

The Licensing of Original Work for Education: An Author's Perspective

by John Degen

Chapter 4



LICENSING PRACTICES IN A GLOBAL DIGITAL MARKET
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THE LICENSING OF ORIGINAL WORK FOR EDUCATION: AN AUTHOR'S PERSPECTIVE

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EXECUTIVE SUMMARY

The starting point for an author is *I made this. It's mine. Let's talk about what you'd like to do with it.* Authors create works with the purpose of being read; and where their works are used for educational purposes, they are especially satisfied. Even if the work was originally created for the consumer, being adopted for a curriculum not only raises the profile of the text, it can lead to a long tail of sales. Other content is, of course, created specifically to meet educational needs.

Payments to authors are structured differently, depending on the type of writing. Commercial authors are paid through a royalty system which is sales related. Academic authors are relieved of the pressure of commercial sales and often write as part of their employment (with the employer paying the salary of the author).

Licensing of published content in education is where authors can and frequently are compensated for their work. This can be primary licensing, resulting in entire books being made available in digital form. Educators may also wish to copy an extract, perhaps a whole chapter, and in these circumstances a deal needs to be struck between the educational institution and the rightsholder that grants permission to copy, in return for remuneration.

Over recent years we have seen a surge in "free" content in the educational space. This may be in the form of Open Education Resources (OERs), which may be free to the user, but the costs of creation, production and dissemination have always to be covered by someone. "Open" content has however not diminished the need for access to properly curated content, and instead education has come to depend on licensing models which come in a variety of formats.

The two main secondary licensing models can be differentiated by the need for authors to either "opt-in" or "opt-out" of licensing schemes known respectively as Voluntary Collective Licensing (VCL) and Extended Collective Licensing (ECL). Recent experience,

especially in Canada, where a disagreement between rightsholders and licensees ended up in the courts has demonstrated that VCL which is not backed with legislation can lead to a breakdown in licensing agreements. The situation in Canada has been substantially weakened for authors by the introduction of poorly defined exceptions and limitations, discouraging authors from creating new works for the education market. ECL has proven to be a preferred framework for authors and other rightsholders and has recently been encouraged in the EU's Digital Single Market Directive.

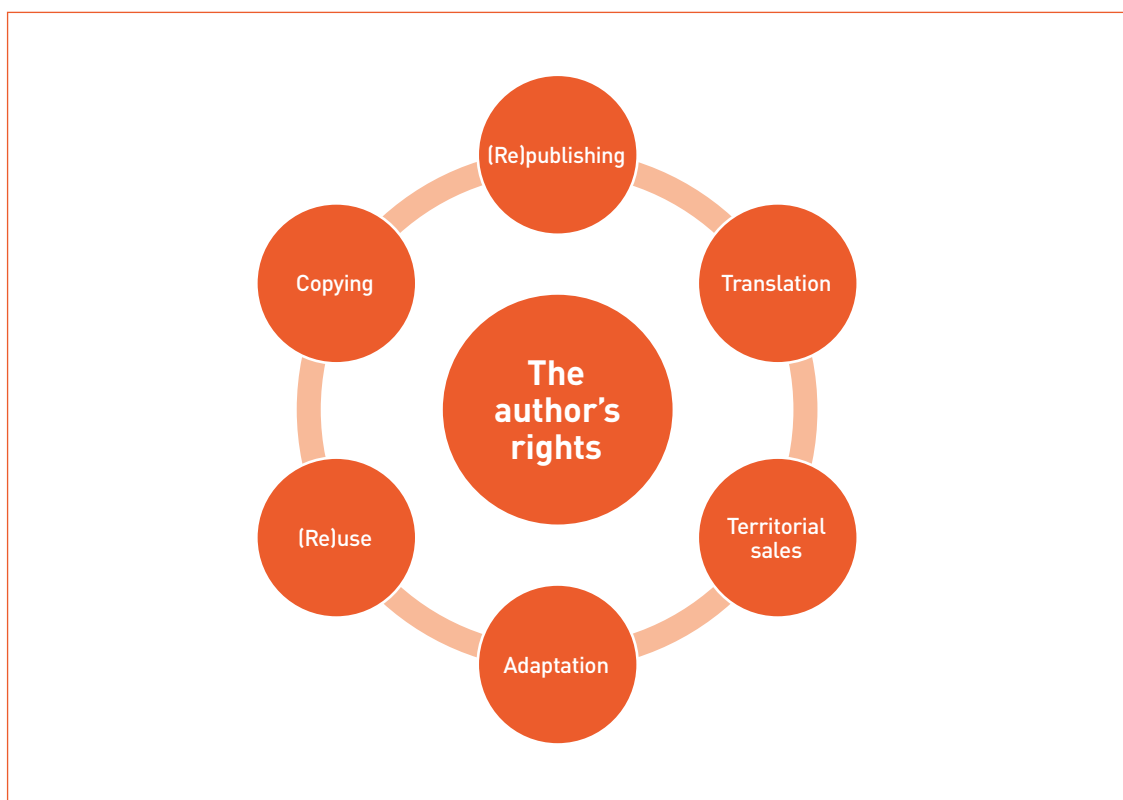
The rise in digital content consumption has exacerbated a belief that content should be free and has led to many challenges for licensing. Publishers are using subscription models to deliver content on proprietary platforms in educational settings however their proliferation is leading to resistance from educators. Blockchain technology may answer some of the issues raised in providing a more consolidated service and an experimental site "Fanship" has been developed in Canada using an *attributable ledger* with a sales platform ■



