Introduction

'Open' resources that are created, used, repurposed and shared within the context of teaching, learning and research have multiple benefits within higher education (HE) and further education (FE). They also provide a platform for business community engagement. Ahrash N Bissell (William and Flora Hewlett Foundation consultant) and David Kernohan (JISC OER Programme Manager) have recently discussed these benefits in detail in the latest edition of *JISC Digital Content Quarterly*.[1]

Both agree that Creative Commons licences (CC licences) can be successfully employed to fulfil the requirement of creating 'open' resources. However, although CC licences share many attributes, differences in specific terms and conditions between the ranges of CC licences can affect how far a resource can be freely repurposed and disseminated. These terms and conditions can therefore inhibit the 'openness' of the resulting resource.

This paper provides an overview of the different model licences that are available across UK HE and FE that might contribute towards the repertoire of Open Resources. It also addresses the following areas:

- Are ALL resources licensed under the full range of CC licences truly open?

- Are there any other template licences that might fulfil the requirements of 'open' for Open Educational Resources (OER) apart from CC licences?

- Under what circumstances is it inappropriate to use open licences?

1. JISC Model Licence

The JISC Model Licence has been drafted by JISC Collections and contains more favourable provisions than any standard commercial licence for access and use of online resources. JISC negotiates the licences with publishers on behalf of UK Funding Bodies for FE and HE communities. The JISC Model Licence contains provisions that allow students and staff to make effective use of online resources for learning, teaching and research.

There are four variants of the JISC Model Licence, and more are likely to be created as new developments in online resource provision and delivery emerge.

- Data sets
- eBooks
- Moving Image and Sound Model Licence
- Electronic Journals (NESLi2)

1 http://sca.jiscinvolve.org/files/2010/04/sca_dcquarterly_02_apr10-interactive.pdf

The Model NESLi2 Licence for Journals is the model licence used by JISC staff or the NESLi2 negotiation agents in negotiations with publishers for JISC journal agreements. It is based on the Model NESLi Site Licence used by the NESLi Managing Agent in negotiations with publishers for NESLi agreements (which was in turn based on the PA/JISC draft model licence) and was approved by the JISC's NESLi Steering Group in 1999 for use by the NESLi Managing Agent.

Benefits of the JISC Model Licence for the UK FE and HE communities:

The Model Licence provides a consistent approach to accessing and using online resources to allow teachers, learners and researchers to use each online resource to its fullest potential in support of their activities.

JISC has a team of specialists dedicated to negotiating the best possible deals and partnering with the publishing sector to influence online resource developments to meet the needs of the FE and HE communities.

Limitations of the JISC Model Licence:

- Staff and students may not make the online resource available off-site to anyone other than staff and students

- Staff and students may not remove/hide or change copyright notices or remove acknowledgements

- Staff and students may not allow the online resource to be viewed in any way other than by authorised access or on the institution's secure network

- Staff and students may not use the online resource for commercial use or for any purpose other than educational purposes

- Staff and students may not display any part of the online resource on a publicly accessible website or network

All of these restrictions continue after the end of the licence agreement.

There are also institutional responsibilities that must be agreed to when an institution signs an Institution Licence. These include the following:

- Issue passwords to staff and students
- Make staff and students aware that they cannot share their passwords with anyone else
- Only allow staff, students or Walk-in Users of the library access to the online resource through the secure network
- Make sure that staff, students and Walk-in Users are aware of what they are and are not allowed to do with the online resource
- Let the publisher or JISC know immediately if they are aware of unauthorised access or use of the online resource. They also must take appropriate steps to ensure unauthorised access or use is not repeated

A breach of the Institution Licence is a serious matter and can be grounds for termination of the agreement. This places the rights of other uses in jeopardy.

