



Copyright and Open Educational Resources

Introduction to Copyright and Licensing

What are Open Educational Resources (OERs)?

Key OER Projects from Around the World

Key Licensing Resources



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The Commonwealth of Learning (COL) is an intergovernmental organisation created by Commonwealth Heads of Government to encourage the development and sharing of open learning and distance education knowledge, resources and technologies.

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Copyright and Open Educational Resources

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Contents

Section 1: Introduction to Copyright and Licensing	1
Section 2: What are Open Educational Resources (OERs)?	9
Section 3: Key OER Projects from Around the World.....	10
Section 4: Key Licensing Resources	11

Section

1

INTRODUCTION TO COPYRIGHT AND LICENSING

Intellectual Property: An Overview

Intellectual property refers to creations of the mind. The World Intellectual Property Organisation (WIPO) – the key multilateral institution that governs such rights, in conjunction with the World Trade Organisation (WTO) – defines the term as meaning “the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.”¹ In practical terms, intellectual property rights confer a temporary, fixed-term monopoly on the exploitation, use and proliferation of a particular creation, in exchange for which commercialisation of the creation is mandated or implied.

In the case of inventions particularly, the intellectual property system is also designed to spur innovation (broadly speaking) as it provides incentive and protection for disclosure of the details of the invention, thereby enabling further inventions to result on the basis of full knowledge of preceding ones.

Legally and intuitively, intellectual property can only exist in so much that the creative concept in question has been expressed in some tangible form. An idea that stays in an individual’s head, therefore, cannot qualify. The tangible form of expression can be varied, depending on the nature of the exercise. The work of authors, artists and musicians, for instance, will usually be protected by copyright. Scientists and engineers, on the other hand, will typically have their inventions protected by a patent. Corporations that have invested in creating a brand can be protected by trademarks, while their business plans could possibly be protected as trade secrets. The work of product designers falls under a system known as industrial designs.

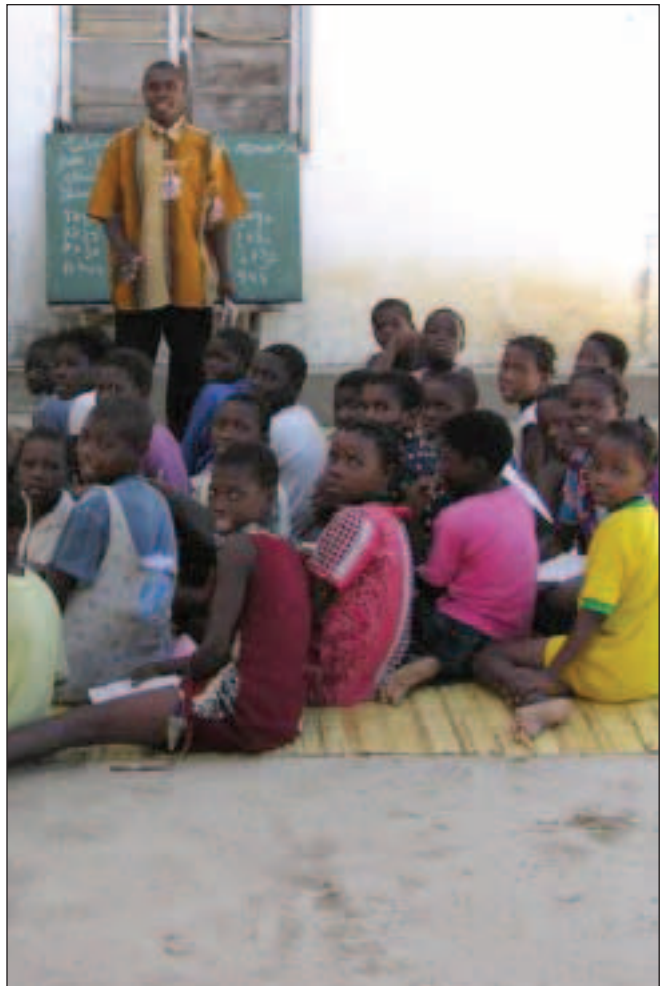
It is important to flag the meaning of the word “protection” in the context of intellectual property. In traditional English usage, the word means to safeguard, to prevent from pilferage, to hold and treasure as one’s own. To a certain extent, this meaning applies similarly to intellectual property as well; the protected in this case referring to the creators – who may be individuals or corporations, and who have invested mental, physical and (often) financial effort in producing a work of artistry or inventiveness. However, in the

