

**A Preliminary Study of
Open Content Licensing Practices in Private Foundations
Prepared for the Berkman Center for Internet & Society
by the FDR Group
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I. INTRODUCTION

Funding from private charitable foundations each year results in a myriad of expressive works. These range from books, articles and reports to music, photographs and films to software and other technology – all of which are protected by copyright.

Partly in response to sweeping changes made possible by personal computers, the Internet, massive digitization of information and instant communications, an alternative to traditional copyright has emerged and has found growing acceptance in many fields, particularly education, teaching, academic publishing and software development. To a large extent, open content licensing builds off the Open Source movement in Information Technology. According to its advocates, this alternative approach to copyright allows authors and creators to more easily determine and specify how they want their work to be used by others, permits knowledge and learning to be more widely shared and readily adapted or built upon, ensures broad access to information in a way that can benefit the public good, and brings clarity to the licensing of creative works.

Open content licenses in the Internet age are a tool that can be used to build “a public domain of materials which can be used in the future without necessarily having to obtain prior permission from

the copyright owner or having to pay hefty royalties.”* Applying an open content license on one’s creative work does not mean giving up all “rights” to the work but rather intentionally deciding how one wishes the work to be used by others – and letting users know up front by the type of license applied. Creative Commons licenses are perhaps the best known, but there are others including the Free Art License, GNU Free Documentation License, General Public License (GPL), EFF Open Audio License and Open Music Licenses, to name a few.

Open content licensing may not be a red-hot issue in the foundation sector, but it is emerging as a salient one with consequences in many fields. It is an inherently complex issue. In an attempt to learn more about the licensing practices that are used in the world of private charitable foundations – and specifically to learn the degree to which open content licensing may or may not be appropriate in that sector and why – the Berkman Center and the Hewlett Foundation commissioned the FDR Group, a nonpartisan public opinion research firm, to conduct a qualitative research study. The findings in this report are based on in-depth interviews with 30 people who work in private charitable foundations or are in some other way familiar with copyright and licensing issues. The focus here is solely on copyrightable materials (not patents) and on the practices among foundations (not other nonprofits or government).

This study explores the different practices that foundations use to determine the ownership and licensing of copyrights for the works they fund as well as the works produced by their staff and consultants. In particular, it seeks to examine foundations’ awareness and use of open content licenses. It attempts to shed light on the obstacles and facilitating factors to further consideration of the option of open content licensing where appropriate in the foundation world.

This qualitative research reflects only the opinions of those who participated in the interviews; the findings should not be interpreted as a definitive view of the licensing practices of any given organization nor of the foundation sector as a whole. Throughout this document, we report the findings in the aggregate only; the research was not intended as a foundation-by-foundation comparison.

* Liang, Lawrence. “Guide to open content licenses.”
http://pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide

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II. SNAPSHOT OF THE SAMPLE

A full methodology describing how this study was conducted and listing the participants is included at the end of this report. Here, we provide a short description of the sample to provide some context for the findings that follow.

Eleven foundations are represented in this research:

- The Andrew W. Mellon Foundation
- Christensen Fund
- The Ford Foundation
- Gordon and Betty Moore Foundation
- John D. and Catherine T. MacArthur Foundation
- Mozilla Foundation
- Omidyar Network
- Open Society Institute
- Robert Wood Johnson Foundation
- Shuttleworth Foundation
- The William and Flora Hewlett Foundation

Individuals from a wide variety of positions and perspectives are included:

- 12 lawyers
- 5 program officers
- 3 communications staff
- 2 executive directors
- Another 8 fell into the “other” category – vice president, fellow, special advisor and the like.

Based on these interviews, just 3 foundations could be deemed as either requiring or strongly encouraging their grantees to adopt open content licenses:

- Hewlett Foundation (specifically, Open Educational Resources)
- Open Society Institute
- Shuttleworth Foundation

Several others indicate that some program officers do ‘make it a point’ to have conversations about issues regarding licenses with potential grantees, but they do not mandate the use of open content licenses:

- Christensen Fund
- Ford Foundation
- Moore Foundation

Those that talked about the funding or creation of software (as opposed to text-based reports or art or music) indicated that an open source license is always required (the type of license is negotiable, but it must be open):

- Mellon Foundation
- Mozilla Foundation
- Shuttleworth Foundation

Six foundations appear to have explicit written policies concerning Intellectual Property:

- MacArthur Foundation
- Mellon Foundation
- Moore Foundation
- Mozilla Foundation
- Open Society Institute (in progress)
- Shuttleworth Foundation

An informal assessment of the Web sites of the foundations included in this research indicates that just 4 out of 11 apply a Creative Commons license to their own Web sites; the remaining 7 use a traditional copyright.

III. HIGHLIGHTS OF THE FINDINGS

Here are the highlights of the findings.

- The most common copyright practice described by participants was where the foundations allow grantees to hold the copyright for their work but include language in the contract or grant agreement permitting the foundation to reproduce and disseminate it as needed. Knowledge about open content licenses varied widely among the interview participants, from a few who were very knowledgeable to many who were somewhat familiar or had merely ‘heard of it.’
- One of the most interesting findings that emerged from the interviews is the extent to which so many seemed to conflate the idea of open content with their foundation’s mission-driven obligation to widely disseminate materials funded by the foundation. Many seemed to hold the belief that a commitment to a strong dissemination policy means – almost by definition – that the foundation’s work is open content.
- Several interviewees brought up sustainability as a concern. It’s one thing, they said, to make materials accessible and to license them so that others can use and build on them. But where are the revenue streams for maintaining and archiving all of this content for the long term?
- According to the more knowledgeable interviewees, there appears to be widespread lack of information within the sector about open content licenses. In addition to lack of knowledge, obstacles to greater consideration of open content licenses also include inertia, fear of the unknown, and more concrete concerns such as losing potential revenue streams.
- Participants shared anecdotes from their own experiences where open content licensing was either used or considered. Some shared personal experiences; others pointed to examples from elsewhere that they thought might be illustrative. Some were positive experiences, others were examples of where the use of open content licenses might have prevented negative outcomes.

