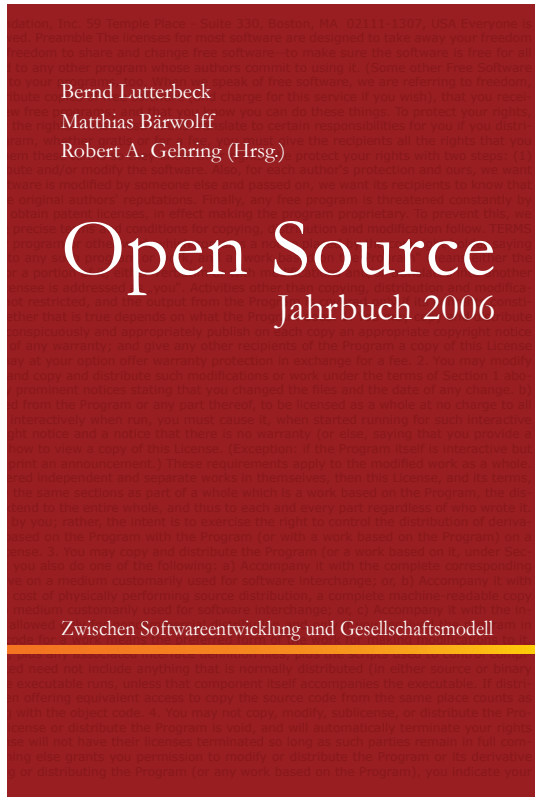


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The *Open Source Jahrbuch 2006* is an extensive compendium dealing with the various aspects of open source software and beyond. Whilst most articles have been written in German, this is one of the articles that have originally been written in English and subsequently been translated into German. Refer to our website for more English articles as well as our translation wiki.

The Case for Free Use: Reasons Not to Use a Creative Commons -NC License

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(CC-Licence 2.5, see
<http://creativecommons.org>)

While open source licenses such as the GPL allow for commercial use by definition, in the context of open content many copyright holders chose to explicitly exclude commercial use. The consequences, however, are more serious than most people are aware: licenses such as the Creative Commons -NC licenses are incompatible with free knowledge databases like Wikipedia, open media archives, and open source projects. This is despite the fact that the copyleft component of most open source licenses offers equivalent protection against commercial exploitation—without sacrificing the freedom of the work—and should thus be preferred to -NC licenses.

Keywords: Creative Commons · Commercial Use · Content Creator

1 Introduction

When the “Creative Commons”¹ project published its first licenses in December 2002, it finally brought a sense of unity behind the free content movement. Instead of having to choose from many scattered licenses, creators now have the option to pick the right license for their work using a simple tool.² They only have to answer basic questions like: “Allow commercial uses? Allow modifications?” The tool then recommends one of the licenses developed by the Creative Commons team. They are legally sane, simple documents, specially adapted for various jurisdictions. In short, the Creative Commons project has made life a lot easier for everyone wanting to share content.

One particular licensing option, however, is a growing problem for the free content community. It is the allow non-commercial use only (-NC) option. The “non-commercial use only” variants of the Creative Commons licenses are non-free, and can in

1 <http://www.creativecommons.org/>

2 <http://creativecommons.org/license/>

one way make the situation worse than the traditional copyright model: many people can or will make the licensing choice only once. In a collaborative context, license changes can be difficult or even impossible. It is therefore crucial that the choice is an informed one.

The key problems with -NC licenses are as follows:

- They make your work incompatible with a growing body of free content, even if you do want to allow derivative works or combinations.
- They may rule out other basic uses which you want to allow.
- They support current, near-infinite copyright terms.
- They are unlikely to increase the potential profit from your work, and a share-alike license serves the goal to protect your work from exploitation equally well.

There may be circumstances where -NC is the only (and therefore best) available option, but that number of circumstances should decrease as the business models around free content evolve.

2 Incompatibility

Free content is no longer a fringe movement—it is something millions of people use every day. Wikipedia³, a free content encyclopedia built by volunteers, contains over 2 million entries in more than 100 languages and is among the largest 30 websites on the planet.⁴ Moreover, its growth continues, as does its integration into search engines. Google features Wikipedia definitions in some queries,⁵ as well as through the integration of Wikipedia mirror Answers.com in the top right corner of search results. Other search engines, such as *Amazon.com*'s *A9*, *Clusty.com*, and *Web.de* have even integrated Wikipedia directly into their user interfaces.

