

Free-for Education (FfE) Licence Model



Introduction

1. In my paper I will attempt to explain the rules and rationale of the new *AEShareNet*-FfE ('Free-for-Education') licence protocol, which is designated by a distinctive mark: . I make passing reference to some of the fundamental structures and concepts underlying *AEShareNet* which are helpful in understanding the  licence, but in the time available that can only be given cursory mention.
2. I have also included some philosophical perspectives about the historical evolution of publishing models from relatively proprietary to the new paradigm described as 'open source / open content'.

Genesis of the licence protocol

3. The immediate impetus for development of the Free-for-Education licence came a year and a half ago when I was asked by the Commonwealth Department of Education, Science and Training (DEST) to examine issues arising for education from the so-called 'Digital Agenda' reforms. That required a schedule of consultations with education groups around Australia. A central concern of education was the operation of the educational statutory licence in Part VB of the *Copyright Act 1968*, which covers print copying and electronic copying and communication of works.
4. At an early stage in the consultations, one of the participants advanced a strongly held view that where copyright material has been placed on the internet, it ought to be treated as open to anyone to copy and use freely, and in particular education should not have to pay royalties under the statutory licence to Copyright Agency Limited (CAL) for that use. My immediate reaction was to regard this as a somewhat 'Bolshevik' view. However as the project proceeded it became very clear that there was a broad consensus that the imposition of royalties for educational downloading and use of most material found on the internet was anomalous.
5. To understand why that is so, we need to consider what has happened over time to the business models underlying publishing, and why the internet is different.

Traditional Publishing Models

6. If we go back to, say, the time of the *Berne Convention* (1886), the main outlines of copyright law had been formed. That law was based on a publishing model¹ that was

¹ By 'publishing model' I simply mean the nature of the relationships which connect creators and consumers of copyright materials, and all the intermediaries between them.

very different to today's complex realities. The traditional publishing industries were based on a linear supply chain proceeding through:

- copyright authors, who are individuals - motivated both by profit and by a desire for recognition
 - publishers, who usually acquired ownership of copyright from the author
 - distributors of various kinds, whose role was to deliver the copyright content to the consumer - by sale of copies or through public exhibition / performance
 - consumers (users) - both individuals and organisational.
7. The publishers and distributors in this chain were generally commercial entities with a view to maximising profit by maximising the delivery of content to consumers. Each industry sector (including print, music, film and broadcasting) had a separate set of business practices and relationships and a vocabulary supporting that. Often these business relationships were very tightly held - as evidenced by the behaviour of UK and US publishers in dividing hegemony of the English language print publishing world between them over many years.
8. There were large upfront fixed costs associated with the publication of copyright works by traditional means (including the manufacturing expenses involved in distribution of content fixed in or on a medium such as paper, vinyl or magnetic tape). It followed that many works were simply never published. Where publication did take place it was generally accompanied by an intention to recoup the costs of publication through sales and royalties.
9. At the user end, consumers received copyright content largely as a 'commodity, at a largely standard price. They did not contribute, manipulate or perform any acts of copyright in relation to the material. Copyright was an arcane area of the law that very few people needed to understand.
10. In summary, for lack of education, opportunity or technical or commercial feasibility, very few individuals could aspire to be serious creators of copyright content for the use of others.

Transformation of Publishing

11. These realities have been profoundly transformed by the growth in technologies in the second half of the twentieth century. Users and user organisations now have the technological capacity to reproduce copies of works cheaply, and to communicate and manipulate them digitally. The 'supply chain' is no longer linear, because consumers may also be re-developers and re-publishers of copyright material.
12. Along with this 'opening up' of publishing opportunity, the range of motivations for developing and publishing copyright material has enlarged beyond the obvious, traditional motivation of making money. For example, a government department may publish:

