

**Cultural responses to open licences and the accessibility and usability of open educational resources.**

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This paper addresses some of the licensing issues raised by creating and licensing Open Educational Resources. Flexibility and ease in accessing educational resources, remixing and imbedding them in other, more culturally specific materials, is central to the OER movement. Flexibility can only be achieved through a combination of resource design and licensing models.

The most popular licensing model for OER content is the Creative Commons suite of licences and most OER providers either use licences taken from the Creative Commons suite or have developed a licence closely modelled on a CC original but adapted to suit their needs, for example the Creative Archive in the UK.

The rise of the media industries has given rise to an elaborate licensing system by which published works are exploited through licensing systems restricted to media industry insiders. While publication and consumption was mediated through physical media, consumers remained divorced and for the most part unaware of the licensing that underpinned the exploitation of copyright. Online and other digital media and developing technologies have changed this. By having access to publishing and production tools, and by licensing access to a digital, ephemeral product rather than a physical object such as a book or print, consumers now interrelate with licensing as never before. And they are, for the most part, either unprepared or unwilling to engage with cumbersome licensing procedures. The logic of the way in which users access content via emerging technologies is that if something is technically possible, then why is it not also legally possible? The open licences adopted by OER producers attempt to address the impenetrability of the licensing system. By putting in place a system of easily recognisable and understandable licences, OER rights holders grant very broad access and manipulation rights in advance of requests from users. This has several benefits:

- it introduces certainty and clarity into the process of obtaining permission to use the work of others
- it reduces the administrative burden of having to clear. This is particularly useful in the educational context where users have little or no inside knowledge of the mechanisms used by the media industries
- It establishes a body of works licensed as “open content” that may be freely shared.

However, we must also recognise that open licences have some disadvantages:

- Rights holders must be prepared to grant and to live with exercising only a ‘broad-sweep’ control over their works, replacing the case by case control with which they are familiar.
- Moral rights are waived under licences offering the right to make derivative works
- Different and often blurred and overlapping boundaries emerge between not-for-profit, educational and commercial exploitation or distribution.

The responses to the opportunities offered by open content, specifically in this case OER, are driven by a number of socio-cultural factors reflecting how the individual or institution balances the advantages and disadvantages of open licensing. It is common for responses to be defined by membership of a cultural or socio-economic group that transgresses national boundaries: communities of publishers, or other commercial rights holders, academics, librarians, individual users, and so on. Each group has its own take on the benefits and threats and many groupings are further subdivided: academic journal publishers do not handle open content in the same way as trade publishers while Physics appears to have a culture that is more sympathetic to open licensing than other academic subjects, and so on.

### **Ownership of economic rights: academic authors and their universities**

Releasing works under an open licence rests upon the consent of the copyright holder(s). In the case of educational content, ownership of copyright must be resolved before content can be released. It is a principle of copyright that ownership vests in the author in the first instance, and in the employer in the case of work produced in the course of employment (“work for hire” in the US). Ownership can be difficult to disentangle for educational institutions and academic authors because it is often not entirely clear whether a work has been produced in the course of employment or not. Custom and practice muddy these waters still further. Traditionally in campus based universities academics have been free to exploit the copyright in their lecture notes by turning them into academic textbooks. A strict interpretation might be that copyright in lecture notes rests with the employer but universities have never sought to exercise these rights and neither have they objected to academic staff exploiting them. Most universities have been happy to encourage this kind of copyright exploitation while still seeking to control or manage the exploitation of other forms of IP, particularly patentable inventions deriving from research, for example.

The ownership of copyright in course materials is fundamental to distance teaching universities and most have addressed the issue in their contracts of employment. Most often the employer acquires ownership of copyright in course materials while members of academic staff retain copyright in papers, articles and work created as part of their personal research. However, the ownership of copyright in electronic course materials is an area of increasing concern to campus based universities entering distance learning, where academic authors may feel that the acquisition of copyright by their employer represents a threat to their own ability to exploit the market for academic textbooks. Even in the case of distance teaching institutions the pattern is mixed. In Europe, for example, the authors of some institutions retain copyright, granting the university only a limited right to distribute the work to their own registered students. Other institutions acquire copyright, including full

exploitation rights, but for a limited period, perhaps only five years, at the end of which copyright reverts to the author. Collaborative course development amongst institutions with varying employment practice has been complicated and has involved a series of head contracts between the institutions with a series of sub-contracts between an institution and the academic staff of another.