1 INTRODUCTION

The professional life of authors — outside the act of creation — involves building and maintaining a complex set of relationships around their exclusive rights to the original work they have created. Through these relationships, authors can negotiate rights to publish, republish, translate, sell in various territories for varying lengths of time, adapt into other formats, and then sell those adaptations. They also negotiate user access, how the work is used and re-used, as well as any copying of the work beyond limited excepted instances.

AUTHOR RIGHTS



For the author, the starting point for these negotiations always is *I made this. It's mine. Let's talk about what you'd like to do with it.* Increasingly, savvy authors with a drive to control their own businesses are comfortable leading these negotiations for themselves, retaining as many of their exclusive rights for exploitation in various markets as they can. Many, however, retain the services of agents for much of this work; and many rely heavily on their primary publisher for secondary rights sales and copyright licensing. With the evolution of author contracts that recognize the equal partnership of author and publisher, the author/publisher relationship can remain mutually beneficial and active throughout the commercial life of a work.

Of course, at the heart of all the rights negotiations listed above, ideally, is a *licence*. Publisher contracts — at least the contracts preferred by authors — typically result in a “licence to publish” that is limited by territory and time. Secondary rights generate secondary licences, and downstream copying for educational purposes should also, ideally and within the agreed upon constraints of exceptions and limitations, be attached to a licence for copying.

While my work with the International Authors Forum has familiarized me with the state of educational licensing around the world, I work and write in Canada, where educational copyright licensing has recently become one of the world's worst-case scenarios. I will, therefore, primarily reference the Canadian experience in this chapter.

2 EDUCATIONAL LICENCE REGIMES

Just as authors feel, or prefer to feel, a sense of real partnership in their publishing contracts, so do they prefer to feel they are cooperating in a mutually beneficial project when licensing their work for copying in educational settings.

Authors delight in their work being used in educational contexts, whether that was the original intent of the creation or a happy accident resulting from the commercial or critical popularity of a work aimed at the general consumer.

To have one's book land on reading lists, and be broadly studied in classrooms can, in fact, be the difference between commercial success or failure, especially in territories with relatively small commercial markets for books. In Canada, for instance, where I write and publish, a book is considered a commercial best-seller once it has passed the 5,000 domestic sales mark. At standard commercial royalty rates, such a low-bar bestseller will simply not return a living income to the author. But should that bestseller find a readership among the country's teachers and scholars, and should they broadly adopt it to their curricula, a long tail of educational second life for the book could mean crucial continued income for many years.

