

## Main Articles

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# Creative Commons Licences in Higher and Further Education: Do We Care?

[Naomi Korn](#) and [Charles Oppenheim](#) discuss the history and merits of using Creative Commons licences whilst questioning whether these licences are indeed a panacea.

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## Introduction

[Creative Commons](#) [1] is helping to instigate cultural change: it is empowering rights holders with the knowledge and tools to decide under what terms they wish third parties to use their creations, whilst permitting users easy and user-friendly means to use content lawfully without the necessity of requesting permission. The release of the Creative Commons licences has inspired a global revolution, supported by a sub-culture with its own identity, ideology, activities and membership [2] and the spawning of other model licences developed with a similar philosophy, such as [Science Commons](#) [3], [Patent Commons](#) [4] and [Creative Archive](#) [5]. However, despite the remarkable widespread use of these licences, there are critics of Creative Commons licences who raise concerns about the ethics, legality and politics of their use [6].

The recent incorporation of Creative Commons licences within Microsoft Office Word, Excel and PowerPoint applications via a downloadable plug-in [7] now provides an integrated method for the creation and licensing of content. It is a brilliant way of encouraging consideration about who is allowed access to digital content and under what conditions, at the time that the content is generated. This development has enormous potential for nurturing educated and mature approaches to copyright and access, but at the same time had also necessitated the need to re-examine the validity of using Creative Commons within teaching, learning and research activities. It has precipitated a critical assessment of their use and the need to set clear parameters about when they can and cannot be used.

## History of Copyright

### Copyright and Balances

Historically, international copyright legislation has been about balances. Balances that strive to cater for the rights of

users and those of rights holders. Balances which also aim to create a fair legislative framework: an equilibrium that addresses the fundamental right of creators of original content to benefit economically from the fruits of their intellectual and creative endeavours and offering them the means to protect what they have created, whilst acknowledging legitimate and fair uses of works which enable the furtherance of society, culture and personal well-being. In order to achieve the correct balance, within reasonable parameters, some of these copying activities have been excluded from the shackles of copyright law, (lawyers refer to them as the "exceptions to copyright"), to allow users the rights to use works lawfully without needing a licence to do so. This is the best-known example of this important and often delicate balance. However, critics of the current copyright law, most notably [Lawrence Lessig \[8\]](#), the founder of Creative Commons and advocate of free culture [\[9\]](#), has argued strongly that the balance has in recent years shifted too far in favour of rights holders and to the detriment of users.

## Rights Holders and New Technology

The evolution of the Internet has created dynamic pockets of sharing, collaboration and access to content, through sites such as [YouTube \[10\]](#) and others which have the potential to test the constraints of copyright law, by providing easy means for unauthorised use of content. The knee-jerk reaction of major industry players has been to employ technological, contractual and legislative approaches to control both legitimate activities which cut across some of their business models, as well curtailing infringing practices.

Digital Rights Management, and in particular Technical Protection Measures (TPMS) are typical technological solutions which have been widely engaged, although these have been publicly criticised, for example by LACA (Library and Archive Copyright Alliance) in its submission to the All Parliamentary Internet Group's consultation on Digital Rights Management [\[11\]](#). Significant criticisms of TPMS include the locking down of digital content which have not only eroded fair dealing provisions, but also are effectively creating works that are in copyright in perpetuity, by preventing access to them beyond the term of copyright protection. These measures have been supported by contractual agreements with users which can also override legitimate access rights. This is because in most countries (but not all, notable exceptions are Eire and Belgium) a signed contract can override exceptions to copyright.

Rights holders have also exerted lobbying pressure and in recent years, the US, Australia and member states within the European Union have implemented a raft of legislative measures which have tightened the digital copyright regime. These include the criminalisation of copyright infringements, embodied with the *Copyright and Related Rights Regulations 2003* [\[12\]](#) which includes the criminalisation of the removal of TPMS. Fair dealing or similar provisions have also been severely curtailed, and this in particular has eroded the delicate balance between rights holders and rights users.

## Creative Commons

### Introduction to Creative Commons

The Creative Commons philosophy is driven by those who believe in free and open exchange of digital content and to create a middle way between "...the extremes of copyright-control, and the uncontrolled exploitation, of intellectual property." [\[1\]](#) The licence was inspired by the open source movement and follows the principles enshrined within copyleft [\[13\]](#) which encourage the free distribution of works and any derivatives made of it. The use of Creative Commons licences therefore has the potential to redress the copyright equilibrium disrupted by recent developments. Recent test cases in Dutch and Spanish courts have upheld the validity of Creative Commons licences in infringement of copyright cases [\[14\]](#).

Creative Commons offers the creators of digital content a range of digital licences attached to their content that permit different access rights to it. These licences are available in various forms that permit the rights holder to retain a level of control over how their work is treated ("Some Rights Reserved"). Availability in different formats, comprising machine-readable code for search engines and other applications to identify the work by its terms of use,

a detailed licence and a summary of the licence using symbols to represent key licence terms offer enormous benefits. The dramatic uptake and continual publicity surrounding Creative Commons licences means that individuals are likely to encounter content on the Internet which is governed by the terms and conditions of Creative Commons licences.