This success is the result of less than 5 years of work. Clearly, free content is here to stay. But, in part to make uses like the above possible, free content sites like Wikipedia explicitly *allow* and *encourage* commercial use. As we will see, there are many desirable commercial uses. More importantly, however, if you choose an -NC license, your work will not be compatible with Wikipedia, Wikinews⁶, Wikibooks⁷, and similar free content projects which have more permissive philosophies and practices.

3 <http://www.wikipedia.org/>

4 http://www.alexa.com/data/details/traffic_details?&range=30d&size=large&compare_sites=&y=t&url=wikipedia.org

5 <http://www.google.com/search?num=20&hs=6IB&hl=en&q=when+was+carl+sagan++born%3F&btnG=Search>

6 <http://de.wikinews.org/>

7 <http://de.wikibooks.org/>

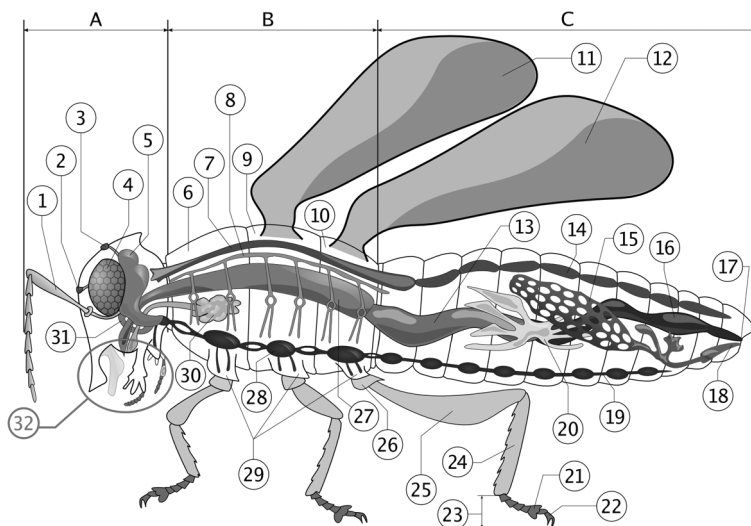


Figure 1: Illustration of insect anatomy by Piotr Jaworski from the Wikimedia Commons (under CC-BY-SA license)

One reason for this is that licenses like Wikipedia’s, the *GNU Free Documentation License*⁸, work according to the copyleft (or, in Creative Commons terminology, “share-alike”) principle: You can make derivative works, but they have to be licensed under the same terms. You cannot make a derivative work through addition of -NC content, as you can no longer apply the (more liberal) “share-alike” license to the entire work. This is true even for Creative Commons’ own licenses: You cannot combine, for example, BY-SA content with BY-NC-SA content (“Otherwise, Share Alike Means Share Alike”,⁹ as a Creative Commons press release put it).

Even where the license allows it, marking up regions of content as non-commercial and consistently following these boundaries is almost impossible in a collaborative environment. Imagine a website with collaboratively edited text that is *partially* -NC licensed. As text is copied from one region to another and modifications are made, it is likely that the license will be violated, or that it will have to be applied to more and more text to stay legally safe.

Many free content communities reject -NC licenses simply for philosophical reasons like the ones outlined in this document. For example, the Wikimedia Commons¹⁰, a media repository operated by Wikipedia’s Wikimedia Foundation¹¹ which contains

8 <http://www.gnu.org/copyleft/fdl.html>

9 <http://creativecommons.org/weblog/entry/4216>

10 <http://commons.wikimedia.org/>

11 <http://wikimediafoundation.org/>

more than 300 000 files, does not allow uploads under restrictive licenses such as the -NC variants. Yet, it is an immensely powerful archive: Any file in the Commons is instantly usable in all Wikimedia projects, in all languages.

The philosophy to allow commercial use is also fundamental in the free software community. While most consumers still use Microsoft Windows as their local operating system, free and open source software is already dominating large segments of the server market, and is increasingly used (Wheeler 2005) as a desktop environment by corporations and governments. It is also a key factor in bridging the digital divide and providing computers to the developing world. Accordingly, both the Open Source Definition (Perens 2002) and the Free Software Definition (Free Software Foundation 2005) explicitly state that sale and other commercial uses must be allowed for a license to be considered free.

It is obvious that a Linux company will be unable to make use of works that prohibit commercial use. But non-profit free software communities are equally adamant in rejecting -NC licenses. For example, the Debian Free Software Guidelines (Perens 2004) explicitly state: “The license of a Debian component may not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources.” Debian GNU/Linux¹² is one of the most popular distributions of the open source Linux operating system.