Other concerns, particularly within but not restricted to traditional campus universities beginning to enter the online teaching sector, include the fear that staff leaving to join a rival institution may be able to take course materials with them and use them to compete for students in the same, online market where student recruitment is much more directly competitive.

### **Ownership of moral rights**

Moral rights, the right to be identified as the author and the right to object to derogatory treatment of the work, are particularly relevant to licences that permit the creation of derivative works. These licences necessarily permit the use of the work in other forms and adaptations, in contexts that are unpredictable and of which the author may not approve. And yet the licensee must be confident that the licensor will not object to their treatment. This includes on the one hand a waiver of moral rights by the author, or at least an understanding that they will not be exercised. This is a particular difficulty for jurisdictions where moral rights are both inalienable and perpetual. In jurisdictions where moral rights are not recognised or where they may be waived or apply in only a limited way to work created in the course of employment, solutions may be found but even in these jurisdictions many academic authors have concerns about how their work may be distorted in the course of sublicensing.

Much of this centres on uncertainty about what kind of use constitutes ‘non-commercial’ or ‘educational’. While those most strongly in favour of open content release are least concerned about the nature of derivative works, many authors have a proprietorial concern about their work and how it is used quite apart from concerns about commercial exploitation.

### **The educational and commercial markets**

While the open content movement is successful in generating shared materials from within the educational community, it is less successful in licensing imbedded non-educational content. This is a real challenge, for while education is sometimes seen as a walled garden, the walls between it and the commercial world are porous and there is a great deal of cross-traffic between the two. Some academic subjects are difficult or impossible to teach without students accessing examples of commercial recordings, images and texts. Some commercial publishing sectors, academic journals being the most obvious example, are dependent upon content generated within the academic garden for their existence. It is a challenge to the OER community to accommodate the licensing of non-educational content under terms that are compatible with the open content ethos while still being acceptable to commercial media rights holders.

The use of third party, mainly but not exclusively commercial, works is accommodated in Copyright legislation by the provision of Fair dealing or Fair Use defences against infringement. These provisions, however, break down in the digital environment. The breakdown comes in two ways:

- Much national legislation makes no provision for distance on-line education and refers specifically to classroom use (in the sense of a physical classroom). Other legislation makes provision for networked access but restricts it to a campus location and so denies access to distance learners
- The development of technological protection measures and legislation preventing their circumvention combine to make it much more difficult for users to exercise Fair dealing/Fair Use provisions in a meaningful way.

So the issue of accessing third party works becomes more, not less difficult to resolve. And accessing third party work in teaching on line is essential to most subjects if the materials created in-house by the university are not to be bowdlerised by having to remove images, quotes and performances taken from third party sources.

Some comparatively recent developments in journal publishing may be the beginning of rapprochement. Academic journals are beginning to find new ways of licensing articles. Some acquire only publication rights, leaving copyright with the author. Others acquire copyright but grant authors the right to self-archive the article on the author's own open access web site. SURF in the Netherlands and JISC in the UK have collaborated in a study into open source journal publishing and have hosted a number of meetings between publishers, librarians and authors to promote a shared understanding of the issue. Physics journals have found their authors particularly receptive to open licensing models as Physics appears to have a culture that encourages collaboration. It is perhaps no coincidence that the internet emerged and was developed from the Physics discipline. In contrast publishers in other disciplines, Chemistry, for instance, report a greater reluctance on the part of their authors.

Interestingly, the confidence held by some publishers that the availability of individual articles held in this way would promote rather than damage sales of the journal has taken a knock with the emergence of more sophisticated search engines capable of reassembling the complete journal by compiling the articles held on authorial web sites.

