

A large, circular lens or magnifying glass is positioned on the left side of the cover, showing a reflection of the text. The background consists of horizontal bands of color: purple, black, green, blue, and grey.

Otherwise Open

Managing Incompatible Content within Open Educational Resources

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I. Introduction

Open Educational Resources (OER) are teaching, learning, and research resources, including media and tools, that are free from copyright restrictions or are publicly licensed for anyone to distribute, adapt, translate, re-mix, and improve.¹ OER are the basis for a burgeoning open education movement, which is rapidly expanding in the numbers of people, projects, resources, and policies designed to support its continued growth and impact. The goal of the open education movement is to build a global learning commons—a large pool of OER that anyone in the world can access, share, modify, and combine with other open resources. Despite this vision, many of the OER being created today are socially, technically, and/or legally incompatible with one another. Incompatibility leads to the creation of silos of OER, rather than an internationally interoperable pool of resources. Silos of OER undermine the growth of the global learning commons, especially when they develop within national borders.

Copyright law is often a source of incompatibility, and copyright issues have been reported as a growing concern of the OER community.² Creative Commons licenses provide one solution to the problem of incompatibility by giving authors the ability to change the default rules that apply to their own resources, resulting in OER that can be legally shared, adapted, combined, and republished. More importantly, CC licenses provide the legal infrastructure for OER that are useful components of the global learning commons. Unfortunately, most educational content available on the Internet remains “all-rights-reserved” under the default rules of copyright. Even with the growing adoption of Creative Commons licenses, many creators opt for licenses with more restrictive terms, which do not necessarily permit all of the desirable uses for the purposes of OER. When creators of OER incorporate into their OER materials that are protected by all-rights-reserved copyright, or that are not legally compatible with the copyright terms of use they wish to offer users (hereafter referred to as “Incompatible Content” or “IC”), then the openness and interoperability of the educational resource at issue is compromised.

This paper seeks to provide an overview of the problem posed by the incorporation of IC into otherwise open educational resources. This

¹ See The William and Flora Hewlett Foundation, *Education: Open Educational Resources*, <http://www.hewlett.org/oer>.

² See generally SUSAN D'ANTONI UNESCO, *OPEN EDUCATIONAL RESOURCES – THE WAY FORWARD* (2008).

paper also describes a number of approaches to resolving this issue, including the reliance on jurisdictional copyright exceptions and limitations, and explores the trade-offs involved in adopting any one of these approaches. It is important to note that we do not know the extent to which the inability to (easily and legally) incorporate IC acts as a barrier to the creation, dissemination and use of OER, or even the extent to which members of the OER community understand and appreciate the legal and practical complexities presented by this issue. Regardless of perception and understanding of these issues, however, the potential risks associated with the use of IC are real, and anecdotal evidence suggests that this risk is having a chilling effect on the creation and use of OER. For these reasons, this paper also suggests areas for empirical research into these issues.

II. The OER Copyright Problem

Any educational resource that is fixed in a tangible medium (e.g., textbooks, lesson plans, lecture notes, educational software, tests, and so on) qualifies for copyright protection. When these resources are created, copyright law provides the default terms of use under which others may take advantage of them. However, the terms of use provided under the copyright laws of one country differ from those granted by the laws of other countries. The exclusive rights granted by national copyright laws can differ in numerous ways, such as what subject matter is protected, how long the exclusive rights last, or whether the moral rights of authors are recognized. Similarly, while all national copyright laws provide certain exceptions and limitations to the grant of exclusive rights, those exceptions and limitations are not standardized. For example, “fair use” provides a mechanism through which many educational uses are allowed. Unfortunately, fair use exists only in the United States, Israel, and the Philippines, while many other nations have narrower educational or private use exceptions.

As a result, the usefulness of educational resources to downstream users can vary widely depending on the default copyright terms of use. Copyright holders have the right to alter the default rules by licensing works to particular people for particular uses, or by applying a standard public license such as those offered by Creative Commons. However, if the copyright holder does nothing, then the default rules apply. These default rules may not be as generous as the copyright holder may want them to be, and may limit desirable educational uses. Furthermore, the default copyright rules are not standard across national borders, so the terms of use available to a teacher lo-

cated in the United States are different from those available to a teacher located in the United Kingdom, and different again from those available to a teacher in Japan.

