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## **E-learning material and open access<sup>[1]</sup>**

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### **1. Introduction: open access and property**

#### **1.1 Roots: land, open access and property**

My interest in open access to e-learning springs from a different sort of access issue: I am developing a web-based teaching resource on rights of access to land (mainly public rights of access) as a National Teaching Fellowship project. I initially assumed, without really thinking about the matter, that there should be no restrictions on access to this resource. I want to make it freely available to all institutions of higher education, and it will include a section on some salient local access issues about the cycle-track I use to get to work (along the old Canterbury-Whitstable Railway) and access to the Whitstable beach (owned, unusually, by a local entrepreneur). This Canterbury and Whitstable material is intended to engage local interest, create links between my university and local groups, potentially to encourage widening participation. So I need to give open access – to a general public as well as to other universities. Once I began to think about my initial assumption about who should be able to get at the material, I realised that open access to e-learning is a desirable, but potentially-fragile, principle which merits careful analysis and support, some of which I try in this paper<sup>[2]</sup> to give.

These roots in land are significant for two reasons. First, to exonerate a land lawyer's amateurishness in dealing with intellectual property and licensing – I claim no expertise in this area and come to it only through the current access issues. Secondly, because the land roots suggested to me a close linkage between access issues and ideas of property. Pragmatic property questions are arguably<sup>[3]</sup> not a big issue in relation to land access: it will usually be clear who the owner is, and the usual focus is on the assertion of public rights which are anyway not dependent on the owner's permission. In relation to e-learning these pragmatic issues loom larger: who has what private rights in e-learning material is more complex and less certain, and my focus is on owners allowing open access; I am not tilting at the law. And these pragmatic questions are not the only role of property in relation to access. The discourse of property can be a key one in arguments about, and for, access. Indeed my principal interest in public access issues as a teacher of land law is the way in which they give a useful concrete, conceptual and historical basis for students' critical reflection on property and ownership. Concretely, for example, a student confronted with the realisation that she may lawfully be banned from the centre of her home town for any reason or none – where that centre has been redeveloped as a privately-owned shopping mall – will realise the public impact which private property can have and the need to consider claims which may challenge the exclusivity of ownership. Conceptually, a number of oppositional conceptions of property have used the idea of access to limit private property or – more interestingly – as the basis of a competing (or complementary) forms of property; the most direct example is Macpherson's idea of 'common

property' [4], which is definitionally a right of access, a right not to be excluded. Historically, instances of pre-enclosure agriculture – often focused in particular on the still-extant idea of the commons – give examples of common property regimes in which property means access and which are more overtly social than the ostensibly individual exclusionary right of private property. I anticipated that property ideas derived from land might have a role beyond the pragmatics in thinking about access to e-learning and I found that they were already in use in different and broader contemporary challenges to intellectual property [5]. I am ambivalent, though, about their use in arguing for open access to e-learning: personally I find attractive the historical linkage to opposition to enclosure, the radicalism of alternative property forms and so on – but this language may repel more people than it attracts, and the realisation that people letting each other get at their teaching material has benefits does not require adherence to the full rhetorical package .

## 1.2 Scope: e-learning material, open access and property

The current inquiry is specifically about open access e-learning material. In section 2 I examine what open access to e-learning material might mean. In section 3 I look at factors which are likely to promote or to inhibit the development of e-learning material and of open access to it. In section 4 I look at ways of promoting open access to e-learning – specifically through the selection and development of appropriate forms of licensing.

## 2. Open access

I do not have a definition of 'open access to e-learning material', and do not want one. I am trying to think about a cluster of loosely-related issues, and to champion tentatively some loosely-related practices rather to define a single phenomenon or argue that a single approach is always best. Some bullet-points are more appropriate than a definition:

### \* The central and obvious issue is who can get at e-learning material

For example, material on an unrestricted and well-publicised web site which needs no special software to use it is pretty clearly 'open access'; material in a VLE which only people taking a particular course or members of a particular institution can see, and which no-one else is made aware of, is pretty clearly not open access.

- More than 'getting at' material may be required. If I want to integrate your material in my teaching I will probably need the right to copy it and to alter it rather than just have my students access it on your site. And your belief in open access may make you want to exercise more rather than less control over how I can use your material, and generate more rather than less complex arrangements (for example allowing me to copy for some purposes but not for others; or requiring me to allow other people to copy from me on the same terms). I look practically at variations on this theme in section 4.
- Less than 'getting at' material may suffice to give at least some of the benefits of open access. For example, I refer in section 3 to a number of examples of e-learning in UK legal education which are well-known, well-publicised in print, and much-demonstrated, but are not on unrestricted web sites. These can stimulate discussion and inspire derivative developments even though they cannot be used in learning or teaching in any direct sense.
- There are gradations. For example, I may [6] make samples available on open access but not a whole learning package; or I may give open access to a usable package, whilst limiting access to additional features (say write-access to a bulletin board or management rights on it).

### \* Collaboration and dialogue are also integral and critical elements

It would be possible to see open access just as a matter of consumption: e-learning is a resource which educational consumers want; other things being equal (not that they ever are) consumer satisfaction will be maximised by giving open access; e-learning material does not suffer the 'tragedy of the commons' – the

resource is not exhausted by exploitation unrestrained by private property incentives[7]. But my conception is more aspirational: a central argument for open access is to promote co-operation in the way material is used (for example in having students work with – or against – those in different institutions; or drawing on the expertise of staff in other institutions), and in the way material is produced and improved (having staff [and students] pool their ideas in planning and giving feedback on learning). Put more cautiously, the technology makes this sort of cross-fertilisation possible for the first time and it would be a waste not to take the opportunity. Collaboration and dialogue in e-learning is one example of a recurrent association of common property forms with co-operation. The historical management of common property regimes of land has tended to involve strong (not necessarily egalitarian) social bonds and rules. The contemporary operation of open-source software tends to involve a strong (whether or not accurate) collective self-conception as a community. The kind of ad hoc co-operation I am talking about is a much more modest aspiration, but I think an important one.