If you want your work to be recognized and used by the free software community, whether it is itself software or not, it is evidently not a good idea to use an -NC license.

All Creative Commons licenses make it clear that it is possible for the content creator to give special permission that goes beyond the terms of the license to any interested party. However, this, too, is insufficient. Any large free content community is likely to reject content under *special permission*, because it would exclude valid third party uses: from local initiatives that make use of the content in schools or community newspapers, to companies which distribute DVDs or printed copies, to useful and compliant mirror sites. This is true for Wikimedia as well: material which is under *special permission* is explicitly forbidden and will be deleted.¹³

Communities like Wikimedia and Debian do not exist for their own gain—they provide free knowledge and free software to the world. Putting your own content under a license recognized by these communities will keep it alive, and will encourage people to make active use of it in many different contexts. This does not merely apply to inherently collaborative works; almost any conceivable work in demand can be usefully transformed or incorporated into a collaborative context.

12 <http://www.debian.org>

13 <http://mail.wikimedia.org/pipermail/wikien-1/2005-May/023760.html>

3 Basic uses

What is commercial use? The relevant clause out of Creative Commons non-commercial (“-NC”) licenses, such as the “Attribution-NonCommercial” license, is this one:

“You may not exercise any of the rights granted to You [. . .] in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.”¹⁴

Many bloggers and blog communities on the web use advertising as a way to recoup costs and generate income. Popular bloggers, from Andrew Sullivan to Markos Zúniga (*Dailykos*), have turned their hobbies into professions, but even smaller publications often use Google Ads to make some extra money. Other sites use small-scale subscription models to unlock additional features and content or disable advertising. Ask yourself if you really want to stop all these individuals from using your work.

Compilations which are sold are another example of commercial use. For example, if one MP3 music file which is licensed for non-commercial use only is included among thousands on a DVD collecting free music and sold for a small personal profit, that is a violation of the license. Note that it is not the amount of the financial gain which matters, it is the intention of the user. Intentions are, of course, difficult to prove, and in many cases, it is best to be cautious. Even under liberal interpretations, any use in a corporate context would almost certainly be forbidden, such as the inclusion of the file on a CD bundled with a computer magazine.

4 Existing copyright terms

For a long time, international copyright law has been written by content distributors. This has resulted in effectively infinite copyright terms. A work which is published in 2010 will remain protected until 2100 if the author dies in 2030 (the duration of protection in the United States and Europe is “life of the author plus 70 years”). This does not even take into account possible future, retroactive copyright term extensions (nor, of course, reductions—but these have never happened so far).

While you may feel you are making a donation to the public domain when licensing your work under an -NC variant, you are effectively supporting the existing, extremely long international copyright terms. The restrictions on commercial use will remain in place until the copyright of your work expires which, for most practical purposes, is *never*. To solve this problem, you could specify that the work falls back to a more permissive license such as CC-BY (attribution only), or to the public domain, after

¹⁴ <http://creativecommons.org/licenses/by-nc/2.0/legalcode>

5 years or any other amount. You could also choose a more permissive license to begin with.

5 Profit

The most obvious argument in favor of -NC licenses is that they prevent your work from commercial exploitation by others. First, it is important to realize that there are commercial scenarios which are not affected by your license choice. This includes support and tutoring, documentation, commentary, sampling, and many other uses *around* the work which are legal regardless of the license. Whatever your license says, the user does not have to accept it, and can simply treat the work as if it was under normal copyright. What -NC can regulate are distribution and modification of the work itself *beyond* what the law allows.

However, keep in mind that in this age, large scale distribution is no longer the exclusive domain of large corporations—it can be done by anyone with an Internet connection or a DVD burner. Even large files like movies can be effectively distributed using mechanisms such as *BitTorrent*¹⁵. This means that if your work is popular and of high quality, it *will* be available on the Internet for free—because the license makes it possible.

The moment you choose any Creative Commons license, you choose to give away your work. Any market built around content which is available for free must either rely on goodwill or ignorance. The potential to benefit financially from mere distribution is therefore quite small. Where it exists due to a predominance of old media, it is likely to disappear rapidly. The people who are likely to be hurt by an -NC license are not large corporations, but small publications like weblogs, advertising-funded radio stations, or local newspapers.