## Creative Commons and Their Use in Higher and Further Education

Certainly, the take-up of these licences within Higher and Further Education institutions is believed to have been significant and, in many cases, possibly unquestioned because of the alignment of the Creative Commons philosophy and the broad sign-up to the benefits of open access. Examples of the use of Creative Commons licences include the Open University's OpenLearn initiative [15]. Indeed, the full extent and implications of the use of Creative Commons licences within HE and FE contexts within the UK will shortly be assessed as part of commissioned research by the JISC. But, in a climate where we really need to know what we are signing up to, should we not be looking beyond the ideology of these licences and checking whether they are really fit for our purposes?

## Are Creative Commons Licences Fit for Purpose?

Creative Commons actively encourages the sharing of educational material, with an 'educational' link [16] on their homepage through to the opportunity to search for material for commercial use and incorporation within other works, as well as to a licence. This 'standard licence' is not specific for educational purposes and users can only choose, as in the case of the majority of Creative Commons licences, to make the content available either for commercial or non-commercial purposes. Creative Commons licences do not specifically cater for educational purposes.

It is also worth noting that there is a significant difference between the information that is provided within the full-length licence in comparison to that which appears within the shortened code of Creative Commons licences. Indeed, the significant 'irrevocable' and 'worldwide' terms which form part of the full licence, are absent from the shortened 'commons deeds' version of the licence. This means that HE/FE institutions may not be aware that any content that they make available to the public under any of the Creative Commons licences, can be used by anyone, anywhere, for the full term of copyright and they do not retain the ability to retract the permission. This does not, however, preclude them from ceasing to make the content available under these terms, but it will not include any content that has already been licensed under the terms of a Creative Commons licence. Other instances that may encourage HE and FE institutions to think twice about using Creative Commons licences include:

- If the work includes third party rights for which the Higher or Further Education institution has not secured permission for them to then be disseminated under a CC licence. This might include the use of photographs, text, images, etc., generated by third parties, or indeed images of third parties for which permission would need to be sought.
- As an employee, unless there is an agreement with the employer to the contrary, the employer is likely to own the rights in the work created (as is the case with course material, research outputs, etc). In this case, as the employee does not own the rights in the work that is produced, he or she will need to check with the institution that it is happy for it to be made available under a Creative Commons licence. Reasons for refusal might include those that are ethical, political, financial or legal. We are, of course, aware that in many institutions, custom and practice leaves such decisions to the employee. The recent HEFCE Good Practice Guide [17], however, strongly encourages such institutions to assert ownership of copyright in e-learning materials, and such advice may well occasion changes in policy in the future.
- The terms of the Creative Commons licence may cut across some of the activities for which an institution or department might normally charge, the business activities of the department or institution, or undermine existing licensing arrangements with third parties.
- Creative Commons licences are global licences without providing any means to restrict the countries in which material may be used. This is important if contractual agreements, relationships, political or ethical reasons preclude the release of certain types of learning material or research outputs in particular countries.
- The department or institution may want more control over the context of use of the work and want to prevent any implied or direct endorsement. This is not currently one of the areas which is covered by the licence.
- It maybe important to know who accesses and uses the material that is generated, for evaluation, marketing and other in-house purposes. The Creative Commons licences have no provision for user accountability, or tracing of usage.
- There are also many instances where you cannot use TPMS (Technical Protection Measures) in conjunction with the use of Creative Commons licences, if TPMS undermine any of the provisions of the licences. Thus, for example, restricting access to students within the institution is incompatible with a Creative Commons licence.

- The Creative Commons licence does not cover database rights, yet much output from FE and HE institutions is protected by such rights. Thus, even with a Creative Commons licence, users may not infringe any database rights.
- It is, in any case, unclear if Creative Commons licences are valid in UK law, as they do not provide any 'consideration' or payment, and there is no 'I agree' button to accept.

## Concluding Remarks

The well-known [JORUM](#) service [18] decided not to use Creative Commons licences in the past because of some of the points made within this article. So, are Creative Commons licences a panacea? No. Should we worry? Probably not, but we need to be aware of the implications and limitations of using Creative Commons licences and remember that their use is only as good as staff awareness about copyright issues, rights management procedures and robust policies underpinning the operations of educational institutions. HE and FE institutions need to be clear about their policies towards access and broader strategic and commercial goals, before committing themselves to the irrevocable terms of Creative Commons licences.

It might be advisable instead for institutions to explore the use of Creative Archive licences [5], which are a set of more restrictive licences, based upon the same premise as Creative Commons but with limits upon the use of content for educational and non-commercial purposes and restrictions relating to the territories in which they may be used.

### AUTHORS' NOTE:

*Ms Korn and Professor Oppenheim currently act as IPR consultants to JISC. Nothing in this article should, however, be construed as representing JISC's own opinions or policies.*

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