



Blog Admin

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Open access and Creative Commons licensing: copyrights, moral rights and moral panics

8 comments

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*There is still widespread confusion over copyright and open licensing in relation to academic research outputs. **Anne Barron** addresses the uncertainty by disentangling the four regimes of authors' rights. Just because the concept of open access requires licensing to be permissive for users of published research doesn't mean that it requires the other regimes to be permissive too. Unlike copyrights, moral rights cannot be licensed away.*

On September 10, the House of Commons Business, Innovation and Skills Select Committee released its eagerly-awaited **Report** on the inquiry it launched in January into the Government's **acceptance** of the

conclusions and recommendations of the **Finch Group report** and RCUK's **implementation** of it. The Committee's Report is remarkable for its frank criticism of the Government's too-rapid acceptance of Finch's privileging of APC-funded gold OA in the transition to a fully open access future for academic publishing in the UK. It calls on the Government to reconsider its preference for immediate Gold and to do more to encourage Green OA – in particular by promoting the development of subject and institutional repositories.

The questions covered by the inquiry reflect the breadth of the debates that have raged around OA since Finch: whether the Government was right to accept the Group's recommendations without further investigation of the academic publishing ecosystem (the Report's answer is 'no'), whether the costs associated with APCs will impact negatively on research activity as well as on research funding ('probably, but empirical evidence is needed'), the likely repercussions for UK HE of heading for Gold without parallel moves by HEI's elsewhere in the world ('negative'), and the authorial rights and permissions that should govern the release of academic research outputs to the public (again, 'more investigation is needed'). It is the latter issue that I focus on here, because although views on the other questions are clear (if polarised), this one, as the Committee reported, has generated 'widespread concern, uncertainty and confusion'.

What exactly is the source of this confusion? Much of it stems from the fact that four distinct but overlapping regimes of authors' 'rights' are invariably implicated by the act of publishing a scholarly article. One is the general law of copyright, which reserves the right to control e.g. copying, distribution and online transmission to the copyright holder but also exempts from liability certain acts done in relation to a work, including 'fair' uses for the purpose of e.g. private study and non-commercial research. The exceptions are currently being '**modernised**', with e.g. a **new exception to facilitate data analysis for the purposes of**

non-commercial research likely to be introduced in the near future.

Another is the law (yes, the law) of 'moral' rights, which protects certain non-pecuniary interests authors are deemed to have in relation to their works: interests in being identified as author, and in being able to object to false attribution of a work to oneself and to 'derogatory treatment' of one's work. A third regime is that instituted when a copyright work is licensed: a licence permits use of the work in ways otherwise exclusively reserved to the copyright holder by the general law of copyright, but that law continues to apply to the licensee except insofar as the licence effectively excludes it. There is a fourth regime as well, but unlike the other three it doesn't have the force of law: this is the regime of social norms governing academic authorship which is collectively recognised by the 'community of scholars' – norms against plagiarism, for example. Some activities that these norms would define as unethical don't count as instances of copyright infringement at all, yet they are still sanctioned (extra-legally) by the academic community.



Image credit: Giulio Zannol (CC-BY)

The consternation adverted to above is mainly focused on the licensing regime that RCUK now requires for much RCUK funded research. This regime is framed by the **Creative Commons (CC) 'BY' licence**, the most permissive of the CC suite of model licences. CC-BY allows anyone to copy and modify (abridge, add to and generally alter) the licensed work and distribute copies and modified versions, for commercial as well as non-commercial purposes, as long as attribution is given to the author(s) of the original work and any copyrights in third-party material included in

the original are not themselves infringed. Since April 1, CC-BY has been the copyright licence under which articles resulting from any RCUK-funded research **must be published** in peer-reviewed journals when RCUK's block grants are used to pay APCs to the publisher.

Many of the concerns about CC-BY are directed at the absence of a 'ND' (no derivatives) clause from this licence. There are worries that CC-BY not only permits acts that would otherwise breach copyright (e.g. translations) but also acts that would in addition breach moral rights (e.g. sloppy abridgements) and acts that wouldn't necessarily be unlawful but would flout the conventions of good academic practice (e.g. embarrassing re-contextualisations not specifically endorsed by the author, plagiarism). But these concerns are misplaced. Just because the concept of open access requires the third of the four regimes to be permissive for users of published research doesn't mean that it requires the other regimes to be permissive too. Unlike copyrights, moral rights cannot be licensed away, and unless expressly or impliedly waived, they persist even after the exchanges entered into by an author in respect of his or her copyright (in my view, CC-BY cannot be read as impliedly waiving these rights). Hence, for example, even when s/he licences derivatives under CC-BY, the moral right to object to derivatives which are derogatory treatments of the scholar's original work remains available. Meanwhile the moral right of attribution is always available in respect of works released under a CC-BY licence, which only reinforces that right by itself requiring attribution.

