



## **Discussion Two: The Pros and Cons for using Creative Commons (CC) Licences in Digital Teaching and Learning Materials**

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### **Background**

This is part of the TrustDR IPR Institutional Development Pack and is part of the outcomes of the work of the **TrustDR** project (**Trust** in **D**igital **R**epositories) funded by the JISC (Joint Information Systems Committee) the UK government body responsible for supporting education and research by promoting innovation in new technologies and by the central support of ICT (Information and Communication Technology) services.

The **TrustDR** project was a partnership between the University of Ulster and UHI Millennium Institute and operated between June 2005 and August 2007 as part of the JISC Digital Repositories Programme.

### **Project website:**

<http://trustdr.ulster.ac.uk/>

### **Digital Repositories Programme website:**

[http://www.jisc.ac.uk/whatwedo/programmes/programme\\_digital\\_repositories.aspx](http://www.jisc.ac.uk/whatwedo/programmes/programme_digital_repositories.aspx)





**DISCUSSION TWO: THE PROS AND CONS FOR USING CREATIVE COMMONS (CC)  
LICENCES IN DIGITAL TEACHING AND LEARNING MATERIALS ..... 1**

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## 1 Overview

Before reading this document you should have read the TrustDR development pack, particularly section 5.14.4 “Choosing the Right Licence to Use” which also deals with some of the popular misconceptions about Creative Commons licences.

## 2 For

1. **Attraction of CC is that it can help simplify the management of IPR,** makes legal concepts more accessible, puts control in the hands of the authors and creators. It can reduce reliance on specialist legal advice, although it is still supported by a substantial legal version of the licence, for which an understanding of the law is important. From an institutional point of view the ‘investment’ of this legal understanding is best done at the policy development stage where the types of licence(s) to use are chosen and specified in the policy. Thereafter, the application of the correct licence to content may be done with reference to the policy and the aid of a checklist. It is suitable for those who want to allow their materials to be made available more widely than traditional commercial publishing models have allowed for in the past. Far from being a challenge to copyright CC is actually a copyright licensing system that is based on copyright law – making it widely acceptable and legal.
2. **The licences and their users have some degree of explicit ideological commitment to a more open IPR regime** than currently exists at the moment in traditional and commercial publishing models.
3. **They have a well-established and growing body of users and proponents worldwide** who are also translating them into use for different jurisdictions and into machine-readable forms (important for rights management). They also have human readable and lawyer readable versions.
4. **They provide a way to widely publish materials digitally on the internet and elsewhere (CD, DVD etc) with the minimum of legal hassle and cost** but in a way that gives some degree of control over the intended uses that the materials can be put to. For these reasons, they were initially adopted by individuals in the ‘creative industries’ (writers, musicians, painters, photographers etc) but their use is now spreading to other sectors.
5. **Since their inception the CC scheme has been enthusiastically adopted by other sectors where people also have had a pressing need to manage the IPR in their digital publishing activities in a simple way.** In education many people have been attracted to the CC licences for the same reasons; simplicity, ease of use, widespread take up and of course, to a degree, intellectual fashion. Faced with an urgent need to publish in these sectors for both commercial (e.g. a photographer promoting their portfolio to attract clients) and academic reasons (e.g. promotion and dissemination of leading-edge research for career advancement and to claim discovery) people have

understandably been attracted to the CC licence scheme. In academia the lack of clear IPR policy and management risk aversion (manifested by procrastination and a reluctance to engage with the subject) coupled with the traditionally high degree of individual academic autonomy have been very conducive to the take up of CC in some quarters.

6. **Usable by institutions**, a report for the Common Information Environment (CIE)<sup>1</sup> provides the rationale for use of Creative Commons (CC) licences in public sector organisations, and overcomes many of the perceived barriers to their use (Barker, 2005). This potentially simplifies and reduces the costs of some types of institutional publishing activities.
7. **All CC Licences come in 3 versions; human readable, lawyer readable and machine-readable.** This aids technical and semantic interoperability; the machine-readable code can be closely associated with the content and travels with it in the digital realm. This means that search engines and information management tools in repositories can easily distinguish the licence terms applied to the content.