That scenario, of course, depends on the sale of individual copies of books to each student tasked with studying it. But the same is true, theoretically, even when those primary sales are not made and students study only copied portions of works — such as in a college course on short fiction, where individual stories from a number of collections by many authors are put together into a physical or digital course pack collection. If the requirement of copyright licensing is honoured, a deal can be struck between schools, publishers and authors that will be beneficial to all parties.

Where publishers are prepared to negotiate access and copying terms with all educational institutions using their publications, one expects royalty splits and distribution terms to be fairly and reasonably laid out in the contract between author and publisher. In those instances, if content with the terms, authors may be satisfied to have the publisher act as the licensing body.

3 AUTHOR ECONOMIES

Here it is necessary to take a moment to consider the various economies of writing into the educational market. The spectrum of compensation schemes for authors when dealing with education often causes confusion around issues of copyright and continued content ownership.

Commercial authors and academic scholars often have sharply differing motivations around exploitation of their work, and vastly different economic relationships with that work. While both seek a readership, the type of readership and how such readers access the work might not be the same.

For the commercial author writing to a contract structured largely around sales royalties, it is essential that a bulk of readership falls into the category of “book buyer,” someone enthusiastically willing to pay the retail price for the work. Continued earnings from such a book depend entirely on reaping a royalty reward from continued sales and/or use of the book, including sales of secondary rights into new territories, and licensing for copying. Therefore, commercial authors are, and should be, concerned with the royalty rates, accelerator clauses, and secondary rights stipulations in their contracts. This is also why organizations like mine, The Writers’ Union of Canada, put so much effort into educating members about contracts.

On the other hand, academic authors, whether writing for textbooks or academic journals are generally relieved of the commercial pressure their publishers must still navigate. While a range of compensation models still exist, including traditional sales royalties, academic authors often consider that the work they do toward publication is part of their work at the academy. Here is a succinct expression of that attitude from a scholarly message board:

[The academic author’s] “business model’ is very different than the publishers’ business model. In my case, I actually did get paid for writing my book — by the university I work for...”¹

This fundamental difference in how different types of authors view their work accounts for the split one often sees between commercial and academic authors on issues like copyright and educational copying.

To be clear, I work in the world of commercial publishing. While I’m concerned for the rights and working conditions of all authors, on issues of contracts, licensing, and copying, my primary concern is fair compensation for the labour and ownership of creation. The academic economy of reputation and tenure I leave to faculty unions, but when its practices threaten the commercial economy of publishing, including and especially the licensing of published content for educational use, I object.

4 EDUCATIONAL LICENSING: THREE EXAMPLES

4.1. Open Licensing

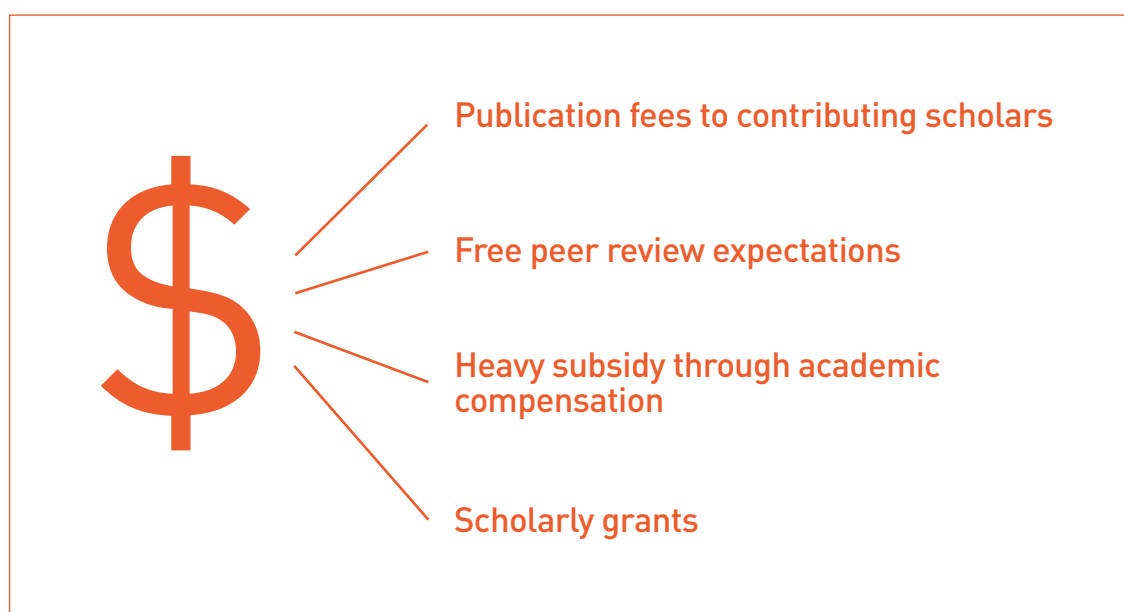
When one searches the Internet for “content licensing in education,” the first page of results leads one to Creative Commons and other “open” licensing types. This is likely more a reflection of the dominant search algorithm’s preference for free and openly accessible content than it is the pragmatic reality within the educational market.