¹ For more information, see the website of the World Intellectual Property Organisation at www.wipo.int/about-ip/en/iprm

legal context of intellectual property, protection is also offered to the consumer and the public at large – the intended beneficiaries of such intellectual property. Intellectual property rights thus not only imply that the creator requires a legally sanctioned economic incentive in order to create, but also that the user requires access to such creations through mass production; and that in fact, the two seemingly competing interest groups are intertwined by their dependence on each other in order for a market to exist.

The contrast between intellectual property and physical property is worth noting. Physical property is generally governed by a wholly different set of principles and laws. If, for instance, one was to own a house, the presence of several unwanted people in that house restricts one's ability to enjoy it. In an analogous manner, consider an apple: it is amply clear that each piece of it could only be eaten by one person at a time. Intellectual property is, however, what economists term a "non-rival" good, by which they mean that one person's enjoyment or consumption of it does not restrict or prevent another's – even if the different consumptions were to occur simultaneously. (For example, several people can enjoy a film at the same time, in different places, without taking away from each other's enjoyment.)

The difference is important in considering the intention and deployment of laws and policies related to intellectual property, particularly in the context of a consuming public, and also in the context of information and communication technologies (ICTs), as will be explained further in this booklet. Since many of the debates surrounding intellectual property are based on a creator/user tension, it becomes necessary to resist the temptation to think of this tension in the frame of the owner/interloper, as one might in matters concerning physical property.





A Brief History of Copyright

The origins of intellectual property cannot be precisely traced to any one particular event or society. However, there are several indications from history that something similar to what we know as intellectual property today existed long before the nineteenth and twentieth centuries – when, for all practical purposes, it was codified and expanded globally.

Two landmark nineteenth century agreements set the tone for the intellectual property regulation that exists today. The Paris Convention for the Protection of Industrial Property ², in 1884, was originally signed by ten countries from Europe, Africa (Tunisia) and South America (Brazil). Subsequently, it was to go through several revisions, updates and expansions, and today 173 countries in the world are signatories to it. The Paris Convention primarily concerned itself with patents, trademarks and industrial designs (as the full title suggests).

More importantly, for our purposes, the Berne Convention for the Protection of Literary and Artistic Works ³, convened in 1886, was to copyright what the Paris Convention was to patents – and likewise, it is globally prevalent today, with 164 countries being party to it.

The impetus for both the Paris and Berne conventions lay in the rapidly industrialising, visibly interconnected context of nineteenth century Europe, and the trade links with her colonies and beyond. It had become clear by then that protection of intellectual property was not merely a national matter, and that a global framework need exist. The work of the Paris and Berne conventions would be completed in the twentieth century with the establishment of WIPO in 1967, and the creation of the WTO in 1995. Today, it is these two Geneva-based organisations that set the global agenda for intellectual property.

WIPO, in theory, is responsible for intellectual property as a whole. In practice, however, it is the Agreement on trade-related aspects of intellectual property rights (TRIPs) – a trade rule at the WTO – that is the single-most overarching regulation on this subject in existence currently. There is some contention as to why

² For the full text of the updated document and history of amendments, see www.wipo.int/treaties/en/ip/paris

³ For the full text of the updated document and history of amendments, see www.wipo.int/treaties/en/ip/berne

the WTO stepped in to regulate a facet of the economy that an existing organisation had already been set up to primarily do; indeed several prominent commentators have suggested that the inclusion of intellectual property rights into the trade agenda has been a stumbling block for global trade talks ⁴. Regardless of the origins of TRIPs, every member country of the WTO – the overwhelming majority of sovereign states in the world – is bound to follow it. TRIPs is an updated, expanded and modified amalgam of the Berne and Paris conventions. In some cases – as in the recent debates on patents and access to medicines, and whether flexibly interpreted patent rules help improve public health by rendering medicines cheaper – the WTO has provided interpretive and legislative guidance within TRIPs. In other cases, aspects of the Paris Convention are simply referred to or incorporated as is. In terms of governance and compliance on every major aspect of intellectual property, including patents and copyright, TRIPs is the standard that countries are now held to.

