

Extracted from: <http://halfanhour.blogspot.com/2011/05/oer-debate-in-full.html>

Half an Hour: The OER Debate, in Full by [Stephen Downes](#)

The OER Debate, In Full

Over the last couple of weeks I participated in a debate on whether OER projects should favour commercial use. The debate, [available on the WSIS Community Platform](#), was quite an interesting debate, but there were numerous complaints from people who wanted to read and comment that the debate platform was inaccessible, that it was not possible to simply read a post and comment without going through a laborious vetting process by UNESCO staff. So I've decided to post the entire debate, from beginning to end, including postings, comments and everything, on this blog. Enjoy, and feel free to comment as you wish at the conclusion of the post.

Day One

Debate introduction



Moderator

[Wayne Mackintosh](#)

The concept of Open Education Resources (OER) is firmly based on the educational value of sharing knowledge. A key issue in the open education arena is whether OER should favour commercial use. It is a complex topic which incorporates multiple perspectives and questions in relation to commercial use of OER, for example:

- Should OER protect the future freedoms of users and creators or the resources themselves?
- What are the implications of license choice and the sustainability of OER?
- How does license choice impact on the pragmatic considerations of reuse and re-purposing learning materials?
- What are the moral considerations associated with sharing OER?

This debate and discussion aims to tap into the experience of OER thought leaders and practitioners. The purpose is to tease out the key issues to support informed decision-making on intellectual property rights for OER. We encourage all participants to vote and post your thoughts, questions, ideas and relevant experiences for nurturing sustainable OER futures.

DayTwo

Pro



Opening statement

[David Wiley](#)

The question of this debate, “Should OER favour commercial use?”, can be answered many ways. Rather than make a moral or ethical argument, I will provide an opening statement which problematizes the mechanism by which commercial uses are disallowed. In other words, I will answer “Yes” on technical grounds. The moral argument can be nuanced and difficult to win. The technical argument is straightforward and unassailable.

I believe, for a variety of reasons, that Creative Commons licenses that include the Non-Commercial clause should not be used. There is, however, one important family of cases where NC-bearing licenses are completely appropriate. In fact, this family of cases is why the NC clause exists. Some history is in order to substantiate this claim.

The first open source-style license for educational materials and other non-software content was the Open Content License, released July 14, 1998. It was a simple adaptation of the GPL that I made while I was a PhD student at BYU. The OCL removed software-specific terminology from the GPL and tried to make the license apply to a broader range of creative works. After a few months, however, I became concerned because adoption of the license wasn’t great. I was particularly disappointed that there wasn’t a single research article, textbook, or other bit of traditional educational material (that I could find) licensed under the OCL.

Early in 1999 I reached out to Eric Raymond, Tim O’Reilly, and others for help thinking through how to solve the adoption problem. I asked Tim specifically, ‘You’re a commercial publisher – what would it take for you to publish a book under an open license?’ Tim responded, ‘After I spend tens of thousands of dollars paying an author, paying for editorial and design, etc., the next publisher down the road can’t be allowed to reprint my book and sell it for \$10 less than me. That would put me out of business.’

On June 8, 1999 I released the Open Publication License. The OPL was not a minor modification of the GPL. The OPL was truly innovative in that, in addition to requiring citation of the original author as source, it contained two license options that authors could choose to invoke or not invoke. The first option restricted users’ abilities to creative derivative works. The second option disallowed “any publication of this work or derivative works in whole or in part in standard (paper) book form for commercial purposes.”

Adoption was much better with the new license. O’Reilly published several books using the OPL,

including Eric Raymond's seminal collection of articles, *The Cathedral and the Bazaar*. RedHat published the documentation for their products under the OPL up until 2010. In 2000 I published my first book using the OPL, free online and pay for print. Both O'Reilly and my publisher used the Non-Commercial option of the OPL on the books they published openly.

Copyright is supposedly a necessary evil – it creates a monopoly on who can make copies (which is bad) in order to provide incentives to authors to produce creative works (which is good). The Non-Commercial clause is a similar evil – it creates a monopoly on who can sell copies (which is bad) in order to provide incentives for individuals and organizations that make a living from their creative works to share them openly (which is good). I recognized early on that without this protection mechanism there would be far fewer open educational resources in the world.

In the opening paragraph of this opening statement I said that there exists a family of cases where NC-bearing licenses are completely appropriate. This is that family of cases – cases where the work to be openly licensed was created by individuals or organizations that make a living from their creative works. Personally, I can't think of other circumstances where using the NC clause is appropriate. Let me explain further.

The student of open content licensing will recognize the OPL structure (mandatory attribution with options addressing derivative works and commercial use) is the same structure that Creative Commons employed when it launched three years later in 2002. (To be more exact, in version 1.0 of the Creative Commons licenses Attribution was an option, too. It wasn't until version 2.0 of the CC licenses (May 24, 2004) that attribution became mandatory on every license. So, the OPL structure precedes the current CC structure by about five years.)

When Creative Commons published its first licenses in 2002, I was relieved. I'm not a lawyer, and who knows how the OCL or OPL would have held up in court? Probably not very well. I was happy to post a big message on opencontent.org declaring that everyone should stop using the OCL and OPL and should begin using the CC licenses. After all, they were lawyers, and had taken the OPL structure and created a far better legal instrument.

However, in retrospect Creative Commons made a mistake in generalizing the Non-Commercial clause of a publication license – defined very narrowly in terms of print publication – into a general purpose Non-Commercial clause in a general purpose license. The problem with this generalization is that, once removed from the specific use case for which it was intended, “Non-Commercial” no longer has a meaning.

In 2007 I was amused to find the following contradiction. Creative Commons posted a “Proposed Best Practice Guidelines To Clarify The Meaning Of ‘Noncommercial’ In The Creative Commons Licenses” which included the following logic:

(1) Is the person making use of an NC-licensed work an “allowable NC user” under the noncommercial license condition?

Allowable NC users are:

(a) an Individual (b) a Nonprofit educational institution/library, (c) a Nonprofit organization as defined under US or equivalent law [1], (together with (1) and (2) “allowable NC users”) (d) A commercial copy shop, ISP, search engine, content aggregator, blog aggregator site or similar service provider who, in the course of providing a service at the direction of the allowable NC user, may exercise a right licensed under the Creative Commons license.

(i) No. License violation – this is not a noncommercial use.

(ii) Yes. Continue to Question B.

This sounded slightly diametrically opposed to MIT OpenCourseWare’s official “Interpretation of ‘Non-commercial’”:

Determination of commercial vs. non-commercial purpose is based on the use, not the user. Materials may be used by individuals, institutions, governments, corporations, or other business whether for-profit or non-profit so long as the use itself is not a commercialization of the materials or a use that is directly intended to generate sales or profit.

When I pointed out this contradiction, guess who blinked? Creative Commons pulled the well-researched draft guidelines off their website. Both unable and unwilling to define the terms of its own license clause, in 2009 Creative Commons undertook a survey of the community to try to understand what other people and institutions thought Non-Commercial meant. The results were predictable. From the [Executive Summary](#):

Perceptions of the many use cases studied suggest that with the exception of uses that earn users money or involve advertising... there is more uncertainty than clarity around whether specific uses of online content are commercial or noncommercial.

In his book *The Wealth of Networks*, Benkler [characterizes](#) the Creative Commons project as follows:

The Creative Commons is an initiative to develop a series of licenses that allow individuals who create information, knowledge, and culture to attach simple licenses that define what others may, or may not, do with their work. The innovation represented by these licenses relative to the background copyright system is that they make it trivial for people to give others permission to use their creations.

As Yochai says, the innovation is supposed to be that the licenses make it trivial for you to define what others may, or may not, do with a work. Of course, the case with the NC clause is that it does not make it trivial to define what others may or may not do. It only makes it trivial to *appear* that you are doing so. Adam Bosworth once [recounted](#) asking Lessig about:

the provision in many Creative Commons licenses that indicates content may not be used for ‘Commercial Use’. I asked, what is Commercial Use? Does reposting to a blog that has ads violate the copyright license? Larry Lessig’s answer was basically, “I don’t know”.

If a lawyer of the caliber of Larry Lessig does not know what NC means, how is your run-of-the-mill user supposed to understand what s/he may or may not do with a NC-licensed work? The only answer is, of course, that they must read the full Terms of Use on the site. The lack of a clear, official definition of NC from Creative Commons transports us backwards in time to a day when site owners were required to write their own terms of use (in this case, their own definition of NC), and when site users were required to read them in detail. In other words, the lack of a clear, official definition of NC destroys the very innovation that Creative Commons licenses are trying to provide.

Should OER favour commercial use? Yes, in part because there is no trivial mechanism for excluding commercial uses.

And what about the family of cases in which using an NC clause is appropriate? Unfortunately, these individuals and organizations have no other choice but the nontrivial one - using the NC

clause and authoring their own accompanying definition, which users must read and understand before they can safely exercise any of the rights granted in the license.

(Another interesting implication of the NC definition problem is this: Take the case of two OERs using the BY-NC-SA license. If each author has created a unique definition of Non-Commercial, are the two OERs remix-compatible under the terms of the SA clause in the BY-NC-SA license? I believe the answer is “no,” but leave the proof as an exercise for the reader.)

Contra



Opening statement

[Stephen Downes](#)

It was in 1995 when I first aspired to demonstrate the suitability of the World Wide Web for educational materials and in demonstration of this I posted a document I had authored a couple of years previous for my students at Grande Prairie Regional College, *Stephen's Guide to the Logical Fallacies*. This work – and none of my work in educational technology since – remains my most enduring and popular work on the web.

There not being a Creative Commons at the time, and the Gnu Free Documentation License being four years in the future (Stallman, 1999) I by necessity created my own copyright notice. I didn't name it or propagate it or try to create a movement out of it; I simply declared how I wish my work to be used. Here's what the copyright notice stated:

Stephen's Guide to the Logical Fallacies (hereafter referred to as "the Guide") is copyright to Stephen Downes, Brandon, Manitoba, Canada. Any person may reproduce this Guide, in whole or in part, for any purpose, provided the following conditions are met:

1. That the author, Stephen Downes (stephen@downes.ca) be notified by email or in writing.

2. That no money is charged for access to the content of this site. Money may be charged for:

- reproduction costs, if the Guide is printed and distributed on paper
- course fees, if the Guide is used as supplementary or resource material in a course

3. That this copyright provision be included in all publications of this Guide.

Note: the purpose of this copyright is not to restrict use of or access to this Guide. In fact, the opposite is the case. The purpose of this copyright is to ensure that the contents of the Guide remain freely accessible to all persons in perpetuity. (Downes, 1998)

I've updated the URL and email address over the years but otherwise this text is unaltered from the original posting in 1995. The original notice also included explicit permission to link, to create mirrors (subject to the main copyright notice), and an expression of limited liability.

I thought then and I think to this day that this was a pretty good set of conditions. If I regretted any

of the provisions, it was the requirement for notification, however, the posting of a single email message was never an onerous burden for use, and it allowed me to justify the continued maintenance of the site. What moreover was the case was that my intent was clear. “The purpose of this copyright is to ensure that the contents of the Guide remain freely accessible to all persons in perpetuity.”

I find it a point well worth making that there is an entire history of open source and open licensing that originated outside the Berkeley-Stanford-Harvard nexus that is now regarded as authoritative. I had based my own copyright statement loosely on the licenses that prevailed at the time in the world of Multi-User Dungeons, and in particular, as an effort to improve upon the license authored by George Reese (Descartes of Borg) for the Nightmare MudLib, a body of code I had used for a number of years in various academic pursuits. As the Wikipedia stub(Wikipedia, 2011) notes, “Technically, Nightmare 3 was released under a pre-Open Source open source license. In other words, it predates the concept of open source but was available for use and modification free of charge consistent with modern Open Source principles.”

The licensing arrangements for MudLibs were created, not with coders and programmers in mind, but with MUD players. As George Reese writes,

Since all drivers except DGD were derived from LPMud 3.0, they all require a copyright at least as strict as that one, which basically states that you can use the server as you like, so long as you do not make a profit off of its use. Most current servers have much more strict and explicitly copyrights. On top of that, many of the mudlibs which exist also have similar copyrights. To require money of your players is therefore a violation of international copyright laws. DGD requires licensing through a third party company.(Reese, 1998)

Lars Pensjö, who wrote the original LPMud(Bartle, 2003, p. 11) in 1989, wanted to ensure free access to MUDs for the players. As the original MUDOS license stated, “Permission is granted to extend and modify the source code provided subject to the restriction that the source code may not be used in any way whatsoever for monetary gain.”(mwiley, 1999) As the discussion makes clear, this is not a prohibition against the recovery of reasonable expenses. It is intended mostly as a prohibition against one person using another person’s work for *profit*.

Why was this important? The reasons become clearer when we fast-forward twenty years into the future and look at what has become of the online multi-player role-playing environment. The license conditions weren’t respected. As Richard Tew (Donky) writes, “That’s the thing with releasing mudlibs, people make a few trivial changes and then decide that it has changed so much that it is effectively something completely new.”(Tew, 2010) After appropriating the idea and (often) the source code, the commercial sector came to dominate the world of multi-player role-playing games. Today, if you want to play, you pay.

My observation, through not only the history of MUDs but through the history of online software and content in general, is that unless the non-commercial clause is stated and enforced, a set of two major phenomena occurs: *conversion*, and *enclosure*.

By *conversion* what I mean is essentially the appropriation of free and open content and resources by commercial providers. The intent of these providers is to obtain whatever may be found for free, and to convert it to commercial advantage. It is an old phenomenon. John Locke describes the principles behind conversion as follows:

Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It

being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to... (Locke, 2010, pp. Chapter 5, Section 27)

The software created by hackers and volunteers, the content placed on the web by authors and professors, the styles cultures and mannerisms on people on the street – all these and more are thought of as being in a ‘state of nature’ by commercial providers. Through the slightest of effort, these words are appropriated, and converted into property, as though a man were harvesting an apple from a tree in the commons.

The phenomenon of conversion would be innocuous enough, were it not for the second phenomenon, that of *enclosure*. Having created a commercial product, the provider now finds that his primary competition stems from the original non-commercial alternative. Hence, it is necessary to in some way make access to the original, non-commercial source more difficult, if not impossible.