#### **\* Quality of the material**

I want to argue at least some link between open access and good e-learning. Seen simply as material, there is no reason to think that e-learning material to which there is open access axiomatically will be better (by whatever criteria) than material to which access is restricted. But seen in terms of the processes of collaboration and dialogue and critical scrutiny which I am trying to associate with open access, there is a stronger case to be made. These processes can be seen as not just supportive of, but a key constitutive element of, good higher education – whether we choose to emphasise the value of scholastic debate more usually tagged to research, of critical legal education which engages actively with its material, or of deep learning which reflects on the learning (and teaching) process. More defensively, open access has some potential to avert possible dangers in the development of e-learning. For example, increasing technical sophistication could push e-learning in the direction of creation by commercial consortia (or of domination by distance courses offered by a small number of high-prestige institutions) and high access costs; the push to associate education directly with the labour market and the ability to deliver ‘bite-sized’ modules could pull e-learning irresistibly in the direction of information-provision training. Development of good quality open access material may be able to inhibit both potential tendencies by showing other possibilities.

#### **\* Money is not very critical**

Charging for access (and the attendant paraphernalia of passwords, registration and so on) will tend towards restricting who can get e-learning material, who bothers to get at it, and who co-operates in its use and production and improvement. But I do not see being free at the point of delivery as any sort of definitional principle of open access to e-learning material (any more than it is of the open source software movement[8]). Raising money may well help sustain[9] e-learning resources. It should often be compatible with giving meaningful open access for free, whilst limiting to users who pay useful additional features (say write-access or the ability to define groups on a bulletin board).

### **3. Potential for growth of open access**

In this section, I look at factors which I think are likely to promote or to inhibit the development of e-learning material, and of open access to it. Liberal theory may want to see a tension here: if e-learning material is to be developed on the basis of economic incentives, private intellectual property will be critical in excluding potential users from the material unless they pay for its use; open access will remove the economic incentive to develop the model in the first place[10]. It would be foolish to deny or ignore this tension but the set of incentives which in practice faces potential authors of e-learning material is a lot more complicated than this simply model allows for, and the culture in which potential authors work is not one which altogether limits behaviour to reacting to incentives[11]. I try to differentiate as I go between the promotion or inhibition of e-learning on the one hand and of open access to it on the other. The inquiry is necessarily speculative, but my sense is that this is an important time for e-learning issues, when some speculation may be helpful rather than idle; that decisions which may have a critical impact on e-learning are being taken being taken by many universities[12] at the moment but that standard practices are still fluid and still capable of being steered in progressive directions.

#### **3.1 The individual author and the university**

I focus here on the relationship between academics and their employing institutions, and in particular

on the

### 3.1.1 Property in e-learning material

Intellectual property has not been a significant issue in relation to academics' traditional activities of research and teaching. With regard to research, there has been no significant issue because universities have not asserted intellectual property rights. They have not asserted copyright in scholarly works[13] (though they are likely to argue or assume that this is because they waive rights which in principle they have, rather than because they have no rights to assert). Most academic writing is not written with a view to spectacular royalties, and does not produce them, and in the absence of an assertion of copyright by the university what royalties are generated are normally kept by the author. And the most important advantage of academic scholarship to the author is not the capacity directly to exploit it economically through the reified and assignable idea of copyright. It is the non-assignable personal characteristic of authorship – simply having written the work (which the university could never claim). It is this which has traditionally brought tenure and promotion and reputation, and which now enters the RAE. Such authorship now has direct legal recognition in English law as a central aspect of 'moral right' [14].

With regard to traditional (pre-digital) teaching material, universities are less likely to have a conscious policy of waiving copyright but as a practical matter copyright is a non-issue. If teaching material is written up in hard-copy and published as a textbook or casebook, rights will normally be waived because it is now seen as published scholarship. If it is not published, intellectual property in it is simply not likely to bother anyone. Consider for example the position where an academic who has produced a popular course syllabus gets a new job and changes institutions: the old institution would not be able to stop a similar course being taught at the new, for even if it held copyright in the material distributed to students it would not hold any rights to the underlying ideas and expertise which had generated the old syllabus, and which could easily generate a new and similar one. The academic would be similarly unable to stop a version of her course being taught by someone else at the old institution. Copyright is in the particular form of expression of ideas, and written course-material does not normally involve a huge investment of time or money in the particular form of expression. It is cheaply replaced and has no significant sale value.

Potentially, who holds what rights over e-learning material[15] may be a far more critical issue. Unlike research, there is no clear tradition of universities waiving their rights. Unlike traditional teaching, making the material public in a systematic form does not clearly tip e-learning into 'scholarship' and therefore attract the waiver of any rights; and there is likely to be a very significant investment in the particular form of expression of the ideas; and there may be a significant sale value. It is clear the copyright in e-learning material is potentially important, but it is not at all clear who holds it. The prima facie position that copyright is held by the author of a work is displaced where the work is produced in the course of employment[16]. On the orthodox view, this will normally mean that where an academic produces e-learning material as a part of her work, copyright will be held by the university as her employer. But at least one influential commentator takes a much more restrictive view of the circumstances in which the course of employment rule will give copyright to a university: Vaver argues that it applies only where it would be a breach of contract for the employee not to produce the particular work[17]. This argument makes ownership of intellectual property dependent on the particular terms of the contract of employment: if I am employed to work specifically on an e-learning project the material will belong to my employer; if (more typically) I am employed as a teacher and I choose to teach through e-learning, the IP will belong to me; if I am employed as a teacher and my university later adopts a policy that teachers must teach through e-learning then ownership of the IP will presumably depend on the consistency of the policy requirement with my contract – whether it is an ineffective attempt unilaterally to vary the contract or a legitimate exercise of a managerial power to particularise my duties under it. The position is, then, that for current employees it is potentially significant who holds copyright in e-learning but we cannot be certain who does. If employers follow the recommendations of the HEFCE working group [18], it is likely that new contracts will increasingly be explicit in vesting copyright in the employer.

