

**HEA/JISC Open Educational  
Resources case study: pedagogical  
development from OER practice**



**Copyright and policy licensing**

**Megan Quentin-Baxter, Professor of Health Professions  
Education, MEDEV, School of Medical Sciences  
Education Development**

**Newcastle University**



## Outline

This SCORE case study undertook to develop copyright and policy licensing, especially in relation to embedding third-party rights in teaching materials and Open Educational Resources (OER), in collaboration with Hugh Look (FutureGlance), Naomi Korn (Naomi Korn Copyright Consultancy), Carol Summerside and the Digital Rights Working Group at Newcastle University. It is positioned alongside a 2011-12 SCORE Fellowship (see separate report) and current activity in a national Joint Information Services Committee (JISC) OER Phase 3 project 'PublishOER' and JISC Phase 2 managing research data project 'iridium'.

A very great deal is already known about working with copyright; however, the increase in use of OER has highlighted an overall lack of institutional awareness of the rules and also, in some places, the necessity for institutions to assert control over their intellectual property (IP). It is no wonder. The 'transaction costs' of adhering to third-party copyright requirements are high, legal advice is impractical, and the complexity of a 'case by case' basis places the understanding of exactly what someone is supposed to do almost beyond the comprehension of everyday teaching and research staff. When the notion of making resources 'open' is factored in, managing third-party copyright in teaching materials becomes the preserve of a few (highly paid) professionals.

In our interviews with stakeholders (senior institutional managers, publishers, authors, students, etc.) even authors were unsure what their obligations and rights were under copyright law. We interviewed several who didn't know that materials that they had produced for a third party (books, reports, CD ROMS, etc.), without formal contract, still belonged to them/their employers, while others were under the impression that although they had signed ownership of copyright away (to publishers) they could continue to use their creative works without seeking permission from the new owner. In considering 'out of copyright' works, unless you personally owned the original (lucky you!) you will always be working with a copy, which itself is copyright.

The use of Creative Commons (CC) licensing has increased access to royalty-free content, especially where this content is developed by 'waged' individuals or organisations who are not seeking an income from their copyright works. Many third-party, 'rights reserved' owners still genuinely want their materials to be used, and many have signed up to licences permitting use of small amounts of content in journals, books, teaching materials and on virtual learning environments (VLEs). However, none of the licences reviewed (except CC) included use in OER.

Some of the issues were picked up by Hargreaves (2011) who considered the complexity of IP law (Copyright, Designs and Patents Act 1988), the implications of the digital age, the evidence and international context, orphaned works and the need for a Digital Copyright Exchange in the UK. This recognised that while solutions remain old-fashioned 'cottage industries', the complexity would remain.

Here we sought to review the literature and find ways to simplify the rules for using third-party published works by staff and students in HE institutions, making more explicit exactly what they should do and therefore better able to inform senior managers. We asked: *if you are allowed to use small amounts of works in, for example, VLEs (that are not safe from exploitation) then why not in OER? If you include third-party works in CC licensed OER then how do you attribute them? Is it okay to circulate*

'OER' with some sections 'all rights reserved'? It also proposed the development of a technology that is urgently needed to aid discovery of licensed works and seek permissions with lower transaction costs/fast responses, and stretched the thinking of colleagues in the academic and commercial sectors alike. Thank you to the HEA, SCORE and the JISC for making this case study possible.

