of the work independent developers put into open licence software and can concentrate on improving the products or applications that are their speciality. In return, independent developers get access to the work these corporations put into adapting open licence software. Open licence developers are also well qualified to work for the corporations and provide support to the corporations' clients. They are even free to market the software on their own account.

The growth of the commercial use of open-licence software has not stopped individuals and groups supported by not-for-profit organisations from continuing to develop GPL software. The Shuttleworth Foundation, for example, has sponsored Ubuntu Linux. Ubuntu Linux is meant to be easy for non-technical people to use and, in particular, supports other languages than English. It is this version of Linux that Dell is offering on its personal computers. Ubuntu also has a commercial sponsor, Canonical Ltd, that provides training and support for Ubuntu users.

As already mentioned, anyone who acquires GPL software and develops it may only distribute the developed software under the GPL. But someone who develops original software, meaning here software that is not a development of other software, is free to decide how to licence it. Such a developer is free to use more than one licence. So software may be distributed under the GPL and another open or proprietary licence. This raises the question whether someone who develops original software and distributes it with a GPL licence may withdraw the GPL licence? Because the GPL is perpetual anyone who acquires a copy of original software from the developer under the GPL is free to continue to use the software. It is not entirely clear whether the developer can prevent those who have already acquired the software from passing it on to others. But it is clear that the GPL does not require a developer to continue

to distribute software and this may make it difficult for others to acquire the software. In addition, the GPL does not require the developer of original software to offer further developments of the original software under the GPL. By not offering further developments under the GPL the developer of the original software will lessen the attractiveness of the earlier GPL version.

The GPL came out in 1989. A second version, GPLv2, came out in June 1991 and GPLv3 in June 2007. Version 3 has two interesting new provisions. The first is in clause 11 dealing with the GPL and patent rights. The other is in clause 3: “No covered work shall be deemed part of an effective technological measure under any applicable law fulfilling obligations under article 11 of the WIPO copyright treaty adopted on 20 December 1996, or similar laws prohibiting or restricting circumvention of such measures.” This means a person is free to remove coding of this sort if it appears in GPL software.

### **Other software licences**

Some software developers use other open source licenses. They may do this because they want to avoid the copyleft restrictions in the GPL that make it difficult to use the software commercially or because they do not want to require licensees to distribute the source code. Or they may have to use another licence because the software on which they are working began with a different license. The following are some examples of other software open licences and how they came about.

Sendmail is a widely used program for managing email that was first published under a BSD licence. In 1999, following difficulties in developing and supporting the software as an open licence product, a company was formed to do this commercially while leaving the software available under an open licence. This called for changes to the BSD licence that resulted in the sendmail licence. The sendmail license, it has been pointed out, is not listed as an open source license at the Open Source Initiative website discussed below.

Netscape, on the other hand, was a commercial software developer that produced the influential Navigator web browser and Communicator email software. Following competition from Microsoft’s Internet Explorer, Netscape decided to release the source code for these products under an open licence

while continuing to develop the software commercially. To enable them to do this they produced the Mozilla Public Licence. The successors to Navigator and Communicator, Firefox and Thunderbird, use this licence. Other developers, particularly by those who want to have both commercial and open licence versions of their software, also use this licence.

The Apache Software Foundation has its own model for software development that has resulted in non-GPL licences. The Foundation grew out of a community of developers who, around 1995, were working on projects that included the important Apache HTTP Internet server. According to the Apache Foundation website: “All software developed within the Foundation belongs to the ASF, and therefore the members.”

### ***Open Source Initiative***

As the number of open licences has grown so it has become difficult for non-specialists to understand the differences between them. In 1998 the Open Source Initiative (OSI) was founded to be ‘the stewards of the Open Source Definition (OSD) and the community-recognized body for reviewing and approving licenses as OSD-conformant’. (<http://www.opensource.org/about>). The OSD is a list of 10 requirements that software must meet to qualify as open source.

The Open Source Initiative keeps a list of licences it considers comply with its definition of open source. It has a trademarked logo that those whose licences comply with the definition can use. It might seem it should be possible to use any OSD-compliant software with any other OSD-compliant software. This, however, is not always the case as some of the licenses contain incompatible terms.

