Fair Access? White paper on Ethics and Open Educational Resources

SUNY University Faculty Senate

Ethic and Institutional Integrity Committee

Abstract

Open Educational Resource (OER) usage by educators should incorporate ethical considerations, particularly those of fairness and transparency in attribution. Although few hard regulations regarding OER usage exist, the ethical principles adopted by the SUNY UFS lead to several guidelines that campuses can use in formulating OER policies. Faculty should appropriately evaluate the academic quality of any OER they wish to use, understand the specific licensing allowances of each resource, and should not violate any licensing or copyright restrictions. The autonomy of the faculty in determining whether or not to use OER should be respected. Neither faculty nor students should be forced to openly license materials created for course learning content or assessment, but both must guard against plagiarism of other OER in the creation of their own materials. The value of development and use of OER in faculty personnel evaluations should be decided by each institution through their normal procedures, and SUNY provides assistance in navigating OER usage issues. OER has the potential to significantly change the educational environment, and will best serve students and faculty if ethical principles underpin the standards set for its use.

Problem Statement

As awareness and funding for open educational resources (OER) has proliferated, many ethical issues regarding the adoption, adaption, and creation of OER have arisen. This white paper neither advocates nor opposes the use of OER; rather, it attempts to articulate and provide guidance with regard to addressing these issues.

What are Open Educational Resources (OER)?

Coined by UNESCO at the 2002 *Forum on the Impact of Open Courseware for Higher Education* in Developing Countries, the term Open Educational Resources (OER) encompasses "teaching, learning and research materials in any medium—digital or otherwise—that reside in the public domain or have been released under an open license that permits no-cost access, use, adaptation and redistribution by others with no or limited restrictions."

It is important to note that while all open educational resources are openly licensed, not all openly-licensed materials are considered OER. David Wiley's 5Rs framework, which articulates the five defining characteristics of OER, provides a basis for understanding this distinction (which is further illustrated in Table 1):

1. **Retain:** the right to make, own, and control copies of the content (e.g., download, duplicate, store, and manage).
2. **Reuse:** the right to use the content in a wide range of ways (e.g., in a class, in a study group, on a website, in a video).
3. **Revise:** the right to adapt, adjust, modify, or alter the content itself (e.g., translate the content into another language).
4. **Remix:** the right to combine the original or revised content with other material to create something new (e.g., incorporate the content into a mashup).
5. **Redistribute:** the right to share copies of the original content, your revisions, or your remixes with others (e.g., give a copy of the content to a friend).

Creative Commons provides the licensing structure by which the permissions that underlie the 5Rs are communicated to users (see Table 1). A global non-profit organization, Creative Commons is dedicated "to building a globally-accessible public commons of knowledge and culture" in an effort to create "a more equitable, accessible, and innovative world." To this end, Creative Commons has not only developed, disseminated, and continually updated the widely-used and legally-enforceable Creative Commons Licenses but has also committed to supporting the correct implementation of these licenses through the development of educational materials and trainings.

To reiterate, all OER are openly licensed, but not all openly-licensed materials are considered OER according to the 5Rs model or the definition set forth by UNESCO. The distinction revolves primarily around the licensing condition which determines a user's right to redistribute modified versions of an openly-licensed item. For example, a textbook which carries a CC BY license is considered an OER because the license permits the user to modify and redistribute the modified textbook. In contrast, a textbook which carries a CC BY ND license does not permit the user to share a modified version of the textbook; the textbook can be shared without permission, but only in its original format.

Table 1. Creative Commons and 5Rs Crosswalk

IS IT OER?	5Rs	LICENSE	LICENSE TERMS
OER	Retain Reuse Revise Remix Redistribute	**Attribution CC BY** 	This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered. Recommended for maximum dissemination and use of licensed materials.
OER	Retain Reuse Revise Remix Redistribute	**Attribution- ShareAlike CC BY-SA** 	This license lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This license is often compared to "copyleft" free and open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use. This is the license used by Wikipedia, and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.
OER	Retain Reuse Revise Remix Redistribute	**Attribution- NonCommercial CC BY-NC** 	This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.
OER	Retain Reuse Revise Remix Redistribute	**Attribution- NonCommercial- ShareAlike CC BY-NC-SA**	This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms.

		CC BY NC SA (icon)	
Openly licensed, but not OER because it cannot be revised or remixed.	**Retain Reuse Redistribute**	**Attribution-NoDerivs CC BY-ND** (icon)	This license lets others reuse the work for any purpose, including commercially; however, it cannot be shared with others in adapted form, and credit must be provided to you.
Openly licensed, but not OER because it cannot be revised or remixed.	**Retain Reuse Redistribute**	**Attribution-NonCommercial-NoDerivs CC BY-NC-ND** (icon)	This license is the most restrictive of the six main licenses, only allowing others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially.