Certainly, CC-BY gives the legal green light to some practices that would otherwise infringe both copyright and academic norms, yet would likely not breach moral rights: for example, it allows an article to be cut down for use in an anthology without the author's specific agreement to the inclusion of the article in the collection and without his or her approval of the edits. (This would only rarely be legally actionable as an infringement of the author's moral rights: in law, a treatment is only

derogatory if it affects the reputation of the aggrieved author, and this can be hard to prove.) Yet under their traditional arrangements with journal publishers, academic authors have generally been unable to invoke copyright to prevent these acts anyway, even when – as in the example given – they clearly do implicate copyright law.

Traditionally, authors assign their copyrights to journal publishers (although typically publishers give licences back to e.g. share articles with colleagues). Consequently, authors have generally not been in a position to invoke copyright to control re-uses they don't like; instead, they have appealed to norms of scholarly propriety. Although sometimes ignored, these do constrain behaviour to a considerable extent; hence anthologists rarely proceed as described in the example above even when the publisher who owns the copyright in the article has licensed its re-use. Certainly, the CC-BY licence tells the world that re-uses which flout these norms are legally permitted without the copyright holder's specific consent, and to this extent it facilitates them. But it is questionable whether it legitimates them. To say that it does is to overestimate the ideological power of a copyright system that has long been at odds with scholarly assumptions about both property and propriety: academics are notoriously protective of their outputs and notoriously precious about how these are read and cited, yet for years they have signed away the property rights given to them by law without so much as a whimper. CC-BY is premised on rejecting the convention that an author's work should be under the publisher's exclusive proprietary control. If the widest possible dissemination of academic work is a good thing, so is this interrogation of publisher power – although critics are right to be concerned about the emergence of new forms of constraint on, and commercialisation of, research in the 'open everything' era (see, for example, the [BSA's submission to the Select Committee](#) at paras. 19-27 and 37-50).

The issue is how academic authors should use the copyrights they will in future retain, and whether they should use them to enforce community norms that may well be in the process of changing. Sensible suggestions have been advanced for crafting a licence template to meet the **specific concerns of HSS scholars**, e.g. by including a requirement indicating how a work has been modified (not merely that it has been modified, as the CC-BY licence currently provides), and reserving translation rights. But a wholesale prohibition on derivatives should be avoided: it would negate many of the benefits of OA and would really be an effort to freeze academic conventions around appropriate re-use in legal boilerplate. Since even the ethical credentials of these conventions are not beyond argument, encoding them in law seems particularly ill-advised. Assertions of the 'indignity' of having one's scholarly output re-purposed or re-mixed behind one's back, or of being unable to track every re-use by others, tend to reflect individualistic conceptions of authorship that may in turn do more to advance academic careers than collective public knowledge. Even Immanuel Kant, that champion of human dignity, **can be read** as arguing that the 'public use of reason' – the kinds of communicative interactions that sustain what Jürgen Habermas calls the public sphere – depends (in part at least) on the institutionalisation of a legal regime that permits the transformative re-use of published works of authorship.

The critics of CC-BY are entirely right, however, to be concerned about the absence of a 'NC' (no commercial re-use) clause from the licence currently mandated by RCUK. Even 'the chap from Rolls Royce' who represented non-publishing business interests in the Finch group 'thought it was absolutely ludicrous that anyone would suggest that his company's access to research literature should be subsidised by the taxpayer' (**para. 88**)

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*Note: This article gives the views of the author, and not the position of the Impact of Social Science blog, nor of the London School of Economics. Please review our **Comments Policy** if you have any concerns on posting a comment below.*

About the Author

Anne Barron is Reader in Law at the London School of Economics and Political Science. She is a graduate of University College Dublin (BCL) and Harvard Law School (LLM), and held lectureships at the University of Warwick and University College London before joining the LSE.



About the author



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