For a graphic illustration of this phenomenon, it is worth attempting to locate the citation just referenced from John Locke. Employ the following search text in Google: “locke ‘removes out of the state of nature’”. This is a very precise search and should take us straight to the original source, which is public domain (having been published in 1690) and freely available on the web, via the Gutenberg Project.

For me, this original simply does not appear in the search results (your results may vary slightly, as Google localizes search results; I have attached a screen shot below). There is one WordPress blog post, and then a series of essay-writing and term-paper authoring services. Through the use of search engine optimization (SEO) commercial providers have made it impossible to locate the original on the web; searchers must know to go directly to Gutenberg and locate the material from among the 30,000 books published on that website (and if it’s not among the 30,000, then I don’t know what searchers can do).

In a paper I presented at one of David Wiley’s Open Education conferences (Downes, Reusable Media, Social Software and Openness in Education, 2004) I described a number of the common practices of enclosure, all prevalent in today’s commercial online environment:

- *Lock-Out* – the imposition of subscription fees or similar access barriers to the environment in which the free resource is located. This is classic ‘enclosure’, the placing of a fence around the public domain resource. Lock-outs include tuition fees, subscription fees, or the placement of authentication or rights management systems onto public domain content. Search your local bookstore for the public domain version of Locke’s *Second Treatise*; you won’t find it. Free publications are banned in bookstores.
- *Lock-in* – a cousin of lock-out, lock-in involves the committing of users to a particular technology which then becomes expensive or difficult to stop using, which in turn enables the charging of fees for access to public domain materials. The classic example of lock-in today is the Kindle or iTunes marketplace, which become increasingly entrenched as the only way to access contents.
- *High Bar* – this is the creation of difficult or expensive hurdles against the *provision* of free or open content; the high bar is intended to prevent distribution of content in the first place. In the educational space, the requirement that content must meet rigid format specifications (such as, say, IEEE-LOM’s 67 metadata elements) is an example of high bar.
- *Flooding* – this is the enclosure practice employed in the Google search results. It becomes impossible to find the original free resource when the market is flooded with commercial

alternatives.

- *Legal Risk* – this is a variation of the ‘fear uncertainty doubt’ (FUD) tactic that is employed against free software. Essentially, the provider of free or public domain content is threatened with the possibility of a lawsuit unless certain conditions are met. Of course, the conditions can never be met; what is important is not that the provider satisfy the conditions but rather that they be held under threat of lawsuit. The present attack on fair use, which clouds fundamental rights with the cost of enforcing them, is an example of the legal risk method of enclosure.

I did not have all of these conditions were in mind when I wrote my first copyright license, but enough of them were to cause me to want to protect my work against the possibility of commercial exploitation. The current legal environment, in which students are charged millions of dollars for sharing song, in which patent and trademark lawsuits mar the distribution and use of educational software, in which students are forced to pay every higher tuitions to access the intellectual heritage that ought to be the birthright of all humanity, these are the conditions that demand, for me at least, the use of the non-commercial clause in my copyright statement.

As they say, your results may vary. Your motivation, and your experience, may prompt you to follow a different course. I do not desire to speak for others.

But nor either will I suffer my own approach to content licensing, an approach well-rooted in history and experience, as in some sense *not free*. And I beg the reader to consider one final matter. And that is, between the two schools of content and resource licensing I have described in this short post, there is a significant difference in *perspective*:

- On the one hand, from the Berkeley-Stanford-Harvard set, a perspective primarily motivated by, and expressing the needs of, the *owners* of content and resources, however obtained, to a maximally free use of those resources to whatever purpose, including commercial exploitation, and
- On the other hand, from the students, writers and hackers, a perspective primarily motivated by, and expressing the needs of, the *creators and users* of these contents and resources, where the purpose is, and always was, the direct expression of creativity and culture from one to the next to the next, without the barriers imposed by commercial exploitation.

I am not on the side of the owners. I do not believe (Downes, Copyright, Thics and Theft, 2003) and have never believed that these owners are in legitimate and honest possession of the full body of material they now purport to sell; they have, as Tew states, made a few trivial changes, and called it their own. They are free, in my mind, to sell their labour honestly, like the rest of us, but they are not free, in my mind, to hold the rest of us hostage in order to enable themselves to do so.

References

- Bartle, R. (2003). *Designing Virtual Worlds*. New Riders.
- Downes, S. (1998, June 5). *Copyright Notice*. Retrieved from Stephen's Guide tot he Logical Fallacies: <http://www.fallacies.ca/copyrite.htm>
- Downes, S. (2003, January 5). Copyright, Thics and Theft. *Stephen's Web* .
- Downes, S. (2004, September 7). Reusable Media, Social Software and Openness in Education. *Stephen's Web* .
- Locke, J. (2010). *Second Treatise of Government*. (D. Gowan, Ed.) Gutenberg Projecr. mwiley. (1999, May15). *Threshold RPG = Copyright Infringment?* . Retrieved from rec.games.mud.lp: Threshold RPG = Copyright Infringment?
- Reese, G. (1998, October 1). *LPMud FAQ*. Retrieved April 17, 2011, from LPMuds.net: George Reese

Stallman, R. (1999, September 12). *New Documentation License--Comments Requested*. Retrieved from gnu.misc.discuss: https://groups.google.com/group/gnu.misc.discuss/browse_thread/thread/c6c449e5c50847f8/48153681e017675d?hl=de&pli=1
Tew, R. (2010, January 4). *Sorrows mudlib v1.84*. Retrieved April 17, 2011, from LPMuds.net: <http://lpmuds.net/forum/index.php?topic=1102.0>
Wikipedia. (2011). *Nightmafne Mudlib*. Retrieved April 17, 2011, from Wikipedia: http://en.wikipedia.org/wiki/Nightmare_Mudlib

Comments



[Muvaffak Gozaydin](#)

- 1.- The purpose of OER is free education for everyone in the world. Its weakness is quality.
- 2.- Any free organisation any project cannot be sustainable. Period. There is a cost to implement the project. Nobody, no organisation can carry that cost forever.
- 3.- EDUCATION is not a commercial activity. Therefore it is a duty of the governments everywhere in the world. When education becomes a commercial activity, quality diminishes, targets bended.
- 4.- Unfortunately there is a law of nature. Supply and demand. As long as there will be demand for education there will be supply to it. But we have to prevent commercial education as much as possible or at least to control its quality and aims .
- 5.- ONLINE Education is the solution for the world education.
ONLINE is for **SHARE**. (**Obama said at Carnegie Mellon 8 months ago**)
All online contents in the worlds should be shared by the world .
SHARING costs are nill as long as they are shared by millions. That nominal cost should be born by users not free. ONLINE should not be commercial. Up to now ONLINE could not prove its virtuedue to commercial cheap online courses.
- 6.- Best OER now is www.academicearth.org providing access to all best universities of the world free.It is open to 7 billion people of the world.That model should be supported, sponsored to extend its coverage of their courses and universities. Plus they should charge \$ 10 per course for sustainability. It is a working model . It proved itself. There is no need to look for new models and waste money . And it is not commercial at all .



[Muvaffak Gozaydin](#)

The courses at www.academicearth.org can be adopted by any university in the world.
The adopting university can assign an online instructor to it, gives credits for registered student, counts those credits toward a degree they confer.

The cost to adopting university is now zero. I suggest they should pay \$ 10 per course so that academicearth can expand itself with more courses and universities.

- 1.- Adopting university increases its quality by top noch Universities online courses
- 2.- University saves money from providing classroom, full time professors

3.- Communities have some saving too. Less traffic, less parking lots, less pollution, Academicearth needs to add some universities like Northwestern, University of Wisconsin, University of Illinois, Penn State, Boston University, University of Texas even University of Nebraska is needed. Not all students can go to Harvard or Stanford .



[Anil Prasad](#)

My first perception is that open knowledge can be used to build a livelihood that is suitable for a civilized society. But fortune hunting using the open knowledge will make it cease to be open.



[Joris Komen](#)

In casting a vote of 'no', I am troubled by your semantics - the word 'favour' would seem to suggest that the commercialising of open educational resources should be promoted 'over' another model of use. Is a commercial use model really the 'favourite' model in the realm of OER development? I would say 'NO'; it goes against the spirit of every open access model for education I've been involved in since the advent of internet and more importantly, that of wiki media!

Not that I object to the recovery of cost in any model of use - but that's not necessarily commercial, that's plain common sense. However, the moment this model adds an insidious 'profit' margin to pay for someone's new toyota landcruiser under the veil of not-for-profit cost 'recovery' then it's not up my street!



[Ed Bice](#)

Great post/argument, David. I would be more bold, however, in making the claim that embracing derivative commercial uses of OER is a good thing in itself, and not simply a position we should take based on the legal complexities of defining/enforcing an NC license.



[Armando Altamira](#)

I agree with Joris Komen.



Jacky Hood

There are only four ways in which people can share the services and objects they create:

- * by trade (i.e., commerce)
- * by charity of the producer
- * by third party subsidization (e.g. advertising, grants, donations)
- * by force (theft, slavery, confiscation, taxation)

Trade starts as barter but soon a medium of exchange emerges. At that point, one party buys (receives the services or goods) and the other sells (receives the exchange medium). The medium is usually currency but it can be gold, diamonds, cigarettes, candy, carbon credits, frequent flier miles, coupons, or anything that has recognized value and lasts for awhile.

Both parties profit in barter and currency exchanges. They each value what they receive more than what they give up. The person receiving currency takes the greater risk because the value of the currency could go down before it can be used to purchase goods or services.

Even if the marginal cost of the next instance of a good or service is very low: e.g. pharmaceuticals and digital materials, it is the initial creation of the good or service that must be rewarded with other goods/services or a medium of exchange.

Third party models work in some cases but they remove some of the decision-making from the buyer and seller.

Force is the method favored by those that say education is a 'right'. Rights are restraints on others. For example, a person's right to life, liberty, and property means that others must refrain from violence, imprisonment, and theft. To say that someone has a 'right' to goods or services means someone else has an obligation to provide those goods or services without compensation, i.e., the producer (or third party payer) has his/her rights violated.

The best business model for open educational resources is very-low-price, very-high-volume. Digital goods have a global market and so volume can be very high. With very high volume, prices can be quite low, on the order of pennies.

The difficulty is finding a payment method that does not cost more than the item being sold. Here we can turn to the telephone companies. A telephone operating company executive once told me, "We are not a phone company; we are a billing company." The phone companies have reduced the cost of billing to a fraction of a cent. There are many other benefits to delivering OER on phones, including the fact that people expect Internet content to be free but expect to pay for content on phones.

The very best reason that OER should be a commercial endeavor is because both producers and consumers of educational resources deserve respect. Producers should not be seen as people whose creations are not good enough to receive something in return. OER consumers should not be objects of pity and charity.

So what does it mean for the producer to both receive compensation for his/her output and for that output to be 'open'? The seller is allowing non-traditional uses of the output, e.g. making copies,

remixing, etc.

In a sense, using OER is like renting a car. Some rental car companies say 'you cannot go out of the country; you cannot drive off-road, etc.' An 'open' rental company puts fewer restrictions on the renter.

My husband and I once bought a house with a covenant that said we would never create alcoholic drinks on the premises.

A producer of OER certainly has the right to refuse commercial use of the output. However, the output's spread will be very limited. Commerce and trade cause services and goods to keep moving. Restrictions stop that movement. A house with covenants will be harder to rent out or sell. Instructors and students will reject OER with restrictions (NC, ND, SA) in favor of those with CC BY licenses.

Regards,
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[Ahrash](#)

I am also interested in getting clarification on the specific meaning of the word "favour" in this debate. Among the many different definitions of "favour" are these two contrasting meanings: "to prefer" versus "to accommodate." These different meanings have very different implications for the purpose of this debate, as the former definition implies that OER are created with an intention and preference for commercialization, whereas the latter implies that OER are created with no prejudices regarding desirable forms of future use, whether commercial or non-commercial. Can someone clarify which meaning we are debating here?



[Stephen Downes](#)

Responding to Jacky Hood, who says:

- > Force is the method favored by those that say education is a 'right'.
- > OER should be a commercial endeavor

It would be interesting to see how commercial endeavours functioned without some sort of property rights that protect the ownership of those who have something to sell. If the owner is not able to protect their goods by force, either directly or through a proxy (usually government) then it is not possible to require a commercial transaction; the other person just takes what they need.

It is very misrepresentative to suggest that those people working for rights are engaged in some sort of enterprise requiring force while those engaged in trade and commerce are not. My observation is that the police and security guards are generally protecting those who *have*, and not those who

need.



[Stephen Downes](#)

Responding to Ahrash:

> Among the many different definitions of "favour" are these two contrasting meanings: "to prefer" versus "to accommodate."

There isn't any widely used sense of 'favour' that means merely 'to accommodate'. The sense of 'favour' used here is one that, as the word suggest, implies a preference or inclination toward.



[Wayne Mackintosh](#)

In response to Ahrash and Stephen's clarification:

I believe the intention with the formulation, as Stephen has articulated, was to imply preference or inclination toward.

As an open debate about things open -- I have indicated to both debaters that they are free to post comments and join discussions on the floor.



[Steve Foerster](#)

I think it's unfortuante that more OER proponents don't see commercial entities not as a threat, but instead as a useful vector for transmitting awareness about the materials we're developing. In the long run, we have as much to gain from the relationship as they. I elaborate [here](#).

--Steve--

Day Three

Position of the house



Opening statement

[Wayne Mackintosh](#)

A key issue in the open education arena is whether OER should favour commercial use. The concept of open education resources (OER) encapsulates a simple but powerful idea that the world's knowledge is a public good and that the open web provides an extraordinary opportunity for everyone to share, use, and reuse knowledge. Many teachers around the world are working at the heart of the educational endeavour, that, is to share knowledge freely.

UNESCO brings you a global opportunity to share and invites you to:

- **Read** and reflect;
- **Cast a vote** to share how you feel (or change your vote as your own thinking matures);
- **Post a comment** to enrich our connected experience.

Don't be missed by your absence and join in the “debate” .

OER provides the means to unleash the educational potential for sharing. Educators can dedicate learning resources to the public domain or release these materials under an intellectual property license that permits their free use or re-purposing by others. The advent of open content licensing has facilitated a change in educational culture from one of copyright restrictions to a culture of permissions for learning.

