



CC Learn Advanced Topics address specialized issues which require additional expertise and are of limited relevance to most people. Please carefully evaluate the appropriateness of this topic to your needs.

CC Licenses and Trademarks: A Guide for Organizational OER Creators and Distributors

What is this document?

This primer is a guide to understanding the relationship between your rights as a copyright owner using Creative Commons licenses (particularly CC BY) and your trademark rights within the context of open educational resources (“OER”). Many people in the OER community are under the mistaken impression that copyright is the only tool at their disposal to protect and control their work and that content alone is the only valuable commodity associated with OER production. Although Creative Commons (CC) believes that copyright should be the principal means used by authors to control their creative works, this primer explains another, secondary set of rights you may have to protect your work – trademark rights – while still allowing for the downstream adaptation, translation, and localization of your work that are so central to the goals of OER.

Who is it for?

For most OER creators, this document will not be particularly useful. It is directed primarily towards organizations creating OER that wish to share their educational materials but are concerned about potential improper or undesirable association of their brand with low-quality adaptations. This document is also directed at organizations interested in finding alternative means for monetizing value-added services that can be layered atop the underlying CC-licensed content. For clarity, the recommendations in this document are not intended for most members of the OER community, but only those with strong brand associations who have the capacity to expend resources managing and policing their trademarks. For everyone else, the standard Creative Commons licensing terms, and particularly the requirement for attribution, should provide all the protection needed. For the sake of this primer, we will presume that the OER in question have been licensed CC BY. However, the suggestions herein will apply to any CC license that does not contain a No Derivatives restriction.



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Introduction

Works licensed with CC BY can be copied, redistributed and adapted without restriction under copyright law, provided that the licensor is properly attributed and other provisions of the license are adhered to. This means the works can be translated, localized, incorporated into commercial products, and combined with other educational resources. CC BY allows these reuses by anyone for any purpose, all with credit to you, the original creator. Moreover, the license's standardized terms and technical implementation means that resources under CC BY can be used all over the world.¹

In some situations it may be important to you to control what recipients can do with your OER.² There are a number of ways in which these restrictions can be implemented by using other, more restrictive CC licenses.³ However, what many OER creators don't know is that copyright is not the only way to protect your reputation as a high-quality producer of OER. Even if you distribute your OER under the least restrictive CC license, any trademark rights you own and associate with your OER are fully preserved. This means you may exercise your trademark rights separately from your rights under copyright to prevent any improper association with lower quality or otherwise undesirable adaptations of your work, while still allowing maximum reuse and adaptation in the spirit of the OER movement. And, if you are a trusted source for educational resources, you may also wish to use your trademark rights as a way to stand behind particular adaptations of your works, which gives users the added value of understanding the quality-assurance processes the work has undergone.

It is important to note at the outset that CC does not recommend the combined use of CC licenses and trademarks except in those circumstances where an organization has (or plans to build) a valuable trademark, invests the resources to protect the use of the trademark, and adheres to best practices in clarifying these rights and distinctions to potential users. Layering any additional rights and considerations onto OER can render the resources less useful due to the greater confusion and risks to users that are likely to ensue.

How does the CC BY license work?

In order to understand the relationship between CC licenses and trademarks, it is first important to understand what CC BY requires of users. Since attribution is an element of every CC license, this section is applicable to all CC licenses. For most purposes, the attribution or credit requirement, when coupled with other restrictions contained in all CC licenses, is all that is desired to preserve authorial integrity.

Attribution mandatory unless you indicate otherwise. First and foremost, CC BY requires that users keep intact all copyright notices on your work and provide, in a reasonable manner, your

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- 1 It is for these reasons that CC recommends that anyone seeking to create and distribute OER should use the CC BY license with their works, and impose additional restrictions under copyright only when necessary and only when the cost of doing so can be fairly justified. See <http://learn.creativecommons.org/wp-content/uploads/2009/04/cclearn-explanations-oer-and-cc-licenses-05-apr-09.pdf> and <http://learn.creativecommons.org/wp-content/uploads/2009/04/cclearn-recommendations-publishing-your-oer-on-the-internet-05-apr-09.pdf>.
 - 2 See <http://learn.creativecommons.org/resources/faq/>.
 - 3 CC licenses allow copyright owners to restrict downstream uses to only noncommercial uses (the noncommercial or NC term), to making only verbatim copies (the no derivatives or ND term), or to license any derivatives in the same manner as the original (the share alike or SA term). See <http://creativecommons.org/licenses/> for more information.

name (or the name of your organization) as the author, the title of the work, and the URL,⁴ if any, that you specify to be associated with the work. It is essential that you make it very clear how you wish to be attributed at the point of upload so that downstream users will know how to credit you properly.⁵ Further, under CC BY, you retain the right to request removal of attribution if you do not wish to be associated with a particular derivative of your work. Thus, if you become aware of your work being used in a derivative work or in any collection as permitted by the license, you have the absolute right to inform the creator of the derivative or collective work that you do not want to be identified as the author of the original work, and insist that your name be removed. This is an important layer of protection that many OER producers find valuable and prevents them from being associated with works they believe are "lower quality" than the work they originally produced.

