

Flexible licensing

The case is presented for a more flexible approach to licensing online library resources. Today's distributed education environment creates pressure for UK higher and further education institutions (HEI/FEIs) to form partnerships and to develop educational products and roll them out across the globe. Online library resources are a key component of distributed education and yet existing licensing agreements struggle to keep pace with the increasing range of users and purposes for which they are required.

This article describes the process of developing a flexible approach to licensing and proposes a new model licence for online library resources which has the adaptability needed in this new global educational landscape. These ideas have been presented and discussed at various workshops across Eduserv's and JISC Collections' higher education and publisher communities, and further consultation is ongoing.

Pressure from successive governments has meant that the UK higher and further education (HE/FE) sector has had to become increasingly innovative in the ways it delivers education and raises funds. An institution is no longer confined to delivering education to its own students at its own locations, but now also has a mandate to create educational products for new markets across the globe. The political imperative and the technology which makes it possible to deliver education anywhere, anytime create what I call a distributed education environment.

Today few, if any, HE/FE institutions (HEI/FEIs) are not involved in some form of shared services, shared resources, franchising or partnering, overseas campuses or even purely commercial activities. Some aspects of this are not new. Part-time courses, overseas students and distance learning have long been features of the UK HE/FE sector. But recent years have seen an exponential increase, both in the ways in which education is delivered and in the variety of potential students. The drop in UK student applications coupled with the pressures on funding are of course key drivers for UK HEI/FEIs to diversify their core activities. Furthermore, these institutions have witnessed an increase in competition from many new types of organization at home and abroad in both the public and private sector. The UK HE/FE sector now consists of as many as 750 institutions and entities competing to offer HE/FE qualifications to one greatly expanded student market.

Encouraged by their own senior management, and empowered by technological developments, institutions have been quick to turn these challenges into opportunities by making their assets and skills more widely available. There is no barrier to sharing material resources such as buildings, ICT equipment and networks. However, the online library resources to which HEI/FEIs subscribe remain the property of the copyright owner or publisher, and are made available to the institutions through a licence agreement.

Licensing dilemmas

Licensing has become an especially hot topic in the information community over the past few years because of the uncertainty about whether traditional licensing models accommodate the range of different types of user and the different uses for which online library resources are now required.

For example, does a licence have to treat a student differently if he or she is located on his/her university's home campus as compared to on its partner/ franchised/ subsidiary/ federated campus in another country? And how will it deal with scenarios which mix education and commerce, such as knowledge transfer partnerships (KTPs) and incubator companies, or any of the other commercial ventures in which HEI/FEIs are now engaged?



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188 What the technology makes easy, intellectual property considerations make complicated. The distributed education environment presents three licensing dilemmas, perhaps best considered as questions:

- Can the licensee use its online library resources to deliver education packages to users belonging to its educational partners?
- Are the online library resources being used for a permitted purpose?
- Can an individual user be linked to a specific institution so that librarians can easily distinguish authorized users from unauthorized users?

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Regarding the first question, whether the licence extends to the licensee’s activities with its partners, it is worth considering what a licence does. A licence essentially defines a relationship between two legal entities: the institution and the publisher or copyright holder. Only the named institution (the licensee) is entitled to enjoy its benefits. The licensee’s partners are separate legal entities, so they are not granted the rights that the licensee enjoys. A suitable analogy might be renting a flat: the rental agreement will allow only the named leaseholders to live there – they cannot sublet it or let someone else live there as well if they were not specifically named in the rental agreement.

The second question, regarding the intended use of the online library resources, can also usefully be considered using this analogy. If you rent a flat (as opposed to owning it) you’ll be subject to the restrictions stipulated by the landlord – you will probably not be allowed to attach things to the walls and you will certainly not be allowed to run a business from it, again unless you were given specific permission in your rental agreement. In the same way, a licence for online library resources is subject to the restrictions that the publisher or copyright owner chooses to apply.

It used to be fairly easy for an institution to ensure that its resources were being used for properly licensed purposes because its students only accessed physical and online resources from the campus library. However, an HEI/FEI may now be running courses on its own subsidiary campus, or a partner’s campus, sometimes thousands of miles away, so it becomes much more difficult to determine if the licence is being used within the applicable constraints.

Looking at the third question, librarians who manage access to online library resources face requests from individual users rather than legal entities. With the boundaries between institutions and their activities increasingly blurred, how can a librarian be reasonably confident that any individual user ‘belongs to’ the properly authorized entity?

Traditional licensing models are not flexible enough to cope with these issues. And if we are rethinking how to license online library resources today, then it makes sense to develop a new licensing model that can also accommodate future developments – activities and user relationships that have not even appeared as yet.

Towards a solution

It seems clear that a new approach is needed for licensing online library resources for this expanded range of HEI/FEIs with their increasingly diverse activities and their increasingly mobile students. These issues are of course a key concern to us at Eduserv because of our OpenAthens identity and access management tool as well as our Chest licences. For more than a year, we have been working with publishers and the HE/FE community, and exchanging ideas with JISC Collections, so that we can come up with robust solutions that can be adopted across the sector.