- None of the interviewees made a case for abandoning the use of traditional copyright licensing in every case and relying only on open content licenses. There also was no intimation that one way is always right and good, while the other is always wrong and bad.
- The findings suggest that there are several factors that inhibit the adoption of alternatives to traditional copyright – lack of information and reluctance to buck the status quo are two examples. Yet the findings also indicate that there are some foundations that have successfully used open content licenses to the benefit of their foundation and the public good. The Shuttleworth Foundation comes to mind.
- As a whole, the experiences of the interview participants who are most familiar with open content licensing and its benefits in the foundation sector show that information is a direct route to support – people who are exposed to open content licensing tend to get on board. As more and more foundations start using open content licenses for their own materials as well as encouraging use among grantees, there is potential for a rippling effect both within the foundation sector and among its grantees.

IV. THE RESEARCH FINDINGS

Finding One: Taking stock of the landscape – knowledge, salience and use

The most common copyright practice described by participants was where the foundations allow grantees to hold the copyright for their work but include language in the contract or grant agreement permitting the foundation to reproduce and disseminate it as needed. Knowledge about actual open content licenses varied widely among the interview participants, from a few who were very knowledgeable to many who were somewhat familiar or had merely ‘heard of it.’

- Knowledge. As expected, familiarity with and knowledge about intellectual property in general and open content licenses in particular ranged from very little, to misinformed, to fully aware and intentional. While copyright licensing was high on the agenda of those who advocate for it – and there were several advocates among the interviewees – many others seemed to view the issue of licensing as one among countless priorities and not a particularly pressing one. Several interviewees speculated that most of their colleagues and co-workers would know very little and probably never have thought about it.
- Taking the lead. If any conversation about copyright licensing were to take place with grantees – including possible use of open content licenses – it would tend to be initiated by program officers. They are deemed closest to the project and so would know best what is needed to serve the goals of the grant. It’s important to point out, however, that many of those who were interviewed for this study believe that program officers on the whole are uninformed about licensing issues and thus the option of open content licenses are not even part of their ‘tool-kit.’ Legal staff are knowledgeable about intellectual property law in general, but it would be unusual, according to these findings, for a foundation’s lawyers to initiate discussion with a grantee about the use of open content licenses.
- Current practice – for grantees. According to the people interviewed for this study, current practices ranged from formally requiring open content licenses (only Shuttleworth seemed to fit this description), to strongly recommending that grantees use an open content license (the Information Program of the Open Society Institute), to making it a point to talk about licensing during the initial stages of grant making (for example, some program officers do

this but it is not a foundation policy at Christensen, Ford, Moore), to not addressing it explicitly. The most common practice for work produced by a grantee was that the grantee owns the traditional copyright on the work but with contract or grant agreement language that permits the foundation to reproduce and disseminate at its discretion. If there is reason to believe a grantee (or some other entity) will profit commercially from foundation-supported work, the foundation crafts language into the contract or grant agreement that entitles it to some proceeds or ensures that the product will be made available to the public at low cost. (See Appendix 1 for more details about intellectual property policies and licensing language for each foundation.)

- Current practice – for consultants and staff. For all but a handful of the foundations where this issue was pertinent, work done by consultants on behalf of the foundation is deemed work-for-hire and thus considered property of the foundation – that is, a traditional copyright is typically used; ditto for work created by foundation staff. No evidence of resistance to this practice was detected in the interviews, with one exception. A program officer who was particularly knowledgeable about open content licensing and an advocate for the use of Creative Commons licenses articulated concern. This person felt that foundation employees should be permitted to choose a Creative Commons license for the intellectual property that they create.
- Use of specific licenses. Among the foundations represented that do use or consider open content licenses, none require a *specific* license – that is to say, the foundation would give a grantee the option to choose any one of the several Creative Commons licenses, General Public License (GPL) or another type of open license as the grantee sees fit. Virtually all of the foundations that fund software development require an open license for software; the *type* of license is always negotiable, but the fact that it must be open is not.

Finding Two: Conflating “open” and dissemination

One of the most interesting findings that emerged from the interviews is the extent to which so many seemed to conflate the idea of open content with their foundation’s mission-driven obligation to widely disseminate materials funded by the

foundation. Many seemed to hold the belief that commitment to a strong dissemination policy means – almost by definition – that the foundation’s work is open content.

Repeatedly in the interviews, people spoke about the importance that their foundation puts on dissemination of the work product that results from their funding and the attention and resources that are spent maintaining their Web sites. Some explained that their foundation is so committed to distribution that it provides explicit permission on its written and online materials to encourage copying and sharing. For example, the Web sites of the Ford, MacArthur and Robert Wood Johnson Foundations all include language that says something to the effect of, ‘The materials contained in this Web site may be used, downloaded, reproduced or reprinted as long as it is for non-commercial or personal use only.’

But this emphasis seemed to have little connection to the philosophy that actually drives open content licensing or its significance in the Internet age, which is that data should be shared so that others can build or make derivatives from the original work. It seemed that because dissemination is the goal, then success is measured in the number of copies printed and the tally of hits on a Web site. In contrast, the interviewees who were very familiar or experienced with open content licensing talked not only about dissemination but also about the free flow of information in both directions, about building, and changing and translating – a way of working where progress is measured not by how many copies or Web hits but by extensive use of the same piece of information in any number of iterations. The Shuttleworth Foundation stands out as one that most obviously transcends the ‘dissemination equals open’ point of view.

