"...In a digital world where **educational users will increasingly engage with a culture of cut and paste, remix, collaboration** and instant Internet access open content licencing will provide a vitally important facility for sharing and reshaping knowledge in the name of culture, education and innovation..."

Open Source Innovation
Data Sharing
Education Systems for Sustainability
The Science of Learning

Open Content Licencing (OCL) for Open Educational Resources

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Introduction

The Internet and associated digital technologies provide us with an enormous potential to access and build information and knowledge networks. Information and knowledge can be communicated in an instant across the globe, cheaply and with good quality, by even the most basic Internet user. In short, recent developments in digital technology have opened up a vast new landscape for knowledge management.

However copyright law which takes definition from international conventions and is similar in most countries provides that you cannot reproduce or communicate copyright material (literary, dramatic, musical and artistic works, films and sound recordings) without the permission of the copyright owner subject to exceptions for fair use/dealing, private use and educational use. Private use and educational use exceptions are usually subject to the payment of a statutory levy, royalty or licence fee.

Therefore while the technology has the capacity, the legal restrictions on the reuse of copyright material, hampers its negotiability in the digital environment. Copyright owners are not obliged to give permission to allow others to reuse their material even with payment of fair compensation unless they are compelled to do so by the law. There are some compulsory licences – for example I can make a recording of any song pursuant to a compulsory licence - but they are not widespread. Going through the process of obtaining permission to reuse copyright material can also be very time consuming and expensive.

The Creative Commons

Professor Lawrence Lessig of Stanford University in the USA and a number of his colleagues frustrated by the fact that the technology offered so much but that negotiability of copyright material in law was so cumbersome came up with the idea of the Creative Commons. Lessig's vision was for a space in the Internet world where people could share and

reuse copyright material without fear of being sued – a creative commons. To do this copyright owners had to agree or give permission for their material to be shared through a generic licence that gave permission in advance.

Copyright protects the expression of an idea. The creator, author or maker of copyright material is normally the first copyright owner of the "economic" exploitation rights (such as reproduction and communication) but creators and authors quite often assign their copyright to commercialising agents e.g. publishers, as part of the bargain for having their work widely disseminated. In many countries, except the USA, a creator or author will also hold moral rights such as the right to be attributed as the author of the work and the right to have the integrity of the work preserved. In some countries moral rights are inalienable in others they can be waived or consented away.

The right to exercise any of the economic rights of the copyright owner such as reproduction or communication is given through a permission that is normally called a licence. A licence may be voluntarily given or compelled by law.

Creative Commons (CC) is a world wide project that aims to build a distributed information commons by encouraging copyright owners to licence use of their material through open content licensing protocols and thereby promote better identification, negotiation and reutilization of content for the purposes of creativity and innovation. It aims to make copyright content more "active" by ensuring that content can be reutilized with a minimum of transactional effort. As the project highlights, the use of an effective identification or labeling scheme and an easy to understand and implement legal framework is vital to furthering this purpose. This is done by establishing generic protocols or licence terms for the open distribution of content that can be attached to content with a minimum of fuss under a CC label. In short the idea is to ask copyright owners – where willing - to "license out" or distribute their material on the basis of protocols designed to enhance reusability and build out the information commons.

Creative Commons is a not for profit corporation based in San Francisco and sponsored by the Centre for the Public Domain, the MacArthur Foundation and the Hewlett Foundation: http://creativecommons.org An affiliated organization is Creative Commons International a not for profit corporation based in London.

Creative Commons Licencing - Open Content Licencing

CC licences are part of a genre of licences that are used to negotiate legal rights in content as opposed to software. Wikipedia, the online peer produced knowledge resource uses the GNU Free Documentation Licence. Many other types of open content licences exist however the CC licences have gained significant attention and popularity over the last three years. Compatibility of content licenced under the different licences is a key issue for the future.

Unlike the GNU General Public Licence from which it took its inspiration, the Creative Commons licences are not designed for software, but are intended for use in relation to other kinds of creative copyright material: websites, educational materials, music, film, photographs, blogs etc. Along with the text of the various open content licences, the project has developed metadata that can be used to associate creative works with their licence status in a machine-readable way.

In addition to certain "baseline" rights and restrictions which are included in all Creative Commons licences, the copyright owner can choose from among certain licensing options, which can be used alone or in combination.