In practical terms, the OER copyright problem arises when the creator of an educational resource intends to release educational resources under an open license but also wishes to incorporate Incompatible Content that he or she did not create. To be clear, aspects of this issue are not unique to OER. Educators and commercial services struggle with issues related to the use of third-party content all the time. For example, a teacher may wish to make photocopies of a chapter of a book to hand out in class, but may not be sure whether it is legal to do so without permission. Similarly, those engaged in the creation and sale of e-learning materials—resources specifically designed for online use and distribution that are not necessarily openly licensed—also confront this issue. However, the risk and confusion involved with the use of Incompatible Content becomes even greater when a resource incorporating such content is placed online with the intent that it will be further distributed and reused (i.e., under an open license).

OER being “open” relies on the educational resource being licensed under a Creative Commons license or another public licensing scheme that allows for use, distribution, and adaptation. However, creators of OER are not permitted to openly license IC because only copyright holders may apply a Creative Commons license to their work. Yet, education regularly demands the use of materials created by others, as the subject of the course itself (such as a poem to be read in a literature course), as the subject of analysis or critique (such as a film clip to be studied by film students), as illustration of a method or process (such as a flow chart of a biological process), and for many other beneficial educational purposes. As a result, creators of OER often believe they need to integrate third-party IC into educational resources in order to ensure that the OER they provide are complete.

The inclusion of IC in otherwise open educational resources is problematic on a number of levels. When all-rights-reserved or more restrictively licensed materials are included in OER, it may not be entirely clear to the downstream user which materials they have permission to reuse freely, and which materials may only be reused with further permission, or may not be reused at all. Even assuming the IC is labeled clearly, its incorporation can add to the burden on the downstream user in terms of transaction and monetary costs. Further, there is also the possibility that creators may feel the need to license

the resulting OER more restrictively than they otherwise would have if the IC had not been incorporated.

Unfortunately, the incorporation of IC generally reduces the openness and interoperability of the OER, and therefore renders the OER far less useful to the global learning commons. Additionally, the level of risk associated with these behaviors is not clear or well understood. While we do not know how likely it is that any of these risks will come to bear in any particular instance, the uncertainty associated with the use of IC has a chilling effect on the behavior of the OER community.³ In cases where institutions play a role in supporting OER, such as MIT or the University of Michigan, the worries are often compounded in the knowledge that they are high-profile institutions and leaders in the open education movement. Additionally, it is quite possible that in the future, a range of potential aggregators may have an important role to play in open education. The risk for such aggregators will be that by aggregating content, they also aggregate the risk of infringement, which in turn, could deter new ventures. Accordingly, there are many reasons to try to lessen or eliminate the risks associated with using IC to maximize the usefulness of OER. A number of techniques for mitigating the risk associated with the incorporation of IC into OER are discussed below.

III. Overview of Copyright Exceptions and Limitations

In dealing with the copyright problem described above, some creators of OER look to existing legal paradigms regarding permissible uses of copyrighted materials as a potential solution.⁴ Unfortunately, despite the existence of numerous international treaties relating to copyright, there is no universal international standard upon which creators of OER can rely. Indeed, the content and structure of copyright laws vary dramatically from country to country. Nevertheless, the laws of most countries permit certain private study or educational uses of a work, despite the copyright holder's otherwise exclusive control over that content. Educators and students around

³ D'ANTONI, *supra* note 4.

⁴ For example, members of the OpenCourseWare Consortium located in the United States have gathered together to develop a set of Best Practices for Fair Use in OpenCourseWare which will be published in September 2009. Additionally, the Commonwealth of Learning has offered guidance on copyright matters for education for Commonwealth countries. See COMMONWEALTH OF LEARNING, DOCUMENT FOR COMMONWEALTH COUNTRIES ON COPYRIGHT MATTERS IN EDUCATION. <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf>.

the world rely on such copyright exceptions and limitations (“CELs”) every day. It is beyond the scope of this paper to perform an in-depth survey of international CELs, but it is useful to provide a few examples to give a basic idea of how CELs work and why creators of OER may find them a partial solution to the copyright issues explained above. The following section applies these CELs to a hypothetical OER situation to show how a particular use case would play out under each country’s laws.