### 3.1.2 The interests of universities

We can expect universities to take the orthodox view on who holds intellectual property, even if Vaver's position introduces an degree of uncertainty which gives employees a bargaining-chip. And universities have clearly been waking up[19] to the fact that e-learning may be important in recruitment, retention and quality assurance, and may sometime give real opportunities for commercial exploitation. Some institutions are unlikely to cede any intellectual property rights to their staff, or to allow open access to e-learning material which they produce. This will apply, for example, to an institution which is setting itself up to make money from distance learning on a big scale and which is confident that it can ensure its staff will deliver the goods without property-incentives. But it is simplistic rather than realistic to assume (as the HEFCE report does) that this will always be the position. Who holds intellectual property and who benefits from it need not be an either / or. It is possible for copyright in e-learning to be held jointly between employer and employee; it is possible (and more likely) for an employer holding copyright to licence use by the employee in particular circumstances; revenue generated by intellectual property can be split between employer and employee. The likelihood of some flexibility in practice in sharing intellectual property and its fruits with employees is suggested historically by universities' attitudes to scholarly works described above (and one might add their attitudes to patent revenue). This is reinforced by McCracken's evidence from the US on e-learning material itself. This suggests a confused picture, but one in which an increasing number of institutions have been prepared to share rights with staff [20]. And any institution which wants to promote e-learning has an interest in motivating its staff. Many institutions will have no ambitions to make money from distance learning and may feel it would be unfair, unnecessary, unhelpful or impolitic to concede no rights to its employees. Even the HEFCE report, which is reluctant to countenance sharing property does not seek to exclude staff from any revenue it generates.

The inconclusive arguments above concern the distribution of intellectual property between university and employee. There is no necessary correlation between these and my central issue of open access. Universities which insist on retaining all intellectual property to themselves may well use their property to prevent employees incline to give open access to material they have authored from doing so. But it is at least possible that open access would in some circumstances be an institutional preference[21] even where an individual author did not want it. For example, a university might want to give open access to at least some e-learning to help meet widening participation targets or otherwise help recruitment, or to forge closer links with local communities or local businesses.

It should not be assumed that universities will axiomatically be against sharing intellectual property with their employees, or giving open access[22]. But it is likely on balance that open access will best be served by individual authors who favour it pushing universities to cede or to share intellectual property in e-learning material. I turn now to look at (dis)incentives likely to affect whether individual authors favour open access.

### 3.1.3 The interests of authors

All sorts of motivations and identities have of course been offered to or thrust upon legal and other academics[23] and all sorts of competing pressures are experienced. A lot of early development of e-learning was self-motivated: developers were enthusiasts curious about the pedagogical potential or interested in playing with the technology, or both; development was a more or less engaging eccentricity, tolerated if it did not get too much in the way of research and (real) teaching. Incentivisation becomes more important as e-learning spreads beyond enthusiasts and becomes a large-scale, mainstream, activity needing a serious investment of time. I said at the start of this section that a simple model of the entrepreneur-author, incentivised by private intellectual property, did not capture the (dis)incentives on academics. But I think it is possible to identify three fairly straightforward factors which together get reasonably close to the pattern of relevant incentives:

First, recognition. Academics need to know that time invested in development of e-learning material will be recognised, preferably not just in the allocation of other duties but in appointment, tenure and promotion decisions and in wider reputation[24]. The kind of right which most matters is authorship, the personal characteristic which cannot be claimed by the university and which legally is protected through moral right; the position is closely analogous to the recognition of research discussed earlier. The uncertainties of copyright do not matter at all here in any direct sense: recognition of authorship in a work is independent of who holds copyright in it[25]. But copyright may be indirectly relevant. An author concerned about wider reputation is will need pretty wide dissemination of her work. For research, it can normally be assumed that publication is precisely that – a rendering public of work so that there are no significant barriers to access by relevant readers (who will be able to get access via a library or electronic sources even if they do not buy). E-learning material is far more vulnerable to much more restricted dissemination. An institution may very well sell access to just a few other universities or very likely deny all access to non-members. An author may want copyright, or appropriate rights by licence, in order to ensure adequate dissemination. And it could be argued that – definitionally – the best dissemination comes through open access. I think this is simplistic: for all the power of search-engines, effective dissemination is likely to depend on channels of publicity rather than simply lack of technical barriers. And wider reputation may not come from the direct individual judgements of students or of other teachers. In the case published research, reputation has traditionally been heavily mediated by peer-review and competition to get into the most prestigious journals – self-publication (at least in the literal sense) on as wide a scale as possible has not been the usual route to recognition. It is quite possible that other mediations will arise for e-learning – and recognition through incorporation into a commercial package is an obvious one. The idea that a search for recognition may provide a significant incentive towards open access is critical dependent on the cultural acceptance of open access (which I look at below): whether or not potential users of material buy into aspirations of cooperation and dialogue with its authors, open access will have to be seen as a sensible choice which authors and institutions may make plausibly, and not as an axiomatic indicator of the worthlessness of the material.

Secondly, portability. I raised earlier the position of an academic taking a new job and wanting to teach at her new institution a course similar to one she had taught at the old. I dismissed this as a practical issue for traditional teaching and hard copy materials, but then pointed to the much greater investment in the particular form of expression of ideas which characterises e-learning material. Many academics are likely to be put off from investing time in development of e-learning material which they would no longer be able to use if they moved[26]. Here, copyright may matter directly: an ex-employer who held copyright could prevent use of the material at the new institution[27]; an ex-employer who did not hold copyright could not prevent it. But all that the academic (and, I would argue, the ex-employer) requires in this situation is the right to use the material, a right of access. As I indicated earlier, it is possible to have such a right without holding copyright. The standard procedure would be for the university (or the academic) as copyright holder to grant the academic (or the university) an irrevocable non-exclusive licence. I am inclined in symbolic recognition of the author's creativity to favour copyright residing in the academic and licensing to the university, or joint copyright[28], rather than copyright residing in the university and licensing to the academic. The detailed substance may be very important in defining exactly what each of the protagonists can do in this potentially-delicate situation and I look briefly at this in the section 4, but whether each has their rights in the form of copyright or of licence does not matter for the purposes of portability as an incentive. I think this may be quite an important factor in relation to the development of e-learning. Its relationship with open access is a fiddly one: if open access is given at the old institution in the first place the issue is likely to be less critical – it may be sufficient simply for the new students to access the old web site. But particular form of open access may still be critical, for example in relation to the longer-term maintenance and development of the site. I come back to this in section 4.