Baseline features

The following features are common to all Creative Commons licences:

- licensees are granted the right to copy, distribute, display, digitally perform and make verbatim copies of the work into another format;
- the licences have worldwide application that lasts for the entire duration of copyright and are irrevocable;
- licensees cannot use technological protection measures to restrict access to the work;
- copyright notices should not be removed from all copies of the work; and
- every copy of the work should maintain a link to the licence
- **attribution** of the creator or author must be given

Optional features

Copyright owners can choose from among the following optional licence conditions:

- **Non-commercial:** others are permitted to copy, distribute, display and perform the copyright work - and any derivative works based upon it – but for non-commercial purposes only;
- **No derivative works:** Others are permitted to copy, distribute, display and perform only exact copies of the work but cannot make derivative works based upon it;[1]
- **Share alike:** Others may distribute derivative works only under a licence identical to that in the original work.[2]

Each Creative Commons licence is expressed in three ways:

(1) the **Commons Deed**, that is, a simple, plain-English summary of the licence, together with the relevant icon/s that indicates the scope of permitted use;

(2) the **Legal Code**, that is the dense legal "fine print" licence document; and

(3) the **Digital Code**, that is, metadata that highlights what licence is attached to the content.[3]

CC Implementation

Creative Commons licences are also being ported or translated to meet the legal requirements of national laws. This has happened in twenty six countries with another twenty working on this aspect – see creativecommons.org/worldwide

Over 53 million objects have already been "linked back" to or released under CC licences and the support for Creative Commons continues to

[1] Note that the "No derivative works" option is incompatible with the "Share alike" option.

[2] Note that the "Share alike" option only applies to derivative works and is incompatible with the "No derivative works" option.

[3] For further information, see "Creative Commons Developers – Using Creative Commons Metadata" at http://creativecommons.org/technology/usingmarkup

grow. The following are notable examples of how the Creative Commons licences are being used or are proposed to be used –

- Online digital music hosting services GarageBand.com, Dmusic.com and Soundclick.com and alternative record label Opsound.org offer Creative Commons licences as an optional tag for all songs uploaded to their websites. As a result, a large portion of the music content hosted on these sites is licensed under Creative Commons licences.
- In their November 2004 issue, *Wired* magazine gave away a CD which features 16 songs released under Creative Commons licences by artists such as the Beastie Boys, Talking Heads front man David Byrne and Brazilian artist Gilberto Gil.
- The producers of the anti-Fox News Channel documentary "Outfoxed" have released some of the unedited footage under a Creative Commons licence.
- The Public Library of Science licences its publications under Creative Commons licences.
- The Australian Creative Resources Online (ACRO) website contains a range of content (such as audio tracks and still images) which are licensed for use under Creative Commons licences.
- In the UK, the British Broadcasting Corporation (BBC) have adapted the Creative Commons licensing model for use by the BBC Creative Archive, which will allow people to download clips of BBC programs for non-commercial use. See http://creativearchive.bbc.co.uk
- The OYEZ Project, founded in 1989 by Jerry Goldman, a professor of political science at Northwestern University, is an archive of recorded oral arguments and bench statements in the Supreme Court of the USA. In June 2003 the OYEZ Project released hundreds of hours of MP3 versions of their archived audio files under a Creative Commons licence.

The notion of peer production where lots of people will team together to produce creative content is facilitated by Creative Commons style open access licensing. It allows people to collaborate and innovate with a broad distributed online world. Wikipedia www.wikipedia.org an online encyclopaedia that has and continues to be created by thousands of contributors is the most obvious example of peer production. Wikipedia

uses the GNU Free Documentation Licence as the method for sharing content.

Why Share?

A common question is "why would people want to share digital content?" Some reasons are:

- Ideologically and financially this may be acceptable – the most compelling example in Australia is government where information is ultimately owned by and for the people
- Open contenting one version of your material e.g. a draft (E Print) or a chapter may in fact be a strategy for enhancing the commercialised version of your content
- A wish to share with others for creative and educational purposes
- Publicity – what the free and open software movement calls "egoboo" or reputation within the open community which in some cases will be exploited commercially down the track
- Negotiability – through technologically implemented generic protocols that can be utilised with the click of a mouse
- "What is junk to one may be gold to another" – the idea that the off cuts or digital junk of one person may be the building blocks of knowledge and creative genius for another
- "Indirect appropriation" – money, design and use of end product, pleasure or social profile gained through involvement in peer production[4]

Does CC mean that Copyright Law is Redundant?