The Model Licences can be found at: **www.jisc-collections. ac.uk/model_licence**

Examples of projects compliant with the JISC Model Licence:

The Burney Collection: **www.jisc-collections.ac.uk/Catalogue/ Overview/Index/94**

Early English Books Online: **www.jisc-collections.ac.uk/ Catalogue/Overview/Index/1006**

The Times Digital Archive (1785-1995): **www.jisc-collections. ac.uk/Catalogue/Overview/Index/84**

2. Creative Commons Licences[2]

CC licences permit the copying, reuse, distribution and, in some cases, the modification of the original owner's creative work without having to obtain permission each time from the rights holder.

The licence is attached to the content and is available in various forms:

Attribution (BY)
Attribution No Derivatives (BY-ND)
Attribution Non-Commercial (BY-NC)
Attribution Non-Commercial No Derivatives (BY-NC-ND)
Attribution Non-Commercial Share Alike (BY-NC-SA)
Attribution Share Alike (BY-SA)

Benefits of CC licences

There are many advantages of using CC licences, including ease of use, widespread adoption and familiarity of choice and flexibility, human-readable, machine-readable and symbolic representations of the licences, and a direct link between the resource and its licence.

The main CC licences offer a series of 'baseline rights' together with four 'licence elements' that can be mixed and matched to produce a customised licence through a point-and-click web interface:

- Attribution (BY) – you must credit the licensor of the work
- Non-Commercial (NC) – you can only use the work for non-commercial purposes

- No-Derivatives (ND) – you may not create adaptations of the work

- Share Alike (SA) – you may create adaptations of the work, but these must be under the same licence as this work

Jurisdiction specific licences ('ported' licences) are available for Scotland, and England and Wales, and non-jurisdiction specific licences ('unported' licences) are also available. There is no variant for Northern Ireland at present. The benefits and disadvantages of selected ported vs unported licence have recently been reviewed. Creative Commons version 3.0 licences will be launched shortly for the whole of the UK.

Considerations when using CC licences:

- Although CC licences may be suitable for many applications, this may not be the case where third-party issues are present and require additional clearance (see below for further information).

- If a resource is comprised of multiple elements of works for which rights holders each individually only require attribution (eg CC BY), this may result in 'attribution stacking'. In such circumstances, the selection of the CC Zero licence and/or the Open Data Commons Licence, which do not require attribution, may be preferable.

- At a strategic level, committing to the irrevocable terms of CC licences raises issues of broader access and commercial goals for organisations. The use of CC licences should be a policy decision and should form part of the overall intellectual property of organisations, where the full implications can be examined and understood.

Examples of JISC Projects using CC licences

'In licensing terms we are using Creative Commons licences, preferring those that provide the minimum restriction on end users, whilst still protecting the needs of the creators. Though we do respect the "free culture" ethos of allowing maximum freedom to users, this is balanced by the pragmatism of persuading academics to release resources when they are unsure what they are giving away and how they can maximise the value of it. So we are seeing releases using almost the full range of CC licences, as projects work within their own subject and institutional contexts to get the optimum equilibrium.' [3]

- One of the JISC-funded OER projects, called 'Organising Open Educational Resources' (**www.medev.ac.uk/oer**), aims to make a large number of educational resources 'open', including: ECGs, X-rays, images, films and virtual patients. In this case, they have chosen a selection of Creative Commons licences:
  - CC BY-NC-SA UK for most resources (Creative Commons, Attribution Non-Commercial Share Alike)
  - CC BY-NC-ND UK for some 'sensitive' resources (Creative Commons, Attribution Non-Commercial No Derivatives)

Open Spires – Open Content at Oxford University **http://podcasts.ox.ac.uk/openspires.html**. Another JISC funded OER project that has provided access to a number of resources, including podcasts, mainly under CC BY-NC-SA (Creative Commons Attribution Non-Commercial Share Alike) licences although a few are also released under the CC BY-NC-ND

3 David Kernohan, JISC Programme Manager: **http://sca.jiscinvolve.org/files/2010/04/sca_dcquarterly_02_apr10-interactive.pdf**

licences (Creative Commons, Attribution Non-Commercial No Derivatives) where repurposing is not permitted.