## Case study

### Background

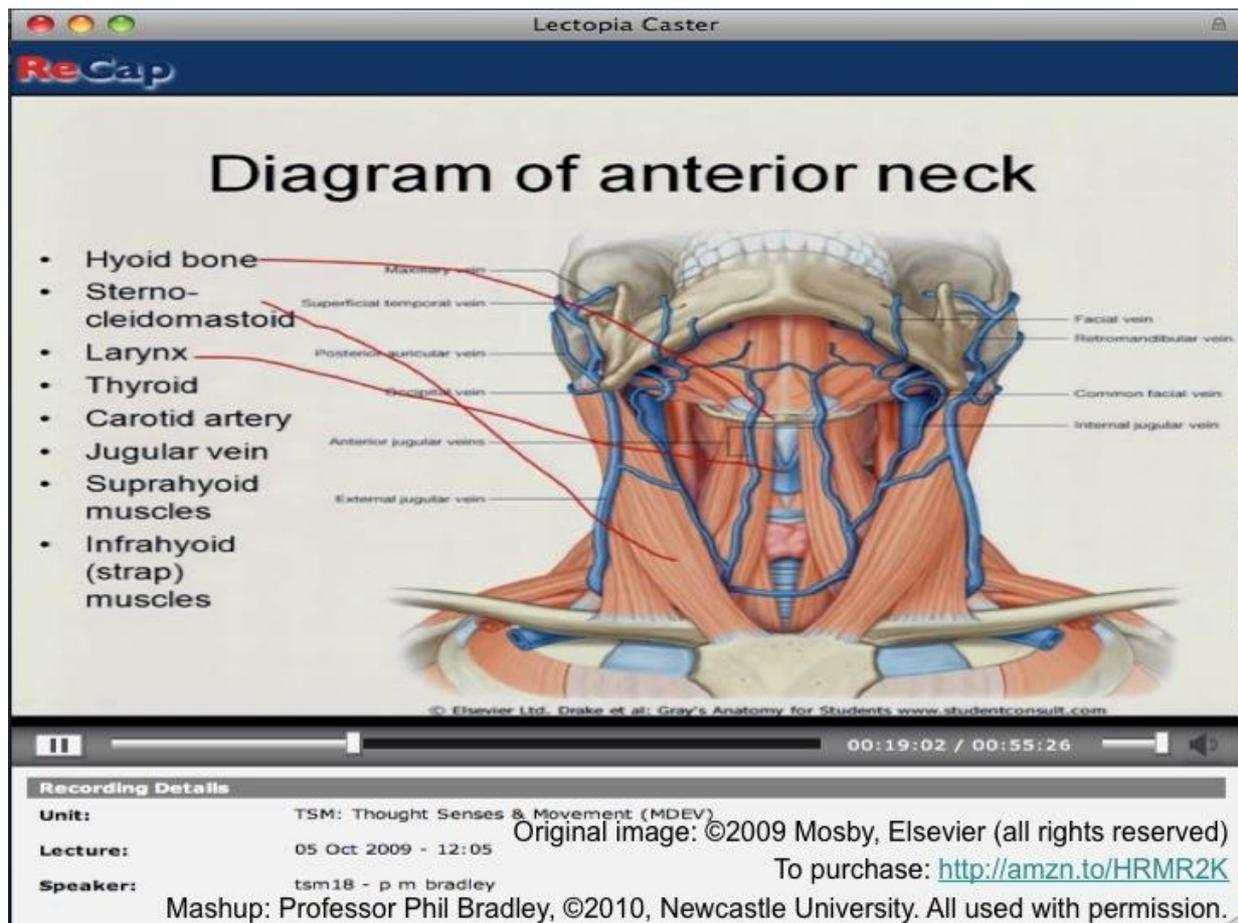
The underlying principle of copyright is that it protects the rights of the creator to (economically or otherwise) exploit the results of their creativity (no matter what the format). This informs institutions using a 'risk managed approach' (as opposed to a 'zero tolerance' approach, which avoids all risk) how to go about promoting uptake and use of 'low risk' sources vs. avoiding 'high risk' sources (for further information see the Web2Rights Risk Management Calculator<sup>1</sup>, the MEDEV OER blog<sup>2</sup> and the Links and References sections at the end of this report). Copyright owners also have the right to be recognised as the owner of that material, therefore attribution of sources is essential, just as you would acknowledge authors and the journal name on a research publication.

Teaching staff want to 'mash up' content from elsewhere to use in teaching, such as **Error! Reference source not found.**, and have for many years relied on a defence under 'purpose of instruction' or 'examination' (Copyright, Designs and Patents Act 1988). However, institutions are increasingly expecting staff to upload files to a VLE and 'record' lectures for students to download and playback. There are at least 34 institutions in the UK routinely recording lectures with ReCap and more when products from other companies are taken into account (e.g. Panopto). Uncertainty arose as to whether this constituted a breach of copyright terms by exploiting the source rather than for the 'purpose of instruction'.