Creative commons draws on the work of the free software movement. "Free software" means free as in freedom (to access code) not price and has come to the fore in an environment of proprietary software distribution where source (human readable) software code is hidden from public view. The free software model is to distribute software with the source code open and accessible so that the recipient can easily and better understand the software. This in turn enhances further innovation, error detection and/or security testing. However the free software movement

[4] Y Benkler, "Coase's Penguin, or Linux and the Nature of the Firm" (2002) 112 *Yale Law Journal* 369

requires through its General Public License (GNU GPL) that if you use open code and innovate upon it and then *distribute* that code in a derivative work you must share all of the code of the derivative work back to the public or the commons. As has been written elsewhere:

> The powerful insight that Richard Stallman and his advisers at the Free Software Foundation .. discovered was that if you want to structure open access to knowledge you must leverage off or use as a platform your intellectual property rights. The genius of Stallman was in understanding and implementing the ethic that if you want to create a community of information or creative commons you need to be able to control the way the information is used once it leaves your hands. The regulation of this downstream activity was achieved by claiming an intellectual property right (copyright in the code) at the source and then structuring its downstream usage through a licence (GNU GPL). This was not a simple "giving away" of information but rather a strategic mechanism for ensuring the information stayed "free" as in speech. It is on this foundation that we now see initiatives like the Creative Commons expanding that idea from open source code to open digital content.[5]

The point being made is that models like Creative Commons rely on the power of copyright ownership and law to structure open access downstream. In this sense CC is not anti-copyright. Rather it uses copyright as the basis for structuring open access. However CC is designed to provide an alternative model for managing copyright in digital content.

How does CC relate to the Open Access (OA) Movement?

The Open Access (OA) Movement is intimately connected with the Creative Commons and Science Commons movement. Open Access as defined in the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003) http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html and the Bethesda Statement on Open Access Publishing (2003) http://www.earlham.edu/~peters/fos/bethesda.htm seeks to open up access to research and scholarship especially that which

[5] A Fitzgerald and B Fitzgerald, *Intellectual Property in Principle* (2004) LBC/Thomson, Sydney, Ch 11.

is publicly funded. Creative Commons licences are seen as a mechanism through which open access to research can be promoted.[6] For example if I write an article on the legal aspects of downloading MP3s off the internet I might put that up on my website with a CC badge representing that the content is licenced under Version 2.1 of the Australian CC licence and allows the user to reproduce, recast and communicate the content so long as they provide attribution (Attribution), do not use it for a commercial purpose (Non Commercial) and share their innovations with the open access community (Share Alike). I would either embed metadata in my website to notify this or more simply write "this article is licensed under the Australian BY-NC-SA Creative Commons Licence Version 2.1"

Dissemination Impact of Open Access[7]

There are approximately 24,000 peer-reviewed journals in the world today publishing around 2.5 million scholarly and scientific research articles per year in many different languages. One directory, the Directory of Open Access Journals (DOAJ) had 1,976 free, full text, quality controlled scientific and scholarly journals listed on 19 December 2005 (http://www.doaj.org). Universities are beginning to answer the call of the Berlin Declaration by establishing digital repositories in which staff and students can self archive their papers, whether they be articles, research or doctoral theses.[8]

One of the benefits experienced by authors is an increase in the number of citations a work receives once it has been released in the OA environment. Stevan Harnad confirms this phenomenon when he states that "A growing number of studies [are] showing that articles that have been supplemented with such self-archived versions have higher (and

[6] R Poynder, "The Role of DRM in Open Access" (2005) http://www.indicare.org/tiki-read_article.php?articleId=93

[7] This material has been prepared in collaboration with Scott Kiel-Chisholm, Project Manager of the OAK LAW Project www.oaklaw.qut.edu.au for an article to be published in *Policy Futures in Education* "Special Issues" (2006)

[8] S. Harnad, "On Maximizing Journal Article Access, Usage and Impact" (2005) http://www.haworthpressinc.com/library/StevanHarnad/04212005.asp accessed 21 December 2005.