However, a different sector of the publishing industry – textbook publishers – has reacted differently and has encouraged linking between publishers' sites and those of their authors as a way of promoting sales of the book, partly as publicity and partly as a way of adding value and easily updated refresher materials for purchasers of the textbook.

The picture grows more complicated when one takes account of other media industries. For example, image rights holders are concerned mainly with the resolution of the images they licence. High resolution images, capable of hard copy printing, are impossible or at best very difficult to license for online use. Lower resolutions, still satisfactory for viewing on screen, are possible.

The difficulty for commercial rights holders is in drawing boundaries between primary, secondary and educational markets. Some contractual definitions of 'television broadcast' eradicate the traditional boundaries between media and between delivery technologies, and there are similar difficulties in distinguishing between markets. For example, as part of its public service remit the BBC in the UK offers a revision service for students taking public exams but many educational publishers

complain that this is an example of public funding distorting a commercial publishing market. If this is difficult for commercial media rights holders, then it is equally difficult for educational providers in a global online market. Distance education universities, competing for fees deriving from a growing online student market, may find it difficult to draw boundaries between non-competing 'educational' uses and educational activities that compete for students in the same market. Campus based universities are able to draw a distinction between their core provision in face to face teaching and online self-study. Defining and protecting what is core is more difficult for distance education.

### **Cultures of resistance**

A common barrier to universities adopting materials created elsewhere is what might be termed "not invented here" syndrome. Administrators at both national level (UK) and within institutions report that it is difficult to encourage academics adopt even simple learning objects written by others. At national level this is a barrier against sharing common resources, reducing costs by avoiding the constant reinvention of generic tools and commonplace subject concepts. The problem remains even at institutional level and administrators have reported resistance to the use of shared resources within a single institution where faculties commonly prefer to create new materials rather than use resources created by members of another faculty within the same institution.

University administrators might also be careful to control the timing of the release of research papers particularly due to the need to protect patentable work until the patent has been registered.

Academic structures may themselves act as a deterrent to institutions and individuals adopting open content licences. Teaching and the creation of teaching materials may accrue fewer rewards and carry less kudos than engaging in research while the system of assessment and promotion for academic research staff also has an influence. Publication in commercial journals is rewarded and recognised while self-archiving or self-publication, even with inbuilt peer review, is not.

It is possible that at an international level there may be a reduced resistance to adopting content developed elsewhere. This may be because of an overriding need to find resources at low cost coupled with the freedom to create culturally specific content by adapting and creating derivative works under open licences.

Creative Commons does not attack copyright and, in fact, relies upon copyright for its effectiveness, but in some minds there is the thought that copyright is necessarily bad in and of itself. I have spent much of this paper addressing the difficulties that educators have in licensing, accessing and sharing work. I want to turn now to some of the benefits of copyright that might, ironically, also argue against open content.

Copyright brings benefit to authors. Its informality protects the disadvantaged as well as those with resources to register for protection under other areas of IP. It prevents the widespread commercial exploitation without recompense that we see in areas where protection does not apply. For example, cultures in which knowledge, skill and craft is shared rather than owned find it difficult to find a way of protecting their

values under systems that do not recognise IP rights in traditional artefacts and designs; pharmaceutical patents may derive enormous benefit from natural resources and medicines with little or no recognition of the 'rights' of the local population.

## **Conclusion**

Developing effective, easily understandable open licences will be fundamental to the success of the OER movement. Online distribution of content changes the nature of ownership. We move online from a world in which we own artefacts to one in which we acquire access rights under licence. The licence, not the object, is what we own and the licence, in complete contrast to the artefact, may be restricted to an individual, expire or be subject to change or require further payment.

Open licences as they stand will assist the promotion of the OER movement but they are not yet fully formed. There is some reluctance to recognise that the boundaries between the educational and commercial media worlds are not watertight. Content flows between the two worlds. The challenge is to develop licensing models that protect commercial markets while not hindering the development of shared educational resources.