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<sup>1</sup> <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>

<sup>2</sup> <https://www.medev.ac.uk/blog/oer-phase-3-blog/>



**Figure 1: Illustration of a third-party work with annotations, recorded by ReCap for subsequent playback by students. All Mosby/Elsevier rights reserved, used with permission**

For uses such as the above copyright owners could charge an administration fee giving you 'permission' to use that material, or charge a fee for a licence for you to use that material (for exactly the purpose identified). Some copyright owners make their third-party content available under a licence that you can use. For the remainder you should seek permission and pay any administration or licence fees. Permission has been granted by both Mosby/Elsevier and Phil Bradley for the appearance of the item in **Error! Reference source not found.** in teaching materials and PowerPoint presentations (used with permission). If you have obtained permission from the copyright owner, say so.

However, it is not always as easy to obtain permission as it appears. The National Gallery stated on its website<sup>3</sup> that as:

*Part of its ongoing commitment to support scholarship and encourage research into the nation's collection of Old Master paintings, the National Gallery, London, is pleased to be able to **waive image reproduction charges for academic books and journals which meet specific criteria and where orders are processed and delivered via***

<sup>3</sup> <http://www.nationalgalleryimages.co.uk/Academic-Discounts.aspx>

**its Picture Library website. Reproduction charges may also be waived for use in student theses, academic presentations or lectures to applicants.**

*These uses are only available to email addresses from recognised educational institutions or at our discretion following a review of material to be published, or following satisfactory proof of proposed publication in an academic context. (National Gallery, all rights reserved; emphasis added)*

This appears to permit use of Old Master paintings for educational purposes following a permission request from a bona fide academic institution. However they go on to state:

*We consider a project to be scholarly when its primary intention is to broaden knowledge. We hope that this assistance will remove some of the financial pressure from academics and result in a wider knowledge of our collection.*

**The Academic waiver is only intended for projects in which the Academic is personally responsible for paying reproduction fees and is not available to commercial organisations.**

*The project needs to discuss the images in an Art Historical context to be eligible.*

*The waiver is only available for inside book or journal use. (National Gallery, all rights reserved; emphasis added)*

Reference to the “inside book or journal” means ‘not on the cover’ (but potentially ambiguous to someone new to permission requests) and on checking understanding of the “Academic waiver for projects in which the Academic is personally responsible for paying reproduction fees” the email reply included:

*If the lectures are only available by subscription (or if any fees are charged for access) we would expect to receive a licensing fee for NG images used in the lectures. (National Gallery, personal communication, all rights reserved)*

Sigh. We are still awaiting a reply asking for clarification of the definition of ‘fees’ as to whether this would include ‘lectures’ to fee-paying HE students.

The reason for the complexity is that essentially every published work could potentially have different licence arrangements, and some works (such as edited books) could have different licence arrangements for each chapter or section (or even an image). For example, the STM-PSP guidelines (2008) permit limited use of journal articles in teaching/VLEs, providing it is fully credited and essentially incidental to the work in which it is reused:

*... the use of small portions of journal articles ... scholars (or their institutions with respect to course-packs) may (without obtaining explicit permission from publishers) [use] a maximum of two figures (including tables) from a journal article or five figures per journal volume [and/or a] single text extracts of less than 100 words or series of text extracts totalling less than 300 words for quotation ... in all media and in future editions.*

Any signatory to the STM (2012) guidelines has permission to reuse the third-party content (e.g. up to three figures including tables from a journal article or book chapter) from other signatory's journals or books (note that this is between publishers and does **not** cover use in teaching) without the need to seek express permission and "permissions given for the re-use of material automatically include re-use for any electronic version of that work". However, exceptions are similarly made when "re-use of material essential to the character of the previously published work or when re-use could compromise the sale of the previously published work (e.g. complex illustrations such as anatomical drawings; cartoons; maps; works of art; creative photographs)".

If you use third-party materials without permission then there is a risk that the copyright owner will seek to assert their rights by issuing a 'notice and take down' or suing you and/or your employer. The probability of being issued with a notice and take down or legal action depends on the nature of the perceived infringement (or loss of potential earnings for the copyright owner). Remember that you are just as liable if you have used sources where someone else has already breached copyright (or 'ripped off' content). Reusing copyright breached content is called a 'secondary infringement' and carries the same legal liability and penalties.