No endorsement allowed. CC BY, just like all CC licenses, also contains a “non-endorsement” clause. Specifically, this clause states that users may only use the credit required for the purpose of attribution, and may not assert or imply any connection with, sponsorship, or endorsement by you, without your separate, express prior written permission. In plain English, this means the user is not allowed to use attribution to make it appear that you in any way support or approve of their uses or adaptations of your OER. So, for example, if a downstream user of your OER material is somehow implying that you are endorsing their derivative work, whether in advertising on a website or otherwise, that could constitute a violation of the license.

Your original remains unchanged. Because CC BY permits adaptations, some people worry that the OER they create will be changed for the worse or somehow "ruined" by downstream users. It is important to remember that when users adapt your OER, they alter copies of your work, not the original. Your original work will remain intact, and indeed, the adaptations based upon it will point back to your original OER, if you require it, so that other users have access to your "higher" quality original.

Changes must be labelled. Finally, CC BY requires users to take reasonable steps “to clearly label, demarcate or otherwise identify that changes were made to the original [w]ork.” This means that users who adapt your OER must tell the world they have done so, thereby letting other users know what changes were made by someone other than you.

Collectively, the safeguards that are built into all CC licenses, including CC BY, are designed to preserve to the original creator of OER the right to protect their reputation and brands while at the same time permitting others to adapt, build upon and reuse their works in the spirit of the OER movement. For most OER providers, these existing safeguards will more than adequately serve their needs.

What is the difference between trademark and copyright?

Trademarks and copyrights are separate ownership rights under the law. Creators use trademarks to indicate source and prevent confusion about the origin of goods or services, while creators of works use copyright to protect expressions of the creator’s innovation and creativity. Under certain circumstances, it is possible for something to be subject to both copyright and trademark rules, as in the case of a copyrighted cartoon character (e.g., Mickey Mouse) that is also used to sell goods and/or services of a company (e.g., Disney).

4 CC licenses allow you to require that downstream users link back to your original work.

5 For more information on marking up your CC licensed OER, see <http://wiki.creativecommons.org/Metadata>.

The table below explains some important distinctions:

Trademark	Copyright
<p>A trademark is a word, slogan, symbol, design, logo, or other source indicator, or a combination of these elements, that identifies and distinguishes the goods or services (whether commercial or non-commercial) of one party from others. Trademarks may also identify an entity as the source of authority or endorsement for non-marketing purposes, as in the case of universities or certification services.</p>	<p>Copyright is the exclusive right to control original works of expression, such as books, music, film—any creativity that is set down in a fixed form. Copyright includes the exclusive right to authorize or prevent the reproduction, distribution, creation of derivatives, public display, and/or public performance of your work.</p>
<p>The purpose of trademark law is to protect both trademark owners and <i>consumers</i> by preventing confusion as to the source of goods or services.</p>	<p>The purpose of copyright law is to protect <i>authors</i> from infringement of their exclusive rights, and to incentivize creation generally.</p>
<p>Trademark law does not permit identical or substantially similar trademarks to be used on goods or services in the same or related marketplaces, even if they are independently or “innocently” created, if the public is likely to be confused by such coexistence or if the value of a strong mark would be diminished or tarnished by a later user.</p>	<p>Copyright does not prohibit the independent creation of a work, even if the new work is similar or identical to a previously existing work (i.e., if nothing was actually copied).</p>
<p>You become a trademark owner by being the first person or entity to use the mark as an indicator of source in the relevant marketplace. In order to maintain your ownership of the mark, you must continuously use the mark, or else it will be considered abandoned. There is no requirement that the trademark be federally registered; however, there are advantages to federal registration when it comes to enforcement of the mark.</p>	<p>Copyright is automatically granted to the original creator of a work, although in some circumstances the copyright owner may be an employer (if it is a work-for-hire) or another party if the work has been assigned in writing. No publication, use, or distribution of the work is required to obtain or retain ownership of copyright. As with trademarks, there is no requirement that you register your copyright in order to obtain or retain ownership; however, there are other advantages to registration, such</p>