1. Fair Use

In the United States, as in most countries, holders of copyrighted works have the exclusive right to reproduce, distribute, publicly perform, publicly display, and make derivative works of their original copyrighted materials.⁵ There are also numerous exceptions and limitations embedded in the U.S. Copyright Act.⁶ The most well-known of these limitations codifies the common law copyright limitation known as fair use.⁷ To the extent it applies, fair use is the most important limitation on an author's exclusive control of a work for those who use copyrighted material for educational purposes, because U.S. law provides no blanket exception for such uses.⁸ Rather, a defendant must demonstrate that fair use applies to his or her particular case. If she can prove her use is fair, then the unauthorized copying or other use is not considered infringement.⁹

The U.S. statute provides a set of criteria for courts to consider in determining whether a particular use is fair. First, the preamble to the fair use section lists six examples of types of uses that are more likely to be permissible, stating:

“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹⁰

⁵ Copyright Act of 1976, 17 U.S.C § 106 (2006).

⁶ 17 U.S.C. §§ 107-121.

⁷ 17 U.S.C. § 107.

⁸ Section 110 of the U.S. Copyright Act does set forth a few very limited educational exceptions for certain face-to-face classroom activities, as well as for digitally transmitted courses, however these are widely believed to be unhelpful for most educational purposes. 17 U.S.C. § 110.

⁹ It is worth noting that Israel and the Philippines also have versions of fair use in their copyright laws as well.

¹⁰ 17 U.S.C. § 107.

Additionally, the statute provides four factors for courts to consider when determining whether a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹

These factors are weighed by the court in each case to determine whether the particular use qualifies as fair use, which makes the doctrine both open ended and flexible. Interestingly, the question of whether a particular use is fair is increasingly dependent on how “transformative” the use is.¹² Nevertheless, because courts must balance all of the factors for each case, the outcome of such cases is often unpredictable. While the broad flexibility of the fair use doctrine is often cited as a virtue allowing courts to apply the doctrine to novel circumstances, that same flexibility can make reliance on fair use risky without professional legal advice.

2. Fair Dealing

Fair dealing is a set of enumerated exceptions to the exclusive rights of the copyright holder found in many of the common law jurisdictions of the Commonwealth of Nations.¹³ Like fair use, fair dealing is a use of a work specifically recognized as not being a copyright violation. Unlike fair use, fair dealing can only apply to acts that fall within one of certain enumerated categories.

Fair dealing varies somewhat from country to country. For example, the Canadian version of fair dealing is broader than its U.K. counterpart, even though these two countries share the same enumerated exceptions for: (1) research or private study, (2) criticism or review, and (3) reporting current events.¹⁴

In the U.K., fair dealing is a rather narrow exception. For example, under U.K. law, research and private study must be performed for non-

¹¹ *Id.*

¹² See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

¹³ Commonwealth Nations are those that were once British Colonies, and therefore derive some of their present laws from those of the U.K. There are 53 countries in the Commonwealth – this section focuses only on two.

¹⁴ *Compare* Copyright, Designs and Patents Act (“CDPA”), ch. III, §§ 28 -76 (1988) *with* the Canadian Copyright Act (R.S.C. 1985, c. C-42) §§ 29, 29.1 and 29.2.

commercial purposes only.¹⁵ Further, this purpose does not apply to non-textual media such as broadcasts, sound recordings, or film.¹⁶ U.K. courts have also interpreted the criticism and review provision rather narrowly—for example, holding in one case that the printing of certain letters was unnecessary and the true “purpose” of doing so was not criticism or review, but simply to attract readers.¹⁷ And though the news reporting exception has been interpreted somewhat broadly,¹⁸ that ruling has been criticized.¹⁹