sometimes substantially higher) citation impacts than articles that have not been self-archived." [9]

Harnad believes that:

> All parties to the research publication and production co-benefit from this supplementary open-access self-archiving: Authors, their institutions, their funders, their publishers, and research itself. The author receives more citations (as well as more downloads: http://eprints.ecs.soton.ac.uk/10647). The institution has greater research impact, and its research output is more visible, attracting more researchers, students, and research funding. The research funder (and the tax payer funding the funder) receives greater return on their investment in the research. The journal gains a higher citation impact factor, wider visibility and greater usage per published article. And of course the progress and productivity of researchers and research itself are enhanced.
>
> Yet despite the benefits of self-archiving, researchers have been rather slow to do it, partly because they are not yet aware of those benefits, and partly because they feel they already have enough to do (and are unaware that it takes only 6-10 minutes per article to self-archive it: http://eprints.ecs.soton.ac.uk/10688).
>
> Publishers are certainly not at fault for the fact that authors have been so slow to self-archive: Ninety-two percent of the 8,450 journals surveyed to date (including most of the top journals) have given their authors the green light to self-archive: http://romeo.eprints.org [10]

[9] S. Harnad, "On Maximizing Journal Article Access, Usage and Impact" (2005) http://www.haworthpressinc.com/library/StevanHarnad/04212005.asp accessed 21 December 2005.

[10] S. Harnad, "On Maximizing Journal Article Access, Usage and Impact" (2005) http://www.haworthpressinc.com/library/StevanHarnad/04212005.asp accessed 21 December 2005.

In the Remix World of CC where do Moral Rights fit?

The generic CC licences which derive from US law now entrench the protection of the moral right of attribution by making it a core term of every licence however the moral right of integrity is only guaranteed under the US licence by choosing the "no derivatives" option or by the operation of some other law. The Australian licences have been drafted in a manner that protects the moral rights of attribution and integrity as found in national legislation as core terms of the licences. In jurisdictions such as Australia where a creator can consent to the use of their material in a way that contravenes moral rights it is expected that another version of the CC licences will be drafted that allows for the creator to consent to uses that will infringe their moral right of integrity.

The moral right of integrity has an interesting interplay with the notion of remix which seeks a freedom to recast the original content. In some countries where moral rights cannot be waived or overridden the power of remix will be challenged. This debate is sometimes talked of in terms of free speech versus the right of the individual to protect an emanation of them in the form of intellectual product. It mirrors differing views as to why we have intellectual property laws.[11] The notion of remix draws heavily on the idea that intellectual property should exist primarily to enhance culture because ultimately it owes its origination to surrounding cultural material,[12] whereas moral rights find justification in the personhood theory that sees intellectual property law as protecting intellectual material because it is part of, emanates or extends from the individual.[13]

CC as a Model for Making Copyright More Active

There is great concern worldwide that too much copyright material is left inactive in archives (e.g. government, museums) because the process of negotiating the licence is too time consuming or expensive, even where the copyright owner does not want to make money. Now that we have a vast array of digital technology that can present much of this material to

[11] B Fitzgerald, "Theoretical Underpinning of Intellectual Property: 'I am a Pragmatist But Theory is my Rhetoric'' (2003) 16 *Canadian Journal of Law and Jurisprudence* 179

[12] P. Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship" (1991) *Duke L. J*. 455,

[13] M Radin, "Property and Personhood" (1982) 34 *Stanford L. Rev*. 957.

the world cheaply and rapidly more and more institutions are considering how they might allow greater access to their archives/knowledge (e.g. BBC). A facility for accessing archived material, especially publicly funded material, will increasingly be demanded as part of the landscape of information management and creative innovation. CC provides an effective and simple way in which sharing and collaborative effort can be facilitated in the realm of digital content and hopefully a way in which inactive copyright material can be given new life.

CC and Sustainable Business Models

As with free and open source software it has become apparent that it is possible to have business models wrapped around open content. With software the approach has been to provide services along with the open code e.g. the Redhat model www.redhat.com, or provide value added code or knowledge under a dual licencing model, the MySQL model www.mysql.com – one open and one restricted/commercial.