Thirdly, finance (where we come closest to the entrepreneur-author model). Funding the development of e-learning can obviously remove potential disincentives – for example by paying for

technical help or replacement teaching during the time spent on development. A positive financial incentive to academics would be the prospect of royalties if the resulting materials have commercial value and are charged for, and either the academic holds copyright or a proportion of the revenue is negotiated with the university if it holds copyright. Whilst I have no objection to academics making money I hope his will not become the pattern: academic recognition in the sense above should provide sufficient incentive and includes forms of financial incentive. I indicated earlier that charging for use of material does not entail any sort of clear and irrevocable separation from the benefits I am associating with open access and that there are a number of pragmatic reasons why it might be necessary and desirable in some instances. But charging to boost individual academics' incomes I think is likely to hinder the kind of open-ended cooperation I want to promote. Perhaps the most important issue about finance in this context is its source within or without individual universities and I come back to this later.

Most of these issues about incentives within the relationship between the individual academic and her employer bear most clearly on the development of e-learning, and only indirectly or incidentally on the specific issue of open access to it. The broader considerations which follow bring open access more sharply into focus.

## **3.2 Beyond the individual author**

### **3.2.1 Teaching styles**

There is a lot of scope for teaching style to affect the possibilities of open access to electronic material. E-learning might comprise simply making text available electronically, with or without other media additionally[29], and inviting students to absorb information. No-one is likely to argue that, without more, this is good teaching – though simple electronic availability can be very helpful in some circumstances, and a stress on the pre-availability of material for students to handle in their own time and at their own pace is an element of currently-popular ideas of resource-based, student-centred, flexible, learning. E-learning might comprise interaction with the machine (multiple choice questions and the like) – which I think has an important though limited role to play, and which is a central element of the IOLIS software. Open access to either of these styles of material would entail the university offering to everyone for free all it would offer at a price to a student who signs up to one of its programmes. This seems likely to dissuade institutions (and perhaps individual academics) from allowing open access beyond, perhaps, a few samples[30] as tasters for potential students or examples for conference-discussion with colleagues at other institutions.

But most of the interesting current developments in legal e-learning[31] are moving away from these models, and in the direction of using the technology as a mechanism of communication between students and between students and teacher, often in a context which blends e-learning and face-to-face encounters (or at least synchronous electronic communication like video-conferencing). The principal examples involve simulating legal negotiation and preparatory legal research. Some simulations may operate with elaborate and sophisticated virtual learning environments (the most fully-developed being Glasgow Graduate School of Law's fictional town of Ardcalloch[32]). Production of such an environment will require advanced technical expertise and huge investments of time likely to dissuade institutions or individuals from allowing open access. But other simulations may need no very elaborate electronic infrastructure[33] and in these cases the style of learning seems to permit (if not necessarily to encourage) open access, provided there recognition of the idea of the simulation as a matter of moral right. The simulation is of little use to a potential student who does not enrol, because she does not get access to the group or to the teacher. Other institutions might choose also to run the simulation, but they have to put their own staff resources into doing so and imitation will be the best form of recognition for the originator (and, indirectly, her institution) provided that the moral right of the originator is acknowledged.

It might be nice to claim that good e-learning material is amenable to open access and bad e-learning material is not, but manifestly this is not the case. I think it is plausible, though, to see a tendency

towards increasingly thoughtful and subtle uses of technology in blended learning which makes open access more plausible – especially a conception of open access to which communication is inherent and central.

### **3.2.2 Complexity: co-operation and funding**

Traditional teaching stresses the relationship between the student and the individual academic (or at the most a small course team within the institution); a private matter between the acolyte and the subject-initiate who is the sole author of any material. The input of other people, for example the law librarian, is obviously important but (rightly or wrongly) can be seen as supportive of but extrinsic to the enterprise of learning and teaching. Finance is just a matter of standard departmental budgeting. E-learning tends towards more open scrutiny and more complex relations – and in doing so it pulls in the same directions as (and will be pulled by) other pressures such as quality assessment and (more positively) the culture of enhancement offered by the activities of the UKCLE and the rest of the LTSN, and now increased incentives towards such enhancement[34]. Preparation of e-learning material will sometimes need to be seen as a team affair, to which the input of educational technologists, information experts and perhaps educationalists is intrinsic; which may bring in staff from more than one institution; which may be funded by a range of agencies[35] external to the individual university or universities[36], typically handling HEFCE funds – for example the UKCLE and the Institute of Learning and Teaching. These sorts of arrangements obviously complicate the property and contractual relations which, as I showed earlier, can be complicated enough even where the only protagonists are a single academic and her employer. They certainly suggest the need for a pretty careful specification in advance of the rights of all concerned. I think that, critically, they also suggest potential to promote open access in the full sense sketched earlier. By definition I am talking about situation in which a degree of co-operative work is going on. It seems to me that funding agencies have the capacity to play the major role in promoting such co-operation and other aspects of open access. Their constituency will normally be HE (sometimes also FE) as a whole rather than an individual institution and they tend to place a strong emphasis on dissemination. A lead towards open access in their allocation of funds should be expected from them.