Through Creative Commons, educators and educational institutions now have greater choice in expressing and implementing the permissions they deem fair and reasonable by choosing one of six creative commons licenses.

A key issue in the open education arena is whether OER should favour commercial use. This is a complex topic involving a wide range of perspectives which suggests a continuum of considerations rather than a definitive binary answer.

UNESCO is fortunate to tap into the knowledge, experience and foresight of two open education pioneers to delve into and interrogate the nuances of perspective regarding commercial permissions for OER and to share this with educators worldwide. Stephen Downes is considered by many to have put the “e” into eLearning and is well known for his daily newsletter, OLDaily, which is distributed to thousands of educators worldwide. David Wiley has been at the forefront of the open content movement inspiring the development of the Open Publication License, which predated the Creative Commons licenses providing a groundbreaking milestone for educators to license their works openly. We will bring multiple perspectives to the table from OER practitioners and we encourage you to add your own perspectives by commenting on the discussions.

This discussion will roughly mirror the structure of an Oxford-style debate. However, in the pursuit of improved understanding of a complex topic the participants will be the ultimate winners by virtue of engagement.

I look forward to a productive, engaging and enriching experience. Your votes and comments represent a stream of digital consciousness in changing our world for the better -- through degrees of openness in education.

Guests (opening phase)



Guest statement (opening phase)

[Ahrash Bissell](#)

Monterey Institute for Technology and Education (MITE) is an independent non-profit organization pioneering a financially sustainable model for the development and distribution of high quality OER. Ahrash Bissell, Project Manager at MITE provides insights into their current thinking on license choices.

The Monterey Institute for Technology and Education (MITE) seeks to meet society's need for access to effective, high-quality educational opportunities in an era of rapid economic, social, and personal change. As a freestanding non-profit institution, MITE sustains its activities through fees paid by institutional members to receive full and customized access to all of the materials hosted or developed by MITE. Individuals can access all of these same materials for free through a web portal called Hippocampus. Like so many organizations involved in the production and distribution of open educational resources (OER), MITE continues to experiment with licensing models that are legally, technologically, and fiscally prudent, given shared aspirations for the promise of OER and a desire to facilitate educational innovation and improvement globally.

The opinions expressed here are reflective of the thinking within MITE, but MITE's current production processes are in transition and do not yet match the opinions expressed here. Overall, MITE does not believe that the non-commercial (NC) term, as currently employed by Creative Commons (CC) and other open licenses, is appropriate for OER. We have two specific concerns about its applicability to OER which we share here.

1) The meaning of non-commercial is unclear, especially for educational and other non-profit institutions.

In education, the vast majority of the involved institutions are non-profits, and traditionally these non-profits spend some portion of their operating budgets to pay for resources and services developed by third parties. Of course, these same non-profits would like to minimize the money they spend on such things, so there is a clear incentive for such institutions to use low-cost or free materials if available.

The NC restriction, such as the version available for some CC licenses, is subject to a great degree of interpretation. One possible interpretation is that NC-licensed materials are free for any non-profit institution to use in any manner, including hosting the content on their servers, embedding the content in other applications, and even perhaps redistributing the content for a fee (e.g., for cost-recovery). The presumption is that as long as no profit is being made, which by definition should not be occurring within a non-profit institution, then the NC term poses no constraints. The problem

here is that commercial activity is not synonymous with profit-making activity. In most cases, non-profit institutions are still engaged in commerce, just not with a profit motivation. One could also argue that individuals engage in commerce whenever they share information, whether or not profits or any money-exchange are involved. Thus, it is unclear how the NC restriction works in education, both because it can be insufficient to enable content-producers to protect their investments from commercial (albeit non-profit) activities, and conversely because it can be too restrictive in terms of the rights granted, especially to individuals.

2) The non-commercial term is a hedge on openness, preventing the emergence of a truly global learning commons and viable sustainability strategies.

For the vast majority of users of educational resources, copyright is only a concern to the extent that it prevents easy access to materials. But publishing and distributing resources via the Internet provides for easy, and often free, access by default. No changes to the copyright status of a resource is necessary for these access benefits to accrue. Therefore, the crucial difference for OER resides in the permissions to adapt and republish resources, especially if that permission is being granted universally.

Consequently, we should seek to provide OER under the simplest terms possible, since any constraints on adaptation and republication will require potential users to become fluent in copyright laws, and further to assume any risks from misinterpreting or stretching the intent of the license.

From this perspective, then, any license other than CC BY (and CC BY-SA in those specific cases where the license has become a mechanism for enforcing community norms) is simply a restrictive license, whether it is CC or not. There may be some signaling benefits to using a standardized license over a *sui generis* (or custom) license, but the signals are also confused since most people do not realize that there are many different CC licenses and are likely to presume that all CC-licensed works are provided under the same terms. We believe that this signaling confusion, coupled with the tendency for organizations to rely on restrictive licensing to hedge their bets on OER, has hampered the growth and impact of the OER effort.

Therefore, we do not believe that the NC term should be applied to OER. In addition to applying a CC BY license, we would argue that OER producers should release OER honestly, meaning they should also strive to publish their OER in formats and via distribution channels that enable people to exercise the rights granted by the license. If there are reasons for organizations to retain greater rights to some of their materials, then use a custom license or retain all rights. If a CC license must be used, plan to take great pains to clarify that such restricted materials do not possess the same open characteristics of the materials licensed CC BY. For the typical user, the differences among restrictive CC licenses (meaning those with the NC, ND, and even SA terms) and custom licenses are meaningless in all cases, the restrictions require them to worry about improper usage of the materials, remixability conflicts with other content, and other challenges which hamper the utility of the materials.



Guest statement (opening phase)

[Erik Möller](#)

Inspired by the free culture and the free and open source software movement, the Wikimedia

Foundation, home to Wikipedia, do not permit the use of the non-commercial or no-derivatives restrictions in their licensing policy. Erik Möller, Deputy Director of the Wikimedia Foundation explains why.

Individuals and organizations alike are subject to cognitive biases, and one of the most common biases is loss aversion: We value that which we think we may lose more highly than that which we think we may gain. It is of crucial importance to the success of the open education movement that the normal bias of loss aversion is countered with rational and wise policies which maximize the public benefit of sharing by minimizing legal restrictions on re-use.

All Wikimedia Foundation projects, including Wikipedia, are governed by a licensing policy approved by the organization's Board of Trustees. Text is licensed under the Creative Commons Attribution Share-Alike License; images can be licensed under any terms compatible with the Definition of Free Cultural Works (<http://freedomdefined.org/>), which excludes licenses that prevent derivatives or commercial use.

As a result of this licensing policy, educational resources under terms which restrict commercial use or prohibit derivatives are not open from Wikimedia's point of view, and cannot be used in Wikimedia projects. Given the global significance of Wikimedia's projects (which reach more than 400 million people every month), this in and of itself is arguably a pragmatic reason to steer away from any restrictive licensing for educational resources which are meant to be widely shared and built upon.

Wikimedia's policy is inspired by the free software and open source movement, which has long established that restrictions against “fields of endeavor” are not in the spirit of openness. For example, the Open Source Definition states:

“The license must not restrict anyone from making use of the program in a specific field of endeavor. For example, it may not restrict the program from being used in a business, or from being used for genetic research. Rationale: The major intention of this clause is to prohibit license traps that prevent open source from being used commercially. We want commercial users to join our community, not feel excluded from it.”

Beyond Wikimedia, prohibitions of commercial use or derivative works prevent valid and important uses of educational resources, often in ways which are far from intuitively obvious. For example, the most widely used publishing platforms like YouTube and WordPress are advertising-supported. A 2009 survey by Creative Commons found that “more than 6 in 10 of both creators and users .. consider uses in connection with online advertising to be 'definitely' commercial even if money made from the ads only covers the cost of website hosting.”

In other words, the license restriction assumes a clear distinction between commercial and noncommercial transactions, while the world wide web has evolved into a space where commercial and noncommercial activities blend all the time. The restriction therefore creates fear, uncertainty and doubt among re-users, and prevents many beneficial uses entirely. For example, offline copies of Wikipedia content have been made and sold commercially in developing countries with limited Internet connectivity.

Restrictions on the creation of derivatives can have similar unanticipated effects. For example, the Creative Commons ND licenses explicitly state that “synchronization of the Work in timed-relation with a moving image” constitutes a prohibited derivative work. In other words, uses in slideshows and videos become impossible. The ND restriction also prevents translations, making educational resources under such terms useless to most of the planet.

Instead of focusing on intent, the Creative Commons "Share-Alike" provision focuses on the actual end result of any transaction, noncommercial or not: Only if improvements to a work are shared under the same terms as the original, the resulting derivative work can be distributed in compliance with the license. This licensing regime aims to maximize distribution, re-use and sharing. Restrictive licensing regimes, on the other hand, are self-defeating -- they fail to realize a large part of the promise of Open Educational Resources.



Guest statement (opening phase)

[Lisa Petrides](#)

I have perhaps a unique vantage point as both a researcher in the field of OER and a provider of OER professional development; as well as a provider of metadata through our open knowledge network, OERCommons.org, which aggregates metadata from over 350 content partners around the world. At ISKME, this three-pronged approach (research, professional development, and knowledge network) has led us to become increasingly agnostic to the issue of alternative licensing—as our goal has been to engage as many educators as possible—and to not exclude those who do not necessarily agree with our license choice.

This has become increasingly difficult, as commercial versus non-commercial use of OER is perhaps one of the most contentious issues in the OER community today. At one point early on in the life of OER Commons, it was suggested that we only aggregate metadata for CC BY licensed material. However, we realized that would exclude about 90 percent of our content partners. And to me, the most effective way to build awareness and increase use of OER is by meeting people where they are. It has been shown in other areas (music and photography) that people are likely to become more liberal in granting additional rights for their material over time—it would be great to see if this happens with OER as well, but a) it is too soon to tell, and b) it may be that the pressure to select the “right” license is one of the factors preventing people from entering the OER space in the first place.

In the creation of OER Commons nearly 4 years ago, we found most potential content partners we approached were unfamiliar with anything other than traditional all rights reserved copyright, so we worked to educate and introduce Creative Commons (CC) licenses within our trainings. Yet while the majority of people in the education sector today still have never heard of CC (typically when I ask a room of educators if they know what CC is, about 1-5 percent raise their hands), what is common among them is a strong desire to share, and to make their materials openly available, free of charge to anyone that wants to use them for education purposes. I guess the question is, is that enough?

In dozens of OER workshops each year—which emphasize not only the advantage of free and openly available materials, but also show how OER can be used as a vehicle for disseminating more flexible, adaptable curricula that supports learner-centric approaches—we have observed a strong desire among teachers for their materials to be made freely available, forever. These “mainstream” educators, meaning, educators who will likely never write a book, create a business, or receive grant funding to produce resources, simply want to share materials with others, but don’t wish for others to be able to make money off of what they have produced. It isn’t based on a desire to prohibit others to earn a living, but simply that they see their work as tax-payer funded for the public good, and believe what they do should always be freely available, not repackaged for sale. You might

think this naïve, but they simply don't care about compatible licenses, how OER Commons might be sustainable in the future, or whether or not the textbook lobby is trying to discourage the use of OER. So, as currently defined, it seems that the NC license is likely to be the most popular choice in the near future, at least among every day educators—the group that will likely define the tipping point for OER use.



Guest statement (opening phase)

[Neil Butcher](#)

OER Africa's approach to licensing:

OER Africa is an initiative of Saide (www.saide.org.za). OER Africa's mission is to establish vibrant networks of African OER practitioners by connecting like-minded educators from across the continent to develop, share, and adapt OER to meet the education needs of African societies. By creating and sustaining human networks of collaboration – face-to-face and online – OER Africa aims to enable African educators to harness the power of OER, develop their capacity, and become integrated into the emerging global OER networks as active participants rather than passive consumers. OER Africa is working in the higher education sector, in partnership with several universities across the continent. For more information on what we are doing, you can visit www.oerafrica.org.

From this perspective, there are two aspects to our approach to licensing: first, our internal approach within Saide and, second, the advice we provide to universities and academics with which we work.

Our own approach has been defined in the form of a Saide policy on open licensing, which emerged through an internal consultation process. As licensing of Intellectual Property is central to the OER concept, Saide has adopted, as a default licence for all products produced through its various projects and engagements, a Creative Commons (BY) licence. The following caveats should be noted however:

1. Such a licence does not apply to any projects where a client has a specific request for a different arrangement included in its terms of contract. However, in instances where licences are not specified, Saide encourages – particularly within the donor community – inclusion of this licence provision in contracts.
2. The Creative Commons (BY) licence has been chosen as the default licence because it is the most open of all the CC licences. Effectively, all it requires a user to do is attribute the original authorship of the materials when using or adapting them, but otherwise leaves them free to adapt them as they deem necessary and use them in whatever way they wish. There may be instances where it is necessary to add further restrictions within the CC licence framework (possible applying a Non-Commercial restriction to prevent commercial use of materials, a Share-Alike restriction to require people adapting materials to release the adapted resource under a similar licence, or a restriction to prevent adaptation of the resource). However, imposition of additional restrictions will be managed as exclusions rather than as a matter of policy in order to ensure the maximum possible openness wherever possible.

To facilitate sharing of its materials, Saide works to ensure that every document released for

distribution via the Internet (both through the Saide and OER Africa web platforms):

1. Indicates the licensing conditions of the resources clearly on the first page of the document and in the footer on every page.
2. Ensure that resources are appropriately branded on every page to attribute the origin of the document correctly. In many instances, this simply requires incorporation of a Saide logo, but more complex arrangements are sometimes required in the event of resources that have been co-produced with other parties.

The focus of this work is to ensure that attribution is easy to retain as our materials are circulated more widely.

In terms of advice to universities and academics, a first point of principle is that we seek to avoid ‘telling people what to do’. Although many people involved in the world of OER have very strong perspectives on which open licences are ‘best’ and why this is so, our experience is that people typically do not respond well to dogmatic attempts to impose such ‘best practices’. As importantly, we have discovered through our work that early discussions about the technicalities of licensing issues often detract from the wider conversation about the educational, economic and marketing benefits of sharing and using open content. Consequently, our approach during early phases of interaction with university partners and with interested academics has been to raise awareness about the existence of alternative licensing options to all-rights reserved copyright. In particular, we describe the Creative Commons licensing framework and its different licensing options, as this is the most commonly used licensing framework for OER. During early advocacy and awareness-raising, we are careful not to present such overviews in a form that implies recommendation of specific licensing choices.

