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Implications of the NonCommercial (NC) Restriction for Educational Content Licensed under a Creative Commons (cc) Licence [1]

Derek Keats[2]

ABSTRACT: Individuals and institutions are increasingly making content available under Creative Commons (cc) licences. Creative Commons licences are heterogeneous, even though common discourse often assumes homogeneity. A cc licence that is analogous to the free software licence of the GNU General Public Licence is the cc Attribution-ShareAlike (BY-SA) licence. An informal survey of content on the Internet indicates that less than 24% of educational content uses this licence. Seventy-three per cent of content surveyed uses a cc NonCommercial (NC) restriction on use. Casual conversations with authors who use cc licences indicate that most do not understand the implications of choosing a particular licence. A set of principle-based guidelines for choosing cc licences for educational content is suggested.

Introduction

An increasing volume of online content is licensed under Creative Commons (cc) licences, and the integration with some search engines makes it feasible to locate content that matches a particular licence. The availability of content under some cc licences is important for education, and has particular potential in Africa and other parts of the developing world (Keats, 2003a; 2003b), especially where the licence permits re-use.

A common cc licence used for educational content is the Attribution-ShareAlike (BY-SA) licence.[3] The cc BY-SA licence provides for three freedoms: 1) to *copy, distribute, display* and *perform* the work; 2) to *make derivative works*; and 3) to *make commercial use* of the work. This licence also imposes two conditions on these freedoms, the second of which ensures that the licence's freedoms are passed on in any derived content: 1) the original author must be given credit; and 2) if the work is altered, transformed, or built upon, the resulting work may only be distributed under an identical licence.

Another cc licence that seems very close to the BY-SA cc licence, but which is in fact very far from it in its underlying philosophy, removes the third freedom (to *make commercial use*) and replaces it with a *not for commercial purposes* or NonCommercial (NC) restriction on the other two freedoms. The NC restriction places conditions on the circumstances under which re-use can occur, thus creating content that is not really free[4] at all.

The purposes of this article are to examine the implications of the NC restriction on educational content, to determine the degree to which the NC restriction is used, and to

1 This article is licensed under the Creative Commons Attribution-ShareAlike Licence Version 3 . ⓑⓨ ⓢ

2 Prof. Derek Keats is Executive Director, Information & Communication Services, University of the Western Cape, Bellville, South Africa.

3 http://creativecommons.org/licenses/by-sa/2.0/, accessed 14 September 2005.

4 I use "free" in this article in the sense of freedom (liberty), not in the sense of the absence of a price.

examine possible reasons educational content authors choose this restriction. The article draws upon the author's personal experience of education work within the context of Africa and the developing world, and argues against using the NC restriction, except where there are clear benefits to the creators of content.

Creative Commons licences for educational content

The NC restriction is commonly found on online educational content of the type located using the cc search plug-in for the Mozilla Firefox web browser (See Table 1 below). Of the search terms used in the quick survey conducted to generate the data in Table 1, 74% of the pages returned included the NC restriction in the licence. Only 24% of returned pages had a free cc licence, in the sense in which the Free Software Foundation defines freedom. For instance, the MIT OpenCourseWare[5] initiative contains a large repository of educational materials for higher education, and the licence used makes use of the NC restriction.

Licence	Symbol	% of results
Attribution (BY)	(BY)	10
ShareAlike (SA)	(SA)	0.3
NonCommercial (NC)	(NC)	1
NoDerivatives (ND)	(ND)	3
Attribution-ShareAlike (BY-SA)	(BY) (SA)	13
Attribution-NoDerivatives (BY-ND)	(BY) (ND)	19
Attribution-NonCommercial (BY-NC)	(BY) (NC)	6
Attribution-NonCommercial-ShareAlike (BY-NC-SA)	(BY) (NC) (SA)	41
Attribution-NonCommercial-NoDerivatives (BY-NC-ND)	(BY) (NC) (ND)	26
All with a NonCommercial restriction (NC)	(NC)	74
Free licences		24

Table 1: Creative Commons licences for educational content. Data based on searches for a sampling of terms that have educational potential. None of the sites were examined, and only the first page of results returned was used (terms = 34, total results = 333).