In a risk-managed approach there are some rules of thumb that make it more or less likely that you and/or your employer will be issued with a notice and take down and/or legal action:

- identify which sources are legitimately made available by the copyright owner (e.g. newspaper or journal articles) and are not 'ripped off' by someone else (e.g. film or TV clip on YouTube);
- seek permission or a licence from the copyright owner;
- clearly attribute the copyright owner with '©(year) (owner's name; author's name [if different]) (URL [if appropriate])';
- ensure that the use of third-party materials (from any of the sources above) is 'incidental' – don't use too much of the source;
- link to internet sources (use a URL) rather than copy them into your materials and if you want to 'deep link' (to an article) first cite the homepage of the source;
- cite how to purchase the source;
- only use the materials for academic purposes;
- have a notice and take down policy, and a disclaimer on each resource.

As a rough rule of thumb the different kinds of copyright licences are indicated in

Table 1.

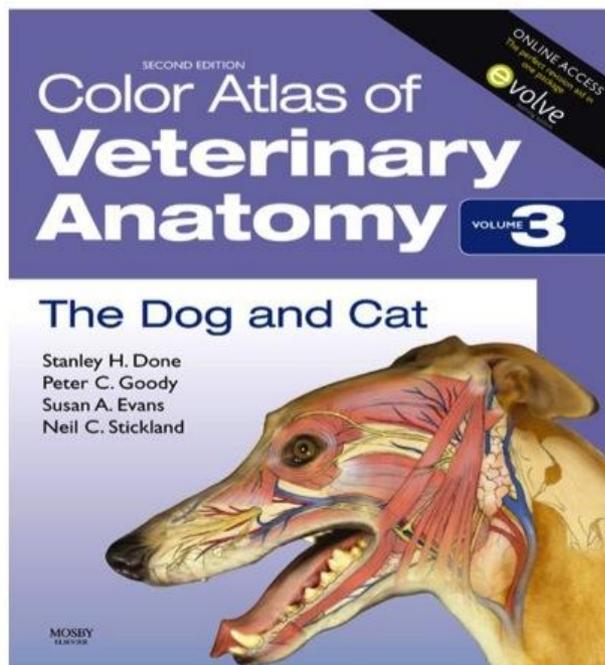
**Table 1: Different kinds of licensed materials carry different levels of risk when it is used in teaching materials and/or OER**

Out of copyright/public domain CC:0 <a href="#">Link to FAQ</a>	Licensed for use and reuse CC by-sa-nd-nc <a href="#">Link to FAQ</a>	Seek permission from owner <a href="#">Link to FAQ</a>	Pay for royalty-free licensed content	Use source carefully in a risk-managed environment <a href="#">Link to FAQ</a>	High risk or permission denied. Film, music, TV, cartoons
Any use including derivatives, commercial. May be used in OER	Limited use according to the terms of the licence. May be used in OER	Specific use according to the terms of the permission sought. May be able to be used in OER	Any use within the terms of the royalty-free licence, cost up front. Not normally able to be used in OER	Attribute, rights reserved, where to buy, disclaimer, notice and take down. Not normally able to be used in OER	'Instruction' and exams only; link from VLE to 'safe' content rather than embed. Remove from external websites/OER immediately
CC-0, some Gutenberg, Google Books, Hathi Trust, Amazon	Xpert, Flickr, Google Images, etc.	Leave plenty of time, be very clear about what the purpose is	From 14p to >£500 one-off payment; all rights reserved	Take reasonable precautions, e.g. don't use too much, i.e. <10% total	Take extreme precautions; find alternatives; advise others to avoid

**Error! Reference source not found.** is an example of the use of third-party content that is likely to be regarded favourably by the copyright owner as it clearly attributes and states where to buy the source.