As our partnerships develop, we then offer support to our partners in helping to make and – more importantly – to operationalize – licensing decisions. Where specific advice is requested on which licence is best, we explain our own position and why we have chosen the Creative Commons (BY) licence as our preferred one, while also noting the space that our Saide policy creates for application of different licences where circumstances arise. From such a platform, we hopefully have enabled a conversation to take place which enables institutions to begin defining their own policies on open licensing, informed, but not dictated, by our experiences. On this basis, we are now seeing that various African universities have made good progress with developing and approving policies that provide for open licensing of their educational materials.

Comments



Kim Tucker

In my opinion, the most efficient way of addressing the considerable educational and sustainable development challenges we face globally, is for users of OER to be free to use the learning resources for any purpose and be free to adapt them (e.g. translate, localise, recontextualise, ...), and be free to make a living by offering such services (translation, etc.) to society, and by enabling wider access to the knowledge (e.g. by selling OER and derived works on media or in forms accessible to learners).

Such freedom, Stephen et al, also means that NGOs, government departments, commercial organisations, individuals, local communities (or anyone) are free to make a plan to make the resources available to learners and to society _gratis_ in a scalable and sustainable manner.

If you are worried about commercial exploitation, then use cc-by-sa to ensure the results of the above process of continuous improvement carry the same freedoms to future learners, educators and others. The emergent commercial competition would be on (e.g.) offering better translation services, more efficient dissemination services, lower cost media options, better customisation of learning resources, learning design innovation, etc. - with each incremental improvement being shared back to society.

For more on this perspective and some historical background (from free software, through open source software to OER and libre knowledge) see:

http://wikieducator.org/Say_libre



[Draper Darren](#)

I've argued in favor of the NC clause (contra commercial use in OER) fairly extensively in the preliminary and culminating posts of this recent series that identifies some of the dilemmas inherent to openness in education.

<http://drapestakes.blogspot.com/search/label/Dilemmas%20of%20Openness>

Naturally, I welcome any push-back and other constructive feedback related to these ideas. Are there any dilemmas I may have missed?



[Geoff Cain](#)

Favoring commercial use IS a restriction. The proponents of commercial use are writing about this as if some right is being taken away. If it is the right to silo learning for profit, then I hope this will eventually be the case. The commercial companies have had their chance and they have shown us how inflated prices can get and how [corporate control does not always equal the best learning materials](#). There are plenty of teaching and learning models that have not relied on money to move them forward. Few people without a direct corporate interest would believe that the publishing companies have our students' best interests at heart.



[FATHI ESSALMI](#)

I think that OER favour commercial use. Besides, two things have to be considered:

Reward of the learning object creator will motivate him/her. So, he/she will create more learning objects. In addition, he/she will be requested for qualified learning objects.

A high cost of learning object could decrease their use when considering that not all learners could pay for the use of learning objects.



[Anthony F. Camiller](#)

I would like to approach this topic from a more ideological view, than from a technical license view. I start from the general principle, that content should be free - the essential concept that the collective knowledge of humanity should be accessible by the same group.

The fullest embodiment of such a principle, is that any individual should be able to access and make use of any content at will, including, in my opinion, commercial uses. Part of the rationale for this, is that production of content for commercial uses has long been a driver of continued innovation in our societies, and as science grows increasingly more complex, the idea of the independent 'hobbyist' inventors becomes ever-more fanciful.

The principle of equity on the other hand, dictates that any content-creator deserves fair compensation for their work. In line with the above principles, use of their work should be free - but this does not exclude them being compensated fairly where such work generates profit. The problem which remains is defining 'fair' - a topic which was initially addressed by patent law and subsequent case law. Unfortunately, decades of lobbying by content-firms has shifted this concept more and more in favour of the content-producer, and away from the public-good, destroying the balance on which the whole system was built.

Thus, it is no longer a situation of defining only what commercial-use *means* - to move forward, we need new models for what commercial-use *entails*- to create a new 21st century balance between the rights of the public and the rights of the author.



[Wayne Mackintosh](#)

A gift of knowledge

Resources to learn more about Creative Commons licenses in education

If you are new to the OER world and want to learn more about the specific terms of the licenses being discussed in this debate, please consult this tutorial:

- [Creative Commons unplugged](#)

We acknowledge the support from UNESCO and the collaborative teamwork of volunteers from the [OER Foundation](#), [WikiEducator](#), the [OpenCourseWare Consortium](#) and [Creative Commons](#) who developed these learning materials. They are licensed under a CC-BY license.

Day Four

Position of the house



Moderator's response phase remarks

[Wayne Mackintosh](#)

Our primary debaters have provided a well-founded basis to tease out key issues whether OER should favour commercial use. We are now moving into the response phase where we can delve deeper into the issues.

David Wiley, steering well clear of any moral or ethical position, has argued that on technical grounds the Non-commercial (NC) clause generates a number of non-trivial issues relating to what others may, or may not, do with a work – restricting the intended advantages of open content licensing.

Stephen Downes has argued that **without** the NC clause, OER producers and users are exposed to the risks of *conversion* (*appropriation of open content by commercial providers*), and *enclosure* (*e.g. where distributors lock-out, lock-in or raise the bar to use, reuse and re-purposing of OER*).

Leading OER practitioners have shared their thoughts on preferred license choices, including:

- **Ahrash Bissell**, Project manager at the Monterey Institute for Technology and Education (MITE) provided insight into their current thinking about open license choices within an organisation which aims to ensure a sustainable model for OER design, development and distribution.
- **Erik Möller**, Deputy Director of the Wikimedia Foundation, which hosts the the popular Wikipedia website, explained how the free culture and the free and open source software movement has informed their license policy.
- **Lisa Petrides**, Founder and Director of Institute for the Study of Knowledge Management in Education who host the oercommons.org suggested that the NC license is likely to be the most popular choice in the near future.
- **Neil Butcher**, OER strategist at OER Africa, explained the approach they have adopted to help African universities to take informed decisions about open content licenses.

So what do educators say?

The [OER Foundation](#) recently hosted the inaugural [Open Content Licensing for Educators](#) workshop and sought the opinion of participants regarding what permissions they deemed fair and reasonable with reference to sharing educational materials.

96% of respondents agreed that content generated from taxpayer revenue should be released freely and 92% of the respondents agreed that educators should share their teaching materials freely. Only a small majority (51%) of the respondents felt that everyone should have the right to earn a living, including the right to make money from free content distributed on the Internet. (You can [download](#) a copy of these survey results).

This is only a small sample of teachers, lecturers and trainers.

- **What do you think?**
- **Are these survey results representative of the wider education population?**

Let us know by casting your vote, but more importantly posting comments on the debate site about what you think.

I encourage you to read the rebuttals carefully and to contribute to our collective understanding of the OER movement in relation to the question: *Should OER favour commercial use?*

Together, we are building sustainable futures for education.

Pro



Response statement

[David Wiley](#)

I always have had, and always will have, great respect for Stephen. I find deep intellectual value in my many debates with him, which is why I continue to engage in them.

I expect that Stephen can produce additional examples, but I have to point out a technical problem with his enclosure example for the sake of readers.

For a graphic illustration of this phenomenon, it is worth attempting to locate the citation just referenced from John Locke. Employ the following search text in Google: “locke ‘removes out of the state of nature’”. This is a very precise search and should take us straight to the original source, which is public domain (having been published in 1690) and freely available on the web, via the Gutenberg Project.

For me, this original simply does not appear in the search results (your results may vary slightly, as Google localizes search results; I have attached a screen shot below). There is one WordPress blog post, and then a series of essay-writing and term-paper authoring services. Through the use of search engine optimization (SEO) commercial providers have made it impossible to locate the original on the web; searchers must know to go directly to Gutenberg and locate the material from among the 30,000 books published on that website (and if it’s not among the 30,000, then I don’t know what searchers can do).

The reason the quote is so difficult to find is that it has been inadvertently misquoted. If you search Google for “Locke ‘removes out of the state *that* nature’” you will find that several of the results on the front page of Google link straight to copies of the original source.

Now, on with the meat of the response...

Stephen's statements regarding enclosure are the real intellectual workhorse of his statement in favour of the NC clause. And let's be clear that each of the mechanisms of enclosure Stephen lists in his opening statement (the list is reproduced below) are genuine risks. However, some of them are not specific to OER. And for those that are specific to OER, I believe there are alternative ways we can deal with these risks (as opposed to applying the Non-Commercial clause). And, due to technical problems with the NC clause outlined in my opening statement, I believe that the alternative mechanisms are better.

Let's look at each of the mechanisms in more detail.

- *Lock-Out* – the imposition of subscription fees or similar access barriers to the environment in which the free resource is located. This is classic 'enclosure', the placing of a fence around the public domain resource. Lock-outs include tuition fees, subscription fees, or the placement of authentication or rights management systems onto public domain content. Search your local bookstore for the public domain version of Locke's *Second Treatise*; you won't find it. Free publications are banned in bookstores.

Bookstores, by the nature of their being stores, are places where things are sold. We should no more expect to find free books in a bookstore than we should expect to find bicycles in a bookstore. If you choose to open a business or run a website, no one else has the right to tell you what it should include.

There are two very real lockout mechanisms associated with accessing OER which are provided online. The first mechanism is the cost of hardware capable of accessing the internet, regardless of whether the schematics and source code for the hardware are openly licensed or proprietary. If you can't afford to purchase a computer, tablet, or smart phone, it can be difficult for you to access OER online. The second lockout mechanism is the subscription fee most people pay in order to access the internet. Even if your friend gives you an old hand-me-down computer, you may still be unable to afford to pay for internet service.

While these two lockout mechanisms are real, they are fundamental digital divide issues and are not specific to the provision of or access to OER. These lockout mechanisms are very real, and people are working directly on diminishing their influence, but they probably don't belong in a discussion about commercial use of OER.

- *Lock-in* – a cousin of lock-out, lock-in involves the committing of users to a particular technology which then becomes expensive or difficult to stop using, which in turn enables the charging of fees for access to public domain materials. The classic example of lock-in today is the Kindle or iTunes marketplace, which become increasingly entrenched as the only way to access contents.

Lock-in is a genuine risk to people who either aren't educated on the issues or aren't paying attention. If you're not careful, it is absolutely possible to allow a person or organization to back you into a corner. Amazon's use of the proprietary .azw format for their ebooks is an excellent example. Once you've purchased 100 books in this format, it becomes very expensive to move to another device which does not support this format. However, if you're educated about the issues and paying attention you will likely purchase ebooks that use an open standard like ePub.

While lockout mechanisms are beyond the individual's control (because they're implemented by someone else), lock-in mechanisms only work when we let them (e.g., when we choose to purchase an ebook from Amazon instead of another provider). The best answer to lock-in problems is better education and raising public awareness of the issues.

If we are to believe the argument that the Kindle and iTunes stores (and similar mechanisms) are becoming the only ways to access content, then we should immediately accept that placing an NC clause on content we wish to share is a death sentence. There is good reason to believe that no NC content will be distributed through these channels. Either the argument is faulty and there will always be viable alternative distribution mechanisms in which NC-licensed content can travel, or the NC clause is ineffective as a defense against lock-in.

- *High Bar* – this is the creation of difficult or expensive hurdles against the *provision* of free or open content; the high bar is intended to prevent distribution of content in the first place. In the educational space, the requirement that content must meet rigid format specifications (such as, say, IEEE-LOM’s 67 metadata elements) is an example of high bar.

To the best of my knowledge, the only requirement for sharing OER online is access to a computer with an internet connection and some very basic skills (which, while very real requirements, I do not believe meet the standard of being a “high bar”). Anyone can share OER through freely available hosting services like Wordpress.com or YouTube. Requirements for conformance with complicated e-learning standards like LOM or SCORM only come into play when trying to sell content (because customers may demand it) or when seeking funding for help sharing OER (though even the U.S. Department of Labor backed off its SCORM requirement in their recent TAA grant once the community spoke up).

It is true that OER shared by people with more expertise in creating and curating metadata, optimizing SEO, etc., will be easier to find than OER shared by people without these skills. This is why it will continue to be important for platforms like Wordpress to automate (or lower the barrier of participation as much as possible) the effective use of these standards for people without technical expertise. RSS did not gain its broad adoption because it was so simple for the average person to create. RSS gained its broad adoption because tool providers figured out how to largely automate both the creation and the consumption of information provided in compliance with this specification.

All that said, the NC clause in no way mediates the “high bar” risk, and it probably doesn’t belong in a discussion about the commercial use of OER.

- *Flooding* – this is the enclosure practice employed in the Google search results. It becomes impossible to find the original free resource when the market is flooded with commercial alternatives.

Not if you use the Advanced Search tool provided by Google itself, which allows you to search only the universe of openly licensed materials. Again, this risk is best mitigated by education and public awareness, not the application of the NC clause.

Additionally, there is no reason that the OER community cannot engage in the “flooding” tactic. Sometimes the best defense is a strong offense.

- *Legal Risk* – this is a variation of the ‘fear uncertainty doubt’ (FUD) tactic that is employed against free software. Essentially, the provider of free or public domain content is threatened with the possibility of a lawsuit unless certain conditions are met. Of course, the conditions can never be met; what is important is not that the provider satisfy the conditions but rather that they be held under threat of lawsuit. The present attack on fair use, which clouds fundamental rights with the cost of enforcing them, is an example of the legal risk method of enclosure.

How does the NC clause mitigate against this risk? It does not. A multi-national corporation with billions of dollars at its disposal can still appropriate your materials however they please and drag out the litigation until you can no longer afford to pursue it. Bad actors will be bad actors. The legal

risk is definitely a real risk, but it is a symptom of deeper problems with modern society and cannot be helped by applying an NC clause. International legal reforms combined with an international rediscovery of basic morality are the only answers to this risk.

I also want to respond to the difference in perspective Stephen mentions at the end of his post. He characterizes the differences in perspective of those who license content as:

- On the one hand, from the Berkeley-Stanford-Harvard set, a perspective primarily motivated by, and expressing the needs of, the *owners* of content and resources, however obtained, to a maximally free use of those resources to whatever purpose, including commercial exploitation, and
- On the other hand, from the students, writers and hackers, a perspective primarily motivated by, and expressing the needs of, the *creators and users* of these contents and resources, where the purpose is, and always was, the direct expression of creativity and culture from one to the next to the next, without the barriers imposed by commercial exploitation.