On the other hand, the Canadian Supreme Court has stated that the fair dealing enumerated purposes should be accorded “large and liberal interpretation” in order to ensure that “users’ rights” are not unduly constrained, and are not limited to non-commercial or private contexts.²⁰ Additionally, the Court has recently developed a broad set of criteria for assessing whether a particular dealing is fair.²¹ The factors relevant to determining the fairness of the dealing in Canada include: (1) the length of the excerpts which have been appropriated from the work (objective factor), (2) the relative importance of the excerpts in relation to the critic’s or journalist’s own comments (subjective factor), (3) the use made of the work, and (4) the nature of the use, be it criticism, review or summary.²² Of note, the impact of the use on the market for the original work does not appear to be an important factor.²³

3. Australia’s “Flexible Dealing” Approach

Australian law also contains statutory limitations for copyright fair dealing, though it recognizes two additional categories that Canada and the U.K do not—the provision of legal advice and, since 2006,

¹⁵ Defined in the CDPA (n 98) s 178: as not including direct or indirect commercial purpose.

¹⁶ Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, 53 MCGILL L. REV. 309 (2008).

¹⁷ *Assoc. Newspapers Group Plc v. News Group Ltd.*, [1986] RPC 515, 518.

¹⁸ *Pro Sieben Media AG v. Carlton Television Ltd.*, [1998] FSR 43 (Can.).

¹⁹ *D’Agostino*, *supra* note 24, at 30.

²⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

²¹ *Id.*

²² LAURENT CARRIÈRE, *FAIR DEALING IN CANADA* (2000), <http://www.robic.ca/publications/Pdf/032E-LC.pdf>.

²³ *D’Agostino*, *supra* note 24, at 34.

parody and satire.²⁴ In the same 2006 bill,²⁵ Australia also enacted an amendment to the 1968 Copyright Act, adding a “flexible dealing” provision that is distinct from the fair use and fair dealing provisions set forth above.²⁶ Section 200AB, while not as open-ended in its drafting as the U.S. fair use doctrine, was intended to confer some of the benefits of a flexible exception to user groups who had traditionally been granted more limited usage rights under the Australian Copyright Act, such as libraries and educational institutions.²⁷ The exception provides broad rights for these groups to use material, but only for certain categories of uses. In other words, the provisions are limited not only by the *purpose* for which the use is being made, but also by the *type of person or entity* making the use. Section 200AB applies to: (1) uses made by libraries and archives for the purpose of maintaining or operating the library or archives, (2) uses made by educational institutions for the purpose of giving educational instruction, and (3) uses made by anyone for the purpose of making material more accessible to those with a disability that causes difficulty in reading, viewing, or listening to the work.²⁸ The 2006 Amendment also expressly incorporates the elements of the “Three Step Test” contained in international treaties such as the Berne convention. According to this test, the exceptions must (1) amount to a special case, (2) not conflict with a normal exploitation of the work or other subject-matter, and (3) not unreasonably prejudice the legitimate interests of the holder of the copyright. Finally, Section 200AB requires that the use not be made for the purpose of obtaining a commercial advantage or profit.

This brief comparison of certain limitations or exceptions to

²⁴ Emily Hudson, *Fair Dealing and Documentary Film Makers: Norms and Law in Australia*, in COPYRIGHT & DOCUMENTARY FILM IN THE COMMONWEALTH: LEGAL SCHOLAR REPORTS FROM SIX COUNTRIES 1, 3-4 (2009).

²⁵ *Copyright Amendment Act 2006* (Cth). For more details on the changes introduced by this Act, see Brian Fitzgerald, Anne Fitzgerald, Timothy Beale, Yee Fen Lim, Gaye Middleton, *Internet and e-Commerce Law - Technology, Law and Policy* (Lawbook Co, 2007).

²⁶ For a full description of the new provision and how it operates see Australian Digital Alliance’s *A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions: Section 200AB of the Copyright Act 1968 (Cth)* at <http://www.digital.org.au/documents/FlexibleDealingHandbookfinal.pdf> and the Copyright Advisory Group’s *Flexible Dealing* at <http://www.smartcopying.edu.au/scw/go/pid/542>.