## Veterinary medicine

- Small enough market sector to test approaches
- Social media interfaces
- Original image:  
©2009 Mosby/Elsevier (all rights reserved, used with permission)  
To purchase: <http://amzn.to/15jH2t>



**Figure 2:** Image from a Mosby/Elsevier publication cited accurately and with a link to purchase the original. It is marked all rights reserved although the presentation file it is embedded in is CC-BY

In this case study we interviewed stakeholders such as publishers with the following conclusions:

- All the publishers cited the potential for increased sales as being the major motivation for participating in OER projects on the assumption that users of the OER content would be stimulated to investigate the mainstream works from which it was drawn, and purchase.
- The non-profit publisher/s also cited the desire to make some of its content available to sectors that could benefit from it.
- All had found little evidence so far that this would work as a strategy, although they had not found any contra-indications.
- The amount of usage was crucial and they were frustrated by problems in being able to link usage information to presence in the OER.
- Some would like to see micropayments, as they considered this would help complete the sale of content-related to an OER, e.g. sale of a high-resolution version of an image available free of charge in the open version.

Publishers were willing to engage in OER experimentation:

- All publishers were willing to make limited content available for OER experiments; however, they were concerned about the proportion of OER that their content would make up.
- Attribution and acknowledgement would be essential.
- A link back to the original source work from which it was drawn would be essential.
- Some form of clear non-commercial licence would be essential.
- Such use should be time-limited therefore:
  - any form of perpetual licence (including Creative Commons) would not be acceptable;
  - publishers would want to review usage and impact;
  - the period could be as short as one year.
- Some authors were very keen to make extracts from their works available in OER as they believed it would help their students and raise the profile of their books.

We also interviewed the Head of IPR at The Open University (OU) where they do not subscribe to the CLA licence, meaning that any use of any third-party work has to go through a permissions request process. This means that works can be cleared for use in books and journals, and local teaching. They also clear copyright for materials to appear in OER, paying any agreed royalties. They have their own system for managing IP produced by OU staff, and that of third parties.

Interviews with senior university managers (research and teaching PVCs and Deans) revealed considerable anxiety about internal practice – the extent to which they felt they didn't know the scale of potential use of third-party material. They were cautious about the uptake of OER primarily as it may additionally expose breaches of third-party rights, rather than they were concerned about the quality of teaching in their institution.

## Technical developments

We showed stakeholders and others the results of a Student App Development Day, whereby students had taken digital versions of book content and messed around with it (**Error! Reference source not found.**).

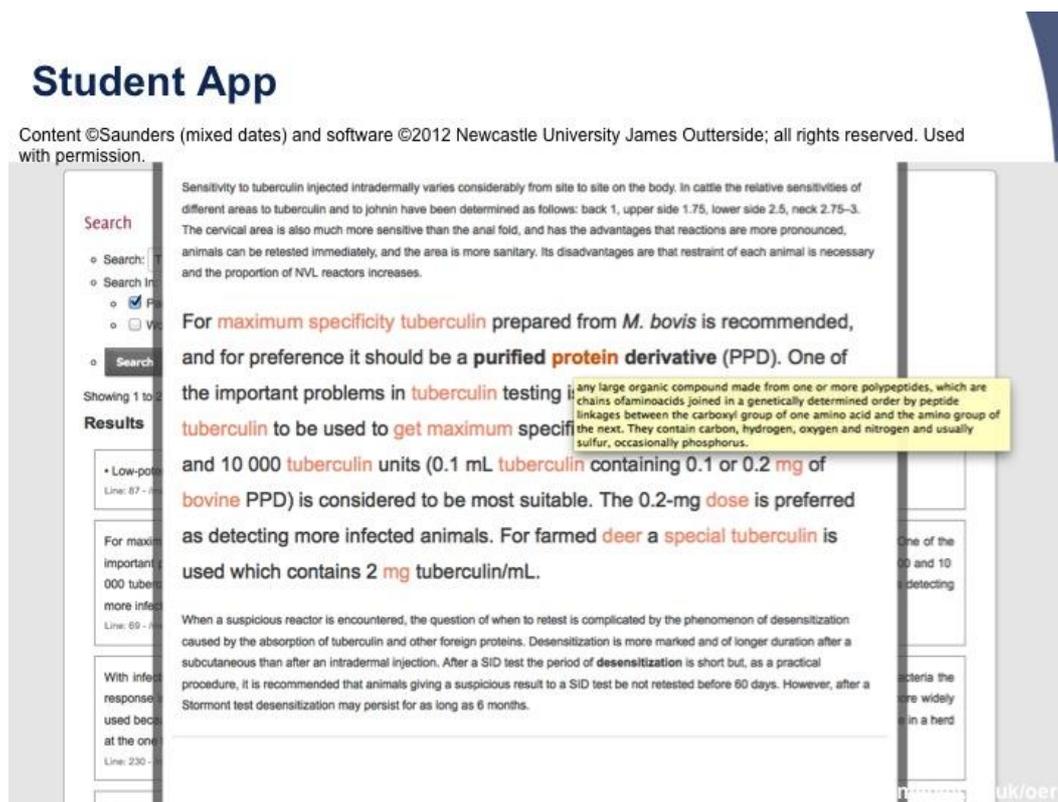
## Outputs from Student App Development Day