3. JISC Collections Open Educational User Licence V1.0

This licence can be used to provide access and use to materials being made available for Educational Use. This is a standard open licence, developed with educational use in mind and allows for all use that is conducive to education and research. As such, any content made available under the terms of this licence gives users the right to modify and adapt the content, to create derivative and collective works containing the content and to disseminate their work and deposit the content in repositories. In turn, users must acknowledge you as the Licensor of the content and this licence. The licence prohibits Commercial Use and any restrictions on subsequent use of the content that are not in compliance with this licence.

Interestingly, this licence is similar in ethos to the CC licences. It aims to be more explicit than the CC licence about how resources may be used in the educational context. The licence is nonetheless compatible with the CC licence. You can use this licence to clear third party rights ('licensing in'), and then put a CC:BY:NC or similar on the final resource ('licensing out'). The language and terminology of the CC licences maps closely to the JISC Model Licence, which makes it a useful tool for negotiating with publishers who have released content under the Model Licence.

Examples of JISC-funded projects using the Open Educational User Licence

The East London Theatre Archive (ELTA) is a database of performing arts resources, from playbills and programmes to press cuttings and photographs. By creating up to 15,000 digital objects, taken from different East London Theatres and V&A Theatre Collections, the archive preserves digitally unique endangered collections, making them accessible to an academic audience. ELTA is led by the University of East London and has been funded by the JISC Digitisation programme. The East London Theatre Archive uses the JISC Collections Open Educational User Licence. JISC Collections Open Educational User Licence V 1.01.doc **www.elta-project.org/props/files/JISC-Collections-Open-Educational-User-Licence-V1-01.pdf**

4. Open Data Commons [4]

Open Data Commons aims to provide open solutions for data and database through the development of three open licences:

- Open Data Commons Attribution Licence (compatible with CC BY)

- Open DataBase Licence (compatible with CC BY SA)

- Public Domain Dedication Licence (compatible with CC Zero)

4 **www.opendatacommons.org**

5. The Open Government Licence

In September 2010, the National Archives announced the launch of the Open Government Licence (OGL) facilitating the reuse of Government information, see: **www.nationalarchives.gov. uk/doc/open-government-licence**. The new licence replaces the 'Click Use' licence previously used to provide access to Crown Copyright materials. This Licence is compatible with the Creative Commons Attribution Licence (CC BY) **www. creativecommons.org** for content, and also the Open Data Commons Attribution Licence, see: **www.opendatacommons. org/licenses/by/1.0**. It covers a broad range of Information (classed as works in copyright, data, databases and source code etc).

It is primarily designed for Crown Copyright material, but also can cover information from other public sector bodies as well if they choose to adopt it. As with Creative Commons licences, it is available in a machine-readable form as well as a 'human-readable' form. Finally, rather than being legislation specific, it defaults to the governing legislation to which the licensor has their specific place of business. It excludes logos, trademarks and other IP such as patents, and includes specific non-endorsement clauses.

Benefits of OGL:

- It provides the means for data, databases, content, etc., to be licensed under one licence – which is useful for content composed of multiple elements.

- It provides the mechanism for public sector content to be made accessible under the same terms with minimal restrictions on the user – thus providing the mechanism by which public sector information can be reused, adapted, blended together, etc.

- It includes non-endorsement clauses, which are not present in the CC version 2.0 licences, although they are likely to be included in the CC version 3.0 licences.

Considerations when using OGL:

- It covers all data, content, etc., which means that it does not provide the granularity that CC licences provide.

- It does not provide the SA/NC or ND variants that CC licences offer. These CC 'flavours' are particularly useful when trying to secure third party permissions and/or where public sector bodies want to exert more control over the use of their material.

- The OGL licence is a global licence like the CC suite of CC licences, but will neither have the same global brand recognition nor credibility as the CC licensing models.

- The OGL does not cover Moral Rights – which are covered in the CC 3.0 licence and also the Open Data Commons Attribution Licence.