²⁷ See, e.g., De Zwart, at 12-15; Emily Hudson, *The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions*, 14(4) AUSTRALIAN L. LIBRARIAN 25 (2006).

²⁸ Melissa De Zwart, *The Copyright Amendment Act 2006: the new copyright exceptions*, 25 COPYRIGHT REP. 4, 12-15 (2007).

copyright shows the diversity of default terms of use that copyright law supplies even among legal systems that all are rooted in English law and the English approach to copyright. Most other legal systems in the world approach copyright from the “author’s rights” or *droit d’auteur* perspective, derived from the laws of continental Europe. Many of these legal systems have customized lists of permissible uses without license. As a result, even though most copyright laws offer users certain freedoms to use works created or owned by others, these freedoms often differ substantially around the world. The diversity and complexity of these differences serve as obstacles to the goal of creating a global commons of resources available under standardized terms of use. Unless or until there is greater international harmonization of user’s rights in copyright law, standardizing the terms of use applicable to educational resources must be done through licensing.

IV. Applying CELs to the OER Copyright Problem: A Case Study

In order to show how these different CELs play out in practice, imagine the following scenario:

A high school journalism teacher decides to create OER directed at teaching students about bias in the media. To do this, she takes short excerpts from news articles covering the same highly publicized event from three different freely available newspapers (one liberal, one conservative, and one international) each of which tells the story from a different perspective. The lesson is based around having the students explore journalistic angles by comparing and contrasting each author’s choice of words, the facts highlighted or omitted, use of sources and quotes, location, and overall framing of the issues presented by the news stories. The teacher does not include her own review or analysis of the specific articles, but rather presents the student/user with some general questions and considerations about bias in the media. The lesson is then placed on the teacher’s personal blog (which is hosted on a site without advertising) with an open license as OER, with the IC marked as distinct from the openly licensed content and properly attributed to the original authors.

If the teacher is located in the United States, then it is probable that her use would be considered a fair use because it is educational, non-commercial, transformative, and only a small portion of the text was used. To be clear, however, because fair use is a case-by-case

balancing test, a court could disagree with this analysis.

If a teacher located in the United Kingdom were to find the U.S. teacher's lesson on the Internet, it is far from clear that he would be able to download the news articles and use them in the exact same manner as the U.S. teacher did—to illustrate media bias generally rather than to criticize or review the newspaper articles. Because this illustrative educational purpose is not one of the specific enumerated categories for fair dealing, the U.K. teacher's use would probably be illegal under U.K. law.

In Australia, the question turns on whether the teacher makes use of the materials on behalf of his educational institution or not. If an Australian teacher makes copies of the original lesson for use within his own classroom, then Australian law probably allows it. However, if an Australian teacher makes copies and distributes the content outside of his institutional affiliation on his personal blog, then the law would probably not shield him from copyright liability.

From the simple hypothetical posed above, it is clear that relying on jurisdiction-specific CELs may result in people in other countries not being able to use those OER without further legal analysis and may indeed prevent use of the OER altogether. There has been no empirical research to date into the use of CELs for published OER (that we are aware of), however, so the implications of relying on jurisdiction-specific CELs for contributions to the global learning commons remain unknown.

Moreover, it is important to understand that whether a given CEL applies depends not only on the location where the OER were created, but also on the origin of the copyrighted material, and on the jurisdictions of the downstream users of the materials. As a result, to the extent creators of OER in one country develop a solution particular to the laws of their own country, that solution is not likely to function seamlessly for the international OER community. As such, jurisdiction-specific solutions could lead to the creation of OER that are legally incompatible with OER created in other countries, resulting in silos of OER rather than interoperable components of the global learning commons.²⁹

²⁹ As mentioned above, there is also jurisdictional variation regarding other copyright issues, such as the determination as to whether particular content is subject to copyright in the first place or in the public domain in a given country. It is beyond the scope of this paper to discuss those additional legal issues, but presumably jurisdiction-specific solutions based on national laws will often lead to problems similar to those addressed in the above section.