### 3 Against

Some objections with replies in brackets:

1. **Creative Commons can support an illusion that they are the answer to all our IPR troubles and that we no longer have to bother about copyright** – i.e. that by slapping a CC licence on something we are released from the duty to respect other peoples copyright and that our rights can easily be protected. (In fact the whole structure and value of CC is that it is built on traditional copyright, property and contract law – in this sense they are in no way an antithesis to copyright and private property etc. However, it must be stressed that the mere use of CC licences is not the same thing as or a substitute for effective rights management – see the TrustDR Development Pack for more on this subject)
2. **Only for Individuals – not organisations.** They were initially aimed at individuals in the ‘creative industries’ (writers, painters, photographers etc) who needed a way to widely publish their materials digitally on the internet and elsewhere (CD, DVD etc) with the minimum of legal hassle and cost but in a way that gave them some degree of control over the intended uses that their materials could be put to. Some legal observers have argued that they are therefore unsuitable to be used by organisations like universities (although with their recent adoption/adaptation by MIT, the OU, JISC and the BBC that argument has been demolished. In fact a study in 2005 into the use of Creative Commons for the public sector funded by Becta, the British Library, DfES, JISC and the MLA found that the scheme was suitable for public

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<sup>1</sup> <http://www.common-info.org.uk/> The CIE is a group of public sector bodies collaborating to deliver common information and services across sectors in the online environment.

organisations<sup>2</sup>. But, and this is a significant ‘but’, this requires the organisation to have put its IPR house in good order – see section 5.14.4 “Choosing the Right Licence to Use” in the TrustDR Development Pack.).

3. **CC licences do not have any way to control or assert the database right** that has been created by the EU – deemed important to protect the rights of those who have paid for the creation of collections of digital materials organised in a certain way, such as those in a learning object or an entire repository. (The database right does not exist in the rest of the world including, arguably, the largest knowledge economy of the USA – who seem to manage OK without it. Also, you should note that collections will remain protected by the database right whether or not it is mentioned in the licence and you can always add explicit permissions to give users the right to use database facilities that would otherwise be restricted).
4. **CC licences do not have the ability to be revoked** (cancelled or taken back) once issued they are forever, this could be a very important issue for some proposed uses and some types of content. (Although any materials that are made widely available under any liberal licence terms would be very difficult in practice to revoke – so the argument here would be to think very carefully about the materials that you release, whatever the licence you choose.). However if a CC licence is breached by a party then it is automatically terminated.
5. **CC licences do not have a ‘non-endorsement’ clause** to prevent future users from associating your materials to support ideas, values, organisations that you might find repugnant or damaging to your reputation. (Although it might be argued that the laws of defamation, slander, and the moral rights of authors would provide protection here.)
6. **CC licences have a specific clause that prohibits the use of technical protection DRM measures** such as passwords or encryption to restrict access to materials carrying a CC licence. This has been claimed to prevent the use of CC licensed materials from 3<sup>rd</sup> parties being used in VLE and repository systems etc – as this would contravene this condition. This ‘lockout’ clause, as it has been termed by some critics of CC, is therefore claimed as a ‘showstopper’ for e-learning uses. (However CC adherents argue that the intent of the clause is being misinterpreted and that is to prevent the use of a CC licence on any materials that are released initially {first publication} in a restricted manner, e.g. *only* behind a password protected intranet. Downstream from the ‘prima’ digital publication they argue it is OK for the materials to be used behind restricted access for whatever operational reasons – and, importantly, that such restricted access arrangements do not override the licence terms – so the users are still free to take and use the materials outside the protected environment that they discover them within. So, what at first

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<sup>2</sup> Intrallect, AHRC (2005) The Common Information Environment and Creative Commons <http://www.intrallect.com/cie-study/index.htm>

sight seems a major problem – is not. The CIE report mentioned above that examined the suitability of CC licences for the UK public sector examines this question in some detail and also arrives at the same conclusion<sup>3</sup>)