A series of workshops have been used to consider, develop and test a number of possible solutions. Initially we looked at adapting our traditional licence, which for some time had recognized the concept of ‘other authorized users’ in addition to core users. We started by

189 expanding the list of different types of user groups. At first this seemed to be promising, but after a while we reluctantly had to acknowledge that this in itself did not completely address the problem.

So, in addition to an expanded list of user groups, we started to analyse the permitted purposes for which the online library resources could be used. This was a development from the long-established principle that online resources could only be used for educational purposes. Now we needed to modernize the definition of 'educational purposes' and complement this with definitions to cover the new range of activities that institutions are increasingly involved with: franchised courses, overseas partners and campuses, and many forms of quasi-educational activity, ranging through to full-blown commercial ventures.

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It gradually became apparent that our lists of users and uses were becoming too long to be useful, so we started to aggregate the categories. However, as soon as we felt we had comprehensive definitions, a new scenario would emerge that did not fit our map. It became evident that trying to define market variants could make the licence model date very quickly and therefore limit its usefulness. We also realized that for any given scenario a user could fall into more than one of the categories we had defined, and this lack of precision could ultimately lead to disputes, so we were in danger of compounding the confusion instead of clarifying it.

The proposed new model

In the end, going back to basics, we came up with what is essentially a three-tiered licensing model (see Figure 1). The idea here is that on top of the core licence, all of an HEI/FEI's educational partner activities would be covered for a single additional fee. Then for a further fee, their commercial partner activities would also be covered.

This new structure is underpinned by an updated definition of educational purposes and by much simplified definitions of users – and is supported by pricing that is responsive to user numbers. We would actually like to remove reference to users altogether, as the user is not legally a party to the licence, but that has proved too radical for the time being.

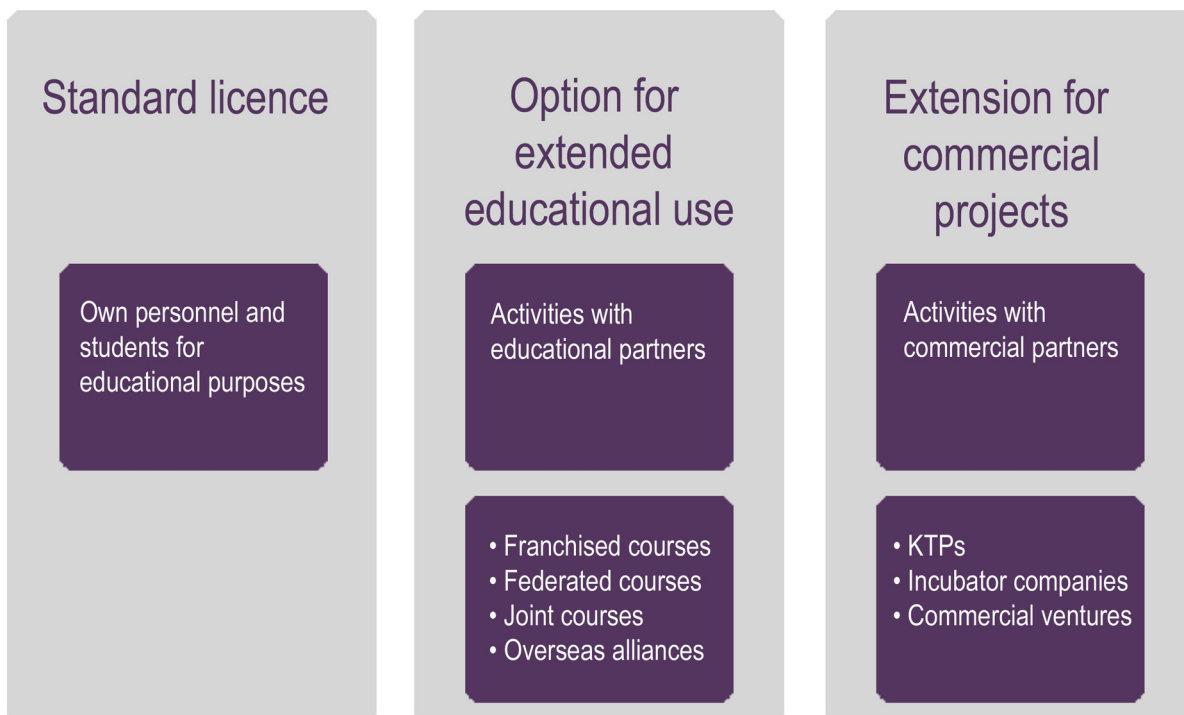


Figure 1. Chest Agreement Licence Model

190 We have tested the model against many real-life scenarios from the UK HE/FE sector and found that the results are reliable. For example, under our model, if an overseas campus is really just a geographical extension of the UK institution, but in every constitutional, governance, administrative and educational sense it is entirely part of the UK institution, then that overseas campus would be covered by the standard licence. Of course, the students from the overseas campus would have to be included in the user count for the purpose of determining the appropriate licence fee. On the other hand, if the overseas campus is a joint venture with, say, a college or university from the overseas territory, then the licence extension for educational partner activities would need to be purchased.