- to promote a public cause, e.g. government health campaign to combat obesity
 - to establish a standard
13. Even a commercial enterprise may have reasons other than direct money-making. For example:
- loss-leading; i.e. giving away content to promote allied services or products where the real competitive advantage lies
 - advertising, pure and simple.
14. Nowhere have these developments been more pronounced than in the medium of the internet. The internet has made it possible for an individual or organisation to bypass the traditional publication channels, a process described by the National Office for the Information Economy (NOIE) as 'disintermediation'. At the same time it has given rise to new forms of intermediation, such as search engines.
15. The internet is widely used by government, business, professional and trade associations, hobbyists, political parties, lobbyists and individuals to publish copyright material that they desire to be given wide exposure. In this, the internet has certain advantages over traditional print publishing:
- it enables more effective and efficient dissemination of the desired message
 - it enables the proprietor to operate fewer shop fronts
 - it saves duplication costs (which are shifted to the user).
16. So it would seem odd if, on top of all these advantages, website proprietors were to receive valuable recompense for educational uses of their material. Yet that seems to be the case under the statutory licence for educational use. The same downloading practices are undertaken by non-educational users in homes and offices all around the world - free of any charge.

Government review of the 'Digital Agenda' reforms

17. To return to the plot, in due course DEST made a submission to Phillips Fox, who were reviewing the 'Digital Agenda' reforms for the Commonwealth Attorney-Generals' Department. That submission recommended, in part:
- Where a work or subject matter other than a work is made available on the internet by or with the consent of the copyright owner, and is not subject to a technological protection measure, it should not be an infringement of copyright for a person to reproduce or communicate that work or subject matter for the educational purposes of an educational institution
 - The operation of the preceding provision may be excluded or modified by agreement.
18. That recommendation reflects a viewpoint that the internet by its nature is a medium that lends itself to an 'open' rather than a 'closed' publishing model. That is, by

placing copyright material on the internet, unprotected, the proprietor has elected to allow use of that material on liberal terms. They remain free to choose differently if they wish:

- by storing material on a secure site that is only accessible to a class of users who can authenticate themselves in some way, and/or
- by imposing contractual conditions of access which spell out a more restricted, or different regime governing use of the material.

19. The DEST recommendation was not addressed in the Phillips Fox report to the Attorney-General's Department following its Review. That is perhaps not unexpected, as it had not been specifically identified in advance as an issue to be addressed. It is not clear whether or when advisers in the policy Departments (AGD and DoCITA) will give consideration to the recommendation.

Practical dimensions of the problem

20. Copyright interests may say:

surely website proprietors who wish their material to be widely disseminated for education or other purposes can give explicit permission (i.e. a 'licence') in the copyright statement on their website?

21. Copyright statements on websites vary considerably.² Some statements (relatively few) give permission which adequately covers educational use. Some sites contain no copyright statement at all. Others contain very restrictive statements that are not to be taken at face value; for example the proposition that all rights are reserved and nothing may be copied, in whole or part, without prior written permission. This ignores the fact that a user must make a copy even to view the material (including the copyright statement!) on the screen. In some cases restrictive copyright statements appear on websites that offer reproduction functions such as 'Print', 'Printer friendly format' and 'Email this article to a friend'. Yet other sites seek to prohibit all uses except 'fair dealing', and generally the implication is that printing out a copy of the whole or part of a web page or downloadable PDF document would constitute fair dealing. Many website notices, whilst they might contain some permissions relevant to education, are poorly drafted so that it is difficult to determine whether the scope of permissions voluntarily given would extend to all the kinds of educational uses that would be covered by Part VB. Few, if any, of the sites seek to force the user's attention, or impose agreement, to the copyright conditions.
22. In summary, it can be surmised that a great many website owners would willingly extend permission for educational use of their website material, *if* they were to apply their minds to the matter. But few do.

² An extensive sample of such websites appears in the annex to the DEST submission to the Phillips Fox Review.

23. Alternatively, it might be argued that under the criteria for assessing 'equitable remuneration' some sort of discount could be allowed within the existing framework, for copying and communication of material downloaded from the internet. A difficulty with that is that CAL would be likely to suggest a discount of 10%; educational users would suggest 90%.
24. In the end the need is broader than merely making the statutory licence work better, because:
- the Part VB statutory licence is unique to Australia
 - it is subject to precise limits about how much can be copied
 - it only applies to 'works' not audiovisual material.