### ***Advantages and disadvantages of open licence software***

Traditionally open licence software users were technically sophisticated. They probably shared the ideals of organisations like the Free Software Foundation and may even have helped develop the software they used.

Increasingly, however, open licence software users have little or no technical expertise. They simply want to save money by switching to open

licence software rather than pay for commercial software from suppliers like Microsoft. Stand-alone products like open licence products like Firefox and Thunderbird should present these users with few difficulties. But non-technical users are likely to resent having to learn how to use the more complex products that are an alternative to Microsoft Windows and Office. In addition, some of the proprietary software on which an individual or institution depends may not be easy to run with open licence software or be available in an open licence version. Open licence software is also likely to need as much support as the equivalent commercial software. Support here means help with installing the software, manuals, training for users and access to experts. Before committing themselves to open source software, users with little technical expertise should check these points and, in particular, be sure adequate support will be available and know what it will cost. Businesses using open licence software should also bear in mind that most open licences disclaim liability for any damage resulting from the software. They may need to consult their insurers.

It is worth noting that some software managers working in higher education institutions have reservations about using open licence software for sensitive data. Their concern is that if the source code is available it is easier to attack the software and publish, change or destroy the data.

Open licences are popular among educators. But individuals and institutions that distribute their original software with an open licence may be giving up the possibility of royalty revenue from those who use their software. They need to weigh this against the advantages of open licensing and the possibility of exploiting their software in other ways. They should also be aware, as has been mentioned, that they have the option of licensing the software with an open and a proprietary licence.

### **Open licences for non-software material**

The success of open licence software led to an interest in using open licences for non-software material and especially for educational and scientific material. The list of individual and institutional signatories to the Cape Town Open Education Declaration of 2007 (<http://www.capetowndeclaration.org/>)

shows how much support there is for open licence educational resources (OERs).

### ***Early open licences***

Open licences for non-software material came some time after open licences for software. The earliest such non-software open licence may have been the Open Content Licence that David Wiley of Open Content published in July 1998. The following year, in June 1999, the Open Content Project published the Open Publication Licence.

### ***GNU FDL***

In March 2000 the Free Software Foundation released version 1 of the GNU Free Documentation Licence (the FDL). The FDL was meant for software developers writing manuals and documenting their work but it can be used for other forms of material. Wikipedia, for example, uses the FDL. A revised version, FDLv1.2, appeared in November 2002 and the Free Software Foundation is working on version 2. The FDL, like the GPL, allows for commercial publishing. If, however, the GNU website list of 30 or so commercially published FDL books is complete (<http://gnu.paradoxical.co.uk/doc/other-free-books.html>), FDL material is not yet as attractive to commercial publishers as the GPL software is to commercial software developers.

### ***Creative Commons licences***

Open licences for non-software material began to attract serious attention in 2001 when Lawrence Lessig and others started Creative Commons (CC). The CC licences are now the most important open licences for non-software material.

### ***CC rights***

The CC licences are based on the CC analysis of copyright rights. This distinguishes between four rights of a copyright holder. The CC website lists and explains these rights:

- “**Attribution.** You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request.”

- “**Noncommercial.** You let others copy, distribute, display, and perform your work — and derivative works based upon it — but for noncommercial purposes only.”
- “**No Derivative Works.** You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.”
- “**Share Alike.** You allow others to distribute derivative works only under a license identical to the license that governs your work.”

All the CC licences include what CC calls the “Baseline Rights”. These are the rights to copy, distribute, display, perform publicly or by digital performance and to change the format of material.

### CC licences

In theory the four CC rights, used singly or combined, allow for eleven different possible licences. In practice CC offers only six licences. These licences allow copyright holders to grant users different combinations of the CC rights. This flexibility makes the CC licences more attractive to authors than the all-or-nothing open licences that are usual for software. As the CC website says:

Creative Commons defines the spectrum of possibilities between full copyright — all rights reserved — and the public domain — no rights reserved. Our licenses help you keep your copyright while inviting certain uses of your work — a “some rights reserved” copyright.

The CC website has a diagram that shows the spectrum from copyright to public domain with CC licences occupying the space between these two:



CC also takes into account that copyright law differs from country to country. As well as a generic or unported version of each licence CC aims at providing a version, in the appropriate language, adapted to the law of each country where the CC licences are used. This means there is no one CC licence in the way there is one GNU GPL. With CC licences it is always necessary to specify which national version of the CC licence is being used, and, in some cases, the language version of the licence.