Under the Creative Commons model it has quickly become apparent that the majority of people prefer to licence out under the non commercial condition. This means they reserve the right to commercialise and to set up a traditional commercial contract with a client. Therefore I can give permission in advance to use my content for non commercial purposes but the minute you use it commercially you are required to obtain permission in the form of a commercial contract. This dual licencing approach provides open access for non commercial purposes but restricted rights of reuse for commercial purposes. Some licences – not CC – are offering these options within the same licence. That is, if you use non commercially you are governed for example by clause 4 of the contract while if you use commercially you are governed by clause 5 which requires a licence fee to be paid.

A number of people have used CC licencing as a tool to promote and profile their work and to even convince commercial publishers to enter foreign markets. The ability for people to access content and translate it has opened up new possibilities and market opportunities.

As well in the case of open access journal articles we have seen the development by publishers of business models where researchers pay for

their open access academic work to be refereed and published in a commercial format– the so called Gold Model.[14]

CC and Open Educational Resources (OER)

Creative Commons and other types of open content licences provide the basis on which to share open educational resources – MIT Open Course Ware is a prime example: http://ocw.mit.edu; see also LAMS Community http://www.lamscommunity.org Educational resources will in most instances involve copyright literary, dramatic, musical or artistic works, films or sound recordings. To this extent permission of the copyright owner, a lawful exception such as fair use/dealing or a statutory licence will be needed to authorise reuse through, for example, reproduction or communication. An open content or source code licence represents a convenient method for sharing and reuse of copyright material by providing the necessary permission.

In sharing and reusing (by teachers or students) learning materials, research results, publications or broader materials for educational environments open content licensing will increasingly play a role. Knowledge management in schools and universities will need to be able to understand and harness the power of this new dynamic.[15] Already Creative Commons has been embedded as a standard search function in major search engines and web browsers.

The rise of collaborative innovation (where people are encouraged to research as part of a team, Grid computing is but one example) and serendipitous innovation where people enhance knowledge through stumbling on to someone else's work (for example, via the Internet) will demand that we understand how to share knowledge and to do it legally.

Publicly funded research and government owned copyright material – as democratic principle - will also be under tremendous pressure to be freed up for reuse for educational purposes. In Australia AEShareNet has

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[14] See further: R Poynder, "The Role of DRM in Open Access" (2005) http://www.indicare.org/tiki-read_article.php?articleId=93

[15] B Fitzgerald, "Structuring Knowledge Through Open Access: The Creative Commons Story" in C Kapitzke and B Bruce (eds.) *New Libraries and Knowledge Spaces: Critical Perspectives on Information Education* (2005) Lawrence Erlbaum and Assoc.

developed a Free for Education Licence (FFE) that they are asking the government and others to use in labelling content that can be utilised for educational activities: www.aesharenet.com.au Creative Commons is also assessing the role of an Educational licence.

Conclusion: Copyright More Accessible and Negotiable

In a digital world where educational users will increasingly engage with a culture of cut and paste, remix, collaboration and instant Internet access open content licencing will provide a vitally important facility for sharing and reshaping knowledge in the name of culture, education and innovation. While respecting the basic principle of copyright open content licencing allows a broader understanding of information management in a way which builds on the existing system. There can be little doubt that open content licencing will become an important option in the copyright management, distribution and utilisation of educational resources.

Further Reading

L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)

Report on Common Information Environment and the Creative Commons (2005) http://www.intrallect.com/cie-study/

http://creativecommons.org

B Fitzgerald and Nic Suzor, "Legal Issues For the Use of Free and Open Source Software in Government" (2005) 29 *Melbourne University Law Review* 412

B Fitzgerald and G Bassett (eds.), *Legal Issues Relating to Free and Open Source Software* (2003)
http://www.law.qut.edu.au/about/staff/lsstaff/fitzgerald.jsp

Appendix: Free and Open Source Software

Extracted from B Fitzgerald and Nic Suzor, "Legal Issues For the Use of Free and Open Source Software in Government" (2005) 29 *Melbourne University Law Review* 412