¹ From the academic discussion board at StackExchange.com <https://academia.stackexchange.com/questions/63619/how-much-revenue-do-academic-authors-make-on-their-published-books>

Despite the Internet's early promise to provide unfettered access to all human knowledge, high quality content — the kind that is of greatest use to educators — is, by necessity, a commercial project. It does not just magically appear without significant investment by both the creator and the publisher, and it cannot be made universally accessible without a balancing compensation mechanism to reward that investment. And while various open educational resource models have been experimented with over the previous decade, none have proven to produce a truly free product.

Costs of creation and other labour, and the relatively high per-reader cost of publication for most specialized scholarly works must still be covered. With open access models, these costs tend to be diverted from budgets outside the process, creating only an illusion of freeness. Publication fees to contributing scholars, free peer review expectations, heavy subsidy through academic compensation, and scholarly granting are all examples of the hidden costs of “free” materials.

THE HIDDEN COSTS OF “FREE” MATERIALS



The need for education to access work outside open or free models has not significantly diminished with the rise of these experiments. Instead of free, education depends on various licensing models² in order to get at content that requires compensation. I'll look at two traditional models, their advantages and disadvantages to authors, and one model on the horizon that is showing great promise.

4.2. Voluntary Collective Licensing

Voluntary collective licensing certainly sounds like an ideal solution. It invites one in with its first two words. It's *voluntary*, and it's *collective*. In other words, it represents a repertoire defined by those who have explicitly chosen to be so represented, and who expect compensation for their work. In that way, it might be suggested, VCL solves the problem of conflicting author economies by leaving out the academic authors who don't feel their work belongs to the commercial market.

But recent experience has shown that voluntary collective licensing unbacked by authoritative legislation depends entirely on the good faith of both the licensor and the licensee, two sectors pressured by their own unique budgetary concerns. Where education does not have the benefit

² For a full description of collective licensing models, see The Role of Collective Licensing, by Olav Stokkmo, in this report (chapter 5).



of progressive, sustainable funding, it quite naturally seeks to cut expenses. Where writing and publishing returns margins that themselves border on the unsustainable, they simply cannot afford to discount their product for any customer segment.

This leads to an atmosphere of conflict that is particularly painful for authors, who see themselves as integral partners in the education of their nation's students. In fact, many authors work directly in education and depend on that sector and writing and publishing for their livelihoods. In a recent survey of Canadian authors, fully "70% of the respondents indicated they had some formal connection to the education system."³ They are then caught in the middle as their two sectors go head to head in an often painful license negotiation or tariff-setting process.

Since voluntary collective licensing depends on the active affiliation of authors and publishers with their CMO, licensors can find themselves challenged by claims of lack of representation, or of representing a repertoire that lacks value. In their submission to Canada's recent Copyright Review, Simon Fraser University made just such a claim:

It should also be noted that a large percentage of the non-scholarly works used by instructors at SFU are non-textual (e.g., images, videos, websites), and therefore not governed by collective licensing agreements or tariffs through literary collective societies such as Access Copyright. In most cases, fair dealing purposes and the Works Available through the Internet provision (s 30.04) in the Copyright Act allow for these uses.⁴

Of course, this argument errs in defining **Access Copyright**⁵ as a strictly "literary" collective, since they, like many CMOs, represent both literary and educational publishers. But it does illustrate a challenge with VCL. The demand to closely define a CMOs voluntary repertoire and to prove its worth to potential licensees can overshadow the moral requirement to pay for all copied work, whether represented by the repertoire or not.