V. Additional Approaches to Resolving the OER Copyright Problem

When faced with the complexities of copyright law, people often establish general rules of practice in order to move forward. Creators of OER confronted with the desire to incorporate IC have established their own particular techniques, aside from or in addition to relying on CELs, for managing copyright issues. These methods include: (1) identifying the copyright holder and seeking permission to relicense the materials using a compatible CC license, (2) finding replacement materials already carrying a compatible CC license or that are in the public domain, (3) creating replacement materials, and then licensing them with a compatible CC license, or (4) deleting or obscuring the materials, thereby eliminating the issue.^{30 31}

1. Seeking Permission to Release the IC Openly and Compatibly

The first technique creators of OER use for legally incorporating IC into OER under a single open license is to go through the rights-clearing process. Generally, this process involves tracking down the rights holder, attempting to negotiate mutually acceptable terms and possibly paying a fee for openly licensing the content. Depending on the country, this process may or may not go through a collecting society. Obtaining permission to re-license IC under an open (or more open) license preserves the integrity of the resource while allowing the resulting resource to be released with all components available under a single, acceptable open license.

³⁰ The dScribe program at the University of Michigan is one example. See Open Educational Resources: dScribe, <https://open.umich.edu/projects/oer.php>.

³¹ It is worth noting that some feel that open licensing works too closely with the traditional scheme of intellectual property protection, and would rather approach the issue of access to and use of content created by others via reform of copyright law itself. In particular CC's approach to licensing has been criticized by Niva Elkin-Koren who believes that CC is helping to "strengthen the rights discourse and the hold of property as a conceptual framework and regulatory scheme for creative works." See Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit* (February 14, 2006) (unpublished manuscript on file with SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466). ALEX TARKOWSKI, *CC LICENSING PRACTICES REVIEWED*, (MAY 20, 2007), <http://icommons.org/articles/cc-licensing-practices-reviewed>. It is beyond the scope of this paper to address these concerns in full; however, more study of this issue is suggested in the section on Next Steps below.

For these reasons, clearing rights appears to be a reasonable course of action for producers of OER. However, this method comes with some substantial trade-offs. For example, tracking down the copyright holder is not always an efficient process and can lead to a huge drain on resources. Further, there is no guarantee that the rights holder can be located at all.³² There is also the possibility that the rights holder will simply refuse to allow the content to be used and relicensed, resulting in a waste of time, energy and money. Additionally, even assuming the rights holder is willing to allow use and relicensing, it may be the case that relicensing requires the payment of substantial licensing fees, which would merely drive up the cost of publishing the OER. Finally, rights holders may allow relicensing but only under more restrictive terms than those desired by the OER maker.

It should be noted that this is the only option (aside from relying on some exception to or limitation on copyright as discussed in Section IV above) that results in OER that retain the original IC—all of the remaining options involve removing or replacing the material. Accordingly, this first option is often thought to result in the highest quality materials, based on the presumption that the original, desired materials are ideally suited to the content of the resource. Nevertheless, unless the creator of OER is able to negotiate the most open and interoperable license for that resource (e.g., the Creative Commons Attribution Only license) then the potential retention of the materials must be weighed against the cost of having to use more restrictive licenses as well as other monetary or opportunity costs.

2. Replacing the IC with CC Licensed or Public Domain Materials

A second technique used to manage OER copyright issues is to replace any IC with content that is compatibly licensed or in the public domain. At first blush, this approach also seems like a reasonable solution. However, in many situations, a substitution simply is not possible. In particular, any OER maker dealing with modern film, art, music, advertising, or other recent cultural or media content would be hard-pressed to substitute the content that is likely the very subject of the course itself. Indeed, it is unclear that there is any true substitute for the “real thing” in such circumstances.

³² In countries that manage copyrights through collecting societies, the issue of locating copyright holders is greatly reduced and collective management of copyright generally enables relatively straightforward licensing terms for uses within a particular country. Nevertheless, there remains greater complexity and uncertainty concerning licensing of materials for use on the Internet.