Making it easier in practice - the licence protocol

25. The alternative for the education community is a practical one. The answer is to provide website owners with a simple and practical mechanism:
- for making a choice about whether their material is to be freely used for education
 - and for communicating that choice unambiguously to users
 - whilst providing some reassurance to owners that their material will not be misrepresented
 - *without* them having to learn too much about copyright!
26. The *AEShareNet-FfE* licence regime sets out to provide such a mechanism. By applying the  mark to particular material the website owner indicates that that material may be used by an individual or organisation for educational purposes. The mark incorporates a link to the  home page which contains a plain language summary of the licence terms. For convenience the essential parts of that summary are set out in one of an **Annex** to this paper.
27. The licence summary is all that most licensees will ever see. It is supported, however, by a more detailed ***AEShareNet-FfE Licence Protocol*** in a tabular form and a **Licence Glossary**, and ultimately by the '***AEShareNet Charter***'.³
28. In the remainder of this paper I focus on some key points about the  licence regime. I shall do that in 2 parts:
- what a 'Free-for-Education' licence allows
 - mechanism for establishing a licence.

³ Amongst other things the Charter provides a dispute resolution mechanism.

What an  licence allows

29. First, the licence allows 'use' for 'educational purposes'. This statement captures the essential scope of the licence.
30. The term 'education' is defined broadly.⁴
31. *AEShareNet* licence protocols are all rendered in a congruent, tabular form. In addition they employ similar terminology. *AEShareNet* (like TLF) uses a 'Rights' architecture which distinguishes between, User Rights, Development Rights, Supply Rights and Sublicensing Rights. In those terms the  licence allows:
 - Usebut *not*:
 - Development of value added Derivatives
 - Supply to third parties
 - Sublicensing to third parties.
32. These 'Rights' are framed on real world realities, rather than aligned with the legal categories of right defined in any copyright law:
 - The term 'Use' means a range of things that you might expect to do as an end-user of the material in question, regardless of how those actions may be classified under applicable copyright law.
 - Some readers might note that the list of 'Rights' does not specifically identify 'copying rights', notwithstanding that it would ordinarily be seen as the most visible right of a copyright owner. The reason is that copying is generally done to facilitate the exercise of one of the defined Rights, and so is subsumed within the relevant Right.
33. It is worth making one point about the dividing line between 'Use' (allowed) and 'Supply' (not allowed):
 - an educational institution may (make and) provide copies to its students, as part of its educational *services*, including charging a nominal fee . . . this is 'Use' by the institution
 - however, the institution may not provide copies to third parties, where the relationship can be characterised simply as a provision of a *product* . . . this is 'Supply'.
34. The  licence does not permit blending of substantial new material with the licensed material so as to give rise to a new layer of copyright (called 'Enhancements'). It does however permit selection of extracts, and slight alterations in format or language so minimal as not give rise to any new copyright (called an

⁴ It would extend to most 'self-education', if it is sufficiently structured or purposeful.

'Edited Version'). However, this is moderated by three important constraints of the licence:

- you are not authorised to infringe the moral rights of the author
- you must not use the material in a way that is misleading or deceptive
- you must not reverse engineer the material or circumvent a technological protection measure.

35. As one may expect, an  licence is non-exclusive.

36. An  licence is permanent, free of all licence fees and royalties, and worldwide in its operation.

Doesn't come in any colour, but safe for kiddies!

37. In summary, one might say that whilst it is broad in some senses, an  licence is overwhelmingly *safe* for a website owner or other copyright proprietor who may be considering applying it, especially given:

- that it is confined to 'Use'
- the constraints outlined in paragraph 34.

38. In addition it may positively assist the website owner in communicating messages that motivated the establishment of the website in the first place. The licence would seem as 'risk free' as it is possible to be.

39. Conversely, for Australian education users an  licence does much more than the Part VB statutory licence because:

- it may be applied to any subject matter, not just works
- it is not subject to limits on the proportion of material used and other tests
- you do not have to pay
- there are no territorial boundaries.