The VCL tariff-setting process can also present problems for the collective if there is not ready agreement on the need for a licence or tariff. Without the authoritative backing of a legislated requirement, VCL carries the danger that the user side of the transaction will simply walk away from negotiations and continue copying based on exceptions and limitations. This raises the very real possibility of litigation as an enforcement method. Take it from a Canadian, authors, publishers and schools fighting it out in court is a particularly ugly outcome of copyright policy. It should be avoided at all costs through progressive legislation that clarifies compensation requirements for industrial copying.

Where such a disagreement does reach the courts, educational users may position the fight as between "wealthy" corporate interests and "poor" students. This has been the experience of rightsholders and collectives in the Canadian copyright disagreements of the past two decades. Since Canadian educational licences have traditionally been calculated on a *per student, per year* basis (never in any context exceeding \$27 *per student, per year*), they are described by their detractors as a burdensome extra fee for students and parents. For instance, here is a group of student advocates claiming to government that a \$27 per year increase in fees would have tangible impact on their ability to access higher education:

"As the cost of attaining a post-secondary degree continues to rise, the educational fair dealing provision is increasingly more important to improve affordability and quality of education. Affordability continues to be an issue for students, particularly in relation to educational materials..."⁶

3 Survey of Canadian Authors on Educational Copying.

4 Submission to Canada's Statutory Review of the Copyright Act, by *Simon Fraser University*.

5 <https://www.accesscopyright.ca/>

6 Submission to Canada's Statutory Review of the Copyright Act by the *Undergraduates of Canadian Research-Intensive Universities*.

Ideally, copying licenses would be paid by educational institutions themselves through a robust materials budget, thereby solving any perceived affordability issues for students, while still respecting the rights of authors and publishers to remuneration for their work.

4.3. Extended Collective Licensing

The widely cast net or blanket approach of Extended Collective Licensing (ECL)⁷ makes it attractive to rights holders, especially authors primarily in the commercial market for whom educational use may be a secondary (though important) consideration. Countries with highly developed ECL structures tend to have highly efficient collective management organizations able to identify all rights holders, even those outside their affiliated repertoire.

Through reciprocal agreements with other countries, transfer payments can even be made to the appropriate rights holders outside the territory. The encouragement of ECL in the European Union's Digital Single Market (DSM) Directive is a big step forward in making this structure a global standard for fair balance within copyright⁸.

It is true that ECL allows for authors to specifically opt out of the extension to their work, but for authors whose primary concern is the continued creation of work, any representation and compensation for difficult-to-track copying is usually welcome. It has been my experience that authors are far more likely to explicitly affiliate with an established CMO once they discover their work has been represented under an extended license, than they are to opt out of future representation. Ignorance of the copying and/or of the existence of a CMO itself is more of a problem for authors than is the accidental competition between CMO and author-chosen representation.

For the author who may not even be aware that their book has been adopted to a reading list in their own or another country, the receipt of a collective licensing royalty payment is a moment of discovery. Learning that one's work is being used in an educational setting can open an author up to that country's commercial market in a way previously unplanned. Reciprocal collective payments through ECL structures alert authors, their agents and publishers to sales potential for future and backlist titles in untapped territories.