I do not suggest there is a simple relationship between complexity, funding and open access. The image of open access as a condition of national funding for big co-operative projects is a long way removed from the image of open access as open-ended and spontaneous cooperation between whichever teachers and students show an interest. And it is of course perfectly possible for institutions to co-operate, without extrinsic funding, to produce material from which all others will be excluded, or for which all others will be charged; or (as I mentioned in section 2) for complexity to lead toward commercial production of material outside the universities or domination by a few big names from which most universities are excluded. But I think the potential for national funding to be used to generate open access material is a very important one – which is not incompatible with less formal co-operation and has the potential to preserve wide participation in the production and improvement of e-learning material against commercial or big-institutional dominance.

### **3.2.3 Culture: open access as a movement**

The best hope for widespread open access is that people and institutions believe in it rather than are pushed into it by incentives or by funding conditions. There are some powerful oppositional academic arguments against the excesses of private intellectual property in general, often using (as I noted in the introduction) the land-derived rhetoric of common property. There are also strong movements targeted more specifically on open access to various kinds of digital material. Often, such movements do not rely on broadside declarations of collectivist, libertarian or anti-capitalist principle but make their cases in surprisingly subtle, pragmatic and thoughtful ways from which any push towards open access to e-learning can pick up a lot.

Perhaps the best-established is the open-source movement in relation to software. Within this have been generated, for example the Apache software (which runs the majority of the world's web

servers) and the Linux operating system (which offers the best hope of breaking the dominance of personal computers by Microsoft Windows). E-learning can I think take two things in particular from the open-source movement. First, the confidence that it is perfectly possible for open access material to achieve serious results on a big scale in competitive conditions[37]. Secondly, the precept of using full and careful licence conditions to secure open access. There is an excellent analysis of open-source licensing by O'Sullivan in a recent JILT[38] article and I come back to these licensing issues in section 4.

Perhaps a bit closer to the direct concerns and experiences of most legal academics is the free online scholarship movement[39], of which the Budapest Open Access Initiative[40] is the clearest articulation. This seeks to avoid publishers charging for material for which authors are not being paid – typically refereed journal articles, either by electronic self-publication in open access archives in advance of standard journal submission, or through open access journals. Again, the difference made by the technology has been stressed. In Harnad's nice image, the 'Faustian bargain' in which authors of hard copy had to allow publishers to charge for access to their work in order to get it published at all is simply not necessary given the ease of free electronic dissemination[41]. The open scholarship movement provides useful academic material for e-learning, and another example of a successful open access programme. Its emphasis on handling only those materials which authors are happy to publish without payment may be reassuring for any scholars inclined to see open access as a threat to their legitimate self-interest.

It is difficult as yet to see any widespread championing of open access specifically in relation to e-learning beyond the admirable lead given by MIT with their OpenCourseWare Pilot[42]. I hope and expect that a conscious movement will develop as more people become more focused on e-learning – and this may be all the more likely as an oppositional position particularly if most universities do take the hard line which the HEFCE report may point to in seeking to exclude employees from intellectual property and to restrict access to material by users.

### 3.2.4 Technology

All aspects of e-learning are inevitably and intimately affected by the technology, however much we try to subordinate it to arguments about learning and teaching. Technological development is always unpredictable and often more or less incomprehensible to those of us who are not IT specialists. But I want to make some brief comments on the well-established growth of VLEs[43] and on (as much as I understand of) some current trends.

VLEs have many virtues – not least that they facilitate the writing of e-learning material by non-technophiles. But the rise of VLEs and related technologies makes the issue of open access a pressing one, by returning to an earlier position in which restricted access is the default. Pre-internet access to e-learning material was intrinsically limited. A computer-assisted learning application authored (say) in the old Guide hypertext software ran on a single machine or a local network. Wider access would only be given by conscious choice and could only be limited. In this example, application files and Guide Viewer system files would be copied onto a floppy and the floppy given to the intended user. The internet shifted the default: e-learning material on a university web site is fully open-access unless conscious and sometimes-awkward[44] steps are taken to restrict it. One response to this may be not to develop e-learning material at all, or not to put it on the web, but the internet in general has accustomed people to open access as a normal phenomenon. The VLE gives a standardised and a specifically teaching-related technology within which restricted access again becomes the norm, requiring no effort to produce and no justification. I have tried to stress throughout this paper that what is at stake is not only who gets to read text but the potential for co-operation and interactivity between the staff and students of different institutions. It is of course still possible (and useful) to set up for material in a VLE particular arrangements with another institution, or for academics to disseminate their work through conference demonstrations, non-working copies and so on but this is to work from a qualitatively different basis from co-operation on open access material, or multiple development of it on the same lines as open-source software. And more

practically, people are likely to be put off by the extra effort and nitty-gritty technical problems which often arise when the attempt is made to open up material behind firewalls to a limited set of extra-mural users. There is a real possibility that increasing and habitual use of VLEs will restrict the potential for co-operation with other institutions and simply knowledge of what is happening in them.

The current trends I want (with some trepidation) to point to can collectively be labelled 'identification and standardisation'. A number of loosely-related XML[45]-based mechanisms have been and are being developed to individuate and sometimes to structure e-learning (and other similar) objects; to mark their unique identity; to describe and record their characteristics; to facilitate their handling; to define rights in them and control access to and operations upon such objects in accordance with those rights. For example, the SCORM[46] model is emerging as a standard (not a unique one) to which different VLEs and authoring tools are likely to gravitate. A plethora of standards and of languages are being built from XML to express digital rights[47]. One objective of identification and standardisation is clearly to express, secure[48] and refine copyright in e-learning material so as to limit access. The standard presupposition of digital rights languages seems to embed limited access and private property: the starting point, built into the grammar of the languages, is that there is no access unless it is specifically granted[49]. But such languages can be used equally to express, secure and refine open access. And I have suggested that effective protection of moral rights can be an important underpinning of open access rather than a hindrance to it. Identification and standardisation may facilitate open access in other ways too. Practical open access requires first that material can be found. Use of metadata can help archiving and allow searching of material in databases which would otherwise disappear into the 'dark web' invisible to search engines and their crawlers. SCORM compliance should ensure inter-operability – so for example material can be exchanged between different institutions using different VLEs, and the portability of material when an e-learning author changes institutions will be secured.