In addition to the CC licences, CC provides a form for an author to place a work in the public domain. This is only legally possible in some countries. CC also has a procedure for recreating the original U.S. copyright term of 14 years.

CC uses symbols and abbreviations to represent the four rights of a copyright holder and combines these symbols and abbreviations to represent the different licences. The names, abbreviations and symbols of the six CC licences give some idea of the complexity of the CC licence system:

- Attribution Non-commercial No Derivatives (by-nc-nd) 
- Attribution Non-commercial Share Alike (by-nc-sa) 
- Attribution Non-commercial (by-nc) 
- Attribution No Derivatives (by-nd) 
- Attribution Share Alike (by-sa) 
- Attribution (by) 

### **CC licence generator**

The text of the CC licences and their different language versions is on the CC website. The CC website does not, however, expect users to study every licence before choosing one. Instead, there is a licence generator that suggests the appropriate CC licence based on the answers to following three questions:

- will an author allow commercial use of the work;
- will an author allow users to modify the work; (Included under this question is the possibility of allowing users to modify the work if they share alike.) and,
- in which jurisdiction does an author want to license the work?

The questions are a convenient starting point for commenting on the six CC licences.

### **Jurisdiction**

It is useful to start with the third question on the jurisdiction of the licence. If a work will be used mainly in one country an author should select that country. If an author is publishing a work internationally or if there is no licence for the country in which the author is publishing, the author should answer 'unported'. The unported version of a licence is a generic, international

license. The following discussion of the other questions will refer to the unported versions of the licences.

### **Restriction on commercial use**

The first question the licence generator asks is: “Allow commercial use of your work?” If the copyright holder does not want to allow commercial use of the work the licence generator suggests a non-commercial (NC) licence. What this means is that a copyright holder who finds individuals or institutions making commercial use of the work can take legal steps to stop them doing this. But what does non-commercial mean? Section 4b of the unported CC Attribution-NonCommercial 3.0 licence says:

You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

One view of what this means, often forcefully expressed in workshops and discussion groups, is that non-commercial means that no money should change hands. This is not, however, the usual meaning of non-commercial. It is not a commercial transaction, for example, to refund someone for buying me a loaf of bread or even to pay that person’s travelling expenses. It only becomes commercial if that person wants to make a profit out of providing this service. It follows that someone who distributes an NC work should be able to charge to recover expenses incurred in distributing the work. These expenses, typically, would include copy charges, salaries and overhead expenses. The only restriction is that anyone doing this does not intend to make a profit out of distributing the work. This is the view of the Draft Guidelines that CC published to try to clarify the meaning of non-commercial. (“Proposed best practice guidelines to clarify the meaning of “noncommercial” in the Creative Commons licenses” available at. [http://wiki.creativecommons.org/DiscussionDraftNonCommercial\\_Guidelines](http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines))

There is still some uncertainty, however, about what “primarily intended for or directed toward commercial advantage or private monetary compensation” in section 4b means. It could be argued that even if a project

does make a profit, the use is still non-commercial if the project was *not primarily intended* to make a profit. According to this view, an organisation that is run for profit may use NC material and may recover its expenses for distributing NC material provided the *project* using the NC licensed material does not aim at making a profit.

This raises questions such as whether private schools run for profit or public broadcasters that accept advertising revenue may use NC-licensed material for teaching or informing their viewers? (See Mikael Pawlo ‘What is the meaning of non-commercial’ in Danièle Boucier & Mélanie Dulong de Rosnay International Commons at the Digital Age: La création en partage 2004 Romillat, Paris 69 at 78-82. Available at <http://fr.creativecommons.org/iCommonsAtTheDigitalAge.pdf>) Another question is whether a business whose profits support a non profit body such as a university may use NC material. The Draft Guidelines appear to prohibit using NC material in these ways. Section C(2) of the Draft Guidelines, for example, says that it is not non-commercial if money changes hands to, for example, a for-profit copy shop. Section A(1)(b) insists that an educational institution or library using NC material must be nonprofit. And Section B appears to classify as commercial any use of NC material in connection with advertising.