It is clear from the data presented in Table 1 that only about a quarter of educational content licensed under a cc licence uses a licence that promotes freedom, whereas nearly three-quarters preclude commercial use.

Practical implications of the NC restriction

The NC restriction on cc-licensed content at first sight seems to be a harmless restriction on freedom to use or produce derived works. It is often invoked because people have a largely emotional sense of "why should someone be allowed to make money off my work?" I suggest here that for educational content, this NC restriction is often based on a misunderstanding of its meaning and the broader implications of its use.

5 http://ocw.mit.edu, accessed 14 September 2005

Compatibility gap

The wide use of the NC restriction represents a threat to the development of free content for education by creating licence incompatibilities, effectively introducing a compatibility gap.

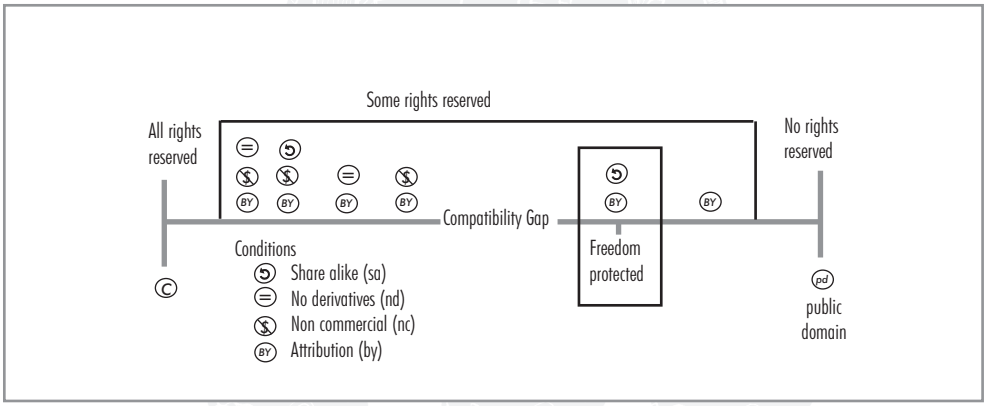


Figure 1: Spectrum of cc licences between "all rights reserved" and "public domain", showing the licence compatibility gap between the BY-SA licence and those with a NC restriction.

The compatibility gap is easily illustrated using the MIT OpenCourseWare initiative and Rice University's Connexions project.[6] Both projects are supported in part by grants from the William and Flora Hewlett Foundation,[7] and both use cc licences. Connexions content typically uses the BY cc licence, whereas MIT content uses BY-NC-SA. Since they are separated by the compatibility gap, content items from these sites may not be used together to create derivative works without obtaining permission from the individual copyright holders.

Heather Ford[8] (in a personal communication to the author) has argued that it is still possible to use NC-licensed content in BY-SA or BY derived works, provided that permission is acquired beforehand. This is true, as long as the author is willing to relinquish the NC restriction for works derived from that for which permission is granted. There are no guarantees that such permission will be granted, and obtaining it may be significantly more difficult than it would be for fully "all rights reserved" materials that are published commercially.

Rights acquisition

One reason that obtaining such permission may be difficult to obtain is that the NC restriction is often applied to personally published materials, for which there is no central clearing agency. If the materials are relatively new, then there is a good chance that there are contact details for the author. However, as materials age, or people move to different jobs, or creators come to the end of their lives, obtaining permission becomes ever more difficult. Also, as the

6 http://cnx.rice.edu, accessed 14 September 2005.

7 www.hewlett.org, accessed 14 September 2005.

