

A Report from the Berkman Center for Internet & Society to
The William and Flora Hewlett Foundation
The Ford Foundation
The Open Society Institute



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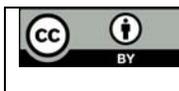
The Berkman Center for Internet & Society
at Harvard University

An Evaluation of Private Foundation Copyright Licensing Policies, Practices and Opportunities

Executive Summary

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“The big opportunity with open licensing is far more practical: it has the potential to dramatically increase the impact, reach and scale of the ideas we invest in as a foundation. Good content, technology and research released under an open license is far more likely to be picked up, used and recirculated than materials that require permission for use.”

The Shuttleworth Foundation, May 2008.¹

Private foundations fund and support the creation of a wide range of work products, ranging from books, articles, reports, and research summaries to educational materials and textbooks to photographs, works of visual art, films, videos, and musical compositions and recordings to software code, computer programs and technical systems to many, many others. Foundations seek to achieve the most impact and the greatest good with the money they invest. Doing so often depends on ensuring the broadest dissemination and greatest, most productive and innovative use, reuse and redistribution of the many works they support.

Virtually all foundation-funded expressive works are protected by copyright.² Under traditional approaches to copyright licensing, for these works to be useful and to fulfill the purpose for which the foundations funded them, the copyright owner (usually the foundation’s grantee) must give advance permission, or a “license,” for others to copy, publish, redistribute, remix or otherwise reuse the works. On the other hand, by using a so-called “open” license such as Creative Commons (CC) or the General Public License (GPL), the copyright owner can grant up-front, blanket permission for a wide range of uses. Potential users anywhere are then free to take the work and use it without cost in all of those ways permitted by the open license without the burden of first locating the owner and securing individual permissions.

Open licenses are a relatively recent alternative way to distribute and license all manner of copyrighted works, but one that has gained rapid and widespread acceptance. Creative Commons estimates that more than 250 million works worldwide now carry a CC license. Highly successful software programs such as the Linux operating system, the Firefox browser and the Apache web server have achieved broad distribution and use under open licenses such as the GPL.

Open licenses free up the works they cover for immediate and wide use, sharing, redistribution and sometimes remixing or repurposing, eliminating the time, cost and inefficiency of users having to first ask for permission and pay licensing fees. Open licenses permit knowledge and learning to be widely shared and more readily adapted, improved or built upon, and allow those later improvements to be readily distributed and shared as well. This can mean dramatically greater and faster access to research, information, technologies

¹ Mark Surman, “How We Work: Open Licensing,” May 2008, Shuttleworth Foundation, *available at* <http://www.shuttleworthfoundation.org/about-us/our-philosophy/how-we-work/open-licensing>.

² Some supported works such as pharmaceuticals or devices also may be protected by patents, but this project has focused solely on copyrights and copyright licensing.

and other resources in ways that benefit foundations' core missions and the public good. At the same time, open licenses allow the works' creators to retain some control over the works and what may be done with them, such as preventing commercial use or modifications.

This project, a joint effort of the Berkman Center for Internet & Society at Harvard University, The William and Flora Hewlett Foundation, The Ford Foundation and the Open Society Institute, with funding from Hewlett and Ford, undertook to examine the copyright licensing policies and practices of a group of twelve private foundations. In particular, it looked at the extent to which charitable foundations are aware of and have begun to use open licenses such as Creative Commons or the GPL. We surveyed foundation staff and leaders and examined a number of examples where foundations have begun to take advantage of new licensing models for materials and resources produced by their own staff, their consultants and their grantees.³ The complete results of our study and our comprehensive analysis and recommendations are contained in the full Report of this project.⁴

Currently, three of the twelve foundations surveyed expressly require their grantees to use open licenses for the works they create; two others strongly encourage the use of such licenses. At the same time, an increasing number of foundations and other organizations that fund scholarly research and publications are encouraging grantees to make their work product available for free in online, digital archives or repositories, though not always with the full benefit of open licenses. In addition, a number of foundations are major supporters of a critical new initiative to create large networks of free and open educational resources (OER) online, usually with by a commitment to some form of open licensing of most of the content.

Based on the survey results, foundation experiences and extensive additional research, the project identified a variety of benefits that the use of open content licenses can bring to foundations and their charitable goals. It also evaluated possible drawbacks and concerns that open licenses might present in certain situations. The project sought to develop an analytical framework and set of factors that foundations can use to begin considering when and where the use of open licenses would further their mission and their day to day work and where such licenses might not be useful or appropriate.