What the Draft Guidelines say, however, does not settle the matter. The Draft Guidelines are not part of the NC licence. As section 8e of the NC licence says: “This License constitutes the entire agreement between the parties with respect to the Work licensed here.” And a notice at the end of the licence says “Creative Commons is not a party to this License, and makes no warranty whatsoever in connection with the Work.” The Draft Guidelines themselves do not claim to be an authoritative. CC published them to “elicit feedback about whether these guidelines accurately reflect the community’s (including both licensors and licensees) understanding of the term”. This means that what the Draft Guidelines say should be treated with respect but any dispute between a copyright holder and a user can only be settled on the basis of what the licence says. This raises the question whether any ambiguities in the wording of the licence should be interpreted strictly, to limit the use of NC material, or generously, to allow the widest use of a work.

CC plans to return to the question of the meaning of non-commercial. It would be helpful to know what authors who use the NC licence really want to achieve. They do not want royalties for their work but they do, presumably, want the work to be made widely available. If these authors object to associating their work with commerce in any way, the Draft Guidelines should be followed. If, on the other hand, these authors want only to avoid commercial interests taking over and restricting access to their work, the authors may be prepared to allow their work to be used by organisations or individuals working for their own profit provided they do not limit further distribution of the CC work. And this could be achieved by using a SA ShareAlike licence.

As with all the CC licences, it is always possible for a commercial user to approach the author of a work directly and ask for permission to use CC licensed work in a way the CC licence does not cover.

### **Modifications allowed**

Once a user has decided whether to allow commercial use, the licence generator's second question is: 'Allow modifications of your work?' There are three possible answers to this question: 'Yes', 'No' and 'Yes as long as others share alike'.

Particularly where the licensed material is educational material, users are likely to want to modify it by adding examples and other material, by translating it into another language or adapting it in some other way. The licence generator will suggest that those who want to allow users to modify their material use either a simple attribution (BY) licence or an attribution non-commercial (BY-NC) licence. Which it suggests will depend on the answer to the first question: 'Allow commercial use of your work?'

The simple attribution licence, not combined with a NC restriction, allows a user to do anything with the material except claim copyright in it or authorship of it. A user may modify the material or leave it as it is and market the modified or original material commercially and keep any profit.

## **No modifications**

If the answer to the licence generator's second question 'Allow modifications of your work?' is 'no', the licence generator will suggest an ND (no derivate works) licence. The human readable summary of version 3 of the unported Attribution-NoDerivs licence says: "You may not alter, transform, or build upon this work.". The legal code prefers to speak of not adapting a work. Section 1a defines adaptation as:

. . . a work based upon the Work, or upon the Work and other pre-existing works, such as a translation, adaptation, derivative work, arrangement of music or other alterations of a literary or artistic work, or phonogram or performance and includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognizably derived from the original, except that a work that constitutes a Collection will not be considered an Adaptation for the purpose of this License. For the avoidance of doubt, where the Work is a musical work, performance or phonogram, the synchronization of the Work in timed-relation with a moving image ("synching") will be considered an Adaptation for the purpose of this License.

This means that a ND licence allows users to use, reuse and distribute a work but not adapt it.

There are situations where an ND restriction is necessary. If a work is a report or set of standards, it makes sense to insist that it is only used in its original form. Changes to a work of this sort destroy its value. Even valid corrections can be harmful because they give readers a false impression of the accuracy of the original report.

The ND restriction is also necessary if an author wants to distribute a work for comment while reserving the right to publish the final version of the work.

Some educators dislike the ND restriction and say it makes it difficult for them to use material most effectively. But the ND licence does allow for an ND work to be used in a collection. (Some versions of the ND licence call this a collective work.) Section 1b of the legal code defines a collection as:

. . . a collection of literary or artistic works, such as encyclopedias and anthologies, or performances, phonograms or broadcasts, or other works or subject matter other than works listed in Section 1(f) below, which, by reason of the selection and arrangement of their contents, constitute intellectual creations, in which the Work is included in its entirety in unmodified form along with one or more other contributions, each constituting separate and independent works in themselves, which together are assembled into a collective whole. A work that constitutes a Collection will not be considered an Adaptation (as defined above) for the purposes of this License.