8 Ford, Executive Director of iCommons, a Creative Commons subsidiary, is co-author of another article in this volume.

number of potential sources of material increases, managing the increasingly complex mix of licences and permissions becomes ever more difficult. Thus, one of the key benefits of the cc licence – simplification of rights acquisition – is eroded over time.

Apart from these issues, there are a number of other direct implications of using the NC restriction. The first is that the work will be used much less often, even for educational purposes. The reasons for this are many. One of them relates to the fact that if an author produces a collection of educational materials, and licenses them under a licence that lacks the NC restriction, she cannot include materials with a NC restriction because the licences are incompatible. She could use different licences for different objects within the collection, or distribute them in separate packages, but she still cannot use them in a derived work no matter how small the change, unless, of course, she is willing to tread the increasingly complex quagmire of obtaining special permissions as noted above.

A practical example illustrates this problem. A the University of the Western Cape, we have a Free Content and Free and Open Courseware Implementation Strategy that recommends the BY-SA cc licence, and our e-learning software provides for this licence to be selected and applied to online content automatically. We believe the best use will be made of our content if it is free,[9] and we believe that free content is in the best interests of education broadly.

To help our lecturing staff understand the cc concept in general, and the BY-SA licence in particular, I wanted to create a course to be offered within our free software e-learning platform,[10] and for this content to be made available under the BY-SA licence. Given the nature of cc, I was sure that somebody had developed some interesting video or rich Internet content that I could use, so I searched for it on the Internet. I located a useful video, *What is Free Culture?*,[11] and another one that complements it well. I wanted to take these two videos and work them together with some of my own material to make a video clip that explains cc and the BY-SA licence in the context of free culture. However, I then discovered that *What is Free Culture?* has the NC restriction prohibiting commercial use. Because of the licence, it also requires that if you alter, transform, or build upon this work, you may distribute the resulting work only under a licence identical to this one.

When I discovered that I could not build on this element of culture without getting permission from someone whose contact details I was unable to locate, I realised that it is not free culture, of the sort envisioned by Lessig (2004), at all. It is restricted culture. It is freer than it would be if it were subject to full copyright, but it is not free, and I am not free to use it to create free content. To use an analogy, it is free culture to the same degree that an inmate

9 See footnote 4 above on use of the term "free" in this article.

10 http://elearn.uwc.ac.za/, accessed 14 September 2006.

11 http://www.archive.org/details/what_is_free_culture, accessed 14 September 2006.

in a minimum security prison is freer than an inmate in a maximum security prison, but it is not free. It is not that I want to use it commercially. I do not, and probably never would, even if I knew exactly what constituted commercial use. But I do not want to preclude my work from being used in a commercial setting because I believe in the benefits of re-use, some of which I outline below. The NC restriction, by preventing derivative works that do not include a NC restriction, reduces the usefulness of the materials. There may well be legitimate reasons for including a NC restriction in some cases, but for most educational content this restriction is not necessary, and reduces the content's usefulness.

Enhancement by commercial organisations

One consequence of the NC licence is that educational content that has a NC restriction cannot be enhanced by commercial organisations, which typically have more creative resources at their disposal than educational institutions. Let us imagine that I produce a useful drawing of a cell being infected by the human immunodeficiency virus (HIV), and a commercial training company, with many more resources than I have access to, decides to use my materials in a corporate training setting (a commercial use). In order to improve the materials, they create an interactive animation of the cell infection process. A BY-SA licence on my original drawing would mean that the commercial firm's enhancement must be made freely available, with the result that in my class I would have a much improved learning resource for my students. An NC restriction would prevent this benefit from ever arising.

A false premise

Casual conversations with a number of content authors who use, or are planning to use, the NC restriction indicate that they typically do not understand the benefit of allowing commercial use. Instead, they are typically under the impression that someone can take their content and use it commercially, including making alterations, and give nothing back. From this perspective, the NC restriction seems logical, but this is a false premise.