Unfortunately, ECL has not been broadly adopted across all territories, and where it does exist it has varying scope and power. In some countries, for instance, an extended collective licence structure combines with national law that preferences reasonable compensation to the rights holder over broad exceptions and limitations to copyright protection. In other words, the law does not allow for an exception claim where a reasonable licence option exists. To authors, this preference indicates a recognition of the value of their labour and is an encouragement to continue with their work. A similar licence preference has been recommended under Article 12 of the EU DSM Directive.⁹

The value of this structure to authors and publishers is clear, since they are the primary focus of the licence protection, but it is also valuable to authors from other territories whose work is used in educational settings. Having such a strong rights regime provides both protection for the rights of global authors whose work has educational value, and an example to other lawmakers of a

⁷ Extended Collective Licence (ECL) <https://www.copyrightlink.org/issues/extended-collective-licence.html>

⁸ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC Digital Single Market Directive

⁹ The New Copyright Directive: Collective licensing as a way to strike a fair balance between creator and user interests in copyright legislation (Article 12) http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/?doing_wp_cron=1595270301.8208930492401123046875



copyright structure that fully understands the balance between access and continued investment in cultural production.

In Canada, which follows the voluntary collective model, licensing is narrowly limited by an affiliation agreement requirement¹⁰, and has also been substantially weakened — some might say rendered irrelevant — by the introduction of poorly defined exceptions and limitations.¹¹ This has had the opposite effect on authors (and publishers) to an ECL system : discouraging them from continuing to create works for the educational market and indicating to them that their labour is not valued under national law. The effect is then extended to all authors, domestic and foreign, who fall under Canada’s various international agreements, creating a compensation-free zone that severely damages Canada’s international relationships, and discourages foreign investment in the Canadian publishing marketplace.

Advocates for repair of the Canadian Copyright Act rightly complain the functionality of the current law does not pass the Berne Convention’s¹² three-step test for exceptions and limitations, in that the normal exploitation of works by rightsholders has been fatally disrupted within the education space. They have pointed to the EU examples of ECL as preferred solutions to this disruption.

A well-designed ECL system is good not only for rights holders such as authors and publishers, but it is generally good for the education sector as well. By providing predictable certainty to the educational budget-making process, ECL removes the element of risk from education sector copying, provided clear guidelines are negotiated. Institutions are then given dependable, broad access to rich content in a variety of formats, and with a variety of permissions, while rightsholders enjoy the encouragement and compensation of remunerated use in an established market.

5 LOOKING TO THE FUTURE: ONLINE ATTRIBUTION LEDGER¹³

The shift to digital book consumption has challenged long-established licensing structures, as they were generally created in an analog world. Analog licensing relied on physical processing and tracking procedures. In the world of educational copying, this meant the physical counting and documenting of individual copies in order to survey industrial use, and so negotiate a price for that use.

We now work in an age of ubiquitous scanning, anonymous file sharing, “free” content accessible on the open internet in classrooms, private online learning systems, and a growing reluctance by the consumer to pay for online content. It has become extremely difficult to maintain a commercial connection between the content used in education and the original rights holder, so that a licence can be offered.

How can one charge a fee for a use that is never officially reported to the rightsholder? One potential answer is point-of-sale delivery of content that seamlessly incorporates ownership attribution, usage rights, and automatic reporting, even on the “free” internet.