Among the concerns or hesitations expressed about using open licenses, many are attributable largely to a lack of knowledge of, or experience with, how open licenses work and what benefits they can bring. Certain others reflect genuine limitations of open licenses in particular situations, such as their possible impact on grantee revenue streams or some loss of control over sensitive materials such as traditional or indigenous knowledge or human rights investigations. Often, however, these limitations are likely to be limited to

³ The FDR Group, a professional public opinion research firm, interviewed over 30 program officers, legal or communications staff and others at 11 foundations: The Andrew W. Mellon Foundation, The Christensen Fund, The Ford Foundation, The Gordon and Betty Moore Foundation, The John D. and Catherine T. MacArthur Foundation, Mozilla Foundation, Omidyar Network, Open Society Institute, The Robert Wood Johnson Foundation, the Shuttleworth Foundation, and The William and Flora Hewlett Foundation. In addition, Berkman Center staff interviewed a representative of a twelfth organization, the Knight Foundation. The full FDR Report can be accessed and downloaded at http://cyber.law.harvard.edu/publications/2009/Open_Content_Licensing_for_Foundations

⁴ The full Report and Appendices can be accessed and downloaded at http://cyber.law.harvard.edu/publications/2009/Open_Content_Licensing_for_Foundations

specific contexts: particular grantees; particular foundation goals, priorities or needs; or particular types of works. These context-specific concerns do not represent barriers to using open licenses in the many other cases or situations where such concerns are not present. Virtually all of these concerns could be addressed, even where a foundation generally uses or requires the use of open licenses, by policies allowing exemptions when necessary to avoid specific problems under specific circumstances. Thus, the existence of legitimate concerns about the impact of open licenses in certain cases should not prevent foundations from beginning to take advantage of the new opportunities and benefits that open licenses can provide.

Our research revealed that, weighed against these manageable concerns, the potential benefits of open licenses for foundations and their work are substantial. On a fundamental level, open licensing is in synch with a charitable foundation's basic mission to create and disseminate learning, knowledge and resources for the public good and can lead to a larger and stronger impact in core areas that are of most importance to the foundation. One participant in the survey explained that the values and goals of foundation philanthropy, including wide distribution of work, broad participation and transparency, "mesh nicely and naturally" with those of many open source initiatives and communities.

Participants in our survey who used, or encouraged or required their grantees to use, Creative Commons and similar open licenses uniformly praised the broad benefits of such licenses in appropriate cases. As one respondent described, "open licenses and open source are the gifts that keep on giving," ensuring the broadest and fastest dissemination of the valuable ideas, practices, works, software and other materials the foundation's funding helps to create; permitting those materials to be easily used to create even more and newer works by adapting, reworking and building upon them; and facilitating the sharing and spread of those later innovations. Another explained that open licenses help "spread the learning" and minimize other foundations having to duplicate efforts or investments, and other grantees having to "reinvent the wheel" for work that has already been done. In many cases, a foundation is able to "do more good with the same money" if open licenses are used.

Most private foundations studied in this project are still at an early point in considering or beginning to adopt the use of open licenses. This is to be expected given that open licensing is a relatively new and emerging approach to copyright. Going forward, however, even for mature foundations with existing copyright practices, open licenses offer new opportunities and new tools to better achieve the foundation's charitable goals and mission in new, proactive and innovative ways.

Taking advantage of these opportunities and beginning to obtain many of the benefits will not require foundations to immediately alter their existing licensing policies or practices. Rather, any approach can be incremental, beginning with internal discussions and careful consideration of the possible benefits and potential drawbacks of open licenses in a foundation's particular situation and fields. That analysis is likely to flow naturally into valuable outreach: conversations with partners and grantees about licensing options, benefits and objections. Program officers ordinarily are in excellent positions to raise these issues with grantees, and the resulting conversations may identify areas where open licensing by the foundation and/or its grantees would be immediately beneficial and create little objection or burden, as well as other areas where greater adjustments need to be made or a more nuanced approach may be required. This type of outreach also will lead grantees to be more informed and intentional in the choices they make about licensing, and over time the

foundation can reach a position to conclude that it has enough knowledge, experience and confidence to begin encouraging grantees in certain areas to use open licenses, and eventually, in appropriate cases, to begin requiring their use.

The Report concludes with a series of recommendations designed to help motivate and facilitate foundations to begin to examine their own licensing needs and practices. These recommendations include steps to raise awareness and develop intentionality in the foundation sector generally as well as steps for individual foundations to engage in their own consideration and evaluation of the appropriateness of open licensing in the context of their particular programs and grantees.

The full Report and the experiences and case studies it analyzes provide a strong starting point for conversations with and within foundations about open licenses and the opportunities they present to enhance foundations' reach, impact and effectiveness. Our hope is that these conversations will lead to thoughtful and informed considerations, grounded on sound research, data and experience, of the relative merits of open licenses in various settings and the best ways to encourage such licenses in those cases where their use would provide significant net benefits.

In many cases, the best way to think about open licenses may turn out to be not when and why, but rather, "why not?" As the Shuttleworth Foundation concluded after its process of using and studying such licenses, "The practical reasons are clear: increased likelihood of impact and scaling for ideas they fund, in ways that could never even be imagined by design . . . [as well as] less tangible but equally important benefits that come from the faster feedback loops and the promotion of open, collaborative ways of working. It's worth taking the time to ask: what are my reasons for keeping this or that idea closed? Unless there is a real bottom line reason, set your ideas free."⁵

⁵ Mark Surman, "How We Work: Open Licensing," May 2008, Shuttleworth Foundation, *available at* <http://www.shuttleworthfoundation.org/about-us/our-philosophy/how-we-work/open-licensing>