Mechanism for creating an licence

40. Anyone can apply the  licence mark to material, to signify that they are extending - to the world - a licence for use of the material for educational purposes.

- you do not need to be Australian
- you do not need to be an *AEShareNet* member
- you do not have to ask for permission, or inform *AEShareNet* Limited.

41. By applying the mark you warrant that you own the copyright or are authorised by the owner to apply the mark.

42. The licence mark may be applied in a number of ways, as explained in the style guidelines on the 'Free-for-Education' site. The guidelines include various downloadable versions. In soft copies the mark incorporates an active link to the 'Free-for-Education' home page. On hard copies, the mark may be accompanied by a visible URL for the 'Free-for-Education' home page. The mark may be applied to a website, a single web page or any other identifiable material in soft or hard copy. It need not be physically embedded or attached to the licensed material. As stated in the *AEShareNet-FfE Licence Protocol*, the mark must be applied 'within, on or in relation to' the licensed material. The essential requirements then are:
- the mark must be recognizable as the  licence mark
 - it must be clearly 'applied', with intent to invoke the licence terms
 - it must be applied to clearly identifiable material.
43. The licence is extended:
- to anyone who is able to access the copy to which the owner has 'applied' the mark
 - to anyone who legitimately acquires a copy derived from the first, which legitimately bears the mark.
44. This principle means in effect that the copyright owner may exercise a measure of control over who obtains a licence, purely by selecting where 'marked' copies are distributed. Although a licence is not revocable once taken up, it is possible for the copyright owner to largely reverse the practical effect of the licence by removing the mark from its website.

A twist in the tail

45. There is no reason for educational users to simply sit and wait for website owners to decide to apply the  licence mark.
46. Assume that an education user (teacher, student or administrator - subsequently for convenience referred to as 'user') sees material on a website that would be useful in the educational context. They email the webmaster to request permission to apply the  licence mark to that material for the purposes of their educational institution (or for personal use in the case of an individual student). The request could attach the licence mark with a (preferably navigable) link to the 'Free-for-Education' home page.
47. What I would expect to happen is this:
- the first request will be ignored
 - the second request may result in the webmaster replying giving permission for the requesting institution to use the material under  licence terms
 - the third request may prompt them to apply the mark generally to the material on their website.

48. I envisage a request might be made in the following form:

To the Webmaster

We refer to the material <specify title or description> on your website at the following location <specify URL>. This would be extremely helpful source material for our educational use. The copyright notice on your website does not seem to cover circulation of the material within an educational institution. I am writing to request permission to apply the  licence mark on the material for circulation to our students and teachers. This would create a copyright licence on terms set out at <http://www.aesharenet.com.au/FfE/>. Briefly, the licence would allow use by this institution for its educational purposes only, but would not allow any broader re-publication.

I would be pleased to receive your consent by reply email. If you have any questions please feel free to contact me.

<Name of teacher / administrator>

<Contact details>

<Name of institution>

49. The second **Annex** to this paper gives another example of how a request was framed in an actual instance. On that occasion about 37 webmasters were contacted for permission, and of these:

- 17 responded permitting use in terms set out in the  licence
- 1 responded 'No'
- the remainder did not respond.

50. The Annex shows one of the responses received. What is also interesting from the example is that it provided an opportunity for the parties to establish collateral conditions or understandings relating to use of the material.

Philip Crisp
18 November 2004

Annex Summary of Free-for-Education (FfE) Licence Rules

(adapted from FfE home page)

What can I do with material bearing the mark?

You may **use** and copy any material covered by an  licence - personally or within your organisation - **for education purposes only**.

- "use" means read, view, play, perform, operate and/or execute the material (depending on its nature and format)
- "education" means a structured program of learning and/or teaching for the benefit of a learner.

If you are an **education provider or other organisation** you may make and give copies to learners, including by emailing them and/or by uploading them to an intranet within your organisation.