Finding Three: Concerns around sustainability

Several interviewees brought up sustainability as a concern. It’s one thing, they said, to make materials accessible and to license them so that others can use and build on them. But where are the revenue streams for maintaining and archiving all of this open content for the long term?

According to the people who brought up sustainability as a concern, “open” covers more than free or available. It is one thing to make a publication free (no cost) and available (easy access). It’s another to ensure the resources are there to disseminate, maintain and archive it over time. Is it fair,

they asked, for us as a foundation to require or even recommend that a grantee use an open content license if funding will not be there to support it? That a grant-sponsored work or program would eventually be self-sustaining is of paramount concern to some; among others, it didn't even come up. Those who talked about this were more likely to be from the larger foundations and to be interested in exploring some new and creative ways for solving what they perceived to be a long-term problem. Those in larger foundations also were more likely to talk about enforcement as a concern as well. Some foundations have hundreds of IP agreements to administer. Is it possible to effectively and efficiently manage this load? Do grantee agreements and contracts have genuine meaning if there are essentially no resources allocated to enforcing them?

Finding Four: Other obstacles

According to the more knowledgeable interviewees, there appears to be widespread lack of information within the sector about open content licenses. In addition to lack of knowledge, obstacles to greater consideration of open content licenses include inertia, fear of the unknown, and more concrete concerns such as losing potential revenue streams.

The opinions of the foundation staff who participated in this research ran the spectrum of viewpoints – from those who advocate and press for more open content licensing in their own institutions and for the sector as a whole, to those who had heard of Creative Commons licenses, to others who were knowledgeable and even supportive of open content licenses but had no experience with implementation. Depending on their knowledge and experience, interviewees were asked to think about any obstacles they had personally faced when implementing open content licenses or what they thought could conceivably stand in the way if their foundation were to consider using them. Essentially they were answering the question: What is it that worries private foundations when they think about open content licensing? The next series of bullet points compiles the potential obstacles that emerged in the answers to this question.

- **Lack of information.** According to many of the people interviewed for this project, there is a tremendous lack of knowledge among their colleagues and co-workers. Most, they say, simply are uninformed about open content licenses as an alternative to traditional copyright, and so this alternative is largely absent from program officers' 'tool-kits.' Nor have they been provided a strong enough reason to make it their business to learn about them. According to

several interviewees, program officers who deal with creative works – for example, art or music or photography, would in all likelihood be more familiar with open content licenses than those who deal mainly with public policy issues or report writing. Similarly, program officers in the field of technology or software are much more familiar with the idea of open content licenses.

- Inertia. As one interviewee put it, a typical strategy is ‘to cling to what you know,’ to continue on the path of least resistance. Some alluded to an ‘if it ain’t broke, don’t fix it’ mentality as an obstacle to greater consideration and possible use of open content licenses. Because relatively few in the sample were highly experienced with open content licenses and their benefits, and because so few were actively disappointed or disillusioned with the status quo, we detected no urgency among them to seek or consider a different approach to licensing.
- Fear of the unknown. It is human nature to stick to what you already know. Advocates thought this instinct may be stronger among legal staff and also among veteran (read: older) program officers, who are perceived as less familiar with digitization and the power and change that are part and parcel of the Internet world. It is the World Wide Web and the preponderance of digitized information resulting from it that was a primary force in the advent of open content licensing, and lawyers and program officers of a certain age may not be so familiar with the Internet and the ways it is influencing the work of grant-making foundations. Change brings uncertainty and thus creates more work and more worries. Some people don’t have a real sense of what open means – so their worst fear is that they will lose all control, and at best the upside is murky. So why change?
- Concerns of legal staff. By training, lawyers are cautious. Any foundation’s Office of General Counsel, after all, is charged with protecting the institution from harm, not with facilitating a hypothetical public good. According to some of the research participants, today’s legal staff in a foundation, in all likelihood, has been trained in conventional copyright and intellectual property law and may be less familiar or comfortable with alternatives to traditional copyright or with open content licensing in general. From the perspective of counsel, why

try something new when we have intellectual property issues under control and our current approach to licensing works just fine?

- The idea of losing potential profits. For some, there is fear that would-be profits may fall by the wayside if foundation-funded works were to be openly licensed. No foundation wants to make it difficult for a grantee to make a living – for example, the works created by a foundation-funded artist or photographer or musician may be their bread and butter. Will requiring an open content license on such creative work inhibit their livelihoods? Similarly, a foundation may want the option of recouping some of its investment if a funded work results in huge profits (unlikely, but possible). Will requiring an open content license preclude this? Much of this concern is hypothetical and may be driven by lack of information.
- Copyright infringement lawsuits. More than one interviewee expressed concern about being sued. Legal staff cannot rest easy with the thought that their decisions on licensing might expose the foundation to accusations of copyright infringement that could put the institution in jeopardy. This may be mostly a theoretical concern and an unlikely problem, but it is something that came up. Similarly, if the components of a license are confusing or simply unfamiliar – for example, the non-commercial aspect of several Creative Commons licenses may have multiple interpretations – then the foundation’s lawyers may become risk adverse.
- Unusual mission and goals of the foundation. The Christensen Fund is a unique organization that works with indigenous peoples. Often times, part of the goal of the grants it funds is to protect the natural resources, culture, stories, languages, etc., of the people under study. Open content licenses are not necessarily the best tool for doing this. The main concern is that in putting certain information in the public domain, for example, the location of a sacred site or the uses of a plant for medicinal purposes, the indigenous community could be exposed to harm. Maybe tourists will flock to the site or a pharmaceutical company will find a way to harness the plant for its own profit. To that end, an organization like the Christensen Fund makes an effort to educate its grantees about the pros and cons of various licensing options as well as alternatives that could be used to protect the intellectual property of the people they study. Christensen does expect its grantees to follow a “ code of

conduct.” The Fund also encourages communication between researchers and tribal leaders; and during the grant-making process it explicitly asks grantees how they intend to use the data they collect.