WIPO, on the other hand, while yet significant to the global patent system, is more consequential in the arena of copyright. In particular, two WIPO treaties have set the agenda as to how copyright is to be regulated in the age of the Internet. These are the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT), both of 1996, which are collectively, and colloquially, known as the WIPO Internet Treaties. The treaties have received a mixed response around the world. Developed countries have been fairly quick to sign on, especially in Europe and North America; in the USA, the national legislation that has been implemented in compliance with both treaties is known as the Digital Millennium Copyright Act (DMCA). Within the developing world, there has been some hesitation to sign on to these treaties, in part because of the relative lack of an Internet focus within some countries (itself often a consequence low Internet access), but also because of concerns about over-regulating ICT in a manner that might hamper future development.

Copyright in the age of ICTs

The arrival and rapid growth of the Internet, in particular, but also other important communication technologies – community radio, niche broadcast media, and interactive media, for instance – took the copyright system unawares. Up until the 1990s, the copyright system was designed for a world which communicated in certain predictable ways – on paper, on television, and on established radio frequencies. Digital media created an unprecedented problem. From a developmental perspective, the relatively cheap and interactive possibilities offered by the Internet were, and are, seen as opportunities. The copyright system is well cognisant of such opportunities too, but it also recognises a threat.

Two examples of such interactivity, seen in the light of one important aspect of the copyright system, might serve to highlight the issue at hand. These two examples are commonplace to any user of the Internet: blogs and peer-to-peer sharing sites. The



⁴ For one among several strong opinions offered on the role of intellectual property at the WTO, see: www.foreignaffairs.com/articles/61211/jagdish-bhagwati/from-seattle-to-hong-kong

aspect of copyright that is crucially being tested here is a set of principles that are known as “fair use” or “fair dealing”. Broadly taken, fair use/fair dealing is what allows users of copyrighted works to be able to engage in reasonable debate, discussion and analysis of a copyrighted work. Fair use/fair dealing is what allows a doctoral research student to quote sections of several published (and copyrighted) texts in her thesis. It is what allows a broadcast media analyst to run short clips of newsworthy events (even if from another channel, or by another analyst) in order to comment upon an aspect of the news. In other words, fair use/fair dealing is a set of allowances to what would otherwise constitute copyright violation ⁵.

Consider a blog that reproduces an article from an online newspaper – in full. From an intuitive perspective, it is an interesting question as to whether this is “fair use.” On the one hand, it is likely that the blogger is making no explicit commercial gain on the use of the article. On the other hand, traffic to the website of the newspaper that originally published the article – or any advertising that is associated with it – is being diverted or lost. There are several nuances even in a situation as seemingly simple as this. Is the newspaper gaining in publicity what it is losing in direct traffic? Is the author of the article (who may not be the copyright holder, if she has assigned her rights to the newspaper) actually benefiting out of such a situation in terms of readership? How is this different from reading out an article in full to a friend, within the confines of one’s home? The answer is that the digital medium throws up an infinite number of possibilities that do not have a clear path within the copyright system.

Much has been made of the peer-to-peer exchange on the Internet, though the idea of sharing a book or a CD in the offline world is hardly controversial. What makes such sharing different in the online world is that the amplification that the Internet facilitates, the vast and simultaneous sharing that an electronic exchange enables. Again, the copyright system – broadly – fails to grasp the scope of this possibility, having never anticipated in full clarity the possibility of such an exchange existing.