Photographs ©2012 Newcastle University Megan Quentin-Baxter cc:by



**Figure 3: Students and staff taking part in an App Development Day. Used with permission, CC-BY.**

Several excellent products were developed including that illustrated in **Error! Reference source not found.**



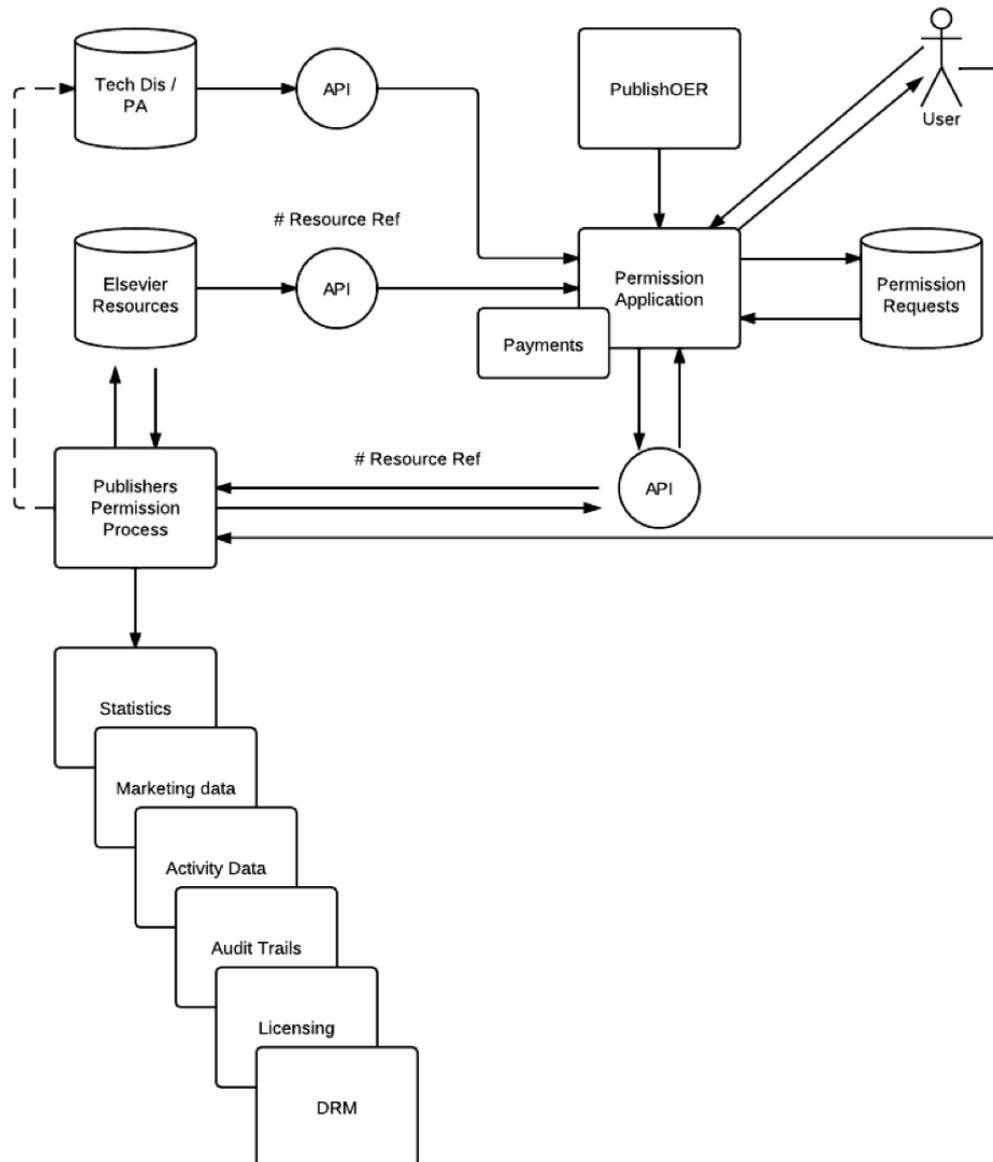
**Figure 4: An app that split a textbook into paragraphs so that it could be searched for specific terms, such as tuberculin, with a dictionary layered over the top to provide rich meanings. All rights reserved.**