Finding Five: Anecdotes (potential case studies)

During the interviews, participants were asked to share anecdotes and examples of situations from their own experiences where open content licensing was either used or considered. These stories may help to trigger thinking among those who haven't given the issue much consideration; they also may help potential users of open content licenses to avoid pitfalls that others have encountered. Some shared personal experiences; others pointed to examples from elsewhere that they thought might be illustrative. Some were positive experiences, others were examples of situations where the use of open content licenses might have prevented negative outcomes. These examples may be worth pursuing for case study potential. But keep in mind that the anecdotes were communicated in telephone interviews and were part of a lengthy discussion that covered many topics. In the retelling here, they may be missing details or context or may contain information that is not quite right. Still, it is the gist of these anecdotes that is instructive, and so the stories have been crafted with an emphasis on the gist rather than the details.*

- Anecdotes – positive experiences.
 - *Learning from within.* In OSI's Information Program, the use of open content licensing is a natural – this is a program designed to deal with copyright reform and open licensing (among many other things). The Information Program encourages open content licenses among its grantees partly by talking with them during the grant-making process. It is driven by the idea that grantees should make an informed choice about the way they want their works to be used. An OSI staffer in another program saw the success of open content licenses in the Information Program area and now would like to make it possible to apply an open content license to a report that this program officer wishes to reproduce and distribute widely. Because use of an open content license was seen to be effective in one program, it is now being sought after as an effective approach in another.

* All but one interview took place over the telephone; one was face-to-face.

- *Coming to an understanding that “open” is a process.* Shuttleworth reported an anecdote where it had found ‘fantastic’ educational material that it wanted to acquire so that it could apply an open license to and thus make widely available as an educational resource in South Africa. The company was interested in selling and the Foundation was interested in buying. Conversation ensued. But the company was uncomfortable with the idea of an open license. Conversation ceased. Some time later, the company reappeared, with a changed outlook – it now supported the open license idea and wanted its materials to be openly licensed and made as widely available as possible. It was a case of going through the process of learning and understanding what an open license would mean. Asked to consider why this company was so resistant at the beginning, the interviewee speculated: 1) it seemed that by giving it away for free the product was being undervalued, and 2) this was their “baby” – a great deal of hard work and care went into creating it, and as a result there was internal opposition to the notion that strangers could modify it at will.

- *Walking the walk.* The Shuttleworth Foundation mandates that any work it collaborates on with other institutions must be open. (A potential collaborator’s other internal processes are not required to be open, but what is discussed or considered with Shuttleworth must be.) A large and influential organization wanted to work with Shuttleworth, and Shuttleworth was delighted until the organization wanted a nondisclosure agreement regarding their planning conversations. This, of course, is antithetical to Shuttleworth’s practices (it uses the expression “Live Out Loud” to describe how it does virtually all aspects of its business). Shuttleworth would not sign a nondisclosure agreement, even if it meant losing the opportunity to work with this large and influential organization.

- Anecdotes – open content licenses may have prevented negative outcomes.
 - *Sub-contractor within a grant.* A grantee worked with a third-party consultant that helped create a logo for the grantee’s marketing strategy. The consultant put a copyright on the logo and wanted the Foundation to pay a very large sum of money to use it. (At the time of the interview, the outcome was not yet certain, but the Foundation was not planning to pay.) The moral of the story – foundations must be careful to have

clarity in their grant language about ownership and licensing of intellectual property, no matter what kinds of licenses they use or expect. In this case, if an open content license had been used, for example, the incident above may not have occurred.

- *It's only open if others can access it; beware of incompatibility issues.* Mozilla originally used one type of open software license, but although it was open Mozilla soon found its code to be incompatible with the code of a large percentage of others. These others were potential customers – and Mozilla wanted them to use its code. So Mozilla adjusted to a more compatible open source license.
- *Deciding on the simplest license and sticking with it.* Netscape (Mozilla grew out of Netscape) wanted to improve compatibility with the GPL (Free Software/Open Source license). It took almost five years to get the almost 500 permissions necessary for the project to be viable. Every single person who had written code had to be tracked down. The moral of the story: Be proactive. It is important to set up a license early and choose the one that is as simple as possible so others can build on the work and compatibility issues can be avoided down the road. Having to sort it out after the fact gets complicated, time consuming and expensive.
- *Signing away rights.* A program officer was asked to write an article for a publication. In the program officer's words, 'the publisher's contract was highway robbery.' The concern wasn't the dollar amount offered but rather the contract's stipulation that all rights would be held by the publisher for 'all technology invented or to be invented.' According to the program officer, this does not fit the definition under the law for work for hire, and authors are unwittingly signing away rights to avenues that haven't even been discovered yet. Open content licensing could have helped – if the program officer's foundation had required that program officers may contribute to published works only if an open content license is used, the article could have been written and perhaps would have benefited many others. *A similar example:* The foundation funded a series of books about reform in China. Chinese authors who contributed to the compilation, after signing the contract with the publishing company, realized that it had forbidden them to post their work on their own Web

sites. Because the whole notion of copyright is new in China, they wouldn't even have thought to ask permission about putting up a full-text version online, because it is common practice. Again, this problem could have been eliminated if an open content license was required by the foundation.

- Anecdotes – examples not based on personal experience.
 - *Scholastic, Inc.*, a Hewlett grantee, is experimenting with a new business model in the form of an open Web site for teachers.[†]
 - *MIT OpenCourseWare* is an example of an open content licensing project that is successful and sustainable. It was originally funded by Mellon and Hewlett.
 - *Harvard University, Arts and Sciences Faculty*. Harvard now requires that all scholars at the institution make their research results available via Open Access on Harvard's online repository as post-prints after having been published in scholarly journals. According to one interviewee, this is 'a huge step forward' and if other universities join Harvard, it will have a major impact that will benefit the free flow of knowledge.