Even when substitution is possible, it is not always easy or desirable. It takes time and expertise to discover and evaluate appropriate materials, especially when limited by the license status of those objects. Searching for appropriately licensed content remains difficult using most current Internet search tools. This is changing as search engines such as Google and Yahoo! begin to incorporate the ability to search by license term and as CC's own search portal, DiscoverEd, becomes more widely used; however, for now, finding appropriate substitute content (assuming such content even exists) remains a challenge. Moreover, the openly licensed materials may be inferior to the original materials, or at least perceived that way. If the final product of this method were to be deemed "lower quality" than resources containing the original third-party content, then those seeking to use OER may avoid resources with substitute materials and inevitably undermine the goals of producing the OER in the first place.

3. Creating Replacement Materials That May be Openly Licensed

A third possibility for the creators of OER is to create, or hire someone to create, replacement materials that are in turn openly and compatibly licensed. For example, it may be relatively trivial to create a new illustration, chart, or graph to accompany text, in which case this approach makes a good deal of sense.

Of course this approach comes with problems similar to those listed above. Even assuming substitution is possible, the development and creation of replacement content takes time and skill, and can be expensive. Further, such resources may still be perceived as lower in quality than the original IC.

4. Deleting or Obscuring the IC

The fourth option is by far the most straightforward: the creator of OER simply removes (or blurs out) the third-party content. Although this method may take a bit of time and expertise, depending on the nature of the OER, it is probably the least burdensome option available. However, it is virtually certain that the integrity and quality of the OER will be diminished if critical (or even merely useful) materials are simply removed. This problem may be somewhat ameliorated by providing links to the materials online, if they are available. Linking provides only a partial solution. It makes the materials only usable online (or at least much less useful offline), which may be a problem in

countries where Internet access is not readily available, and there is always the possibility of the link going dead or being disabled.

The upside of the techniques outlined above for managing IC within OER is that each results in uniformly licensed OER that are both open and interoperable. Yet, the legal basis of these practices has not necessarily been studied from an international perspective. Depending on the law, these techniques may suffice to reduce or eliminate the OER copyright problem, but more study would be required to determine if these practices are globally appropriate. Because there is at least some risk that the legality of these practices will be tested, the OER community would benefit from a deeper understanding of the international complexities of copyright law.

There are many other aspects of these techniques that also remain unknown. For example, it is not entirely clear what the impact each of these practices has on a variety of factors, including: (i) how quickly and efficiently OER can be produced, (ii) the overall cost of the OER, and (iii) how downstream users perceive the utility and quality of the OER that go through this process as compared to OER that retain the original third-party content. It would also be helpful to better understand whether and to what extent the copyright issues differ across different subject areas. Additionally, as noted above, each practice comes with perceived disadvantages, yet there is no empirical research that gives credence to those apparent shortcomings.

VI. The Trade-Offs Between Openness and Completeness

It should be clear at this point that including IC in otherwise openly licensed OER diminishes their capacity for reuse and therefore the overall openness of the OER. When OER are not uniformly openly licensed, the user has no sense of certainty regarding what he or she may do with the OER. While it may be the OER creator's intent for the user to be able to republish, translate, and adapt the resource, the downstream user has no security that those activities are also legal with respect to the embedded IC because the default terms of use under national copyright laws are not uniform.

There are circumstances where there are no openly licensed materials appropriate for teaching a specific subject or concept, or where the openly licensed material available is perceived as inferior to

the all-rights-reserved or more restrictively licensed alternative. In such circumstances, creators of OER are forced to choose between the completeness and perceived value of the resources on the one hand, versus openness and interoperability on the other. It is worth noting that the both the completeness and value of such resources, if released under an open license, would likely be improved over time as downstream users fill in gaps and create new, relevant open content. Even so, it is possible that some creators of OER would prefer to release only “perfect” or “complete” materials to the public.

Given this tension, creators of OER are faced with a series of decision points, and at each point she must determine which course of action will best meet her goals. If the OER creator primarily values openness, especially the international portability and legal compatibility of the OER at issue, then the creator of the OER must resolve the IC problem in a manner that results the release of all components of the OER in question under a single open license. That is to say, because relying on CELs greatly diminishes the ability of the downstream user to republish, reuse or adapt the OER, only uniformly openly licensed OER will suffice.