Free educational use applies whether or not you charge for the course. You may also charge learners for copies of  material on a cost-recovery only basis. You may not otherwise supply or sell copies to third parties.

If you are an **individual learner** you may include part or all of the material in an assignment. (Your organisation's usual academic requirements in relation to acknowledging sources apply and you should be aware of the [Moral Rights](#) of authors).

You may use and copy the material only within limits inherent in the version legitimately acquired by you. You may not do anything to circumvent a technological protection measure.

You are not entitled to make any substantive changes to the material. You may take an excerpt of the material, provided that you do not deal with the material in a way that might:

- mislead or deceive any person
- infringe the author's Moral Rights.

You should retain any embedded copyright information (including the  mark) on copies that you make, in accordance with the rules of the *AEShareNet-FfE* Licence Protocol.

You may not assign or sublicense any of your rights.

How a licence arises

You do not need to do anything to formalise an  licence. The licence arises automatically if and when:

- the copyright owner has applied the  mark to a copy of the material (the 'source copy')
- you hold a copy directly or indirectly derived from the source copy, on which the mark is retained
- you obtained that copy by legitimate means (eg, without circumventing any technological protection measure).

Related documentation

The [AEShareNet-FfE Licence Protocol](#) and the associated [Licence Glossary and Explanation](#) are the definitive legal documents which explain the licensing conditions of the use of material with the FfE mark and take precedence over all other documentation. (The *AEShareNet-FfE* Licence Protocol is part of the Licence Comparison Table which shows the conditions of *AEShareNet-FfE* along with other *AEShareNet* Licence Protocols.)

Legal notice

It is your responsibility to confirm that the  mark was applied by the copyright owner. We do not warrant that all materials which might bear the mark do so with the authority of the owner. If you identify any wrongful application of the mark please report it to support@aesharenet.com.au.

 is a trade mark of *AEShareNet* Limited, ABN 34 091 619 402. *AEShareNet* is a streamlined copyright management framework established by government on a non-profit basis for the education sector. *AEShareNet* Limited does not determine the materials to which the mark is applied, and gives no warranty of any sort regarding those materials.

Annex

Example of request for permission

Request

To the Rights & Permissions Manager

On 20 July AGS will conduct a major seminar for its clients dealing with the topic: '*Intellectual Property - Policy & Practice in the Commonwealth*'. The Seminar will be held in Canberra. If successful it may be repeated in other capitals. The seminar is intended to provide participants with a better understanding of IP and the policies and strategies for its protection, management and commercialisation.

As part of the Seminar I am planning to present examples of material from the World Wide Web, as a visual way to explain to the audience:

- categories of IP (copyright, trade marks, domain names, etc)
- the IP management strategies evident on those websites, eg copyright statements relating to the website content, commercial products on offer, etc.

I would expect to illustrate my presentation by showing content from about 10-12 websites - or however many I can cover in 20 minutes. I would be grateful if I could present some material from your website in that fashion. Use would be by AGS only, for purposes of the Seminar(s) only, and would adhere to other limits set out in the standard  licence at <http://www.aesharenet.com.au/FfE/>.

You will see that the '**Free-for-Education**' licence terms do not allow for substantive alterations to the material, or any use that would be misleading or deceptive. Whilst we will be charging for the Seminar we will not separately commercialise the proceedings.

I am sending a similar request to webmasters at a number of government and non-government websites, which I have selected at random. I cannot be specific at this stage about the exact material I may refer to in the presentation; indeed the presentation may involve some impromptu web surfing. I would be happy to send you a copy of my presentation after the event.

Response

Hi Philip

You are welcome to use any examples from our website in your seminar on copyright.

I would certainly like to see a copy of your presentation after the event, and if your presentation implies any criticism of the way we have handled copyright issues on our website I would appreciate hearing this from you prior to the public presentation.

[signed]

Webmaster

Comments

A good response. Says what it needs to say, without unnecessary reiteration of licence terms. Note that creation of a licence does not require any formality, beyond invoking the  mark. Note also that this exchange gives rise to some collateral conditions or understandings.