Finding Six: A mixed ecology

None of the interviewees made a case for abandoning the use of traditional copyright licensing in every case and relying only on open content licenses. There also was no intimation that one way is always right and good, while the other is always wrong and bad.

Several of the individuals who participated in this research were true-believers in the benefits of increased open content licensing for the sector. At the very least, these advocates said, the writers,

[†] Created by a joint partnership of Scholastic Inc., [Teachers Without Borders](#), and the [William and Flora Hewlett Foundation](#), TeacherShare is a valuable, ever-changing free resource for K-8 classroom teachers. This online social tool provides educators with an environment in which they can interact on a consistent, flexible, and practical basis. Developed as an Open Educational Resource (OER), TeacherShare offers a worldwide learning network in which teachers can create, edit, collaborate and share classroom content within the K-8 community.

Excerpted from <http://teachershare.scholastic.com/toer/GenericPage.htm?page=AboutPage>

artists, photographers, film-makers, musicians – all of those who create – should think about the issue. That’s one of the advocates’ goals – to get those who create to consciously decide how they want their work to be used, and to get those who enjoy and use creative works to understand how to use them properly and fairly. According to some interviewees, this intentionality is somewhat lacking at the moment. Generic contract language is often used in place of a genuine conversation about intentions surrounding attribution, share-alike, commercial and non-commercial, derivatives and so on. There needs to be a larger conversation within the foundation sector, they said, about why it’s important to be intentional about licensing – who benefits, who doesn’t, and why. What’s in it for the foundations themselves? What’s in it for the grantees? Since charitable foundations receive special tax status and other benefits, they are especially obligated to ensure that the work they do is placed in the public domain and made easily accessible. It is foreseeable that some business models, for example, in scholarly publishing, will need to change in order to remain viable.

According to those most knowledgeable about the topic, the ecology of licensing practices will always be a mix. For one thing, they said, there are exceptions to all rules, and private charitable foundations do not want to be perceived as coercing their grantees to sign on to something that may not be in a grantee’s best interest. When considering an open content license or a traditional copyright, a program officer might want to consider such things as:

- The goals of the project – each project is unique and has its own special needs.
- The type of product being produced – is it a work of art, a photograph, a piece of music? Or is it a written report that compiles information gathered from many other resources?
- The field in which it resides – some fields are more conducive to open content licensing than others, for example, Information Technology is more conducive than biospace research.
- Will any harm come to any party as a result of an open license – for example, is there an issue of confidentiality or anonymity? In the case of indigenous peoples and their culture – is their intellectual property being adequately protected?

- To what extent would a person's livelihood be adversely affected – for example, a foundation would not want a scholar whose tenure or reputation may be reliant upon publication in prestigious scholarly journals to lose out on a chance to publish in said journal due to the foundation's licensing preferences.

V. METHODOLOGY

The interviewing process

The interviewing process began with several extensive telephone conversations between Phil Malone of the Berkman Center and Steve Farkas and Ann Duffett, principals of the FDR Group. The result of these discussions was an interview guide. Next, Phil Malone alerted potential interviewees that the nonpartisan FDR Group would be contacting them to invite them to participate in an interview regarding their organization's copyright and licensing policies and procedures. In the end, the Berkman Center provided the FDR Group with a list of approximately 30 names of staff members from a dozen nonprofit organizations, mainly charitable foundations. A total of 30 people participated in interviews: 20 came from the original list and an additional 10 were referred by others.

Interviews ranged from 12 to 57 minutes; on average they were 31 minutes in length. All but one took place over the telephone (one took place in person) between March 17 and April 29, 2009. The interviews followed a semi-structured interview protocol. That is to say, the inclusion of some topics depended on the knowledge, interest and experience of the interviewees, while other topics were asked of everyone. Participants were assured of confidentiality. Most were either program officers or legal staff, but there were also executive directors, officers, communications staff and other grants-related personnel represented. In most cases, the interviews were one-on-one, but several included two or more people from a single foundation at the same time.

All interviewing, analysis and writing for this report were done by Ann Duffett, Ph.D., of the FDR Group.

As with virtually all qualitative research, this study has limitations. By definition, qualitative data are not based on precise measurement and cannot be generalized to the population at large. These interviews merely reflect the opinions and experiences of the 30 individuals who participated and cannot accurately be interpreted as the definitive view of the licensing practices of any given organization nor of the foundation sector as a whole. Relatively short telephone conversations, sometimes with just one person from a given organization, are not sufficient for gathering all of the data necessary to corroborate and verify information of this kind. Still, although the findings and

analysis are suggestive rather than predictive, they are valuable as a tool for learning about open content licensing within the foundation sector.

Areas for future research

Two suggestions for future research that could benefit the body of literature on the topic of open content licensing include: 1) conducting a national random sample survey of foundations (or particular staff members within foundations) to determine actual levels of knowledge and experience as well as attitudes on this topic; and 2) conducting in-depth case studies of various types of foundations to ascertain how effectively they have or have not implemented open content licensing into their own works and what best and worst practices can be gleaned from them.