A grass roots movement started by free software guru Richard Stallman in the 1980s has revolutionised the way we think about software development and distribution. Stallman was frustrated with the fact that he could not access the source code (the human readable code) of software that was controlling a Xerox printer in his lab at MIT. His quest for opening up access to source code in software has led to the creation of a powerful form of collaboration known as the free software movement.
Free software is not free because it has no price; it is free because it contains values that enhance liberty for users and programmers. Stallman is quick to point out that "free software does not mean that the software is free, as in requiring no payment. When I speak of free software, I'm referring to freedom, not price. So think of free speech, not free beer."[16]
Stallman applies four strict criteria to maintain free values in software:

1. The freedom to run the program, for any purpose (freedom 0).
2. The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
3. The freedom to redistribute copies so you can help your neighbor (freedom 2).
4. The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.[17]

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[16] Richard M Stallman, "Free Software: Freedom and Cooperation", Speech at New York University, New York, 29 May 2001 <http://www.gnu.org/events/rms-nyu-2001-transcript.txt> (27 August 2001). On the power of free software models to enhance digital diversity consider: B Fitzgerald, "Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?" [2001] *EIPR* 121; B. Fitzgerald, "Software as Discourse: The Power of Intellectual Property in Digital Architecture" (2000) 18 *Cardozo Journal of Arts and Entertainment Law Journal* 337.

[17] "The Free Software Definition", Updated 27 October 2001, <http://www.fsf.org/philosophy/free-sw.html> (23 July 2002).

Free software is distributed with the source code disclosed or open at the point of distribution. Non-free or proprietary software is distributed with no source code disclosed, requiring anyone who wishes to discover that source code to engage in a process of reverse engineering by decompiling the machine code into source code. The fear that attaches to distributing the source code with software is that a recipient may use it to their advantage and profit without giving back to the community, free-riding on the community based developments. In order to remedy the most extreme examples of this Stallman ensured that the source code he distributed was covered by a lawfully binding obligation created through the GNU General Public Licence (GPL).[18] The GPL provides that if you take free software code and create and distribute a new work based on the code, you are obliged to disclose your code to the people you are distributing to, which in essence means the whole community. In this way the GPL leverages upon the copyright in software code owned by the person licensing out the code to oblige the recipient to share improvements with the community for everyone's benefit.

This was Stallman's powerful insight: copyright in software code can be used not only to close access and exploit its benefits for monetary reward but can also be claimed at the source to structure open access down-stream. Software source code that was released free to access would remain free to access, and any improvements would also be free to access.[19]

Today, nearly every government in the world wants to know more about free software and how the model works, and the private sector is not far behind. Some governments have already begun the task of migrating to the use of free software in the public sector. The free GNU/Linux operating system now rivals the dominance of Microsoft Windows in controlling how our computers and networks run, at least at an institutional level.[20] The Australian Government Information

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[18] "The General Public License (GPL)", Version 2, June 1991, <http://www.opensource.org/licenses/gpl-license.html> at 19 August 2001.

[19] For a detailed overview of and motivations for peer and user led production, of which free software is a prime example, see: Y Benkler, "Coase's Penguin, or, Linux and The Nature of the Firm" (2002) 112 Yale LJ 369; J Lerner & J Tirole, "Some Simple Economics of Open Source" (2002) 50 J. Indus. Econ. 197; E von Hippel, "Innovation by User Communities: Learning from Open Source Software" (2001) 42 Sloan Mgmt Rev 82.

[20] For example, Netcraft, a respected long-term Internet research and analysis organisation, in their most recent survey suggest that over 69% of all active websites use the free Apache webserver (Netcraft, June 2005 Web Server Survey

Management Office's (AGIMO) recognises that the use of open source software is "particularly widespread in areas such as network infrastructure, single-purpose computer servers, security, Internet and intranet applications and network communications" in both the private and public sectors.[21]

Copyleft and Non Copyleft Licences: There are two main types of free and open source software licences. The simpler licences, for example the revised[22] BSD and MIT/X11 licences, allow redistribution and use in source and binary forms, with or without modification, on the condition that the copyright notice is retained and that any applicable warranties are disclaimed. There is no requirement that derivatives of the free software be free themselves. On the other hand, the copyleft licences, like the GNU General Public Licence (GPL), attempt to create a contributory commons by requiring that any re-distribution of the software or its derivatives is released under the free licence.[23]

Free Software v Open Source: The Open Source Initiative (OSI) is a non-profit organization. Its leading proponent, Eric Raymond, has conceptualized business models enabling commercial exploitation of open source programs.[24] Programs distributed with the Open Source Certified trademark (OSI Certified)[25] are published on an approved list of licenses[26] that conform to the open source definition.[27]

<http://news.netcraft.com/archives/2005/06/01/june_2005_web_server_survey.html>)
;

[21] AGIMO, A Guide to Open Source Software (2005), p 10.