This means that provided the ND work is reproduced whole and unmodified it can be published in a collection with a commentary or other relevant material. It is not clear whether it would be permissible to use hyperlinks to take a user directly to parts of an ND work or to connect an ND work to a commentary or other material.

Section 4 of the legal code goes into detail about how an ND work can be incorporated into a collection and how the work must be credited. It is possible to assemble a collective work consisting of materials carrying different licences. A collection may also, if it is sufficiently original, qualify for copyright protection and for its own licence which does not have to be an ND licence. When this happens the collective work's licence will not change the licences attaching to the components in the collective work.

### **Share Alike**

If the answer to the licence generator's second question 'Allow modifications of your work?' is 'Yes, as long as others share alike' the licence generator suggests a share alike (SA) licence. This ensures that modified works based on the licensed material are available to others under the same conditions as the original work. The share alike licence offers authors the possibility of making their work 'viral' in a way that is similar to the GPL. Version 3 of the unported Attribution-ShareAlike licence says:

You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US); (iv) a Creative Commons Compatible License.

The CC's symbol for share alike is almost exactly but not quite the same as the FSF's symbol for copyleft.

### **Attribution**

All the CC licences require what CC calls attribution. The human readable summary of version 3 of the unported Attribution licence explains what attribution means:

You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work)

## **Changing or withdrawing a licence**

The CC licences all say the licence is for the duration of copyright and only ends if the person holding the licence breaks the terms of the licence. Section 7b of version 3 of the unported Attribution licence, for example, says:

Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work).

Whether an author can stop those who have not begun using the material, from acquiring rights in terms of the original licence is an awkward question. Section 8a of the licence suggests that an author cannot do this:

Each time You Distribute or Publicly Perform the Work or a Collection, the Licensor offers to the recipient a license to the Work on the same terms and conditions as the license granted to You under this License.

There is a problem with this clause in that the identity of the ‘relevant third party’ is unknown until someone begins to use the work. This means that an author is bound to an uncertain person. Not every legal system accepts that this is possible. If an author does withdraw a licence this will not affect the rights of those who had previously begun to use the material.

## **Concluding comments on CC licences**

There was no CC equivalent to the GNU Manifesto although there is now a ‘Free Content and Expression Definition’ that may serve as a manifesto. It seems, however, that what the founders of the CC movement had in mind was a community producing material that it would make available under the CC licences in the same way as there are communities of software developers, making software available under different licences. There two features of the CC licences that might hinder this.

First, the system of CC licences is complex and, as has been shown, the meaning of the licences is not always clear. A pre-publication review of this chapter advised against publishing some of the comments for fear that they might weaken confidence in the CC licences. It seems, however, that long-term confidence in the CC licences will only be possible when difficulties of the sort this chapter raises have been resolved.

Second, and possibly more importantly, authors and educators ‘need to eat’. Those in regular employment and those supported by public or private grants may be happy to use the CC licences. But authors earn their living from

their work might be reluctant to use the CC or any other open licence. Commercial publishers, whether they publish traditionally or online, are unlikely to want to pay authors for the rights to publish a work that is already freely available. And it is difficult to see how there could be a commercial use for non-software open-licence material in the way there is for open licence software

### **Other non-software open licences**

Some authors draft what are, in effect, their own open licences. This can be done quite simply. So, for example, the copyright notice on the Antiquarian Horological Society's Website (<http://www.ahsoc.demon.co.uk/>) reads:

The material in these pages is copyright.

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Open licence drafting, however, is not always a simple matter and not every home-grown licence is free of problems. The United Nations Disaster Management Training Programme, for example, has the following licence on some of its training material:

The first edition of this module was printed in 1991. Utilization and duplication of the material in this module is permissible; however, source attribution to the Disaster Management Training Programme (DMTP) is required.

In this licence it is not clear whether 'utilization and duplication' includes making derivative works and using the material commercially for profit.

The African Medical Research Foundation, to take another example, has licensed some of its educational material with CC Attribution-Share Alike licence. The Foundation then goes on to explain that copying, reproducing and adapting the material is 'to meet the needs of local health workers or for teaching purposes'. It is not clear if this limits the CC licence. The Foundation also asks, although not as a term of the licence, for feedback on how the material is being used:

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work may be distributed only under a license identical to this one. AMREF would be grateful to learn how you are using this course, and welcomes constructive comments and suggestions.