Framing the Ethics of OER

While OER present relatively new challenges for ethics, basic ethical principles governing other aspects of academic life continue to apply. In its 173rd Plenary, spring 2016, the University Faculty Senate passed a statement of ethical principles to help guide SUNY in its mission. These principles include: fairness, civility, character, respect, honesty, trust, transparency and inclusivity. In differing ways these core ethical values apply to a consideration of OER as faculty prepare material as an OER, use material produced by others, and model to students the fair, appropriate, and transparent use of academic resources. Some issues related to OER have already been well established in copyright law and practice. For example, respect and trust lead to allowing faculty to decide their own use of OER. Inclusivity leads to developing materials with a consideration of what students have the ability to access. Transparency, honesty, and fairness lead to being scrupulous about proper use and attribution of materials. We have used these principles as a guide in developing the following recommendations.

Isn't everything on the Web "open"?

No. There is an important distinction between what is "openly accessible" and "openly licensed." While creators may choose to make content freely accessible to users for personal consumption, they do not waive their exclusive rights to copyright by doing so. Unless accompanied by an open license notification, materials accessed on the Web should be assumed to be protected by copyright— even when a copyright notice does not appear with the content. This is because copyright is conferred to a work the moment it is fixed in any tangible form, regardless of whether that form is directly perceptible or made perceptible through the aid of a device such as a computer. With copyright comes the exclusive right to reproduce, retain, distribute, perform/display, adapt, and modify copyrighted works. Thus, treating a copyrighted work like an OER puts a user at risk of infringing on copyright, for which the faculty member and/or the institution may be held liable.

Is it ethical for faculty to incorporate open materials into their courses?

Yes, if the faculty member deems the materials to be of sufficient quality for their instructional purposes. Faculty have a responsibility to examine *all* prospective course materials through the lens of their subject expertise and experience as educators. While the editorial process employed by many traditional publishers may often result in the production of a rigorously peer-reviewed text, it is important to recognize that the process itself may vary substantially from publisher to publisher and does not provide an absolute guarantee of quality. Likewise, it is inaccurate to assume that open textbooks—by virtue of being open— do not go through a rigorous peer-review process. "Open" refers *only* the ability of the user to access the material free of charge. "Openly-licensed" refers *only* to the criteria under which users may interact with and reuse material without acquiring permission from the copyright holder. "Open" does not speak to the editorial process a text has (or has not) undergone. Thus faculty have a responsibility to scrutinize the quality of all materials under consideration for inclusion in their course, not just those materials that are openly-licensed.

A number of checklists, guides, and rubrics exist to help faculty evaluate OER. For instance, The Open Textbook Network recommends evaluating open texts across 10 criteria: comprehensiveness, content accuracy, relevance longevity, clarity, consistency, modularity, organization structure flow, interface, grammatical errors, and cultural relevance. A more comprehensive option, the Achieve rubrics evaluate OER for alignment of OER with standards as well as the quality of the content, assessments, supplementary materials, practice materials, and accessibility.

Is it ethical to require faculty to adopt only open educational resources? Is it ethical to prohibit faculty from adopting open educational resources?

No. Mandates which strip faculty of the autonomy to select course materials, open or otherwise, infringe upon academic freedom. Even the Scholarly Publishing and Academic Resources Coalition (SPARC), an advocacy organization dedicated to the promotion of open knowledge, cautions against adoption mandates: "It is important to respect the right of faculty to select materials most appropriate for their courses. States can most effectively advance OER by encouraging and supporting faculty to adopt OER when it is appropriate for students. Never impose mandates or pressure" (p. 8).

Is it ethical to require faculty to openly license their original course materials?

No. Unless faculty have waived their rights to course materials created in the employ of a particular institution (e.g., work-for-hire agreement) or have committed to an open licensing agreement as per the requirements of a particular project in which they have chosen to participate, it would be inappropriate to strip faculty of the right to license (or not to license) their original works under licensing terms of their own choosing. To mandate licensing requirements would constitute an infringement on academic freedom.

Is it ethical to incorporate copyrighted materials into newly created OERs?

Copyright holders are endowed by copyright law with the exclusive right to reproduce, prepare derivative works, distribute copies/phonorecords, perform, display, and transmit the work for which they hold the copyright. Those who wish to do any of the above with a copyrighted work must seek and obtain permission from the copyright holder or risk copyright infringement. However, §107 states: "Notwithstanding the provisions of sections 106 and 106a, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

Section 107 also outlines four criteria by which the "fairness" of a particular use should be judged on a case-by-case basis, including the purpose of the use, the nature of the copyrighted work, the substantiality of the portion used, and the impact of the use on the market value for the copyrighted

work. With regard to the issue of substantiality, it is worth noting that there is a widely-held belief amongst educators that one can use 10% to 15% of a work for educational purposes without infringing on copyright. Educators must be aware that these percentages stem from best practices but have no actual basis in the text of Title 17.