The participants

The following individuals participated in this research:

The Andrew W. Mellon Foundation

Rebecca Feit, Assistant General Counsel

Ira H. Fuchs, Vice President for Research in Information Technology

Donald J. Waters, Program Officer for Scholarly Communications

Christensen Fund

Lourdes Inga, Manager of Grants Administration

Kenneth Wilson, Executive Director

The Ford Foundation

Fatima Crosby, Outreach Associate

Alan Divack, Director of Special Projects

Kate Hartford, Program Officer

Marcy Hirschfeld, Resident Counsel

Ken Monteiro, Deputy Director Office of Legal Services

Victoria Valentine, Managing Editor

Joe Voeller, Senior Communications Officer

Gordon and Betty Moore Foundation

Sasha Abrams, Senior Counsel

William B. Green, General Counsel and Secretary

John D. and Catherine T. MacArthur Foundation

Joshua J. Mintz, Vice President and General Counsel

Mozilla Foundation

Frank Hecker, Staff Associate Member

Gervis Markham, Staff Member

Mark Surman, Executive Director

Omidyar Network

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APPENDIX 1: SELECT INFORMATION ON INTELLECTUAL PROPERTY POLICIES FOR EACH FOUNDATION

Many of the foundations represented in this study offer information about their Intellectual Property policies on their Web sites. At our request, some foundations also provided generic contract language to us via e-mail. What follows is a brief summary of each foundation's policies and procedures based on what was gathered in the interviews as well as what is provided on their Web sites.

The Andrew W. Mellon Foundation

- On Web site: Explanatory Statement on the Andrew W. Mellon Foundation's Intellectual Property Policy for Digital Products Developed with Foundation Funds
- On Web site: The Foundation generally seeks "to reach intellectual property agreements with prospective grantees prior to providing support for the creation or development of digital products"
- On Web site (Terms & Conditions): "The content and code of this Web site are subject to copyright protection and are owned by AWMF or by third parties and used under license. You may not copy, reproduce, republish, upload, post, transmit or distribute in any way the text, photos, images or any other materials from the AWMF Web site, except for personal, non-commercial use that furthers the charitable mission of AWMF or use that is otherwise consistent with fair use or other educational exceptions to US and international copyright laws. For any other use, you must obtain the prior permission of AWMF."

Christensen Fund

- This is a unique foundation that works with indigenous peoples. Often times, part of the goal of the grants it funds is to protect the natural resources, culture, stories, languages, etc., of the people under study. Open content licenses are not necessarily the best tool for doing this.
- Nevertheless, the foundation has an institutional commitment to an open philosophy and makes considerable effort to be proactive in educating itself on the pertinent issues. It also

wants its grantees to be aware of licensing and makes it a point to talk about it during the grant-making process.

The Ford Foundation

- Provided: Sample of grant letter with language about licenses for a patent project
- Provided: Sample of grant letter with language about granting the Foundation “a license to disseminate on the Foundation’s website any product produced by your organization under this grant”
- Provided: Copyright and Publishing Guidelines, Appendix D, March 2006
 - All rights “generally remain the property of the authors of such material (grant recipients) unless expressly transferred in writing by the grantee to the Foundation.”
 - For Foundation staff – copyrightable materials remain the sole property of the Foundation
 - For consultants – “an express transfer to the Foundation of these property rights is incorporated into all consultant appointment letters” ... this may be waived with signed permission. [“Under existing law...most property rights to copyrightable materials ... could be deemed to remain the property of the consultant”]
- On Web site: “All of the content featured or displayed on the Web site, including without limitation text, graphics, photographs, images, moving images, sound and illustrations ("Content"), is owned by the Ford Foundation, its licensors, vendors, agents and/or its Content providers. All elements of the Web site, including without limitation the general design and the Content, are protected by trade dress, copyright, moral rights, trademark and other laws relating to intellectual property rights. The Services and the Web site may be used only for the intended purpose for which such Web site and Services are being made available. Except as may be otherwise indicated in specific documents within the Web site, you are authorized to view, play, print and download documents, audio and video found on our Web site for personal, informational and noncommercial purposes only. You may not modify any of the materials, and you may not copy, distribute, transmit, display, perform, reproduce, publish, license, create derivative works from, transfer or sell any information or work contained on the Web site. Except as authorized under the copyright laws, you are responsible for obtaining permission before reusing any copyrighted material that is available

on the Web site. For purposes of these Terms and Conditions, the use of any such material on any other Web site or networked computer environment is prohibited. You shall comply with all applicable domestic and international laws, statutes, ordinances and regulations regarding your use of the Web site and Services. The Web site, its Content and all related rights shall remain the exclusive property of the Ford Foundation or its licensors unless otherwise expressly agreed. You will not remove any copyright, trademark or other proprietary notices from material found on this Web site.”

Gordon and Betty Moore Foundation

- On the Web site, there is a Legal Statement that says...“The Content and Code of the Site are protected by copyright. Except as set forth in the paragraph below, you are welcome to use the Content provided that: (1) you respect the Gordon and Betty Moore Foundation's, and any other party's, copyrights in the Content; and (2) your use of the Content is non-commercial and furthers the charitable purposes of the Gordon and Betty Moore Foundation.”
- On the Web site, there is a “Data Sharing Philosophy and Plan” that says its goals.... “will best be served through a culture of open access to data.” Among other things, it says that “data developed in whole or in part by GBMF grant funding are the property of the grantee unless otherwise specified.” A Data Sharing and Management Plan becomes part of the grant agreement, and it includes lots of questions to consider, including whether a Creative Commons license is appropriate.

John D. and Catherine T. MacArthur Foundation

- Provided: Generic “Rider” about Intellectual Property for grantee agreements
- On Web site: Policy on Information Sharing and Policy on Intellectual Property Arising Out of the Use of Foundation Funds
- On Web site: “Except as may otherwise be provided herein, all copyright interests in materials produced as a result of this grant shall be owned by your organization” and also includes language “to effect the widest possible distribution” and about “a non-exclusive, transferable, perpetual, irrevocable, royalty-free, paid-up, worldwide license to use, display, perform, reproduce, publish, copy, and distribute, for non-commercial purposes....”