In addition to policy work and development of case studies the PublishOER project involved a series of technical investigations to consider how textbook content could be made more discoverable and accessible. Key to this was considering how a permissions-request system could lower the 'transaction costs' currently associated with making publisher permissions requests on a case-by-case basis.

Technical solutions include splitting the electronic version of books, magazines, etc., into elements such as paragraphs, captions and images, and adding metadata describing each of the elements including its licence terms (this would be hereditary so that child elements inherited the metadata of the parent), and databasing them so that each element can be linked to separately and independently of another. Each publisher could have and manage its own databased book content able to be searched by a permissions-request interface in order to generate an instant permissions decision and record where published content was being reused.

Many publishers already subscribe to the RightsLink Copyright Clearance Center<sup>4</sup> an interface providing licensing decisions instantly (or referred for more complex decisions) including licensing prices where these would apply. However, it is not well known in UK academic circles, and could be enhanced with additional features including the potential for an underlying micropayments commerce site.

<sup>4</sup> (<http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/rightslink.html>)



**Figure 5: A representation of how the demonstrator PublishOER permissions-request system should integrate with a publisher's own content database and API**

### Example scenario

A university professor notices an image in an Elsevier book that she might wish to use within a PowerPoint lecture:

- They scan the book's permissions-request QR code, which takes them to the PublishOER permission system using a personal bookmark, central or social media login to gain access.
- The system requests some basic information about who they are, where they are based and what typical purposes they might have (as they are using the interface for the first time).
- They either scan the book's QR code or choose the relevant publisher from a list managed by TechDis/JISC Collections and the Publisher Association and search for the image.

- The professor completes additional information (check boxes) about the image's use and answers some optional publisher-specific questions.
- The permission system calls the appropriate API recording the validity of the request and providing an instant licence decision (noting a reference number in the usage database).
- A downgraded version of the image is created on the fly, with the full attribution, licence (all rights reserved), an ID number by which the item can be tracked, and information about the licensee (the professor) automatically embedded.
- All information about the request is made available to the publisher's database via the API.
- The professor then can use the image in their lecture, or even in openly licensed content, fully attributed and marked 'used with permission'.
- The publisher has access to statistics, marketing/activity data, audit trails, etc.

## Micropayments

For more complex scenarios or costed licences a micropayment scheme can be applied. Now when the professor scans the QR code with the intention of sharing a chapter of a book (in ePub format) with a student class the system reports the amount of credit she has remaining.

Deciding to top-up so that she can share the paper on the VLE, she opts for an SMS system to apply for credits:

- She enters her mobile phone number and a credit amount (say, £10.00) in the PublishOER system, generating a text containing a code while the system verifies the transaction.
- The professor replies to the text confirming the code and is granted £10.00 credit on the publisher's account while the professor's phone bill is debited by £10.00.
- They make a permissions-request on the PublishOER system to make available the book chapter to their class this year which costs £1.50. The PublishOER records the debited amount against the topped up account by £1.50.
- The PublishOER system emails a reminder to the professor next year to note that further payment would be required if the material is still in use.
- This micropayment system can be hosted within the PublishOER system or be specific to the publisher.