OER and Students

Can faculty require students to openly license their original works or works created in collaboration with faculty?

While it may be legally permissible in some cases, it is questionable ethically. Consensus amongst open pedagogy practitioners favors student autonomy with regard to the licensing and sharing of work. Faculty who intend to encourage students to license their works openly should first determine whether the student or the institution owns the rights to student work. If students have not transferred their rights to their institution, faculty should discuss with students the permissions afforded by each license.

Does OER enable and encourage students to submit modified versions of existing works rather than creating their own original works in response to course prompts and assignments?

No, OERs do not promote or condone plagiarism. First, each of the open Creative Commons licenses require attribution. Even if a student would like to incorporate openly licensed materials into a paper, the student remains obligated to cite the original source. The attribution condition (BY) included in each of the 6 open licenses (CC BY, CC BY SA, CC BY NC, CC BY NC SA, CC BY ND, CC BY NC ND) requires users to acknowledge the works they have paraphrased, quoted, modified, or remix.

Second, open licensing conditions do not override assignment requirements as set by the instructor. The four least-restrictive licenses (CC BY, CC BY SA, CC BY NC, CC BY NC SA) may permit a user to modify an existing work, but the licensing terms DO NOT govern the acceptability of such modifications as they relate to course assignments. Instructors are responsible for setting and communicating standards for coursework. If the use of modified versions of existing OER will not satisfy the requirements of an assignment, faculty should make this explicit to students.

OER and Scholarship

Do I need to cite OER?

Yes. Each of the six Creative Commons licenses requires attribution of openly licensed materials. OERs can be cited in accordance with your discipline's preferred citation style. When identifying openly licensed materials within a work, Creative Commons recommends the TASL method: include the title, author, source, and license. For instance, a TASL citation for an image would look like this:

How heavily will OER adoption, modification, and creation weigh in tenure and promotion portfolios?

At this time, there is no consensus amongst SUNY institutions (or other institutions of higher education, for that matter) with regard to the role of OER activities in tenure and promotion applications.

As the open education movement grows, institutions should be proactive about communicating to faculty the role of OER in the reappointment, tenure, and promotion portfolio. For instance, the University of British Columbia has formally recognized the creation of and contribution to OERs as evidence of educational leadership in the university's reappointment, promotion, and tenure procedures. Hudson Valley Community College's Academic Senate and President have, in their recently passed open access resolution, recognized "the use of open educational resources (OERs) as an innovative solution to the escalating cost of higher education." Finally, SUNY Delhi's Academic Promotion Guidelines recognize the creation of OER as evidence of scholarly ability.

It is of some urgency, then, in fairness to faculty, that all SUNY institutions, decide through the normal procedures whether and in what ways OER work will be considered in the personnel review process for continuing appointment and promotion.

Support and Assistance for Working with OER

SUNY OER Services (SOS)

A shared service provided by SUNY's Office of Library and Information Services (OLIS), SUNY OER Services (SOS) works directly with SUNY campus leads and faculty to support the adoption, adaption, and creation of OER course content. In addition, SOS provides professional development and networking opportunities in support of advancing, sustaining, and disseminating research relating to OERs and open educational practices. Faculty who are interested in learning more about OER can contact SOS at oer@suny.edu.

OER Campus Leaders

Each SUNY campus has a designated OER Campus Leader who can assist faculty in understanding, locating, curating, adapting, and creating open content. OER Campus Leaders can also assist faculty in

identifying the licensing terms for open and non-open resources. Faculty can identify their OER Campus Leader by reaching out to oer@suny.edu.

Institutional Counsel

If a question arises regarding the legality of a particular use of a piece of intellectual property, openly licensed or otherwise, feedback should be sought from the university or college's counsel. Contact information for SUNY Counselors by campus can accessed here: https://system.suny.edu/counsel/staff-biographies/.

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Ethics and Institutional Integrity Committee Members:

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Bill Robins, Empire State
Genevieve Birren, Cortland
Grace Zhao, Farmingdale
Carlie Phipps, SUNY Poly
Jason Whitehead, Morrisville
Sarah Battaglia, Stony Brook
Sampson Blair, U Buffalo
Anne Bongiorno, Plattsburgh
Kathleen Powderly, Downstate
Nancy Quay, System Liaison
Cemal Basaran, Buffalo

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Danielle F. Apfelbaum, Farmingdale