The problem with fair use and the purported “transgressions” of blogs and/or peer-to-peer sites is that the mismatch is, in many countries, yet to be clarified. In the countries where an attempt at clarification has been made (such as in the USA, with the adoption of the WIPO Internet treaties and the implementation of the DMCA) many clauses within the updated law have been found to be unworkable and unfeasible in a practical sense ⁶.

Open Educational Resources — Licensing and Copyright

Open Educational Resources (OERs) are characterised by the fact that their copyright scope is limited by means of an open content license. The “all rights reserved” model of traditional copyright is replaced with a more generous “some rights reserved”. What does this mean exactly? In the schooling context, an open content license enables the recipient of an educational work to freely use, distribute (and in some cases modify) the material.

⁵ For a summary of likely provisions that qualify as “fair use” or “fair dealing” see the Commonwealth of Learning Copyright Audit 2006: www.col.org/resources/knowServices/copyright/Pages/lawEduc.aspx

⁶ The Electronic Frontier Foundation has been compiling negative effects of the DMCA since its inception; see: www.eff.org/deeplinks/2008/10/dmca-ten-years-unintended-consequences

The goal of OERs is to grow our collective body of “knowledge”. In the context of schooling, OERs apply mainly to educational textbooks and other extra-curricular resources. To grow this body of work implies not only that more resources are freely available to educators, but also that more educators (and schools) can participate in the production of such resources. Thus, not only does the body of knowledge grow with OERs, but so does the number of *knowledge creators*.

At this stage, it might be prudent to ask some pertinent questions: (1) How are OERs different from all the other material that is seemingly “freely” available, especially on the Internet? (2) And how do OERs enable the growth of knowledge beyond what a traditionally printed and traditionally licensed textbook can do?

One might best set about answering this question by examining a set of case-studies. The first example to consider is the Technological Protection Measure (TPM), a feature of new media that is increasingly prevalent and already protected by law in several countries.

TPMs enable manufacturers of certain media goods (like film, music or text) to lock the digital files that contain such items to only operate under certain circumstances. For instance, a TPM can prevent an mp3 music file from playing on more than one computer (thus rendering it useless when transferred) – or, can prevent sections of an e-book from being copied and pasted into another document. In some cases, a TPM can even prevent ordinarily possible applications of fair use, such as having the text-to-speech facility activated for use by visually impaired persons. Yet, a TPM is not essentially designed to restrict use but to equitably grow the use of a media product – it is a device originated in and by the commercial media industry.

The WIPO Internet Treaties render the use of a TPM legal. In countries where the WIPO Internet Treaties have not been adopted, their use and the legality of it is more ambiguous. TPMs are a perfect example of how copyright law for the Internet can sometimes be mistakenly (or over-) interpreted, thereby seeming disconnected to copyright law as such. For instance, there is nothing in the WIPO Internet Treaties that prevents countries from protecting fair use/fair dealing while yet legalising the implementation of TPMs and measures to prevent their circumvention. Yet, few countries in the world have taken advantage of this nuance, instead simply banning circumvention (or mandating blanket anti-circumvention rules), thereby making it illegal to circumvent TPMs even in the act of legitimately exercising fair use/fair dealing rights as guaranteed under existing national copyright law.



Another good example to consider is video-sharing technology, where new formats and hosting services are enabling the proliferation of homemade video. This technology offers immense value and potential contribution to teaching, education and general dissemination and sharing. However, sovereign copyright law (of the country in which the video is created, and countries where it is viewed) is applicable to any film product, regardless of it’s commercial application, and indeed, often poses a significant barrier in producing and disseminating instructional video. How so? In part, this is because all media – and film in particular – tends to rely heavily on pre-existing media. For instance, an instructional video on politics might need to use clippings of broadcast news coverage

of an election; and such clippings will be the copyright of the news agency or television station, and thus – typically – only available to other users for permitted use with a fee.

The paradox of the Internet and digital communication is that while it makes the use and integration of several media sources much easier, it also makes copyright violations more easily detectable. OERs are important, therefore, precisely because they do *not* come with unnecessary and cumbersome restrictions on use; in countries where copyright law is both typically (though needlessly) restrictive and enforced strongly, OERs take on a crucial importance. To any society in the world which looks to the Internet for educational resources, OERs provide a barrier-free way of sharing, using, growing and creating curricular knowledge.