Indeed, to make a substantial profit with your work, a company will have to provide added value beyond what is available for free. An -NC license stops any such attempt to add value in its tracks. But there is an alternative. The Creative Commons “Share-Alike” licenses require any work derived from your own to be made available as free content, as a whole. (The licenses without a share-alike clause only guarantee that the part of the work created by you remains free.) Any company trying to exploit your work will have to make their “added value” available for free to everyone. Seen like this, the “risk” of exploitation turns into a potentially powerful benefit.

This principle works very well in many areas of free content and free software development. Most notably, the Linux operating system kernel is licensed under a share-alike (or *copyleft*) license. Many companies make use of customized versions of the kernel, for example, to include it in embedded devices¹⁶. All improvements made

15 <http://www.bittorrent.com/>

16 <http://www.linuxdevices.com/>



Figure 2: The German Wikipedia DVD is an example of undeniably beneficial commercial use of free content that would not have been possible under an NC license, even by special permission, as every Wikipedia contributor would have needed to agree.

by these companies can be used by the main Linux kernel development team. If the kernel was under an -NC license, the commercial use of Linux would be impossible.

Another interesting tale of commercial use is the German DVD version of Wikipedia. Produced by a company called *Directmedia*¹⁷, it has quickly become a bestseller in *Amazon.de*'s software category. Yet, to make that DVD, *Directmedia* had to cooperate with Wikipedians—who helped to prepare the data by making it searchable and sortable, and to weed out articles not ready for publication. *Directmedia* has, in return, donated a substantial percentage of the profits from the DVD to Wikipedia's mother organization. It has also made a separate "donation" of 10 000 reproductions of public domain paintings to the Wikimedia Commons.

The Wikipedia DVD was a working business model because it provided added value: an offline reader software which did not previously exist, combined with a well-organized effort to whip the content into shape. It also showed that beyond the copyleft principles, any highly successful cooperation with commercial entities around

¹⁷ <http://www.directmedia.de/>

free content is likely to depend on mutual goodwill. Another illustration of the same principle is *Answers.com*, a commercial Wikipedia mirror, whose parent company pays for one of Wikimedia’s developers, and has also been one of the sponsors of Wikimedia’s 2005 conference, Wikimania. None of this is required by the license.

Commercial use can be highly mutually beneficial where it does occur. The Share–Alike principle protects you from abusive exploitation, while not forbidding experiments. These experiments, however, are essential to build a true, innovative economy around free content. Especially when dealing with collaborative works, -NC makes such commercial experiments practically impossible, as every single contributor would have to give explicit permission.

One final factor to keep in mind, especially for wide-spread small scale exploitation, is the enforceability of the license. For example, even a generous interpretation of Wikipedia’s *GNU Free Documentation License*¹⁸ requires that content users link back to Wikipedia and the article history, and point out that the document is freely licensed.¹⁹ As is evident from a brief look at Wikipedia’s own list of mirrors and forks by compliance,²⁰ many content mirrors completely ignore the *GFDL*. Some even systematically remove all evidence that the content is from Wikipedia. Such behavior, while illegal, is difficult to punish, as mirrors reside in many different countries. Many have been quickly set up, without anyone in charge of operations.

Even though Wikipedia is a large community with a reasonably well-funded parent organization, it is clear that it is hard to enforce even very basic licensing requirements on free content. Ask yourself whether you are truly willing and able to enforce violations of an -NC license. Otherwise, the only people you punish with the restriction are those who are careful to respect your wishes—people who are likely to be amenable to friendly cooperation anyway.

Still, you might feel that your work should not be used to *legally* set up mirrors that effectively spam search engines. There are two responses to this; one social, and the other technological. The social response is that no matter what license, if any, you choose for your work, you can still make your feelings and expectations about the use of your work clear without making them legally binding, and can choose to associate with people who respect your values.

The technological response is that all forms of spam represent weaknesses in information and communication infrastructure. Most of today’s search engines still rely on a relatively dumb “spider everything” approach. Under this model, free content will always be used as fodder to get profitable rankings. It seems unwise to make a decision about licensing based on flaws of current search engine technology.²¹

18 <http://www.gnu.org/copyleft/fdl.html>

19 Technically, the *GFDL* requires reproducing the history of authors, but Wikipedia’s “Gentlemen’s Agreement” is to simply require a link to the history instead, as extracting and reproducing it is often impractical.