VLEs encourage the growth of e-learning but discourage open access. Some elements of identification and standardisation emerge from a concern to preserve private intellectual property but they have at least the potential also to promote open access.

### **3.3 Conclusions on the potential for growth**

These various arguments are unsurprisingly and reassuringly inconclusive. I am not for a moment arguing that the growth of e-learning – let alone open access to it – is some historical or structural inevitability; simply that open access is, if people want to take it up, a realistic possibility which can make a significant contribution to high-quality e-learning. There are no immovable objects in the way. There are at least some factors which may tend without any conscious planning to foster open access (eg individual academics' desire for recognition). And there are some ways in which open access can be promoted deliberately. For example, those with the influence might try to steer funding bodies towards open access projects; those without may have to be content with writing polemical papers, and practising what they preach. In my next section, I focus on one particular way: devising adequate licensing arrangements.

## **4. Licensing and the promotion of open access**

### **4.1 Licensing users**

The most important element in making e-learning material open access is technical rather than legal: putting it on a web site which anyone can get at or a CD which anyone can have a copy of. I find the gesture of just doing this, and avoiding any consideration – let alone assertion – of legal rights quite an attractive one. But this would be a pretty ineffectual gesture. Copyright (which I do not want to have) arises automatically from authorship[50]. No-one could safely copy my material to use it if I said nothing (and universities are not likely to take chances on this). Moral right (which I do want to

have in order to ensure recognition) requires a positive assertion and would not exist if I said nothing. To give access, I need to engage in more complex arrangements than to exclude it. This is unsurprising to a land lawyer: common property is a form of property not its negation; private property exclusion creates a no-relationship which can be simple and unqualified, whereas as common property access creates a potentially-delicate relationship which will tend to need detailed particularisation. It must promote open access to e-learning to develop and make available standard terms on which it can be offered: symbolically, careful licence terms cast open access as a serious approach; practically, they allow authors a clear idea what they are letting themselves in for, and users a clear idea of what they can and cannot do with material.

There should be no need at all to devise a new licensing regime: there is already available a big range of pro forma licences for open-access licensing – the Open Source Initiative site[51], for example lists over forty sets of terms (many of which have lots of sub-variants). And there are also in the literature various ways of categorising different sets of licence terms – for example O’Sullivan posits a continuum from ‘permissive’ to ‘restrictive’ licences and a basic distinction between free and open source licences[52]; some protagonists like the resonances of the term ‘copyleft’ to describe a regime which tries to keep access open rather than close it down whereas others prefer ‘open copyright’ as less overtly politicised[53]. There is embarrassment as well as riches here. Apart from the problem of choosing from among so many, most of these licences have emerged from the open-source software movement and are directed at keeping the source-code of computer software in the public domain, not at web pages, and not at teaching material.

The best-known open-source pro forma is probably the Free Software Foundation’s GNU GPL (General Public License) licence conditions, under which Linux is distributed[54]. The FSF does address material other than software. O’Sullivan mentions a recommendation that the GPL is suitable for ‘creations of an academic nature from which the author is unlikely to benefit economically but may nevertheless wish to earn reputation’[55] but the FSF’s current recommendation seems to be to use their non-software variant – the GNU FDL (Free Documentation License). This was written initially for prose documentation which accompanies open source software but the FSF do also recommend its use for ‘all sorts of educational and reference works’. However, it is an off-puttingly complex – if ingenious – document. It assumes a standard structure of linear prose (though addressing electronic reproduction). It comes in a single version which allows incorporation into a derivative version as well as simple reproduction, which does not distinguish between commercial and non-commercial uses, and which requires any reproduction or incorporation to be done on the same terms[56]. And it contains just before its preamble a specific prohibition on modifying the terms of the licence: ‘Everyone is permitted to copy and distribute verbatim copies of this license document, but changing it is not allowed.’ I can understand the FSF’s desire to preserve its licence conditions and I see no irony in adopting this rigid attitude to the licence – though the contrast with its attitude to other intellectual property is obvious enough. But it does seem to me that advantages of common property which I am arguing in relation to e-learning material apply equally in relation to its licensing: there should be a lot of scope to improve licence terms through collaborative dialogue on them, and this is not possible for the GPL licence without breaking its terms.

A much more promising starting point are the Creative Commons licences[57], and it is these[58] which are being used by MIT’s OpenCourseWare Pilot. These licences are expressed in much plainer language (in the full text of the licences as well as in the helpful initial summaries). They do not assume prose, or any particular structure. They come in eleven different versions to give permutations around these variables:

- **attribution / non-attribution** – most authors are likely to want to ensure recognition through requiring their work be attributed to them but there is provision to omit this
- **no derivatives / derivatives** – permission may be given just to copy or also to reproduce in altered forms (which would promote improvement of material and innovation around it rather than merely its distribution)

- **non-commercial / commercial** – permission to copy may or may not be limited to non-commercial purposes
- **sharealike / not sharealike** – this limits derivative works[59] to those which are distributed under an identical licence.

This variety seems to me important: apart the different preferences which different authors or institutions may have, there are important variations in circumstances. For example, it seems wholly right for an individual teacher who feels strongly about open access as a principle to insist on ‘sharealike’ licensing, which has the potential both to create solidarity with other believers and to twist the arms of unbelievers, who will have to give open access themselves if they want to incorporate her material. On the other hand, this would look less attractive for a big nationally-funded project the purpose of which was to make material available to all universities; why should this be only to those universities who bought into sharealike licensing?