While it is in vogue to criticize institutions and side with hackers, I don't think this is the right way of looking at the problem. In fact, I don't believe it's the right problem at all. In my mind, the biggest difference in licensing perspectives in the OER community is linked to the SA clause - the primary cause of license incompatibilities I described in my opening statement.

The difference in perspective among those who favor the BY-SA license and those who favor the BY license comes down to a simple question: do we choose to privilege people, or do we choose to privilege content? In the SA model, we privilege content (we guarantee that content stays in the commons) at the cost of author freedom (to choose which license to use with derivatives). In the BY model, we privilege people (we guarantee their freedom to choose what which license to use for derivatives) at the risk that some derivative works may leave the commons (be copyrighted).

So should we privilege people or content? For me, this is a very simple question. Content is simply a means to the end of supporting people's learning. Content is never the end in itself. The idea that we might privilege content over people is frightening to me. As educators, people should always be the first, most important focus of everything we do.

Additionally, in the context of current realities where the majority of the OER in the world are being produced by the so-called "developed world," the propensity to use the SA clause is even more sinister. With SA we once again find the "developed world" mandating solutions for the "developing world" by saying "if you adapt our open educational resources for use in your country, you are required to license them the way we tell you to. Because we know what's best." The SA clause is simply a new form of Imperialism, and has no place in a global network of generous, sharing people.

Contra



Response statement

[Stephen Downes](#)

David Wiley makes a nice point, correcting my misquote of Locke's *Second Treatise* and suggesting this fixes the problem of enclosure I described in my opening paper. But does it? Let's

look at the results given by Google for the [search](#) “Locke ‘removes out of the state *that* nature’”:

- Postings of excerpts by professors on class websites – [Hanover](#), [Mandell](#)
- Political activist sites – [constitution.org](#), [LONANG](#), [jim.com](#) (the only complete copy), the [founders’ constitution](#)
- Ad-supported sites – [Chuck Brahman](#), [Lapham’s](#),
- Text copied from publishers – the [prenhall](#) site, the [Nozick book review](#) site

Though we no longer have essay authoring services represented, we nonetheless are faced with an enclosure in progress, and significantly, no link to the Gutenberg library or any other citeable open access source.

And the example of Locke’s *Second Treatise* is kind to Wiley’s position. Search for something that does not have an academic or political nature, and prepare to be swamped with commercial results. This comment from Peter Yared at Media Beat is typical: “If you search for any topic that is monetizable, such as ‘iPod Connectivity’ or ‘Futon Filling’, you will see pages and pages of search results selling products and very few that actually answer your query.” (Yared, 2011) We all know this is happening, we can all see it for ourselves.

And I think there’s a substantial point to be made out of that observation. Lisa Petrides sums it up nicely. “Educators... simply want to share materials with others, but don’t wish for others to be able to make money off of what they have produced. It isn’t based on a desire to prohibit others to earn a living, but simply that they see their work as tax-payer funded for the public good, and believe what they do should always be freely available, not repackaged for sale.” (Petrides, 2011)

But let’s go back to the beginning and consider David Wiley’s defense of the position. (Wiley, 2011)

There is a technical argument in favour of commercial-friendly licensing, he writes, that is “straightforward and unassailable.” The technical argument is based on what appears to be a contradiction between different understandings of the meaning of ‘commercial’ in Creative Commons licenses, specifically:

- Commercial, in the sense of commercial *users* of the content, specifically, individuals, nonprofit organizations or institutions, or commercial copy shops performing work for some noncommercial user, and
- Commercial, in the sense of commercial *use* of the content, such as charging fees for access, attaching advertisements to content, and the like.

Wiley writes, “If a lawyer of the caliber of Larry Lessig does not know what NC means, how is your run-of-the-mill user supposed to understand what s/he may or may not do with a NC-licensed work?”

I am not an expert, but my understanding is that the distinction between commercial and non-commercial *entities*, as opposed to *use*, is a particularly American distinction. It echoes the disagreement Wiley and I had regarding the proposal that there be an education-specific Creative Commons license. (Wiley, Open Education License Draft, 2007) The proposal, which I opposed, (Downes, 2004) was that content could be licensed for educational use only, where this was defined as use by an educational organization such as a school, college, university, or other NGO. My objection at the time was that such a requirement favoured institutions that charged money for access to resources, and created a bias against providers of educational material for informal, individual and home use.

But it’s one thing to say that a lawyer is confused, and quite another to say that people are confused. In Wiley’s own text, he was perfectly clear about what *people* believed was meant by commercial

and non-commercial: “uses that earn users money or involve advertising...” The broad strokes of what is understood by non-commercial are understood by all, and if lawyers encounter difficulty pinning down an exact definition, well, that is what lawyers are paid to do. But our response here should be to do what Creative Commons did and abandon any attempt to define ‘commercial’ according to whether a *user* is a commercial enterprise, and to look instead at the use.

Then the question of whether an act of copying falls under the non-commercial clause becomes a very simple question: are you trying to make money off some else’s freely contributed work? If the answer is “yes” then you are violating the “noncommercial use” clause. If the answer is “no”, then you aren’t. And if you’re trying to find a narrow interpretation, or a nuance, or a loophole, or some other condition only a lawyer could misunderstand in order to allow your use of noncommercial material in some way that might be deemed commercial use, then you’re probably violating the clause. It’s the old saying, “if you have to ask whether you’re breaking the rule, you’re breaking the rule.”

But if there is a need for another litmus test to determine whether or not a use is a commercial use, then we can return to the original desire of those authoring non-commercial clauses into their licenses, the desire for free and unfettered access. It is in fact this condition I apply to materials I am considering for linking in OLDaily. Basically, the condition is this: if the reader can directly access the materials without restraint, then the use is non-commercial. Otherwise, it is commercial.

By focusing on the imposition of access controls on content, I avoid distracting myself with the *reason* for the access controls (who am I to try to read someone’s mind? If they’re trying to enclose content for any purpose, whether to charge money, collect emails, force people to view ads, keep stuff private, whatever, then it’s *commercial* – they seek some personal gain, which they will obtain through restricting access, which is the basis for *commerce*, including but not limited to commerce having directly to do with money). In other words, *commercial use is the act of restricting access*.

Dissemblance hangs on nuance. The numerous proponents of commercial use in this forum all in one way or another argue that they are in the business of providing open access. Yet they all in one way or another have based a business practice of extracting money from people who wish to access these open materials. They expect – indeed, they *require* – that materials be contributed by users with no conditions on commercial use whatsoever, and they translate this into a mechanism for sustaining their own enterprise.

The argument, such as is stated by Erik Möller, is that such conditions, “prohibitions of commercial use or derivative works prevent valid and important uses of educational resources.” (Möller, 2011) But if we examine these “valid and important” uses, we find they depend on mechanisms for restricting access. Möller provides his own example: “the most widely used publishing platforms like YouTube and WordPress are advertising-supported.”

Quite so. And YouTube will vigorously resist efforts to harvest and display YouTube content in alternative venues. YouTube’s terms of service stipulates, “You agree not to distribute in any medium any part of the Service or the Content without YouTube’s prior written authorization.” YouTube has become one of the sole sources of online video precisely by *preventing use* of those videos elsewhere; that’s how it is able to sustain itself through advertising, sales of user data, and the like. Flickr, Facebook, Twitter and the rest of these services have similarly restrictive conditions in their terms of service. *It doesn’t matter* how users license their content on these sites; they are locked down for exclusive commercial use by the owner.

Geoff Cain makes the point nicely in his comment. “Favoring commercial use IS a restriction. The proponents of commercial use are writing about this as if some right is being taken away. If it is the

right to silo learning for profit, then I hope this will eventually be the case.”

Ahrash Bissell, writing for the Monterey Institute for Technology and Education (MITE), expresses the same sort of concern David Wiley does. “The meaning of non-commercial is unclear,” he writes, “especially for educational and other non-profit institutions.” For example, “One possible interpretation is that NC-licensed materials are free for any non-profit institution to use in any manner, including hosting the content on their servers, embedding the content in other applications, and even perhaps redistributing the content for a fee (e.g., for cost-recovery).”

Again, notice the nuance. The intent, toward which we work though each successive phrase in the paragraph, is to raise revenue for the institution by restricting access. The defense of this strategy is the argument on grounds that *it's not clear* whether the use is commercial or non-commercial. But there are in fact two very clear alternative strategies MITE could use to employ open educational resources:

- It could mount those resources on a public web server, open for all to use, to access, and to copy resources for their own use, or,
- It could mount those resources on a server which restricts access in some way in order to benefit the institution or its tuition-paying students

Yes, the lawyers could get into agonizing arguments about the nuance of whether the latter action is commercial or non-commercial. But the relevant fact, from the perspective of the people who actually employ the non-commercial clause, is that access is being restricted. MITE could very easily host the materials in such a way that all can access them, thereby enjoying the benefits of free and open educational resources, without violating the authors' intents that they be freely shared.

The “truly global learning commons” that Ahrash Bissell writes about, and which is heartily endorsed here, will emerge only with individuals and institutions *stop* restricting access for personal or institutional gain.

Downes, S. (2004, May 5). *Free for Education Home Page*. Retrieved April 20, 2011, from Stephen's Web: <http://www.downes.ca/post/7159>

Möller, E. (2011, April 19). *Guest statement (opening phase)*. Retrieved April 20, 2011, from WSIS Platform of Communities: <http://www.wsis-community.org/pg/debates/group:14358/phase/251476/252289>

Petrides, L. (2011, April 19). *Guest statement (opening phase)*. Retrieved April 20, 2011, from WSIS Platform of Communities: <http://www.wsis-community.org/pg/debates/group:14358/phase/251476/252289>

Wiley, D. (2011, April 18). *Initial statement*. Retrieved April 20, 2011, from WSIS Platform of Communities: <http://www.wsis-community.org/pg/debates/group:14358/phase/251476/252289>

Wiley, D. (2007, August 8). *Open Education License Draft*. Retrieved April 20, 2011, from iterating toward openness: <http://opencontent.org/blog/archives/355>

Yared, P. (2011, January 12). *Google already knows its search sucks (and is working to fix it)*. Retrieved April 20, 2011, from Media Beat: <http://venturebeat.com/2011/01/12/google-search/>

Comments



[Abel Caine](#)

These are absolutely brilliant responses.

Abel

UNESCO OER Programme



Steve Foerster

Stephen Downes mentions the old saying, "if you have to ask whether you're breaking the rule, you're breaking the rule."

Thank goodness in legal matters that this isn't true! For example, if those of us in the U.S. who are keen on fair use followed this rule of thumb, there would be nothing left of this important exception to copyright. Courts come up with all sorts of interpretations of law and contract that normal people would find counterintuitive. David Wiley's point stands that if even Professor Lessig can't define it clearly, the rest of us shouldn't be expected to do so. Or, put more dramatically, "we know it when we see it" is the enemy of the rule of law.



Kim Tucker

David Wiley wrote:

"In the SA model, we privilege content (we guarantee that content stays in the commons) at the cost of author freedom (to choose which license to use with derivatives)."

I see it differently, you cannot generalise about the "the SA model" in that way.

With the NC-SA combination a *restriction* is being imposed on how future derived works may be used by people (only for non-commercial purposes).

With CC-BY-SA freedom is being ensured in how future derived works may be used - freedom to use, learn with, adapt and share to help your neighbour, community and for the benefit of society.

The Share Alike clause in CC-BY-SA reads:

"Share Alike — If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one."

A "similar license" would be similar in intent - a license which perpetuates the freedoms in derived works.

CC-BY embraces these freedoms but permits derived works to be licensed in ways which restrict people in terms of being able to access the resources, and in how they may be used and shared. There are many who will abuse that 'privilege'.

As you indicate, CC-BY resources may be incorporated and mixed into derived works under a wider variety of licenses. The benefit is that more people are likely to use and adapt the resource (more channels for sharing the knowledge). However, as you point out, this includes "the risk that some derivative works may leave the commons (be copyrighted)".

Don't underestimate this risk. The observations with Google (one of many companies offering such 'search' services) is just the beginning. Automated search and aggregation services are becoming increasingly sophisticated. Use of CC-BY-SA and similar licenses which perpetuate freedom to use, adapt and share is one strategy for safeguarding the commons and protecting against its enclosure.

On a scale for freedom in the global knowledge society - inclusivity and freedom to participate - the Creative Commons licenses peak at CC-BY-SA (in the current state of copyright law).



Wayne Mackintosh

A reflection on why our discussions on open content licensing are so important.

In a closed digital world, it now becomes necessary to label children who share contemporary social experiences and culture as thieves. Corporates need to depict "children" having their heads bashed with a mallet for sharing.

How did we allow this to happen?

http://www.youtube.com/watch?v=InzDjH1-9Ns&feature=player_embedded



Nagarjuna G

This debate of "commercial" vs "non-commercial" diverts the attention from the core issue: which is the freedom to use a cultural product (OER being one) for forwarding culture. Once we grant this freedom, we also grant the freedom to an user to e.g. spread the cultural product. If an agency or a person would earn some compensation for spreading the cultural product, it is not a sin. On the other hand if we do not allow this to happen, we are blocking its spread. In a collaborative space, contacting the variuos copyright holders to obtain copyright permissions for someone who wants to spread the work, is painful. Therefore, they will not do it, unless the work is developed as a single or a few authors. This will make all collaboratively produced NC works will remain within one narrow medium. So, I plead not to use the terms like commercial or non-commercial, but use the fundamental social methods of forwarding a cultural product, which happens when another agent uses it. This use in most cases is the use to interpret OER, to understand it, to share it, to re-interpret it (to modify it), and share it again. This cultural dynamism will be blocked if we use NC clause. So, it is wise to protect the OER by allowing any kind of use as long as the other clauses of the license such as SA are imposed.

The wisdom of the very first zeroeth level freedom as defined by Richard Stallman, and how this is widely used for both free software as well as free knowledge (Wikipedia) is what will be dumped if we choose NC condition.

The other point to keep in mind is, if we use NC condition we will be making OER non-usable in other collaborative projects like Wikipedia, Wikibooks, etc.