- The Licence warns the licensee not to use the licence if the licensed material contains third party materials, but does not guarantee to provide any information about what content does contain third party materials – leaving the licensee taking all the risk.

How Open are So-Called 'Open' Licences?

Although all of these licences aim to provide free access to resources, not all the resources licensed under these various licences can be freely used or repurposed. This is a very important distinction within teaching, learning and research-based environments. If not creating resources that are truly open, we cannot claim to be realising the multiple benefits of open educational resources. Without distinguishing truly open resources from partially open resources, we can create certain problems, including:

- Restricting the potential for catalysts for value-adding services, new forms of teaching and accreditation, and new pathways for participation in educational goals by anyone, anywhere in the world

- Creation of potential silos of resources that are not interoperable because they have been licensed under different licensing regimes

- Particular difficulties if so-called 'open' resources are blended or mashed with resources that are genuinely open. In these cases, the resulting mashed resource will be potentially infringing copyright as they are 'contaminated' with resources that are not open and the resulting resource may be unusable

- Projects that have been funded under the 'Open Educational Resources' programme of work may risk jeopardising their terms and conditions of funding

The table below compares the various features of the most commonly used licences described above in terms of 'openness', i.e. freely being able to use, repurpose and share outputs.

Licence Type	Who can gain access to the resource and under what terms?	Can the licensed outputs be reused and/or repurposed?
JISC Model Licences:		
Data Sets Model Licence	Authorised users only	No, though extracts may be used in teaching and learning
E-Books Model Licence	Authorised users only	No, though extracts may be used in teaching and learning
Moving Image and Sound Model Licence	Authorised users only	No, though extracts may be used in teaching and learning
Electronic Journals (NESLi2)	Authorised users only	No, though extracts may be used in teaching and learning
Creative Commons:		
Attribution (BY)	Anyone	YES, but you must credit the licensor of the work
Attribution Non-Commercial (BY-NC)	Anyone – for non-commercial purposes only	YES, but you must credit the licensor of the work
Attribution No Derivatives (BY-ND)	Anyone	NO and you must credit the licensor of the work
Attribution Non-Commercial No Derivatives (BY-NC-ND)	Anyone – for non-commercial purposes only	NO and you must credit the licensor of the work
Attribution Non-Commercial Share Alike (BY-NC-SA)	Anyone – for non-commercial purposes only	YES, you must credit the licensor the work and if you create adaptations of the work, these must be under the same licence as the licence selected by the original creator.
Attribution Share Alike (BY-SA)	Anyone	YES, you must credit the licensor the work and if you create adaptations of the work, these must be under the same licence as the licence selected by the original creator.
Creative Commons Plus	Anyone – but could be restricted to non commercial purposes	Not necessarily. The Creative Commons Plus licence facilitates the add-on of an additional licence on to the Creative Commons licence in order to facilitate the granting of more permissions by the content creator to the user, thus introducing greater flexibility to the type and range of permissions that are granted.
Creative Commons Zero	Anyone	YES, with no restrictions. The Creative Commons Zero licence facilitates creators to waive all copyrights and related or neighbouring interests that they may have over a work such as moral rights, publicity or privacy rights, rights protecting against unfair competition and any rights protecting the extraction, dissemination and reuse of data.
JISC Open Educational Licence	Anyone – for non-commercial purposes only	YES, the work can be used in any way and for any such purposes that are conducive to education, teaching, learning, private study and/or research as long as you are in compliance with the terms and conditions of the licence.
Open DataBase Licence[5]	Anyone (applies to data and databases)	YES – but you must attribute any public use of the database, or works produced from the database, in the manner specified in the ODbL. For any use or redistribution of the database, or works produced from it, you must make clear to others the license of the database and keep intact any notices on the original database. Share-Alike: If you publicly use any adapted version of this database, or works produced from an adapted database, you must also offer that adapted database under the ODbL.
Open Data Commons Attribution Licence[6]	Anyone (applies to data and databases)	Yes – but you must attribute any public use of the database, or works produced from the database, in the manner specified in the ODbL. For any use or redistribution of the database, or works produced from it, you must make clear to others the license of the database and keep intact any notices on the original database.
Public Domain and Dedication Licence[7]	Anyone (applies to databases)	YES, with no restrictions whatsoever.
Open Government Commons Licence[8]	Anyone (applies to content, data, databases and source code)	YES, you must credit the licensor the work. The licence also includes no endorsement clauses.