A further advantage of Creative Commons does not prohibit modification (though it does deny the Creative Commons imprimatur to modified licences)[60]. Creative Commons licences even ‘off the shelf’ will go a long way to offer authors or their employers a choice of clear, pre-available, options for different versions of open access; I do not think anyone need feel they cannot offer open access for want of an appropriate licence. But there is every possibility that the licences can be improved upon – if only in fine-tuning them for e-learning[61]. This calls for technical input from copyright experts, and consideration by any relevant authors or institutions of what they would want.

#### 4.2 Other licensing issues

The issues above of the terms on which a copyright holder makes material available for copying by others are an obvious focus, and I think genuinely an important one. It does not follow that they are the only one. I identified an important example of a further licensing issue in section 3: the relationship between academic and employer, and in particular the issue of portability. I think the availability of terms which allowed an old university to retain and develop material its employee had developed, and the employee the right to take with her and develop the same material would address a potentially-significant disincentive to the development of material. I am not aware of any pro forma for this except for the HEFCE report’s Model contractual clauses which stipulate only a procedure and have no substance; that the employee ‘shall be entitled to enter into negotiations with the Institution’ [62] may not do much to reassure staff.

More broadly (and subversively of some of the ideas in this paper) perhaps the licensing issue is a red herring? and the focus should be on encouraging in other ways inter-institutional cooperation between staff and feedback from students?

#### 4.3 Mechanisms to sort out licensing

I suggest the development of e-learning material and of open access to it would be helped significantly by national collaboration on appropriate licensing, with fine-tuning of Collective Licences at its centre but looking also to produce other pro formas (for example for an agreement between authors and institutions) or for wider discussion of open access or alternatives to it. To set the ball rolling (or perhaps, better, see if there is a ball to roll) I am very happy to host discussion on these issues and to steer it (where relevant) towards concrete licence proposals – a message board will be available on the web site I shall be using for my access to land material – <http://www.access-rights.org.uk>. In the longer term (if any), though, it would be better that discussion and any pro formas be taken under the aegis of a national organisation, provided it is one prepared to take a less narrow view than HEFCE has done so far.

- [1] By Nick Jackson, Lecturer in Law at Kent Law School and National Teaching Fellow. Contact [n.s.r.jackson@kent.ac.uk](mailto:n.s.r.jackson@kent.ac.uk)
- [2] The current paper draws heavily on a first attempt at the January 2003 LILI conference, and I have also used some of the same ideas in responding to the report of the HEFCE Working Group on 'Intellectual property rights in e-Learning programmes'. This other material is available at <http://www.access-rights.org.uk/>, as is [this paper](#).
- [3] Though until the Countryside and Rights of Way Act 2000 government policy placed a big stress on voluntary access, agreed with the land owner – and I would argue the 2000 Act, despite the 'right to roam' maintains this conciliatory attitude in much of that right's implementation.
- [4] C.B. Macpherson 'The meaning of property' in C.B. Macpherson (ed) Property: mainstream and critical positions (1978) University of Toronto Press, Toronto. Another classic example is Reich's conception of the [then!] 'new property', the right not to be excluded from the 'largess' of the welfare and regulatory state: C. Reich 'The New Property' (1964) 73 Yale LJ. Also extracted in C.B. Macpherson, op cit.. See also Reich's more recent application of his ideas to environmental issues: C. Reich 'The Individual Sector' (1991) 100 Yale LJ 1409. A less direct but important influential more modern example is the Gray's conception of 'property as responsibility': allowing access to other people is among a number of possible obligations cast an inherent in, rather than as an extrinsic limit upon, private property. See K. Gray and S. Gray 'The Idea of Property in Land' in S. Bright and J. Dewar (eds) Land Law: Themes and Perspectives (1998)
- [5] For example, Rose's critique of Hardin's classically baleful over-exploitation critique of common property – C. Rose 'The comedy of the commons: custom, commerce and inherently public property' (1986) 53 U of Chicago Law Review 711. G. Hardin 'The Tragedy of the Commons' (1968) 162 Science 1243. And much of Boyle's writing uses land metaphors – for example J. Boyle 'The second enclosure movement and the construction of the public domain' (2003) 66 Law and Contemporary Problems 33; 'Fencing off ideas: enclosure and the disappearance of the public domain' [Spring 2002] Daedalus 13; 'A politics of intellectual property: environmentalism for the net?' <http://www.law.duke.edu/boylesite/intprop.htm>
- [6] Do. See <http://www.ukc.ac.uk/law/undergraduate/modules/samples/index.htm>
- [7] Over-use is one problem; lack of incentive to produce is another. I look at this in section 3.
- [8] Linux, in particular, has become popular only as boxed versions which are charged and supported have become available.
- [9] It may help establish resources to but I have in mind the fairly common situation in which funding is available to set up a project but not to maintain it indefinitely. IOLIS is a strong example.
- [10] For a brief, intelligent and non-technical economic analysis of intellectual see R. Posner 'The law and economics of intellectual property' [Spring 2002] Daedalus 5.
- [11] It is to be regretted that the recent report of the HEFCE working group on 'Intellectual property rights in e-Learning programmes' sticks so closely to an unrealistically narrow assumption that all e-learning development will be in contexts in which only private property approaches are plausible.
- [12] I have some involvement in my own University's current discussions and, through this, some knowledge of developments at other institutions. I do not want to discuss individual cases.
- [13] I am not considered with legal research and therefore not with patents, where universities have been more assertive.
- [14] s77 Copyright, Designs and Patents Act 1988. Such rights have long been central to civilian systems of intellectual property. See M. Holderness 'Moral Rights and Authors' Rights: The Keys to the Information Age', 1998 (1) The Journal of Information, Law and Technology (JILT). [http://elj.warwick.ac.uk/jilt/infosoc/98\\_1hold/](http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/)
- [15] And distance learning material whether or not it is not electronic – see R. McCracken 'Managing copyright in distance education' Open University 12 July 2002 <http://www.cenorm.be/iss/Workshop/LT/Digit-rights/CENCcopyrightbestpractice.doc>
- [16] s11(2) Copyright, Designs and Patents Act 1988.
- [17] D. Vaver Copyright Law (Essentials of Canadian Law) (2000), Irwin Law Concord, Ontario. And see also the AUT position discussed in R. Weedon 'Policy approaches to copyright in HEIs' – study for the JISC Committee for Awareness, Liaison and Training, p6.
- [18] Note 11 sup, Appendix 3.
- [19] Ibid and, for example R. Weedon, op cit..
- [20] op cit p4