7. **CC licences are difficult to enforce and they make it difficult to ensure compliance - in fact do they have any legal basis?** (This misunderstands the reasons people want to use these licences in the first place – the political economy of the CC user community – widespread dissemination and attribution of the work in this community is the primary economic benefit and gain – the risk is part of that gain. As opposed to the controlled access, usually for a fee, in the more restricted traditional publishing economy. Enforcement is often regarded in extremis as a last resort in this more open publishing economy. As in any licence, enforcement depends on the text of the licence and the particular circumstances. Yes, enforcement is possible, successful action has been brought and won by rights holders under CC licences. So yes, these licences are legally valid)
8. **CC Licences are badly drafted and too vague and do not work well in our UK jurisdiction – they have a US bias.** (The world is already full of badly drafted IPR licences as many popular music industry artists are able to testify – to their cost. CC licences may be better than nothing for some users who do not have the time to wait for their institutions to sort their act out or cannot afford the services of a lawyer to draft a licence. As far as jurisdiction goes; a licence is a licence is a licence – good or bad. In fact both the English and Welsh and Scottish versions of the Licences have been carefully crafted to work within each jurisdiction.)
9. **CC represents a political posture and an anti-IPR and copyright position** (Quite possibly true for some adherents – so what? If some people want a less restrictive and fairer IPR regime good luck to them! If they are using traditional IPR and copyright law to do this, even better! It is doubtful that many of these people are actually promoting the ending of all property rights and relations in our society – now *that* would be radical! The obverse to this argument is also true: That those that are critical of CC or object to it are equally ‘political’ in their attachment to a more controlled and restricted IPR regime in society but present that as the ‘natural order’ or as the part of the ‘inevitable’ workings of the economic system. As many political analysts have observed through history every *ancien regime* is thus forced to mystify the rationale for its dominance – the publishing industry and its supporting apparatus are no exception)



## 4 Conclusions

1. **The arguments against the use of CC in education would be much the same for the application of any other general-purpose licence regime** – the risks are in fact manifestations of the underlying ignorance, confusion and apathy towards IPR in our educational systems. This is the fundamental issue not the choice of licence.
2. **Why are CC licences attractive and popular?** Simplicity, user control, human and machine interoperability, level of take-up; are the prime reasons along with orientation towards a more liberal regime. They are effectively recognised as the ‘currency’ for IP licensing within the open content movement.
3. **Are the CC licences fit for purpose?** Yes – if you know what your purpose is!
4. **What type of organisation could make good use of the CC licences and their possible derivatives?** Ironically, and contrary to some of the popular misconceptions surrounding CC, those organisations have to be already relatively well organised in terms of IPR management to make effective use of the CC licences and their possible derivatives. The clear examples of this are:
  - a. MIT OCW – they describe this process as best understood as becoming a ‘digital publishing organisation’ for more information about this please see their website<sup>4</sup> - note the numbers of people they have working on this:
  - b. OU – their Openlearn initiative has been described as ‘rethinking intellectual property within the light of open content aspirations’, this builds on and is made possible by the extensive rights clearance processes already employed by the OU
  - c. BBC Creative Archive – this also uses a background infrastructure of extensive rights management processes to be able to use a derivative of the Creative Commons Licence
5. **Why would you want to make derivatives of the CC licences?**
  - a. To benefit from the common core of work that has already been invested in the CC licences and
  - b. To gain a certain amount of legal interoperability in the derivative that could possibly provide a future migration path towards a more open IPR regime. BC Commons and the BBC Creative Archive are both good examples of this
6. **If CC licences and their derivatives are only really good for organisations that have got their IPR act together what do we use and do in organisations that are in a mess or want to change to a more organised state?** Well, this comes back to the basic idea we introduced early on in the TrustDR Development Pack, that to make any sensible decisions about these kinds of

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<sup>4</sup> <http://ocw.mit.edu/ocweb/global/aboutocw/publication.htm>

things you have to understand what you are doing – what your business is and where the value lies and where you want your business to go. This the essential factor to start tackling IPR in any industry and education is no exception. Along with understanding your own business you have to find out more about the IPR basics that apply to that business. Surprisingly, perhaps, the main tool to sort out these categories of organisational IPR is not creative commons but plain old copyright. That's right, because the IPR in these types of organisation is so confused and underdeveloped we need to understand the basics of copyright and apply them to these situations and express this in clear policy.

## 5 References

Barker, E. et al. (2005). *The Common Information Environment and Creative commons: Final report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences*. Intrallect and AHRC Research Centre for Studies in Intellectual Property and Technology Law. Available at <http://www.common-info.org.uk/publications.shtml> [Accessed 17.10.05] or <http://www.intrallect.com/cie-study/> [Accessed 18.01.2006]