5 www.opendatacommons.org/licenses/odbl/
6 www.opendatacommons.org/licenses/by/
7 www.opendatacommons.org/licenses/pddl/
8 www.data.gov.uk

From the table above, as 'open' refers to resources that are free to use and are able to be used freely, i.e. the least restrictions are placed on the user – then only the following licences would fulfil these requirements of being truly open:

Truly Open Licences
Creative Commons Attribution (BY)
Creative Commons Attribution Share Alike (BY-SA)
Creative Commons Zero
Open DataBases Licence (for data and databases)
Open Data Attribution Commons Licence (for data and databases)
Government Open Data Commons Licence (for content, data, databases and source code)
Open Source Software Licences (for software, depending upon the small print of the licence)

However, there may be some circumstances in which it might be inappropriate to use open licences, due to specific risks that might arise for the licensor and subsequently any end-users, and in these cases, licences that place 'some' restrictions upon the user, such as 'ND' and/or 'NC' restrictions, might be more appropriate. Situations where this consideration will need to be made include the following:

- Inclusion of clinical content for which consent has not been cleared, such as much of the material licensed under the OOER JISC-funded project
- Inclusion of images of children and/or adults for which consent has not been cleared
- Inclusion of content that might be inappropriate in any way
- Inclusion of data and/or databases
- Inclusion of other IPRs, such as trademarks and/or performers rights
- Inclusion of material whose use is restricted to certain users and/or classes of users
- Inclusion of third-party-generated content for which permissions have not been cleared. This may include:
  - Works for which permission has not been sought
  - Situations where the rights holders are unknown or cannot be traced (orphan works) and where a risk-based assessment has determined that their use is risky under an open licence
- In circumstances in which the open licence selected clashes with organisational practices and/or policies
- In circumstances in which an open licence might conflict with potential business models

In these situations, the following licences might be more suitable than any of the truly open licence types above:

- Any licence with a 'no derivatives' attribution or any licence with limitation in use or repurposing
- Any licence with a 'no commercial use' attribution
- Any licence that restricts certain classes of users from being able to access resources

To conclude, whilst undoubtedly there are numerous benefits associated with the use of 'open' licences and the creation of truly Open Educational Resources, which are repurposable and reusable, there are clearly circumstances (as above) where this is not feasible. In these cases, whilst licences that may be selected will not fully satisfy 'openness', such as some of the CC licences with non-commercial and/or no derivatives provisions, the priorities of the initial licensor of the content need to be based upon an **open vs risk** evaluation, rather than openness only. Only by achieving such a balance can JISC-funded projects ensure that they are best placed to avoid potential legal/business/policy pitfalls whilst at the same time opening up resources in ways that are more open than previous.

Moving forward, the following might alleviate some of the circumstances that could preclude the ability to use truly open licences:

1. Early consent to reuse resources, media and materials under open licences when initial contact is made with a subject; when a work is acquired and/or when a work is created.
2. Development of digital asset management systems to record rights and permissions associated with digital and analogue objects.
3. The development and implementation of IP Policies creating frameworks for best practices and overlain with an organisational IP Strategy laying out a clear pathway for IP protection and exploitation in the future.

Realistically, however, these measures are unlikely to prevent all these circumstances from occurring. In this respect, therefore, it is probably sensible to consider simultaneously **degrees of openness**, rather than 'open' being an absolute standard.

Want to Find Out More?

Creative Commons **www.creativecommons.org**

Strategic Content Alliance briefing papers on Creative Commons Licences and Embedding Creative Commons Licences into Digital Resources
http://sca.jiscinvolve.org/wp/ipr-publications