(Credit: original text by Dan Plummer, ©2012 Newcastle University)

In conclusion, the best things that you can do to adhere to good licensing and policy practice is attribute others (as you would want to be attributed), read the licence terms of any third-party materials, ensure that you put the copyright details on your work and include a disclaimer/notice and take down policy.

## Learning from OER

"If you want to get to there then don't start here." Working with the OER sector has been a pleasure and a privilege; however, it has been extremely difficult at times. It seems that everyone involved in licensing and policy is willing to make changes in order to improve access to knowledge and support educational processes. However, the systems in place at present reinforce maintaining

the status quo. Every stone that has been 'turned over' revealed new horrors, fear (of litigation; of loss of earnings) and challenges. This case study draws heavily on work elsewhere, and it is difficult to untangle it completely. Readers are recommended to consult other works such as those listed in the References section, and to watch for updates, as the author and the wider team are learning all of the time.

## Conclusions

We concluded, when we asked 'can we establish a national licence, principles or rules for third-party content to be used in OERs?', the following encouraging, but very draft, result:

- every resource on a 'case by case' basis;
- up to ten natural or 'derived' things (e.g. images) per teaching resource for any purpose, including openly licensed (including if they are transformed in some way: annotated, cropped, coloured, videoed, etc. and text sections reproduced as a .jpg or .pdf);
- downgraded quality of images/text/sound;
- permission sought for every use and reuse and full attribution given to sources;
- embedded materials marked with their own licence including 'all rights reserved';
- notification of publishing of any embedded works as Open Educational Resources;
- have a disclaimer on the resource and a notice and take down policy.

This means that third-party owners need to database their content (as described above) and make it available behind an API, with metadata about the licence terms. Staff should be able to easily find the electronic version of a resource and download it for use in teaching, recording the fact that it was being downloaded (and for what purpose). Publishers would like access to the results of whatever staff and students do with their content, possibly to signpost it to others.

This is an excellent early result that points the way towards a new national framework for third-party works to be used in OER. It requires new technologies in order to manage copyright requests, permissions and possibly payment. It heralds new ways of working that raise the confidence of all parties in the legal climate, but only if third-party copyright owners buy into the system. If they do, then everyone will benefit.

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## Links

CABI: <http://www.cabi.org/>

Copyright Licensing Agency (CLA): <http://www.cla.co.uk>

Creative Commons (CC): <http://creativecommons.org>

Elsevier: <http://www.elsevier.com/>

Flatworld Knowledge: <http://www.flatworldknowledge.com/>

JISC CASPER Project: <http://jisc-casper.org>

JISC Collections: <http://www.jisc-collections.ac.uk>

JISC Digital Media: <http://www.jiscdigitalmedia.ac.uk/>

JISC Legal: <http://www.jisclegal.ac.uk/>

OER IPR Support Project: <http://www.web2rights.com/OERIPRSupport>

Libraries and Archives Copyright Alliance (LACA): <http://www.cilip.org.uk/get-involved/advocacy/copyright/pages/about.aspx>

Manson Publishing: <http://www.mansonpublishing.com/>

MEDEV Organising Open Educational Resources Project: <http://www.medev.ac.uk/oer/>

MEDEV PublishOER Project: <http://www.medev.ac.uk/ourwork/oer/publishoer/>

National Gallery: <http://www.nationalgalleryimages.co.uk/>

Open Access Scholarly Publishers Association (OASPA): <http://www.oaspa.org/>

Open Education Week, 5-9 March 2012:  
[http://www.openeducationweek.org/category/blog/open\\_textbooks/](http://www.openeducationweek.org/category/blog/open_textbooks/)

Pearson Higher Education, Learning Solutions:

<http://www.pearsonhighered.com/educator/learning-solutions/index.page>

Penguin Group, Pearson Education: <http://www.pearson.com/about-us/consumer-publishing/>

Rightscom: <http://www.rightscom.com>

Royal Veterinary College (RVC): <http://www.rvc.ac.uk/>

Saylor Foundation: <http://www.saylor.org/>

Strategic Content Alliance (SCA): <http://www.jisc.ac.uk/contentalliance>

UK Intellectual Property Office: <http://www.ipo.gov.uk/>

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