### **Access to knowledge and information sharing**

There is a growing awareness of the importance of access to knowledge and information and of the need to prevent commercial exploitation from making important knowledge the preserve of relatively few. An example of this was President Clinton's decision to increase funding for the Human Genome Project to ensure that the sequences were not patented and limited to commercial use. When discussing access to knowledge it is useful to distinguish different kinds of knowledge or information.

Governments have detailed information about matters such as the health, safety and education of the population, trade figures, economic performance, spatial information and geodata. They collect this information for their own purposes and, in terms of the law of most countries, they have copyright in it. Such information, of course, is often also useful to researchers and commentators and to those thinking about investing in the country either to make a profit or to help development. There is, however, no single approach about whether and on what terms this information should be available.

In 2005 Brazil and Argentina proposed to the World Intellectual Property Organisation that the organisation's development agenda should discuss the possibility of a Treaty on Access to Knowledge (A2K). Much of the draft of the treaty deals with widening the scope of the exceptions to and limitations on the copyright holders' rights. Part 5 is entitled 'Expanding and enhancing the knowledge commons' and includes articles providing for access to publicly funded research and government information and a provision that government works should be in the public domain.

A category of government information to which some countries already allow access is material of a legal, judicial or political nature: legislation, case law and parliamentary proceedings. In 2002 delegates from some Commonwealth countries produced a 'Declaration on Free Access to Law' that asserts, among other things that '(p)ublic legal information is digital common property and should be accessible to all on a non-profit basis and free of

charge; . . .' Anyone who has followed the discussion in this chapter and reads the full declaration will realise that the declaration needs to go into more detail about creating derivative works and using the material commercially.

Tax exempt foundations and not-for-profit educational and research institutions also fund research that produces important information. According to the law in most countries, funders and employers can decide on what terms to release this information. It is understandable that researchers looking for funding may want to include a profit line from intellectual property in their research proposals. Educational institutions also like the idea of using the research done by their staff to produce what some call 'third stream' income. It could also be seen as part of academic freedom that academics who work in educational and research institutions are entitled to a say in how their research is released. Access to knowledge advocates could argue that governments should consider whether institutions and funders that do this are really entitled to their tax-free status.

Creative Commons works through Science Commons to encourage the free flow of scientific information. One of the Science Commons projects has drafted model contracts for the transfer of biological material. Another project aims at publishing material that is important for biological research with an open licence. A third project aims at getting peer reviewed journals to publish with open licences and enlisting academics to publish only in journals that do this.

### **Concluding comments**

In conclusion it seems worth mentioning two features that most open licences lack: provision for notifying the copyright holder about how material is being used and provision for alternative dispute resolution.

#### ***Notification***

It is surprising that open licences do not allow an author to require a user, in return for being free to use the author's material, to keep the author informed about what a user does with the material. The African Medical Research Foundation's licence requests this information but it is not a condition of using the material. Drafting such a condition, of course, would have to be done

so as not to impose too much of a burden on users. But if it could be done the information would help assess the value of open licence material.

### ***Alternative dispute resolution***

We have seen the different opinions about what some of the clauses in the CC licences mean. And there has been litigation about the meaning of the GPL. As things stand only a court, possibly even a whole series of courts in different countries, can settle differences of opinion. Given the cost of litigation, it is unlikely that the courts will ever have an opportunity to do this. In 1999 ICANN adopted a Uniform Domain-Name Dispute-Resolution Policy for settling disputes about domain names. There is no reason why there should not be a similar dispute resolution procedure for settling disputes between copyright holders and users about the meaning of open licences.

### **References**

Much of the material used in this chapter comes from the websites of the organisations responsible for the different licences and initiatives where readers will easily find it. The Creative Commons website, in particular, has a helpful index of academic commentary. The following may also be helpful:

- Lawrence Liang *Guide to Open Content Licenses* v1.2 20004 Piet Zwart Institute Willem de Kooning Academy Hogeschool Rotterdam. Available at <http://pzwart.wdka.hro.nl/mdr/pubsfolder/opencontentpdf>.
- Andrew M. St. Laurent *Understanding Open Source and Free Software Licensing*, 2004 O'Reilly. Reviewed by Mike Fraser in issue 42 January 2005 *Ariadne*.