	as the ability to obtain statutory damages under the Copyright Act.
The trademark owners' rights are <i>unlimited in time</i> as long as the trademark is properly used and protected by the owner.	The term of copyright is statutorily limited (for example, in the United States and the European Union the term is the life of an individual author plus 70 years, in Iran the term is life of the author plus 30 years, while in Japan and South Africa, the term is life of the author plus 50 years). ⁶
Any trademark owner may use the "TM" (for trademark) or "SM" (for service mark) to designate terms or designs as marks. Owners of federally registered trademarks may use the "(R)" symbol to designate federally registered marks.	Any copyright owner may use the "(C)" symbol to designate ownership of a copyright and reservation of rights in a work. Alternatively, an owner may use one of the Creative Commons symbols to reserve something other than full rights in a work.
The owner's permission is not required to make a "fair use" of a trademark. Fair uses of trademarks are uses that do not indicate source/origin of goods/services, and can include (i) a merely descriptive use of a term (e.g., "Our mechanics know how to fix Toyotas"), (ii) parodies and social/political commentary, and (iii) news coverage concerning a mark. In many cases fair use of a trademark requires that the user only use the material necessary to make the intended communication (e.g., the Toyota repair shop cannot communicate its service without using the term "Toyota," but that is not necessarily a justifiable reason to use the Toyota logo in its signage).	The owner's permission is not required to make "fair use" of a copyright-protected work. Fair uses of copyright-protected work are evaluated using multiple factors, including the purpose/character of the use, the amount of the work used, and the impact of the use on the marketplace for the work. Fair uses can include educational uses, parody, social/political commentary, and news reporting.

As a trademark owner, what are my rights and obligations?⁷

Assuming you are a trademark owner and a distributor of high-quality OER, then you may be invested in protecting the goodwill associated with your brand and reputation, over and above the protections already built in to the CC BY license. As a trademark owner, you have the right to prohibit people from using your trademarks in association with any lower-quality adaptations

⁶ For more information on international copyright terms, see <http://onlinebooks.library.upenn.edu/okbooks.html>.

⁷ This primer is based on U.S. Law. It is beyond the scope of this primer to discuss international trademark law.

of your OER in a way that is likely to confuse consumers or tarnish your mark. These rights can be enforced in a variety of ways, from sending a simple note to a particular user who is misusing your mark and asking them to stop doing so, to sending an official “cease and desist letter,” to filing a lawsuit.⁸

As a trademark owner, you also have the ability to license the use of your trademarks to other producers/distributors of OER. You might choose to license a word mark (e.g., the name of your company), a design mark (e.g., your company logo), or a mark created specifically for use with OER you create. For example, an institutional user may be interested in obtaining your “endorsement” for the materials they present to their students because your brand is well known and respected. Because CC BY contains a non-endorsement clause, the institution would need to negotiate for the right to imply your endorsement or use your trademark in a manner that conveys to the public that its materials meet your standards. This would require a separate agreement (in the case of endorsement) or trademark license (in the case you are granting permission to use your trademark).

How can I utilize a trademark license without undermining my CC license?

If you choose to allow adaptations of your OER under a CC license, then you may wish to consider using your trademark as a way to differentiate between “approved” versions of your works, and those that you do not endorse or are not affiliated with. To be clear, however, you may not use a trademark license to modify or restrict the rights granted under the CC license.

One potential model for implementing a trademark license in conjunction with CC licensed OER would be to offer one version of the OER under CC BY without any of your branding on it. You can then make clear through your trademark policy that additional rights to use your trademarks are available, e.g., a mark that indicates that the resource is an “official” or “approved” version.

You should also know that when it comes to trademarks (unlike with copyright), if you fail to exercise sufficient control over the goods and/or services offered under your trademark, the trademark may become devalued, or in the worst case scenario, unenforceable. For this reason, if you are going to allow anyone else to use your trademark for anything other than attribution, you must ensure that quality control provisions are included in any trademark license agreement you offer. These quality controls will help protect your reputation and ensure that any downstream OER offered under your trademark meet your quality standards.

Questions?

This is a highly abbreviated document. For more information about these and related topics, visit Creative Commons (creativecommons.org) or send questions to CC Learn directly by email: cclearn-info@creativecommons.org.

⁸ For additional information about trademark law see: <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm>, <http://topics.law.cornell.edu/wex/Trademark>