[Maria Droujkova](#)

When I search for non-enclosed items, I add these terms: download, free, open, "full text", online. In my experience, kids learn these and other more content-specific techniques for finding open content within their first months or years of using the Internet.

It would be easier if all online entities were meta-tagged like Flickr objects, of course, by how open they are. Meanwhile, keyword search works well enough for most purposes. [Here is the search I used](#) to find the Locke treatise in question, linked from the first hit on the result page.

On the other hand, when searching for commercial objects, add some of these keywords to the search: price, buy, "compare prices". Ironically, I can't find any objects to buy for Locke, at least not on the first pages of these searches: I keep finding free resources, though one of the pages was also selling an ebook they provided in html for free (probably with better pagination), another subscription to a journal from which the article it had come, etc.



[Peter Rawsthorne](#)

when I consider the negative impact private HE institutions can have on learning.

<http://www.pbs.org/wgbh/pages/frontline/collegeinc/view/>
<http://www.nytimes.com/2007/02/11/education/11phoenix.html>

And the absurd profits these institutions are making combined with the large amount of student debt being created... these two are directly tied.

<http://www.ibtimes.com/articles/95633/20101228/student-debt-crisis-threatens-us-economy.htm>
<http://isis.sauder.ubc.ca/media/blog/student-debt-a-growing-problem-in-canada/>

When I also consider the legislative changes that can (and will) increase the barriers to materials I believe we should keep OER non-commercial. And forces within commercialization will ALWAYS be lobbying to restrict access.

<http://www.michaelgeist.ca/content/view/5479/125/>

Commercial interests in education will have a negative impact on access. We need to keep commercial interests out of OER and shift our focus to quality. I hedge that if we spent as much time focusing on how to build quality OER rather than copyright issues we could create an educational movement that would make commercial interests irrelevant.

I'm voting NO... more on these topics as this debate continues. Thanks to WSIS for putting all this together...



[Kim Tucker](#)

Vote: "Should OER favour commercial use?" - NO - I don't think **any** particular type of use should be "favoured".

But a "NO" vote implies I am in favour of using NC - I am not!

"Should OER 'accommodate' commercial use?" - YES - I'll go with this interpretation as I cannot change my vote to "Abstain".

Taking Nagarjuna G's point further (wrt knowledge):

What *opportunities* arise with freedom?

The pro-freedom perspective highlights an invitation and an opportunity for absolutely anyone to participate in co-creating the highest quality of learning/knowledge resources that will always be in the commons with the [oft quoted freedoms](#). (IMO, [CC-BY-SA](#) is the best CC license in this respect).

For Peter Rawsthorne and others:

Be careul not to mix issues. Trying to punish commercial or private institutions (etc.) by insisting on NC use only will disempower and discourage them (and others) from making valuable contributions and slow their transition into the OER world (with more open and innovative busines models). The implications may go much deeper: pre-empting scalable solutions to global education issues.



[Peter Rawsthorne](#)

Kim,

I agree with your first statement. I found the question rather vague... what is favour? At first I also wanted an "Abstain". To be honest, I'm really close to sitting on the fence on this; Mostly, because I believe given fair-use / fair-dealings [an independent adult learner can ignore copyright](#). I think this is an issue for the institutions to work out among themselves with the commercial entities, publishers, etc... I really don't think the adult learner should concern themselves with copyright issues. Read the above embedded link...

On the issue of punishing commercial or private institutions. I don't see it as such... it is more about trust. Commercial entities / institutions are opportunistic and will act in ways of self interest, and they will lobby thier interests to gov't. I believe the links provided in my previous comment provide good examples of how commercial for profit HE institutions will conduct themselves. In particular, this post regarding Canada's copyright modernization act that could trump educational fair-dealings. <http://www.michaelgeist.ca/content/view/5479/125/>

I'm willing to have my opinion swayed... could anyone provide some examples of commercial interests contributing any substantial (and quality) amount of OER using a CC-BY-SA? With the

amount of time OER has been around there must be some good examples... Or have we seen a commercial entity using some CC-BY-SA content, reusing it, improving it and releasing it back as CC-BY-SA?

Day Five

Guests (response phase)



Guest statement (response phase)

[Neeru Khosla](#)

CK-12 believes that licensing should be a choice that should include the non-commercial clause.

Openness is frame of mind – a commitment to doing things with the idea of sharing and letting others use that work for their needs. This is the easy part. The hard part is reaching consensus on the licensing.

The *Open Educational Resources (OER)* group has been debating this issue for some time now and is divided in spirit. The Creative Commons (CC) license is the chosen license by the group but the challenge has been in choosing from adopting the many versions of this license. Fortunately or unfortunately, CC allows for **choice** in licensing. It stipulates that you can operate under any kind of license – free to use; modify the content, as long as you attribute the creator, etc.

If there are choices available then why shouldn't these choices be available to both the users and providers? The mandate to stick to one form -- "commercial" -- amounts to "dictatorship." It goes completely against spirit of "openness" to insist that "this house believes in doing things one way and only one way, and you have to abide by the rule of the house." *OERs are not just one house but instead are many houses that make a village, and will thrive as a village.*

We at CK-12 Foundation have invested heavily in our projects and operate under the Creative Commons NonCommercial-ShareAlike (<http://creativecommons.org/licenses/by-nc-sa/3.0/>) license. If, as an OER, we are asking people to "pay back" by a "share-alike philosophy" then this should also apply to "royalty sharing." Most OERs do not have a sales force or any marketing budgets. Therefore, if someone is going to commercialize our product, we should have the right to share in the revenues. Many other major OER projects have invested heavily and have adopted the same license – Carnegie Mellon University, the Open Learning Initiative, MIT's OpenCourseWare, and the Khan Academy. Non-commercial does not change in any way the usage conditions for the very people who need these materials the most and rely on our content to be provided free of charge.

What must also be given due consideration is that OERs have been struggling to be taken seriously, as for-profit organizations question our robustness, quality and sustainability. These non-profits claim that if there are no revenues, then OERs cannot produce high-quality and sustainable content. I ask you, why not allow OERs a chance to survive and ensure that we can keep on contributing? Why do people assume that because something is free it is therefore worthless or of lower quality?

OERs are confusing “feel good” and “self promoting” attitudes by saying to all “we are going to help you by letting you make money on us.” In reality this action is condescending to the people on the receiving end and turns them into “dependents.”

The most dignified way to impact social change is not to keep filling peoples’ begging bowls but rather to empower them. Commercialization should not be structured in such way as to be unfair by leaving out the people who put in the most effort in creating the content.



Guest statement (response phase)

[Robin Day](#)

Reflections on adopting a Creative Commons Attribution IP policy at Otago Polytechnic.

[Otago Polytechnic](#) is a vocational education institution which provides quality skills for a wide range of applied and professional careers in the Dunedin and wider Otago region as well as some significant national programmes in New Zealand. Otago Polytechnic is New Zealand's first signatory of the [Cape Town Open Education Declaration](#) and is one of the first post-secondary institutions in the world to adopt a default Creative Commons Attribution intellectual property (IP) policy.

Prior to the adoption of this open policy, the Polytechnic did not have a formal IP policy in place and the executive leadership team saw the need to address this as it looked to opportunities to lever off the IP being created by staff and students. Previously, the IP and copyright of teaching materials created by our staff during the course of employment was assigned to the institution under “all-rights reserved” in accordance with the New Zealand Copyright Act 1994. The Executive commenced with a consultation process with staff and students to develop an appropriate IP position for a digital age.

Two years of consultation and discussion followed with significant input coming from those with a high stake in IP – the staff in the schools of, Fine Art, Design and Information Technology who were the main creators of new and applied ideas and products in the institution. Phil Ker (the Chief Executive) and I engaged with those interested, meeting and involving them with the drafting and redrafting of the policy to reach a position that was appropriate, sensible and practical. It was clear from the onset that this was an area of important to staff and students and that there were very high stakes in this academically.

During the consultation period, where the initial position put was that the institution held rights over IP through the employment relationship and for students by view of the fact that their IP was supported by staff input, some staff were saying things like, “You’re not owning my thinking! If that’s the case, I’ll do what’s required for my job and do my really creative thinking at home!” Some students also protested that in that case, they’d do what was required to get a qualification, but would keep their best work to themselves because they wanted to be able to set up their own companies to develop their ideas after they finished study and not be restricted by the Polytechnic having the say in how they would do this.” (Note in the final policy: our organisation does not assert copyright on student work and they remain the owners of their IP and our role is to be guardian of this in protecting the students rights, this position was also adopted in a parallel policy that addressed Maori IP where a partnership model is adopted. This was negotiated with local Iwi). From an educational perspective, it seemed that a policy of taking ownership of people’s IP could

constrain learning and knowledge development. This raised for me major concerns over the quality and standards of education and the desire to provide an education that enable students to succeed and do their best thinking in this endeavour.

After considerable debate and consideration in 2008 we adopted a default Creative Commons Attribution licensing policy where the IP of teaching materials are co-owned by the institution and their creators. In this way, the organisation protects its investment in teaching materials while providing recognition and the permissions for creators to choose how to use their IP freely. In the early days, some critics felt that the organisation would lose students by opening up its teaching materials, and that we would also lose potential commercial opportunities through the sale of IP. However, neither have occurred. We have not recorded any substantive changes to student enrolment trends at the Polytechnic since going open. On the contrary, the accrued institutional benefits have exceeded expectations resulting in a significantly raised international profile and collaboration potential for a small regional institution. We have also become much more collaborative with other institutions around the sharing of quality teaching and learning materials and research opportunities. Our approach fits with the New Zealand Government's Open Access Licensing (NZGOAL) framework which encourages open licensing of creative works funded through taxpayer dollars.

We are not opposed to commercial uses of our openly licensed IP. In fact, this is a potential revenue source for collaborations with the private sector, which in our case, will be reinvested back into improving our learning services at the Polytechnic. Our open IP policy is also well aligned with our institutional strategy of education for sustainability. After all, OER is a sustainable and renewable resource.

Our open strategy has prepared us for our role as anchor partner in planning the [OER university](#) concept. The OER university concept is an international innovation partnership which will provide free access to high quality OER courses with student support provided through a global network of volunteers. Students can be assessed for a fee by participating institutions and earn a credible credential. Combined with [Capable NZ](#), our prior learning assessment (PLA) and work based learning centre using PLA, OER provides opportunities for Otago Polytechnic to further improve access to learning, especially for students where barriers to access currently exclude them from the more traditional modes of educational delivery as part of our strategic vision to engage better with our community.

As a publicly funded institution, we believe OER is the means by which education at all levels can be more accessible, more affordable and more efficient. This is indeed a very exciting time for us as we progress these initiatives working with others in an open environment.

[Comments](#)



[Jacky Hood](#)

The real difficulty is that the attribution (BY) part of the CC BY license is not being well-used by creators and adopters. If the attribution makes it perfectly clear how and where the original creators' work can be accessed, then no derivative can take away the market from the original creator unless

that derivative has significant added value in content, access, technology, cost, etc. If an entity has made the license more restrictive or increased the price, adopters will avoid the derivative and go to the original.

On the other hand, a commercial entity that adds content, photos, layout, mobile formats, tools (highlighting, notetaking, student social networks), bound copies, and more, the market will gravitate to the derivative, even if that derivative has a more restrictive license and costs more. This is how the open software market works and this will also work for OER.

With a CC BY license on the original work, instructors will pull content from the originals and put that content into their presentations, learning management systems, etc. Students will go to the derivatives that cost a little but offer more attractive layout, highlighting, note-taking, student social networks, mobile versions, and/or convenient, well-designed bound copies.

Creators who wish to obtain revenues for their creations should license the **content** CC BY and then create their own derivatives in highly usable formats that have either more restrictive licenses or restricted access.

We struggle in College Open Textbooks to get instructors to adopt open textbooks. (We have more luck with smaller OER.) Confusing licenses and access methods are a major cause of resistance. Quality is another issue and that will never be high until all creators (authors, layout artists, editors, fact-checkers, photographers, illustrators, publishers, printers, marketers, etc.) can receive revenues. Allowing instructors to use content freely in their classes while charging students small fees for access on various devices, intelligent reader software, and bound textbooks will provide the revenues needed for creators while protecting instructors from copyright infringement.

We need a separate debate on ND (no derivatives) licensing. This license is far more harmful than NC and even more confusing to creators and users. Many creators think that omitting ND will allow others to change the **original** work. Other creators do not realize that the ND restriction means that an instructor cannot use a subset of the original work (e.g. inserting a few chapters from a textbook into a learning management system). ND can work for very small resources, e.g. a photograph or short lesson. Anything longer with an ND license will simply not get used.

Open resources need both creators and users. Revenues must be obtained for creators. Users must be able to afford the resource and understand the licensing. CC BY is the licensing that will serve both sides of the market.



[Mokurai](#)

You ask:

Cast your vote (if you haven't done so yet) and share your thoughts by posting a comment:

- What would you recommend for the executive leadership at your institution?

We are firmly committed to Free Software and Creative Commons content. However, we work with commercial entities to find a mixed business model that allows students access to content, while allowing the companies to sell materials and services (such as training) to government agencies and ministries. We also work with those who want to put their materials under other licenses, including GPL, or release them into the Public Domain, so far as that is possible.

- If an executive manager, what do you think?

Project Manager, Replacing Textbooks (with OERs)

Sugar Labs

Free textbook replacement OERs in every subject, for every age or grade level, for every country, in every language needed.

- Has your leadership considered open content licensing? If not why?

From the beginning.

- What aspects of the contributions from our guest contributors would you recommend for your own institution?

We have been satisfied with our policies. Although we recognize that everyone involved must make a separate and individual judgment on the morality and practicality of Free and Open licensing, we have had those discussions among ourselves, and are embarked on the execution phase.

- Other thoughts

Computers with free OERs cost much less than textbooks. I don't think this works for computers and commercial OERs, judging by the prices I have seen. It is equally important to us that Free licenses allow students and teachers to improve OERs, and permit adaptation to local requirements, translation, and remixing as needed. None of this is easy or convenient for commercial products.



[John Stampe](#)

I have been following this debate with interest as to see if I could be persuaded to support the pro camp, but after listening to this debate I voted NO.