- On Web site: “Copyright in the text materials contained in this Web site is owned by the John D. and Catherine T. MacArthur Foundation. ©2005-2008 the John D. and Catherine T. MacArthur Foundation. The text materials contained in this Web site may be used, downloaded, reproduced or reprinted, provided that this copyright notice appears in all copies and provided that such use, download, reproduction or reprint is for non-commercial or personal use only. The text materials contained in this Web site may not be modified in any way.”

Mozilla Foundation

- Mozilla Foundation is unusual in that it is not primarily a grant-making foundation but more of an operating foundation. Because it is a technology organization, it tends to be ahead of the curve on the open licensing issue. The types of groups or people it works with as consultants are already on board in terms of an open philosophy and use of Open Source software, so concerns about requiring such licenses are moot.
- On Web site: Mozilla Code Licensing plus historical documents relating to the Mozilla and Netscape Public Licenses
- On Web site: Statement of Direction and Mozilla Manifesto (set of principles)

Omidyar Network

- Another unusual organization – this is both a limited liability corporation and a 501(c)(3). For the grants it makes and the nonprofit organizations it works with, the Omidyar Network requests that the data be made public, but it does not mandate how or require an open content license. The organization’s intent is to ensure wide dissemination, never to change or modify the works.
- Omidyar Network has a new and sophisticated Web platform, and it is encouraging its grantees to archive and share information there. As a result, it is becoming more aware of the value of open content licenses and ‘the next step’ is to start actively encouraging open content licenses among grantees.
- Web site includes a Fact Sheet and “About” section that describes the foundation and its interest in transparency and commitment to openness.

Open Society Institute

- On Web site: There are “Terms and Conditions” and “Use of Materials on this Site” and “Copyright Notice.” “In keeping with OSI’s goals and mission, many of the materials posted on our website, except for those that contain a copyright notice for a third party other than OSI, are licensed to the public through the CC Attribution-Non-commercial-No Derivatives license...” “...Unless specified otherwise, the Open Society Institute owns or controls all materials that appear on the OSI website, including, but not limited to, text, artwork, photographs, graphics, audio and video clips. OSI’s rights in and to all materials on this website are protected by U.S. and international laws.”
- OSI does not require or mandate that its grantees use an open content license for the works they create with foundation funds, but it strongly encourages them to do so, and OSI as an entity does advocate for open content licensing.
- According to one interviewee, work products created by OSI staff are typically licensed by Creative Commons by attribution license. Work products created by consultants are typically commissioned works made for hire under standard consultancy agreement templates, so they are OSI’s copyright and if they appear on OSI’s Web site, the Creative Commons license would be attached to those works.

Robert Wood Johnson Foundation

- Typically, the grant agreement includes language that says Intellectual Property is owned by the grantee but the foundation has broad license to use it.
- On Web site: There are RWJF policies and governance charters but nothing easy-to-find about intellectual property.
- On Web site: “All of the content featured or displayed on the Web site, including without limitation text, graphics, photographs, images, moving images, sound and illustrations (collectively, "Content"), is owned by the Foundation, its licensors, vendors, agents, and/or content providers, as applicable.... Foundation reserves the right to track the usage of Content.... Except as may be otherwise indicated in specific documents within the Web site, you are authorized to view, play, print, and download documents, audio and video found on the Web site for personal, informational and noncommercial purposes only. You may not modify any of the materials, and, except as set forth below, you may not copy, distribute,

transmit, display, perform, reproduce, publish, license, create derivative works from, transfer or sell any information or work contained on the Web site.... Unless we have expressly made a file available for download, prior permission to use, download, reproduce, publicly display or republish any of the non-text materials on the Web site (e.g., software, graphic images, video and audio files) must be obtained from the Foundation or any other designated copyright owner, as applicable.”

Shuttleworth Foundation

- The Shuttleworth Foundation stands out as the one foundation of these 11 that fully embraces an open philosophy. Its Web site documents its journey to achieve this philosophy.
- Provided: Memo of Agreement (for grantees) and Consultancy Agreement (for consultants)
- On Web site: Statement of Principle: Open Resources; alludes to licenses for software created with Foundation funds (GNU GPL or other suitable FLOSS license); copyright works under appropriate open licenses, CC_BY SA license or GNU FDL, or into the Public Domain; preference for CC licenses which do not circumscribe moral rights such as CC SA 2.5 and CC Generic Unported 3.0 license, or subsequent versions of those licenses
- On Website: Open Resources Policy
- The Foundation encourages the use of open licenses where appropriate. Open licenses are based on existing copyright law, but ensure openness and re-usability.

The William and Flora Hewlett Foundation

- In a preliminary review of Hewlett’s Web site, no specific Intellectual Property policies were found. But it is a major funder of Open Educational Resources (OER), so there must be some policies surrounding OER regarding open content licensing.
- The OER section of the Web site does say, “The Program and its grantees also work toward creating more flexible copyright and licensing systems to make more information available to the public.”

APPENDIX 2: FURTHER OBSERVATIONS AND IMPLICATIONS

Until this point, the findings include straight reporting of what was said by interviewees during the interviews – a relaying of the points of view of the foundation staff members themselves. In this appendix, there is a change in perspective toward the researcher’s analysis of and observations about what was culled from the interviews.

Bringing greater intentionality about licensing

The findings suggest that there are several factors that inhibit the adoption of alternatives to traditional copyright – lack of information and reluctance to buck the status quo are two examples. Yet the findings also indicate that there are some foundations that have successfully used open content licenses to the benefit of their foundation and the public good. The Shuttleworth Foundation comes to mind. What follows are some options that might be considered by foundations in bringing greater intentionality about licensing, particularly open content licensing, to foundations for their own work product and that of their grantees. Obviously, not all of them can be done.