- [21] The only actual example of which I am aware is MIT's open courseware.
- [22] Eg the HEFC report acknowledges in an appendix (whilst ignoring in its recommendations) that 'A number of institutions commented that an open access policy should be adopted, similar to that used by the Massachusetts Institute of Technology', note 11 sup, Appendix 2.
- [23] See for example the discussions in T. Varnava and R Burridge 'Revising Legal Education' and A. Paliwala 'Space, time and the (e)motions of learning', both in R. Burridge et al Effective learning and teaching in law (2002) Kogan Page, London.
- [24] This is obviously consonant with the line taken in the recent white paper – see The future of higher education (Jan 2003) Cm5735 paras 4.17 – 4.19.
- [25] The HEFCE report is quite right to stress the distinction drawn by its respondents between between 'ownership and authorship', note 11 sup at para 12b.
- [26] And it is at least possible that some might see the possibility of offering an e-learning package to a potential employer as a positive incentive to develop it in the first place.
- [27] Because it would involve copying – s13 Copyright, Designs and Patents Act 1988.
- [28] Deprecated by Weedon, op cit p 27
- [29] For example in my department we make all the lectures in many of our modules available as sound files to download from the web.
- [30] See for example <http://www.kent.ac.uk/law/undergraduate/modules/samples/index.htm>
- [31] See P. Maharg and A. Paliwala 'Electronic resources' in R. Burridge et al (2002) op cit p31.
- [32] Ibid pp 91-96
- [33] For example the EDHEC-Warwick fragrance negotiations – ibid pp 96-97.
- [34] See, for example, the proposals in the recent white paper for expansion of the national teaching fellowship scheme and for centres of teaching excellence The future of higher education (Jan 2003) Cm5735 paras 4.26 – 4.30
- [35] Though greater centralisation in one form or another is probably imminent under the white paper's plans for a single 'teaching quality academy' – ibid para 4.25
- [36] The HEFCE report (note 11 sup) discusses consortia but not these possibilities of external funding.
- [37] Particularly in relation to electronic resources. See O'Sullivan's references to Rose's critique of Hardin's classically baleful over-exploitation critique of common property – C. Rose 'The comedy of the commons: custom, commerce and inherently public property' (1986) 53 U of Chicago Law Review 711. G. Hardin 'The Tragedy of the Commons' (1968) 162 Science 1243.
- [38] M. O'Sullivan 'Making copyright ambidextrous; an exposé of copyleft' <http://elj.warwick.ac.uk/jilt/02-3/osullivan.html>
- [39] See <http://www.earlham.edu/~peters/fos/guide.htm>
- [40] See <http://www.earlham.edu/~peters/fos/boafaq.htm>. Somewhat similar aspirations are expressed, in less campaigning terms, by the JISC in relation to its Distributed National Educational Resource [http://www.jisc.ac.uk/pub99/dner\\_vision.html](http://www.jisc.ac.uk/pub99/dner_vision.html)
- [41] S. Harmed <http://www.arl.org/scomm/subversive/sub01.html>
- [42] <http://ocw.mit.edu/index.html>
- [43] Virtual learning environments. The most popular commercial examples are WebCT and Blackboard. Some universities have developed in house some or all the features of commercial VLEs. I do not need here to distinguish between VLEs and MLEs – managed learning environments – which add various administrative functions.
- [44] Standard intranets offering campus-only access are frustrating for many, especially non-traditional, students. Other mechanisms of log-on control or password protection can be fiddly to set up and / or difficult and off-putting for users.
- [45] 'Extensible mark-up language'. See <http://www.w3.org/TR/REC-xml>
- [46] 'Sharable content object reference model'. See for example <http://www.trainingfoundation.com/articles/default.asp?PageID=945#What%20is%20SCORM?> See also the MIT-led OKI project: <http://web.mit.edu/oki/product/index.html>
- [47] See the IEEE (Institute of Electrical and Electronics Engineers) white paper Towards a digital rights expression language standard for learning technology at [http://ltsc.ieee.org/meeting/200212/doc/DREL\\_White\\_paper.doc](http://ltsc.ieee.org/meeting/200212/doc/DREL_White_paper.doc)
- [48] And there can be legal protection against attempts to circumvent built-in technological measures to protect digital rights, or to remove digital rights management information. See the EU Directive 2001/29/EC articles 6 and 7.
- [49] Ibid p14
- [50] Arises automatically, but not automatically mine; it will be recalled that copyright may be held by my employer rather than by me.
- [51] <http://www.opensource.org/licenses/bsd-license.php>

[52] O'Sullivan op cit p1; drawn together in the European Community term 'libre software' – ibid p13.

[53] See eg <http://www.meydaonline.com/general/copyleft.htm>

[54] Included in O'Sullivan, op cit, as an appendix.

[55] Ibid p 8

[56] Sometimes emotively castigated as the 'viral' quality of copyleft licensing.

[57] <http://creativecommons.org/>

[58] Specifically, the attribution non-commercial sharealike version.

[59] Therefore there cannot be a non-derivative sharealike licence. Sharealike is the 'viral' quality within Creative Commons licensing.

[60] 'Except where noted otherwise, all content on this site is licensed under a Creative Commons license. We do not assert a copyright in the text of our licenses. Modified versions of our licenses, however, should not be labelled as 'Creative Commons.' <http://creativecommons.org/policies>

[61] To take one fairly obvious example, it is not at all obvious where university teaching will stand on the licences' distinction between commercial and non-commercial purposes.

[62] note 11 sup, Appendix 3 para 16.