Most of the debaters and guests did not directly address the actual question: should we favor commercial use? I take favor means to give commercial use preference. None of the participants have convinced me that we should prefer commercial.

The whole point of OER was to get beyond the commercial closed culture that existed (and for the most part still exists).

Commercial use is about making money, not about open education. Just take a look at commercial textbooks. Commercial use (of anything) is all about control, including control of information.

I think the issue is that if we believe in open education then the resources used must not only be open, but must remain open forever.

As to which license to use I agree with Kim Tucker's comment that the SA clause of the CC-BY-SA is adequate, but I respect those who use the NC clause (and which I also used to use).

Day Six

Position of the house



Moderator's closing phase remarks

[Wayne Mackintosh](#)

Welcome to the closing phase of our inaugural OER debate on the UNESCO platform. Our debaters have prepared sterling and compelling closing statements.

The debate is now "*up close and personal*" in the sense that we have moved from the generic opening statements, to institutional perspectives and now focusing on the individual. Tell us what you think by posting a comment and enriching the experience for all.

- What licence would **you** recommend (or use) for your creative works and why?
- When remixing OER, what licenses do you target when searching for OER.
- In your view, is it OK to apply a more restrictive license or NC restriction to derivative works based on the most open license (eg CC-BY)?

Let's work together in building a thriving OER ecosystem!

Pro



Closing statement

[David Wiley](#)

In closing, I want to make three more points.

First, as the field matures, people and projects' choice of default licenses tends toward more openness. (I'm following the [definition](#) of "open" in "open content" here.)

Flickr is the single largest collection of openly licensed material in the world where contributors have the freedom to choose the open license applied to their contributions. This collection can be analyzed in order to understand broad trends in licensing behavior. In 2005 I wrote a [paper](#) examining the occurrence of different CC licenses on Flickr. The table below compares those 2005 data with the same data from 2011.

License	2005 Photos	2005 %	2011 Photos	2011 %	% Change
BY	339K	9%	25,6m	14%	+4%
BY-SA	271K	7%	16,3m	8%	+1%
BY-NC	502K	14%	24,8m	13%	-1%
BY-ND	100K	2%	9,0m	4%	+2%
BY-NC-SA	1,2m	34%	52,9m	29%	-5%
BY-NC-ND	1,0m	30%	53,4m	29%	-1%

The biggest loser over the last six years has been BY-NC-SA (down 5% as a proportion of all CC licensed photos). The biggest winner has been BY (up 4% as a proportion of all CC licensed photos). These changes have occurred while the total number of CC licensed photos on Flickr grew from 3.5M in 2005 to 182M CC licensed photos today.

We can see the same trend in large institutional OER initiatives as well. MIT OCW, now ten years old, uses the BY-NC-SA license. The Open Course Library initiative in Washington state, launching this summer, uses the BY license; the Open High School of Utah, which launched its OER collection last summer, applies a BY license to all the materials its teachers create; etc. Clearly, the OER community writ large is slowly iterating toward openness.

Second, as I pointed out in my opening statement, there are several technical problems with the NC language of the Creative Commons licenses. These problems are insurmountable if a licensor hopes to reduce the friction involved in the reuse / revision / remixing / redistribution of their OER. These technical problems all come down to definition. The license document itself provides no definition of commercial use, and (as I excerpted in my opening statement) the authors of the license cannot define it either. This results in two major categories of problem.

Underspecification problems. Because Noncommercial is not defined, almost anyone who is serious about obeying the law (which is generally something we encourage) will, in the last analysis, likely steer clear of making any use of NC licensed OER. We could identify 1,000 examples from the real world. Here's one:

A nonprofit organization provides BY-NC-SA licensed textbooks which are formatted appropriately for printing. A school district decides to adopt these books, but after doing their homework and reading the NC clause asks itself, "can we legally send these textbooks to a print-on-demand vendor, who we will have to pay for printing the textbooks?"

Many would argue that they cannot, because you can be sure the vendor will profit from printing the BY-NC-SA material. "No, that one's ok," you may say. But that's what you say, not what the license says, and may or may not be what a judge says. Who knows? Want to roll the dice and find out? With fines of \$250,000 per instance of illegally sharing a \$0.99 song online, what do you think the punishment would be for misappropriating a \$50 textbook? Want to expose your credit history to that kind of risk? How about your university's endowment? How about your employer's pension plan?

If there's one thing we know about copyright lawsuits, it's that their disproportional stupidity never ceases to amaze. And that's what you'll have if you violate someone's CC license language - a copyright lawsuit. If you or your employer are risk averse to any degree, you're just going to skip using the textbooks in the example. And don't think about hiring a temp to do the printing in-house - they would be getting paid specifically to print the books. That's a possible violation, too!

(In fact, I see a possibility for a whole new kind of troll here - a distant relative to the patent troll. This would be the NC troll - an institution who creates and distributes NC licensed material, tracking carefully who visits and uses it, and then sues people who they deem to have violated the NC terms. Of course, they'll wait until someone with deep pockets like Google or Stanford has done it before they spring the first one. It's a whole new business model for OER, brought to you by the NC clause!)

Overspecification problems. Some institutions understand that the intent of open licenses is to reduce friction in the system. (What is "friction?" It's the pain, hassle, and cost of trying to get permission. When something is CC licensed, you should never have to ask permission - because the sole purpose of the license is to tell you what permissions you have. If you have to ask for a clarification about permissions, the license has failed to accomplish its primary purpose.) In order to reduce friction, these institutions create and publish their own definition of "What Noncommercial Means to Me." This way, the CC license continues to remove friction from the system because people know (without asking!) what they do and don't have permission to do.

Now let's take the case of two OERs licensed BY-NC-SA. The author of OER number one has created and published a definition of Noncommercial in order to keep the reuse / revise / remix / redistribute friction as low as possible. The author of OER number two has done the same.

Author one has written a clear and concise document defining commercial use according to the nature of the use (essentially, is someone trying to sell the OER?). For example, a for-profit entity cannot try to sell the OER, but is perfectly free to use it internally to train its employees.

Author two has written a clear and concise document defining commercial use according to the nature of the user. This definition states that use by individuals is fine, but use by any kind of institution (including non-profit institutions) is a no-no.

Now, can these OER be remixed together? No. The definitions of NC are contradictory, and there is no way to BY-NC-SA license the remix in a way that simultaneously incorporates both definitions (and this incorporation is a requirement of the SA clause). In cases where the definitions of NC for two OER are different but complementary, a remixed OER could theoretically be released under a BY-NC-SA license that incorporates both definitions. But can you see that this starts to get confusing? And that this mechanism serves to withhold more and more rights? This scenario not only fails to decrease friction, it seems to add it to the system. Each and every OER whose author creates a unique definition of NC eventually gets remixed into a corner from which it cannot emerge.

In short, underspecification (failing to create a boutique definition of commercial use) requires potential remixers to contact you for clarification. In this sense, underspecification is equivalent to retaining traditional copyright on your materials. Overspecification (creating a boutique definition of commercial use) inevitably sinks remixes of your OER into a black hole from which they cannot emerge.

Third, and most importantly, there is no place in the open education community for intolerance (did that sentence contradict itself?). If people or institutions that are new to OER want to adopt the NC clause, we should not belittle them, shame them, or torment them. We should consistently teach and inform them in a supporting and friendly manner. History shows that eventually they will make their way toward greater openness.

If people or institutions that have been members of the OER community for a long time choose to use the NC clause, we should not judge them harshly either. We should by all means continue to

explain and expound the many problems their license choice creates for other members of the community. However, each and every member of this community should be a true friend to every other. And like every good friend should, after we have done our level best to explain why this new girlfriend or haircut is a terrible idea, it is our duty to support them in whatever choice they make.

In summary, there will soon be enough BY licensed OER in the world that the BY-SA, BY-NC-SA, and other more restrictively licensed OER won't matter that much. We might adapt the famous statement, "the Internet interprets censorship as damage and routes around it" to read "the OER community interprets restrictive licenses as damage and routes around them." Just as the open source software community recreates restrictively licensed products like Microsoft Office, the OER community will recreate existing online courses, textbooks, and other materials licensed BY-NC-SA or BY-SA and license these new materials CC BY. It's happening already.

Contra



Closing statement

[Stephen Downes](#)

To date we have heard from a variety of organizations urging that developers of OERs adopt a commercial-friendly license. We have not heard so much from individuals (except perhaps those trying to figure out how to post a response to this forum).

The vast majority of individuals do not want to commercialize their educational resources. Most people are happy just posting articles to their blog sites or uploading photos to Flickr or Picasa. Commercialization gets them into a world of licenses and royalties and lawyers. Most people can do without that sort of grief.

When asked, the majority of people want to apply a non-commercial license to their work. On Flickr, for example, three times more Creative Commons licensed photos employ the 'non-commercial' clause than some commercial-friendly license. (Flickr, 2011) Surveys of academics, such as the Oak Law Project survey, show a similar trend, a strong and consistent preference for non-commercial reuse of academic content. (Austin, David, & Heffernan, 2008) Major OER initiatives, such as MIT's OpenCourseWare, are licensed using the non-commercial clause. (MIT, 2011)

Yes, if you ask a lawyer (or if a lawyer asks you (Creative Commons, 2008)) then the term 'non-commercial' may appear confusing. Ask a lawyer whether the sky is blue and you will be asked for a definition of 'blue' and after the argument agreeing that you cannot distinguish it from 'green' or 'grue'. (Goodman, 1965) But there is a sense of non-commercial that is intuitively obvious, a sense that I have developed through these three contributions, a sense based on the *use* of a resource, and specifically, a use that *blocks access* to that resource.

When you grant access to a resource only on condition of some sort of payment, whether in direct cash payment, or in terms of services or endeavours, or agreement to be subject to advertising and other messaging, then you are blocking access to the resource. And there is a non-trivial mass of people in the world who do not want access to their worked blocked. They want their work to circulate *freely*. They want to *share* their work. They want to provide *access* to knowledge and information.

In his guest comment, Ahrash Bissell stated that the “non-commercial term is a hedge on openness, preventing the emergence of a truly global learning commons and viable sustainability strategies.” These two claims form the core of opposition to the non-commercial clause. But neither claim is rooted in fact, and in the case of both, the opposite is true.

It is a hedge on openness, not when you declare that the resources are intended for non-commercial use, but rather, when you attach a price-tag to putatively ‘open’ resources. People understand a Creative Commons license, and quite rightly so, as meaning that they do *not* have to pay for the use of the resource. The existence of a price-tag is akin to the existence of some stranger walking into your town and declaring that he owns the air, and that you must pay.

It prevents the emergence of a global learning commons, not when you ensure that all resources are freely and openly available, but when you lock them inside a fence and demand that all comers pay a fee for access. The barriers of commerce – not merely the financial cost, but the commercial overhead of contracts and agreements, licensing and payments, enforcement mechanisms and more – are barriers to a global learning commons. Those agitating for commercial use of open educational resources desire something quite different, a global learning *marketplace*.

There may indeed be a day when we can entrust access to learning to the marketplace, but in a world where the market finds it tolerable to render impoverished a full third of humanity, that day is not yet today. The market serves only those with means, and provides nothing to those without means, and yet it is those without means who have the greatest need for learning (amongst other needs, many even more pressing, that the marketplace also fails to provide).

David Wiley argues that the non-commercial clause is no hedge against the mechanisms of conversion and enclosure I describe in my previous post. He writes, “this risk is best mitigated by education and public awareness, not the application of the NC clause.” How ironic that those most in need of “education and public awareness” are those least able to afford it. Yes, you can learn how to avoid paying if you are willing to pay to learn how to avoid paying. That is why the rich continue to avoid paying, and the poor continue to pay (the same logic applies in income tax law, where deductions are available to help the poor, but are accessible only to those able to afford tax lawyers).

But in fact, a non-commercial clause, where ‘commercial’ means something like ‘a use of a resource that *blocks access* to that resource’, is an effective barrier against the harms caused conversion and enclosure. Interpreted thus, the non-commercial clause says, in effect, that you *cannot* convert open content into private property, and that you *cannot* thereby enforce rights of ownership, such as the blocking of access, over it. The resource *remains free*, a subject of public trust, not private ownership.

There is a place for private ownership, a place for marketplaces, and a place for commercial educational resources, both open and otherwise. But any economy fails, including an educational economy, that consists solely of the commercial. There must be a space for any person, and for all persons, to perform some deed, create some product, or teach some knowledge, *for the common good*, not subject to by trade and other commercial considerations.

The exercise of our creative arts in this public space is the very foundation of freedom, and the suggestion that these must be bought and sold in order to be free is the deepest misunderstanding of freedom of them all.

Austin, A., David, N., & Heffernan, M. (2008). *Academic Authorship, Publishing Agreements, and*

Open Access: Survey Results. Brisbane: Queensland University of Technology.
Creative Commons. (2008, November 25). *Non-Commercial study questionnaire* . Retrieved April 26, 2011, from Creative Commons: <https://creativecommons.org/weblog/entry/11045>
Flickr. (2011). *Creative Commons*. Retrieved April 26, 2011, from Flickr:
<http://www.flickr.com/creativecommons/>
Goodman, N. (1965). *Fact, Fiction and Forecast*. Indianapolis: Bobbs-Merrill.
MIT. (2011). *Privacy and Terms of Use*. Retrieved April 26, 2011, from OpenCourseWare:
<http://ocw.mit.edu/terms/>

Comments



Jacky Hood

Another irony: The commercial publishers of open resources (Flat World Knowledge, Eleven Learning) use the Non-Commercial (NC) license and those who believe in sharing (notably Connexions) use CC BY.

Anyone who wants his/her materials freely shared should use a CC BY license and make it easy to gain access. If someone else creates a derivative of those works, adds NC, and restricts access, learners can simply go to the original source. If the derivative has compelling advantages, then the learner can choose to go to the trouble or cost of gaining access.



Peter Rawsthorne

I want to thank everyone who has contributed to this oxford-style debate, both invited contributors and commentors. I also want to thank WSIS for creating the space for this event. Thank-you.

I have listened and read David Wiley and Stephen Downes go "head-to-head" on this and similar topics in the past. And thanks to both of them for thier boldness and thoroughness. After years of struggling with the issue I believe it has never been so clear to me as it is now. Lurking upon and commenting within this debate has been an excellent personal learning experience. And is very well aligned with some of my current writings on the subject;

<http://criticaltechnology.blogspot.com/search/label/fair-dealing>.