- Educate legal staff about the open content license alternative. You’ll need real examples of where open content licensing has worked and reasons why it worked in those cases. You’ll need sample contracts that ‘chill out the lawyers’ – examples of solid contract language that will pass an understandably cautious lawyer’s smell test.
- Recruit ‘young blood’ for program officer positions and mentor them for leadership positions. While youth is not a guarantee of support, it is safe to say that people who have grown up with the Internet are more amenable to the open content philosophy and may have provocative and viable ideas for how it can improve or help any given foundation’s mission.
- Encourage grantees to use Creative Commons licenses or other appropriate open licenses. This can be done in a variety of ways: initiating a discussion about licensing during the grant-making process; instituting an opt-out approach for all grantees; including a question about intentions for licensing on the grantee application. At the very least, implementing any one of these steps would result in the grantee having to think about the issue. Better yet, use

Creative Commons or similar licenses on your foundation's materials wherever appropriate. As reported earlier, just 4 out of 11 foundations in this study apply a Creative Commons license to their own Web site.

- Create greater awareness. Talk about licensing issues with co-workers and colleagues and during your public presentations and speeches. Highlight grantees that have benefitted from the use of open content licenses. (Creative Commons Web site has some examples.) Invite experts to come to your foundation to speak on the issue. As noted previously, the more that people understand the concept, the more they tend to support it.
- Review all program areas within the foundation and make conscious determinations where open content licenses might be appropriate and can best be leveraged. It doesn't have to be a blanket across the board decision – what's right for one program or one type of work may not be for another. But certainly don't eschew open content licenses for all departments when in fact they could be useful in one or a few.
- Don't recreate the wheel. Learn from the Open Source/Free Software experience. Many of these discussions over tricky issues have already been had and foundations may learn from them.
- Collaboration. Think about JStor, Artstore, the OpenCourseWare Consortium. Many of these kinds of projects were successful only because several institutions sharing a common goal were committed to working together. The end is more than the sum of its parts.
- Structural/Institutional Resources. Create the time and space to be practitioners of "open" in the work place, e.g., using wikis instead of e-mail; appointing a staff person to be in charge of implementation; instituting formal policies; using versions where all parties become accustomed to working on documents that are likely to change. (These are examples of practices the Shuttleworth Foundation implemented. Shuttleworth was the one example from those foundations represented in the research where the open philosophy, policy and

mission were all in synch. Shuttleworth's Web site is a terrific resource for learning about its growing pains.)

Observations on moving forward

This was an unusual research effort. The sample was diverse, including people who crossed the spectrum in terms of levels of experience and knowledge. It also included people from very varied positions – lawyers, program officers and communications experts – and fields – education, software and science. This section offers observations on moving forward from the perspective of the principal investigator. As the Berkman Center and its partners seek to widen their circle of thinking, involvement and outreach on this issue, these reflections may provide guidance, or at least food for thought. After all, asking an institution to change its culture – especially a large foundation with strong traditions – requires preparation and knowledge.

- For those who want to truly advocate the benefits of greater use of open content licenses in the foundation sector, consider a sector-wide education campaign. As more and more foundations start using open content licenses for their own materials (for example, on their Web sites) as well as encouraging (or even mandating) it among their grantees, there may be a rippling effect both within the foundation sector and among its grantees. After all, private foundations in the United States produce tremendous amounts of important information in a vast array of fields. As articulated by one interviewee: Imagine the impact it would have if even a small portion of the works generated from this billion-dollar industry carried the Creative Commons logo? Part of this education effort would need to take place at the very highest levels of private foundation leadership. If there was even a small group of leaders – George Soros, Mark Shuttleworth, Paul Brest – who made it a point to speak publicly about the importance of open content licensing and the benefits to the philanthropic community and the public it serves, that ripple might turn into a tidal wave.
- Frame the issue as a pragmatic good. This should be the core of each conversation about the subject. Related themes would include things like: 1) It's not only the right thing to do, it's good for the sector and for the public; and 2) Open content licensing is in synch with a charitable foundation's mission to disseminate knowledge for the public good – in appropriate cases it will lead to a stronger impact in areas that the foundation cares about.

- Advocates could do a better job showing the value of increased open content licensing in the sector by talking about the benefits of increased visibility, impact and citations as well as larger audiences. Also, they could make a case that more sharing and collaboration of intellectual property among institutions will result in a public good. All users will benefit from the knowledge, especially those in developing countries, and users may be free to reuse, remix and build upon the knowledge in ways that continue to leverage and extend the original funded work.
- Don't be shy of acknowledging that, in particular cases, there may be pros and cons to encouraging or requiring open licenses, and that there may at times be some winners and some losers. Intuitively suggesting that there are no losers in situations such as this doesn't make sense to the uninitiated. There are always conflicting interests.
- There is a need for new and creative ideas for sustainability models, both to ensure that grantees are able to find revenue streams that maintain their good works and to ensure that the knowledge and works that are produced and licensed openly remain available and accessible.
- Remember that to unleash the full benefit of an open content license, marketing and publishing skills need to be put to use as well. Slapping a Creative Commons license on a document is not magic. It takes additional work to inform, spread the word, encourage new uses and derivatives, and the like. Dissemination alone is often a passive endeavor, but open content licensing can transform it into a far more valuable undertaking.
- Finally – something to ponder: During tough economic times, will grantees and foundations give in to an instinct to be even more protective, to pull back? To what extent are open content licenses as important and productive during difficult times? Does the economic downturn provide meaningful reasons for avoiding such licenses?

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ABOUT THE FDR GROUP

Farkas Duffett Research Group, LLC, is a full-service opinion research company that uses the tools of public opinion research to help foundations and other nonprofits succeed with their programmatic initiatives and reform efforts. Our expertise is in surveys, focus groups, program evaluation, and organizational evaluation.

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