While much of the focus of copyright in the Internet age tends to be directed towards the digital domain, it is a fact that in the majority of countries in the world, Internet access is still very low. In the developing world, learning largely occurs through the printed word. Books are usually considered a static physical entity; however, this ignores several technological applications that make the contents of a book far more widely accessible (and accessibly produced) than previously. For instance, in South Africa, a group of students at the University of Cape Town got together some years ago to collaboratively produce better science textbooks for schoolchildren: their experiment, the Free

High School Science Textbooks (FHSST) project⁷ is now the object of international attention and acclaim. The way in which copyright is integrated into such a project is interesting. FHSST does want its authors to have the right to be identified as such. However, other than that, FHSST makes few claims on their exclusive right to use and deploy the textbooks – in fact, they allow anyone at all to use, print, even sell at profit or modify at will (as long as the modified text is also similarly available to the public at large), and they allow this by means of an open content license called the GNU Free Documentation License⁸.

The GNU Free Documentation License is one of a range of Internet-friendly innovations in copyright which allow for individuals or groups of producers to control the direction of the work they produce. Perhaps the best known GNU license is Creative Commons⁹.

The work of more user-friendly copyright licenses is by now well documented. The need that they arose to fill is the just-discussed incompatibility of existing systems of copyright (both in terms of national law, international law and general practice), which they set out to change. Their basis is a simple one. Copyright is usually referred to as a bundle of rights – which is to say, it includes several different exclusive rights, such

⁷ For more information on FHSST see: www.fhsst.org

⁸ For more information on the GNU Free Documentation License, sometimes abbreviated as GFDL, see: www.gnu.org/copyleft/fdl.html

⁹ For more information on Creative Commons licenses, see: www.creativecommons.org

as the right to make profit by selling, the right to translate, the right to change the format of, etc. While copyright seemed like a “one-size-fits-all” model, it turned out that not only was the one size not fitting all, but also, that there was no strict legal reason not to break down the bundle into its constituent parts, and let the producers of content decide for themselves exactly what parts of the bundle they wanted to use and what parts they were willing to give away.

In summary, perhaps the most important reason why OERs (such as the books created by FHSST) are crucial to growing curricular knowledge in the developing world is because they are free. The affordability of traditionally produced, printed textbooks is a concern no matter where in the world one lives; in developing countries, for resource-starved government schools, and resource-poor families, the affordability of books can mean the difference between schooling and illiteracy.



In Conclusion

Copyright vests automatically in most countries around the world, whether or not the creator of an educational work wishes to exert copyright in its entirety. What this means for education, unfortunately, is that all traditionally produced, printed textbooks, are to a large extent “locked.” Even digital resources such as those available on the Internet are restricted. In the traditional scenario, the promise of the Internet is thwarted: blind users, for instance, cannot necessarily convert a text file into an audio file in order to access it; teachers in poorly resourced schools cannot necessarily distribute copies of a textbook without paying heavy fees; schools which operate in a particular local language cannot simply translate a book or an essay that they wish to use in education.

All of these situations, however, could be – and are – averted with OERs. The promise of the OER is that permission to use, even modify, is granted to anyone who wants it. In a minority of countries around the world, copyright law is applied in a manner that allows flexibility on the part of educators. In a majority of countries, however, it is not¹⁰: and it is in these countries where the presence of OERs is all the more necessary and urgent, for it autonomously institutes a system of fairness, equity and sharing, without waiting for the law to change.

¹⁰ See: Consumers International IP Watch List Report 2009, available at www.a2knetwork.org/watchlist

Section

2

WHAT ARE OPEN EDUCATIONAL RESOURCES (OERS)?

The term OER can be traced back to 2002; it was instituted during a UNESCO Forum on the Impact of Open Courseware for Higher Education in Developing Countries in that year.