What has emerged for me is as follows;

1. There are two distinct views that are present (though unrepresented) in this debate and I believe they have different and opposing interests.
 - **Independent Learner (adult or otherwise):** I consider this collective of individuals as the largest block of OER consumers and creators. In my opinion, from an educational resource consumer perspective, they can almost completely ignore copyright due to fair-dealing / fair-use (All they need to do is honour the BY). And >

70% want to contribute with a NC license. I appreciate Stephens reference to flickr on this. The independent learner (whether self-directed or institutionalized) is the target group for OER creation and consumption. All mass collaboration projects are examples of this, and its success. - I feel this group was under represented in this debate.

2. **Institutional Faculty, Staff and Employees:** This group is restrained by thier being associated with large institutions (whether public, private, commercial, academic, gov't; they are NOT independent learners) And they have to work within the guidelines (and legalities) of their institutions and cannot claim fair-use / fair-dealing. And cannot publically encourage their students to claim fair-dealing / fair-use.
3. both institutions and individuals should be left to decide the licensing scheme they would like to use by choosing one that would best support thier values and mission. Dictating the licensing scheme keeps people from contributing to OER.
4. we still need to be very weary of commercial interests impacting access to educational resources, cause they will come at it from many different directions. This Michael Geist post titled, "Q. Do Digital Locks Trump Educational Fair Dealing? A. Yes." pretty much sums it up for me, and is why I have voted **NO** for OER to favour commercial use.
<http://www.michaelgeist.ca/content/view/5479/125/>

Suggestion: Next time a similar debate is run please invite a few copyright lawyers with differing views (include fair dealing / fair use perspectives) and invite a selection of independent learners from different age groups.



[Charlie Lowe](#)

This has been an interesting debate about the broad use of noncommercial in Creative Common licenses. A useful future discussion would be the commerical advantages or detriments of CC-BY vs CC-BY-SA. There are very different opinions in the OER community about these two licenses, as for instance was raised by Kim Tucker's critique of David Wiley's content/commons vs people/freedom principles of CC-BY vs CC-BY-SA, and much more to discuss.

For instance, that binary thinking breaks down when examined closely, for the difference is that in CC-BY-SA, one is required to continue to use the same license with the aim of building a commons where all content is licensed CC-BY-SA. On the other hand, the obvious goal for CC-BY is the same: build a commons where all the content is licensed CC-BY. Only, instead of by legal methods, the user is to be persuaded by an idealistic moral high ground, one that is a little shaky; the idea that people are granted "freedom" to do whatever they want with CC-BY, while also saying everyone should use CC-BY. The implication for any CC-BY licensed content: "If you use my work, you have the freedom to choose whatever license you like to relicense it, but the right choice is CC-BY." A gift with strings attached.

And with Stephen's original examples of conversion and enclosure, when one splits the Berkeley/Harvard dichotomy and examines copyleft vs. non-copyleft licensing in the open source community and their effects, there is evidence to suggest that commercial interests, who embrace open source development themselves, may also work against conversion and enclosure. A recent

example: the history of OpenOffice and the fork to LibreOffice. Due to Sun's exploitive management of the community, and Oracle's potential additional misuse, commercial interests such as Novell helped to split the community off and form the LibreOffice project. The end result is that now Oracle is abandoning the OpenOffice project, and the community is more "free" of commercial exploitation than before. Moreover, there is also evidence to suggest that non-copyleft licenses, such as the BSD, have been a great failure for preventing enclosure and conversion that is detrimental to the production of open source software, Unix being a prime example.

I'll admit my bias for CC-BY-SA due to my understanding of open source development. It would be great to hear, though, counter arguments for CC-BY and promotion of commercial participation. To date, one of the argument for CC-BY is that it is more attractive to commercial interests than CC-BY-SA. But as I have made clear in a recent article ("Considerations for Creative Commons Licensing of Open Educational Resources: The Value of Copyleft"), each encourages different types of commercial participation, and CC-BY-SA may be more beneficial to the production of OER in the long term. The CC-BY side of the argument needs to be qualified more to be useful.



Cable

I think Jacky nailed it. We use CC BY at the Washington State Board for Community & Technical Colleges.... in our [Open Course Library](#) project and in our system-wide [Open Policy](#). Our intent is to share - and to make our open content as re-mixable and as re-usable as possible And if others can commercialize our content, that helps me "sell" (no pun intended) to our business community and many politicians. I find, after enough conversation, everyone has a reason to love OER ... as a policy guy trying to help folks find that reason ... CC BY gives me (and most important, others) the most degrees of freedom.



Jacky Hood

Many thanks to the organizers, presenters, respondents, and hundreds (I am sure) who watched and pondered this important debate.

I hope that everyone will join the upcoming OER debate at eLearning Africa. The topic is probably even more controversial. "The eLearning Africa 2011 Debate, traditionally a very lively, parliamentary-style discussion, will address the following motion: 'This house believes that the OER movement is fundamentally flawed because it is based on the false assumption that educational institutions are willing to share resources freely and openly.' "

Post comments at http://www.elearning-africa.com/eLA_Newsportal/is-the-oer-movement-flawed-join-the-debate/ or attend in person in Tanzania on May 27.

Also, if you missed last year's debate, watch the archives. Everyone on both sides is pro-OER but the 'cons' do a great job of playing devil's advocate.

Part 1 is not available but it had no real content

Part 2: <http://www.youtube.com/watch?v=gbyuuuPDctw&feature=related>

Part 3: <http://www.youtube.com/watch?v=C5uRon0L3Bg&feature=related>

Part 4: <http://www.youtube.com/watch?v=JGN4-jnd6kc&feature=related>

Part 5: <http://www.youtube.com/watch?v=K5lalv2D3Z8&feature=related>

Part 6: <http://www.youtube.com/watch?v=KLCN7IT4-SU&feature=related>

Best wishes and thanks again,

Jacky Hood, Coordinator, Open Doors Group

http://opendoorsgroup.org/?page_id=5



[Kim Tucker](#)

Hi all,

> What licence would you recommend (or use)

> for your creative works and why?

Usually CC BY-SA so that:

- Absolutely everyone has the freedom to use, copy, distribute, adapt, enhance, share their enhancements and collaborate on improving quality and reach of the resources.
- People are free to find innovative ways of raising funds and offering professional services to help themselves, their neighbours and their communities in this way.
 - e.g. free to make an economically viable plan to make the locally adaptable libre learning resources available gratis (free of charge).
- We can look forward to value-adding contributions being released with the same freedoms attached, so that the cooperative process continues in a culture of cooperation and sharing.
- People wanting to make a living through free/libre and open educational resources will be drawn to more sustainable (in the deep sense) business models:
 - i.e. Not by selling non-rivalrous resources (e.g. digital copies and access/ licenses to use closed resources) while consuming rivalrous resources through their profits and generating waste.
- e.g. By selling their know-how (time) (services such as translation, localisation, custom packaging, learning design innovation, training, support, distribution, ...) while covering costs.
- A libre (free as in freedom) culture of sharing and collaboration may thrive and be protected against [threats](#) from powerful players in the media and software industries with vested interests in restricting people and enclosing knowledge and culture.

The share-alike strategy is needed for as long as [copyright law is out of step](#) with the digital age precipitating [threats](#) to a free culture.

> When remixing OER, what licenses do you

> target when searching for OER.

PD, CC0, CC BY, CC BY-SA - since these may be mixed into CC BY-SA works.

> In your view, is it OK to apply a more restrictive

- > license or NC restriction to derivative works based
- > on the most open license (eg CC-BY)?

First note that CC BY is being misleadingly touted as the "most open" CC license with SA being lumped with NC as another "restriction". See my posting on [this page](#) beginning "David Wiley wrote: ...": with CC BY-SA, the SA is an assurance of freedom to co-create into the future, not a "restriction".

Some say, we can always make a version of a CC BY resource by slapping a CC BY-SA license over it (perhaps with some modification). You could do that, but it would be too late. Using CC BY (or CC0) leads to a situation that is indefeasible (sorry, the stable door analogy doesn't work): the resources may be enclosed (with access and usage restrictions) and these non-libre versions may later dominate the education space. i.e. the cc-by resources of the OER community become the foundation content of education enclosures.

So, rephrasing to be more specific to this debate:

- > In your view, is it OK to apply the NC restriction
- > to derivative works based on CC-BY?

This is legally permissible and the original authors have granted that permission by using cc-by. Who would do this (apply NC) and why?

One answer is (e.g.) someone (say, Company X) developing custom learning resources professionally to earn a living. The NC clause effectively means "only we may make money with these resources, you may not unless we give you permission".

If sufficient value has been added, people will buy.

The NC clause supposedly helps the producers retain market share while they get their return on investment.

Note that others are free to develop similar resources with the same and other base cc-by materials, so any competitive advantage in the resources themselves is likely to be lost in shorter time frames than the duration of copyright terms (at least 70 years, see [A brief history of copyright](#)). Rapid innovation cycles and healthy competition.

The NC clause also limits the potential benefits of peer production. In this respect it would be wise for Company X to re-release the resources without the NC restriction asap once they've "broken even" or if a competing product (perhaps a libre alternative) pre-empt returns on investment. Or perhaps sooner still if the competitive edge rests in skills and know-how (the services offered). In this case, the re-license re-release delay tends to zero. Who needs enclosures? Localisation and Company X's other services are always required, and enhanced sooner the sooner peer production comes into effect.

Company X might as well use CC BY-SA for their improved version immediately and continue providing great professional services while reaping the benefits of peer production in the continuous collaborative improvement of the resources. More rapid innovation cycles and healthy co-opetition.

Another class of people (or institutions) who like the NC clause are those who seem to be saying "We own this resource, we may or may not be making money out of it, but you may not (we are exercising our power to stop you from doing so)". In some cases these are public funded institutions established to educate and empower people to be able to contribute to the economy and

development of the country. Is it right for these institutions to restrict usage of that knowledge or of the OER produced by the institution (to NC use)? Are there grounds for a policy of freedom with publicly funded OER?

Legally and with the authors' permissions, it is "OK" "to apply the NC restriction to derivative works based on CC-BY", but doing so is not conducive to peer production and co-creation of a sustainable services based OER ecosystem. For this the best approach is to use CC-BY-SA.

> Let's work together in building a thriving OER ecosystem!

The Creative Commons licenses emerged from the Free Culture movement largely inspired by the [free software](#) movement and Lessig's work on free culture (e.g. [Free Culture](#) book). The OER movement has been influenced more strongly by the commercially motivated "[open source](#)" [position](#) and has [missed the point](#) (as illustrated in this debate to some extent).

The result is "continuous confusion", contradictory and pointless debates, like this one and the one scheduled for e-learning Africa (respectively). The mind set remains rooted in flawed concepts such as buying and selling "[intellectual property](#)" in a world where an author's freedom of license choice is seen as more important than freedom itself.

Education should be founded on ethics rather than pragmatics and commercialisation. Focus on our freedom to cooperate in achieving the [libre knowledge vision](#):

Knowledge for all, freedom to learn, towards collective wisdom.
Enabling communities to empower themselves with knowledge.

A plea: be inclusive and instrumental in co-creating a business environment in which ethics is a competitive advantage, and encourage sustainable models for peer production of quality learning resources for all.

It is time for prominent members of the OER community to stand up for freedom, talk about "libre resources", educate the community about [the threats](#) to a free culture and the opportunities such a culture enables for education for all (freedom to learn).

Strategy:

In the current situation, with copyright law as it is, CC-BY-SA is the most "pro-freedom" license in common usage (e.g. [Wikipedia](#), [WikiEducator](#), [LeMill](#), ...). I suggest more people use it and the OER leaders start promoting CC-BY-SA as the "pro-freedom" license.

That is not to say that we should stop using CC-BY. A dual strategy is in order. CC-BY resources will be drawn into the enclosures and in turn draw people out of them. If you value a free culture and freedom to learn, use CC-BY-SA, especially if you have produced something really special.

With thanks to all :-)

PS Re the debate at e-Learning Africa:

'This house believes that the OER movement is fundamentally flawed because it is based on the false assumption that educational institutions are willing to share resources freely and openly.' The OER movement is fundamentally flawed but it is not based on that assumption which is an easily testable assertion. Rather, conduct a workshop to produce a plan of how a free culture of African educators can collaborate to out-compete the vendors of closed knowledge products on display at

the expo (with locally adapted relevant libre learning resources).



[Khuzaima Abdul-Haleem Jallad](#)

Salam to ALL,
OER being commercialized is a wonderful concept and I trust ALL should think positively towards this initiative. Almost everything, commercial or otherwise can be found and cracked. Let's not allow others the pleasure of hacking our masterpieces. Let's give it to the public or private sectors openly!



[castfel](#)

... for me, is clear beyond functional considerations, which should be stored in this space a building "open" to resources for education, the opposite is the marketing ...

Day Seven



Winner announcement

[Wayne Mackintosh](#)

OER is based on a simple but powerful idea that the world's knowledge is a public good to be shared for the benefit of society.

This debate has confirmed that the question of whether OER should favour commercial use is a complex topic involving a wide range of perspectives, justifications and opinions from a variety of different contexts. Clearly there is a continuum of considerations rather than a definitive binary answer.

Opinion is divided. 57% of respondents have voted in favour of commercially friendly Creative Commons licenses. Nonetheless, a large proportion of respondents (43%) have voted in favour of using the non-commercial restriction.

In the OER world, there's more which binds us together than holds us apart. Notwithstanding the diversity of opinion, both sides of the house are united in a shared vision, namely that learning resources should be shared at no cost to the learner. However, we may differ in the our preferred strategies for implementing and nurturing the development of a sustainable OER ecosystem.

The concept of "freedom of speech" encompasses an educational responsibility to respect the views individuals hold and the choices they make. This inaugural debate of the UNESCO OER community has generated a wealth of perspectives to assist educators and educational institutions to take informed decisions about license choices.

Weighing up the evidence, we should declare our learners as the ultimate winners of our debate. In conclusion, I paraphrase Edmund Burke: "All that is necessary for the closed and unsustainable education systems to triumph is for good organisations to do nothing." Let's take up our collective responsibility to lead OER futures.

Looking forward to the next UNESCO OER community debate!