Previous attempts would have had us considering who employed the staff, or who awarded the degree, for example. But the proposed new approach has both the simplicity and the flexibility to meet all the different licensing requirements that we are seeing today.

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Identifying users

So it appears that we may well be on the way to a solution as far as drafting a licence is concerned. However, we also need to help librarians with the problem of having to identify the access rights of any individual user. Does the user ‘belong to us’ or are they more closely associated with another institution or legal entity? We felt that rather than trying to address this in the licence document, it would be better to provide the librarians with a separate interpretation tool.

Again, we went down a number of blind alleys before coming up with what we believe is the best way forward. The ideas we rejected had one thing in common: they all tried to provide an empirical solution, whereas we now understand that an element of judgement is necessary.

We developed this tool for librarians from a number of tests applied in other contexts to determine the type of contractual relationship that exists. Particularly helpful was HM Revenue & Customs’ approach to determining whether any individual is an employee or self-employed contractor. Again, we have tested and canvassed opinion on the proposed questions, involving the professional community – librarians and information professionals – who would end up using them.

The current 12 questions are presented here (see Table 1) and we would very much welcome further comments and input. In recent months, we have canvassed opinion at workshops and presentations made across both Eduserv’s and JISC Collections’ institution and publisher communities. Reaction so far has been favourable, and with further consultation we are confident of coming up with a tool that can be applied usefully and consistently.

Publishers’ perspectives

So what is the publishers’ view of this more flexible licensing model? So far it seems to appeal because the current lack of clarity can result in a degree of inadvertent underlicensing: partner activities cannot be easily distinguished and so access to online library resources is either allowed under the standard licence for the standard fee, or denied, so the partners go elsewhere, often to free internet resources. Either way, the publisher misses out on potential revenue.

It makes sense both to the HEI/FEIs who offer education packages, and to the partner institutions and other parties who buy them, that access to the relevant online library resources is included in the package. The partner organizations cannot justify purchasing a full licence for the necessary resources because, typically, only limited access is needed by a relatively small number of users. The model we propose offers a solution to this requirement.

Proposed diagnostic tool for librarians
<i>A licence grants the licensee the right to use an online resource. So a student is entitled to use the online resource if s/he can be considered to be part of the licensee. The following questions should help librarians to decide whether a "student" is part of the licensee.</i>
1. Is the student enrolled, registered and included in reports to statutory/regulatory bodies as a student of the licensee and only of the licensee? The licensee means exactly the same legal entity as appears on the licence for the resource in question.
2. Was the student included in the user count that determined the fees to be paid for the licence for the resource in question?
3. Does the student receive his/her education or research supervision from the licensee's personnel?
4. Does the licensee alone award the student his/her qualification?
5. Is the licensee entitled to take disciplinary action directly against the student without reference to any other party?
6. Is the student responsible for paying the licensee for his/her education or does the licensee receive public funds for the "student's" education?
7. Does the student have access to the same systems and online resources as all the other students of the licensee?
8. Does the student access any online resources physically or remotely from any other licensed institution?
9. Is the online resource that the student wishes to access part of a resource sharing arrangement or collaboration between the licensee and another licensed institution or part of a broader educational package or commercial arrangement between the licensee and another party?
10. If the student receives payment from any party for his educational or research activity, does that party have the right to control the distribution of the output from such educational or research activity?
11. Would any of the licensee's subsidiaries, partners, associates or alliance members consider the student to be a student of the subsidiary, partnership, association or alliance rather than being a student of the licensee?
12. Would the student consider himself to be a student of the licensee or of some other licensed institution or party?
<i>When the detailed facts have been established, the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that the individual is one of your own students or more closely associated with another licensed institution.</i>

Table 1. Questionnaire on proposed diagnostic tools for librarians

Some publishers have expressed concern that payment of one relatively small incremental fee allows any number of extra activities to be covered. The potential for a disproportionate expansion in user numbers is an aspect we acknowledge needs to be watched. But for now, it is more commonly the case that a large HEI or FEI with tens of thousands of core, licensed students, requires limited access to its licensed online library resources for perhaps only a couple of hundred additional students from its partner organization.

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Conclusion

In conclusion, traditional licensing models no longer work well for the institutions, their partner organizations, the librarians, the users or the publishers. Current forms of licensing simply cannot cope with today's distributed education environment, and we don't envisage any slowdown in the current political or technological trends. Looking towards the future, we need to adapt our thinking, and develop flexible licensing which is responsive to the ever changing distributed education environment.

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To cite this article:

Jansen, M, Flexible licensing, *Insights*, 2012, 25(2), 187–191, doi: 10.1629/2048-7754.25.2.187

To link to this article:

<http://dx.doi.org/10.1629/2048-7754.25.2.187>