Broadly speaking, OER refers to material that is of use in the curriculum and around it (both curricular and extra-curricular), in any format (a printed book or pdf file, a short video film, an audio file), that is shared openly by its creator/s in order that others may use, distribute, and even modify it, without permission.

OER is to the educational world what Free and Open Source Software (FOSS) is to the information technology world. It is educational material that is individually or collaboratively produced, which can be further improved and changed or adapted by numerous interested educators and creators, yet all the while open to most kinds of use, anywhere in the world.

The opportunity with OERs is therefore, twofold: (1) there are thousands, if not millions, of existing OERs that educators in developing countries can take advantage of; these OERs can be prescribed in or outside the classroom, and they can be used free of cost. (2) However, the opportunity also exists to create OERs. Educators at a school or institution of learning might be able to translate an OER, modify it in some other way, improve it, or create their own wholly new resource.

Why are OERs important? They represent a horizon of learning for marginalised learners who might not otherwise be able to afford or access educational material. They also provide the invaluable opportunity for such learners (and such educators) to contribute their own unique learning experiences back into the system by creating their own free educational resources. In developed countries OERs are equally important, as they represent a horizon of quality for learners in those systems. Since OERs can be updated more frequently, and also collaboratively discussed, the depth, style and quality of information within is often of a higher grade than in traditional textbooks.

Section

3

KEY OER PROJECTS FROM AROUND THE WORLD

- **The Cape Town Open Education Declaration** is a milestone in recognising the role of OER in stimulating education: www.capetowndeclaration.org/read-the-declaration
- **OER Commons** is a large and well-resourced database: www.oercommons.org
- **The William and Flora Hewlett Foundation**, originally involved with UNESCO to coin the term OER, maintains their own resource: www.hewlett.org/oer
- **The California Open Source Textbook** project is a private-public partnership to create textbooks for the California K-12 school system: www.opensourcetext.org
- **Free High School Science Texts** is a pioneering South African programme where college students got together to improve science textbooks: www.fhsst.org
- **Connexions** is fast emerging as perhaps the most interesting publishing platform and environment for OER: www.cnx.org
- **Wikibooks** has over 35,000 pages worth of material, much of it being OER, and has established itself as a reputable aggregator: <http://en.wikibooks.org>
- Visually impaired persons in the USA have the benefit of listening to “audible” books through a government-sponsored programme called **Bookshare**: www.bookshare.org
- Visually-impaired readers across the world can share accessible books, journals, class notes, articles and spoken word through **Inclusive Planet** (now incorporating India’s BookBole): www.inclusiveplanet.com
- **Wiki Educator** is a community resource supported by the Commonwealth of Learning and Otago Polytechnic, New Zealand: <http://WikiEducator.org>
- **The Commonwealth of Learning’s OER search facility**: www.col.org/oer
- **The Commonwealth of Learning’s copyright programme**: www.col.org/copyright

As much as many of these projects are the most prominent in their field, in fact there are hundreds of thousands of OER in India, Africa, the Americas and beyond, and when searching for appropriate content for classrooms, it is best to navigate the terrain personally in order to find the best fit.

Section

4

KEY LICENSING RESOURCES

- **Creative Commons** is set of licenses that are popular as well as easy to use and implement: www.creativecommons.org
- There are several other open content licenses that can be of use to educators, and a good resource to learn about them is Lawrence Liang's "**A Guide to Open Content Licenses**": www.pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide
- *Introducing Copyright: A plain language guide to copyright in the 21st century*, by Julien Hofman, The Commonwealth of Learning, 2009: www.col.org/IntroducingCopyright



This resource booklet was developed by Mr. Achal Prabhala, in association with the Commonwealth of Learning (COL) and first presented to participants at an international workshop on copyright and open educational resources, hosted by COL in association with the launch of the Commonwealth Open Schooling Association (New Delhi, November 2009). Open schools and allied institutions in Canada, the Caribbean, the Pacific, Africa and Asia were represented.

While this booklet provides legal information to the best knowledge of the author and publisher, it does not constitute legal advice.

also available at www.col.org/OpenSchooling