[22] The original BSD license had what came to be known as a 'obnoxious advertising clause', which required attribution to be displayed on all advertising materials. This caused a problem when there were many contributors to a project, because the attribution material quickly became large and unwieldy. Current versions of this license do not include the clause, but there are still many examples of software products released under the original license or modified versions of the original license.

[23] See Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (2004 Prentice Hall).

[24] These include loss leader; widget frosting; give away recipe/open restaurant; accessorizing; free the future, sell the present; free the software, sell the brand; free the software, sell the content: Eric Raymond, *The Cathedral and the Bazaar*, <http://www.catb.org/~esr/writings/cathedral-bazaar>; Shane W Potter, "Opening Up to Open Source" (2000) 6 *Rich. J.L &Tech* 24; M Fink, *The Business and Economics of Linux and Open Source* (2002) Prentice Hall PTR

[25] Open Source.Org, Revised 30 April 2001,
<http://www.opensource.org/docs/certification_mark.html> (24 November 2001).

[26] Open Source.Org, <http://www.opensource.org/licenses/index.html>, (24 November 2001).

The difference between open source and free software is mainly a philosophical one. Because the definition of 'open source' is somewhat broader than the definition of 'free software', it is clear that all free software is open source, but not all open source software is free. In practice, however, most licences that satisfy the OSI definition will also be considered 'free'.

The OSI was initially formed by a small group of people, including Bruce Perens and Eric Raymond, in order to promote commercial uptake of free software, from fear that the term 'free' would otherwise discourage that process. Accordingly, the definition of open source was taken from the definition of free software,[28] but the emphasis was placed away from freedom and towards the development benefits of using an open source methodology. After a year, Bruce Perens resigned from the board of OSI, regretting that "open source has de-emphasized the importance of the freedoms involved in Free Software".[29] The FSF has noted that the changed focus of 'open source' software encourages commercial developers to "gain the favourable cachet of 'open source' for their proprietary software products – even though those are not 'open source software' – because they have some relationship to free software or because the same company also maintains some free software",[30] as well as to reap the benefits of the open source development methodology without granting back to the users the benefits of free software.

In an effort to be all encompassing in discussion of this area of activity while respecting the nuances of the ideological differences it has become fashionable to use the term Free and Open Source Software (FOSS) or Free/Libre and Open Source Software (FLOSS).

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[27] Open Source.Org, Version 1.9, <http://www.opensource.org/docs/definition.html>, (20 July 2002).

[28] The initial OSI definition of 'open source' was identical to the 'Debian Free Software Guidelines' <http://www.debian.org/social_contract.html#guidelines> at 22 June 2004.

[29] Email from Bruce Perens to debian-devel@lists.debian.org, 'It's Time to Talk About Free Software Again', 17 February 1999, <http://lists.debian.org/debian-devel/1999/02/msg01641.html> at 22 June 2004.

[30] GNU Project, "Why 'Free Software is better than 'Open Source'", <http://www.gnu.org/philosophy/free-software-for-freedom.html>, (13 November 2001).

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Brian is a well-known intellectual property and information technology lawyer. He has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan and his latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past five years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India, Japan, Malaysia, Singapore, Norway and the Netherlands. In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. During 2005 Brian has presented talks in Germany, India and China and was a Visiting Professor in the Oxford University Internet Institute's Summer Doctoral Program in Beijing in July 2005. He is also a Chief Investigator in the newly awarded ARC Centre of Excellence on Creative Industries and Innovation. He is also Project Leader for the DEST funded Open Access to Knowledge Law Project – OAK Law Project, looking at legal protocols for open access to the Australian research sector. His current projects include work on digital copyright issues across the areas of Open Content Licensing and the Creative Commons, Free and Open Source Software, Fan Based Production of Computer Games, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Project Leader for Creative Commons in Australia. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane, Australia.