20 http://en.wikipedia.org/wiki/Wikipedia:Mirrors_and_forks/GFDL_Compliance

21 Most simply, Google and its competitors could make an effort to better aggregate duplicate search

6 Conclusions

6.1 For content creators

The use of an -NC license is very rarely justifiable on economic or ideological grounds. It excludes many people, from free content communities to small scale commercial users, while the decision to give away your work for free already eliminates most large scale commercial uses. If you want to obtain additional protection against large scale exploitation, use a Share-Alike license. This applies doubly to governments and educational or scientific institutions: content which is of high cultural or educational value should be made available under conditions which will ensure its widespread use. Unfortunately, these institutions are often the most likely to choose -NC licenses.

As we have seen, *special permission* (“You can use my work in this context, but in no other”) is frequently insufficient. It also defeats the point of free content licenses: Reducing friction by making it possible, for humans and machines, to instantly find content that is usable in a desired context.

However, you might still argue that as a creator, you could simply wait until anyone actually expresses interest in using your work under a more liberal license than the -NC variant you provide it under. Most use scenarios, however, will not be of a kind where an alternative to using your content is unthinkable. Human beings, especially in volunteer online communities, tend to take the path of least resistance and least offense.

You might feel that a certain amount of friction can be helpful, that you want to track usage of your work, and enter interactions with those who wish to go beyond what the license allows. But to achieve this, you can simply state: “You are free to use this work in any way you want to, as long as you attribute me as the creator. Depending on the scope of the use, it would be nice if you could also tell me about it.”

Using a suggestion like this, you avoid friction, while still defining your expectations for those who want to be on friendly terms with you. In all aspects of life, we have our own standards of conduct, and we avoid people whose standards are incompatible with ours. Choosing permissive licenses or the public domain is an expression of the power of choice in association. Taking a lesson from Wikipedia, it’s a simple statement that most human beings are essentially trying to do the right thing. Working together, we can try to educate or isolate those who are not, without the need for lawyers to get involved. We can develop and refine mechanisms to track usage, such as *trackback*²² in blogs, and build large but entirely voluntary associations of people who share a moral obligation to try to give back when they take.

results under the main site result. Combining search and social networking to take into account user perception and creator reputation seems like a logical next step.

²² <http://en.wikipedia.org/wiki/TrackBack>

Prohibiting commercial use except by special permission, on the other hand, puts you on the fringes of the free content movement, where the beer is free, but the philosophy is shallow. You lose much of the potential for your work to be improved, combined, aggregated and shared by those who believe in unrestricted freedom of use. You exchange the opportunity to be part of a dramatic shift in the ideology of ideas for a vague sense of security. At the same time, you give up much of the opportunity to make money the old-fashioned way by making the content in question perpetually available for free.

Recognizable and genuine free content communities can only evolve around the principle of true freedom. You have the chance to send a clear message whenever you license your own works. You have the chance to be heard, amplified by the voices of free content supporters around the planet.

If you *must* use an -NC license for one reason or another, please do add an additional notice specifying the term of copyright protection you desire for your work. Otherwise, traditional copyright law will apply, and commercial use will be forbidden long beyond your death.

6.2 For content users

If you see work online which is licensed under an -NC license, please kindly thank the creator for making their work available for free, and ask them to change the license (feel free to include a copy of this text, or a link to the network location where you found it).

Strategically, it also makes sense to systematically seek out individuals and entities which provide large bodies of work under -NC terms, and to lobby them to change these terms. At the very least, this will raise awareness of the issues with -NC.

6.3 For Creative Commons

As a project with the goal to make licensing choices simple, Creative Commons has a responsibility to inform its users about the drawbacks of licenses which forbid commercial uses. Many individuals who choose an -NC license are unaware of the implications of such a decision. The fact that Creative Commons openly advertises²³ the -NC option in its propaganda is not helpful. At the very least, the license selection screen should include a brief summary like the following:

“Note that forbidding commercial use will prevent your work from being used by any free content community that makes its entire body of work available under more permissive terms. This includes large knowledge bases such as Wikipedia, some open source software distributions,

23 <http://creativecommons.org/about/licenses/how1>

and also some media repositories. It will also prevent *all* primarily commercial uses of your work, large and small, unless you explicitly approve them. The ‘Share-Alike’ licenses reduce the risk of exploitation by requiring that any derivative work is made available under the same terms, while drastically reducing incompatibility and not forbidding all commercial uses. See this document²⁴ for a more detailed look at some potential drawbacks of forbidding commercial use.”

Hopefully, Creative Commons will contribute to the effort of informing creators that the seemingly simple choice of forbidding commercial use is not so simple at all.

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²⁴ <http://intelligentdesigns.net/Licenses/NC>