There are some important questions that can help one to decide whether or not to apply the NC restriction.

- Do I lose anything by leaving out the NC restriction and only using a BY-SA licence?
- If someone makes money out of my content, do I lose anything? and
- Are there significant gains that can arise out of not restricting commercial use?

The answer to the first question depends on the kind of material that is being licensed. If it is a commercially published book, and you want to promote sales, then there is probably a legitimate reason for a NC restriction to prevent other publishers from publishing it and selling it at a lower price than your own publisher. But even for a book of this nature, you are not likely to gain financial benefit forever. So it is reasonable to offer it under two licences, one for the period during which financial gain is expected, and another for after that time period.

For example, I might publish my book with a NC restriction for five years, after which it reverts to a BY-SA licence. However, for educational resources that are not going to be sold commercially, this benefit does not arise, and you lose the benefit of possible improvements made either for commercial use or by those who do not wish to use the NC restriction. Since content is non-rivalrous, greater use is not a loss but rather a gain.

In Africa and other areas of the developing world, capacity-building is vital to development (Keats & Beebe, 2004). Capacity-building happens in purely non-profit educational settings, in private sector initiatives, as well as in grey areas in between. The NC restriction creates uncertainty, and precludes the use of NC-restricted content in private sector capacity-building initiatives, and because of the restriction may also preclude the use of NC materials in combination with materials where the NC restriction is not used.

Guidelines for cc licences for educational content

The decision whether to use the NC restriction ultimately rests with the author. I hope that this decision will not be taken based on incorrect assumptions or emotional appeal, but will be the result of a wise decision. This article appeals to educational content authors seriously to consider not using the NC restriction, but rather to use the BY-SA licence for content that has educational application, unless there are very good reasons to do otherwise. Creating truly free content can contribute to social good as well as bringing benefits to the author.

To facilitate use of the BY-SA licence, the guidelines illustrated in Figure 2 below are suggested for educational content licensing. These guidelines are implemented in the Free Content and Free and Open Courseware Implementation Strategy at the University of the Western Cape (Keats & Ridge, 2005). ❑

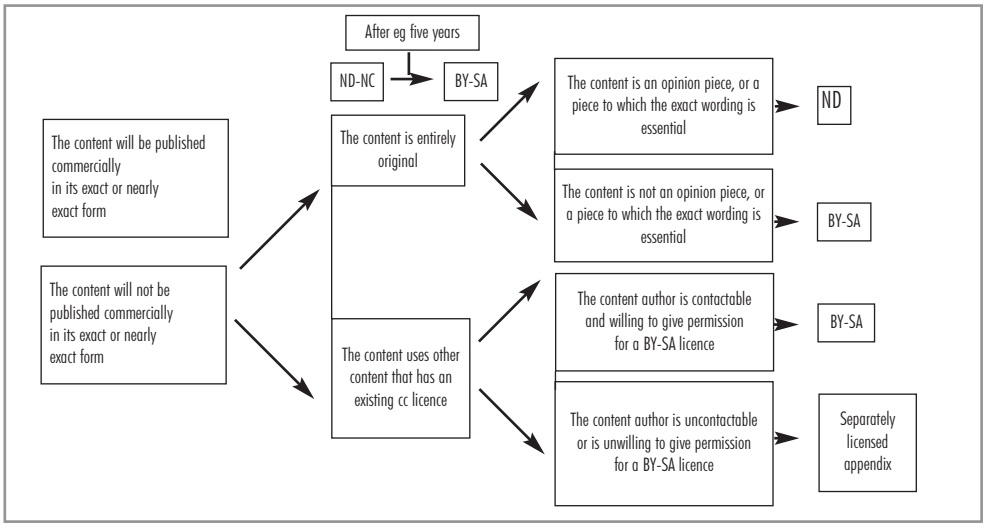


Figure 2: Suggested guidelines for choosing cc licences for educational content

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