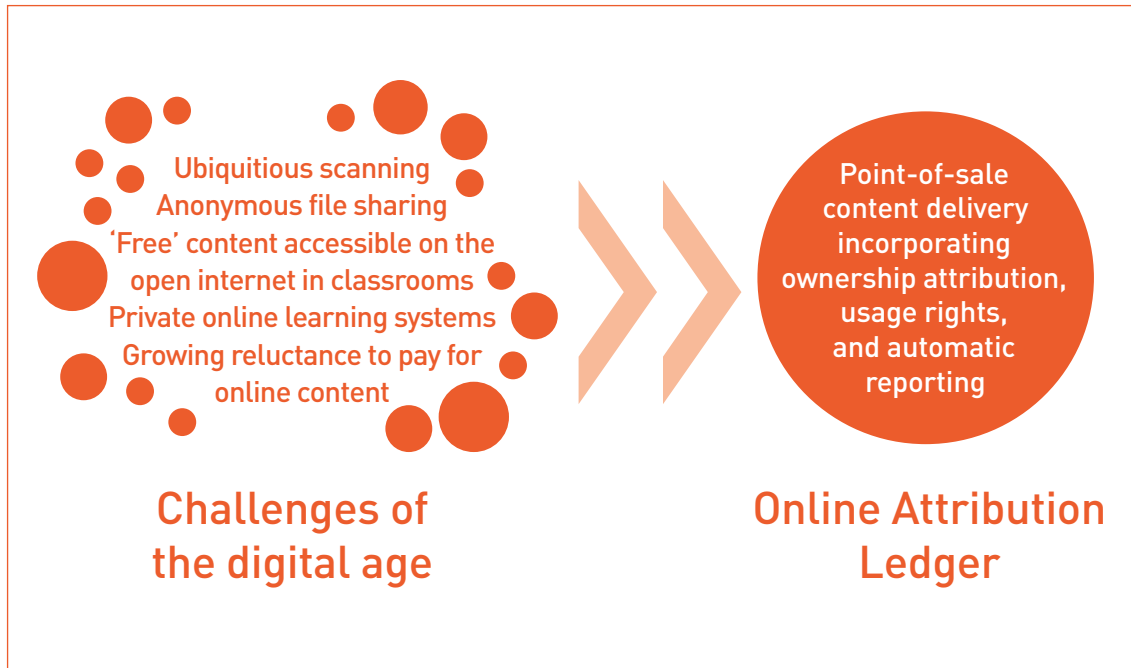
¹⁰ <https://www.accesscopyright.ca/creators/new-affiliation-agreement/>

¹¹ At a Conference on Canada’s Copyright Modernization Act: ‘Where Does Balance Fit?’
<https://publishingperspectives.com/2017/11/canada-copyright-modernization-act-conference/>

¹² <https://www.wipo.int/treaties/en/ip/berne/>

¹³ <https://attributionledger.com/>

ONLINE ATTRIBUTION LEDGER



Various private, “walled-garden,” subscription models (eg, **Discovery Education**)¹⁴ that have these features already exist for educational content, in which the consumer is locked into a defined repertoire and given a variety of use and copy freedoms for the price of an annual subscription. These models work, but they are facing resistance from educators who prefer not to be restricted by a single repertoire.

The question arises — can we combine dependable repertoire definition, a negotiated licence, and content delivery all at one trackable point of contact? Such functionality exists within the world of blockchain technology but has yet to become widespread on the open internet. Were the smart contracts enabled by blockchain¹⁵ adopted for the creative content of writing and publishing, they could very well become the next iteration of collective licensing.

The Canadian experimental site, **Fanship**¹⁶ (currently at the beta testing stage), was developed by the innovation arm of Access Copyright. Fanship combines an underlying and immutable attribution ledger, proving ownership of content for authors and their publishers, with a dynamic sales platform. Fanship offers immediate e-book sales and delivery with the added functionality of direct consumer-to-rightsholder contact.

While Fanship is not aimed at educational consumers specifically, once it has proven the functionality of the ledger, the sales platform, and the potential for an in-built licence within a smart contract, it could certainly be adapted for that purpose. What that could mean is that educators might pick and choose from an unwalled Access Copyright repertoire on the open internet. All affiliates of Access Copyright, both publishers and authors would then have their rightsholder status guaranteed through the underlying attribution ledger. And all terms and conditions of a standard collective licence would be built into a smart contract that enabled access, use, and defined copying. What’s more, royalty splits and payments could happen immediately, providing both real time income for rightsholders, and an accurate record of use.

¹⁴ <http://www.discoveryeducation.ca/Canada/>

¹⁵ <https://www.ibm.com/blogs/blockchain/2018/07/what-are-smart-contracts-on-blockchain/>

¹⁶ <https://fanship.fan/>

6 CONCLUSION

Educational licensing is the author's friend. While often a blunt instrument, collective licensing provides essential representation for creators who have released their work into the world. The complex of relationships that come attached to professional content, especially within a commercial model, can simply be too intricate and attention-intensive to manage on an individual basis. Collective representation and collective action are effective balancing agents for what is from the outset an unbalanced project — tracking, negotiating and enforcing all the potential and actual commercial interactions of one's work in the economy. Both voluntary and extended collective licensing continue to occupy a crucial place in that economy, and possible innovations to licensing structure hold much promise ■



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