If, on the other hand, the creator of OER primarily values the actual or perceived upgrade in educational value that comes from incorporating third party content, then the OER maker cannot rely on methods 2-4 detailed above in Section V. Rather, the creator of OER is constrained to clearing the rights with the rights-holder (and accepting the concomitant problems associated with that process), or relying on CELs to ensure retention of the IC.

This is the current trade-off that must be made in legally managing IC in the OER context. So long as educationally valuable content is offered only under the default all-rights-reserved terms of use, or under restrictive license terms, this tension will always exist. And, as long as these trade-offs are being made, the global learning commons suffers in either reduced quality or reduced openness and interoperability.

VIII. Ongoing Projects and Next Steps

More study is needed to understand how the use of IC in OER impacts the global OER community. In particular, the OER community needs more information regarding international copyright law generally, as well as about international educational CELs. Because

most creators of OER are unlikely to have clear understanding of the CELs that apply within their own countries, a study of international CELs would help to clarify the sorts of uses of third-party content that are possible, if such use is desired. Perhaps more importantly, the OER community needs to understand the implications for the international OER community, and on the global learning commons, of relying on jurisdiction-specific CELs. This information would help OER creators to evaluate whether the benefits of relying on CELs would outweigh any costs to the global learning commons. To this end, ccLearn is in the early stages of conducting a study that seeks to gather information regarding of these issues.³³

We are aware of various efforts to better understand the ways in which copyright law influences educational practices and access to information around the world. For example, WIPO has undertaken a study on international copyright exceptions and limitations for education.³⁴ Early drafts of the study reveal that it is focused primarily on a purely legal analysis of how member countries' laws are currently drafted.³⁵ Hopefully, once information regarding the law as it currently exists has been collected, WIPO will also seek to discover information regarding the actual practices and needs of educators to help shape future international initiatives.

Other projects have taken a regional approach. For example, the African Copyright & Access to Knowledge Project "is probing the relationship between national copyright environments and access to knowledge in African countries."³⁶ In the United States, MIT commissioned a study on behalf of the U.S. members of the OpenCourseWare Consortium to ascertain the ways in which open courseware producers understand and apply fair use. This effort resulted in a document entitled "Best Practices in Fair Use for OpenCourseWare" and will be published in September 2009.³⁷

³³ The OER Copyright Survey was available online for OER creators and user to provide feedback on these issues through August 31, 2009. A copy of the survey is available on the ccLearn website at <http://learn.creativecommons.org/wp-content/uploads/2009/08/OER-Copyright-Survey.pdf>.

³⁴ See *WIPO Copyright Body Takes up Limitations and Exceptions, with a Focus on the Visually Impaired*, 13 BRIDGES WEEKLY TRADE NEWS DIGEST (No. 20) (June 3, 2009), <http://ictsd.net/i/news/bridgesweekly/47862/>.

³⁵ See Draft Questionnaire on Limitations and Exceptions, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122312.

³⁶ The African Copyright & Access to Knowledge Project (ACA2K), http://www.aca2k.org/index.php?option=com_content&view=article&id=179&Itemid=61&lang=en.

³⁷ In the interest of full disclosure, ccLearn consulted on this project.

Further, as discussed throughout this paper, there are numerous additional aspects of the problem of using IC in the OER that remain unknown. It would be useful to develop a deeper understanding of at least some of these issues, including:

- The degree to which OER creators and users understand and worry about copyright law issues generally;
- Whether open licensing provides adequate mechanisms for access, sharing, and reuse or whether reform of copyright law itself is needed;
- The degree to which the inability to legally include third-party all-rights-reserved content in OER poses significant barriers to building the global learning commons;
- Whether certain subject areas pose more of a challenge than others;
- The impact and consequences of the various techniques employed by the OER community to address the international copyright issues presented herein.

ccLearn looks forward to working together with the global OER community in addressing these complex issues, and welcomes feedback on this paper.



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