

## CLARIFYING OWNERSHIP OF TEACHER-CREATED DIGITAL CONTENT EMPOWERS EDUCATORS TO PERSONALIZE EDUCATION, ADDRESS INDIVIDUAL STUDENT NEEDS

SETDA Policy Brief, prepared in partnership with EducationCounsel LLC

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In the fall of 2012, SETDA released a ground-breaking report, *Out of Print: Reimagining the K-12 Textbook in a Digital Age*, which documented and provided advice to states and districts on how to manage the ongoing shift from traditional print-based instructional materials to digital content. While the advantages to increasing the use of digital content by students and teachers are significant, the policies and practices associated with a successful transition are still emerging. The purpose of this series of policy briefs is to shine a light on specific policies and practices that we believe are key to keeping efforts to employ digital content in K-12 education on track and on target.

### Introduction

Increasingly, teachers across the United States are using technology, including digital curricular resources and tools, to enhance students' classroom experiences and improve learning outcomes. Recognizing student needs, interests, and preferences, teachers employ digital content to transform their instructional practices, including, in some cases, by independently creating, modifying, and sharing learning materials. The purpose of this policy brief is to help state and district education leaders thoughtfully evaluate and address these developments in ways that promote high-quality teaching and learning.

Empowering teachers to engage in the development, refinement, and use of digital materials – including lesson plans, videos of instructional practice, and formative assessments – holds real promise for improving student learning experiences and teacher effectiveness. Unlike traditional textbooks and other printed materials, digital content can be updated in a more timely manner and better targeted to meet specific student needs – enabling and stimulating flexibility, creativity, and collaboration and allowing for an educator-influenced system of ongoing improvement and enhancement.

Intellectual property law and policies are central to strategies for empowering and encouraging educators to realize the full potential of exciting new digital content and tools. In the era of digital publishing, which includes teacher-created, -refined, and -remixed materials an important question has arisen: who owns this digital content? Policymakers need to approach this question proactively and purposefully. In their deliberations regarding appropriate intellectual property policies to promote the development and best use of digital content, state and district leaders should consider the advantages provided by open educational resources (OER).

### What are Open Educational Resources (OER)?

**OER are "teaching and learning materials licensed in such a way that they are free and may be used, reused, remixed, and otherwise customized to meet specific needs."**\*

In other words, OER are teaching, learning, and resource materials, tools, and media that are in the public domain or are available under an open license so that they may be used and repurposed freely by educators, students, and self-learners.

\* See SETDA, *Out of Print: Reimagining the K-12 Textbook in a Digital Age* (2012), available at <http://www.setda.org/priorities/digital-content/out-of-print/>

## Purpose/Goals

Digital educational resources designated as OER, using a Creative Commons or similar intellectual property license, hold the promise to enhance teaching and learning. OER offer educators a clear pathway for promoting the development, use, remixing, redistribution, and sharing of digital and other resources. This policy brief provides ideas for state and local policymakers – including the state educational agency, state board of education, legislature, and/or Governor (depending on the state context) – to consider as they evaluate plans for transitioning to greater use of digital materials and tools, including strategies and policy ideas for empowering educators to realize the full benefits of digital content.<sup>1</sup>

### Alignment to National Education Reforms

States and districts' increasing use of digital content to improve teaching and learning, aligns importantly with other significant K-12 policy developments nationally, including:

- **College- and Career-Ready Standards:** Implementation of college- and career-ready standards necessitates the development of new, more robust curricular and other educational resources. Adoption of the Common Core State Standards in many jurisdictions also creates new opportunities for collaborating to develop, remix, and reuse digital materials aligned to standards as states and districts implement curriculum adoption strategies.
- **Personalized Learning:** States and districts are placing a growing emphasis on providing student-centered/independent learning opportunities, including those that acknowledge competency-based learning, to reflect learner variability. Digital OER are uniquely positioned to support personalization.\*
- **Challenging Fiscal Climate:** In a time of strained federal, state, and local public budgets, digital content and OER can offer significant costs saving (e.g., no reprinting/ redistribution costs associated with print materials).

\*See "The Accessibility of Learning Content for All Students, Including Students with Disabilities, Must be Addressed in the Shift to Digital Instructional Materials" (SETDA, 2014).

## Legal Landscape: Who Owns Digital Educational Content?

State and district leaders interested in exploring the use of digital content should develop a working knowledge of two key intellectual property terms – "copyright" and "license." This section provides a high-level overview of these concepts, which are defined as follows:

- **Copyright** refers to the **ownership** of intellectual property. A copyrighted work is any form of expression that reflects at least minimal creativity on the part of the author, including text, images, lesson plans, etc. Copyright controls how the intellectual property can be used and distributed. Copyright attaches automatically when the work is created, and copyright is granted to "the author" of that work.
- **License** refers to **permission for others to use or to share** this intellectual property (without the copyright owner relinquishing its ownership).

<sup>1</sup> This paper focuses on teacher-created digital content, but students also are creating resources. While student-generated digital learning materials are beyond the scope of this paper, this development also raises questions about ownership and use that policymakers should assess.

State and district policies that encourage or require that teachers create digital content resources must address who grants the license. The "author" owns the copyright and therefore can grant a Creative Commons or similar license. But there is some uncertainty about whether the teacher or the school district is the "author" for copyright purposes.

Historically, before the Copyright Act of 1976, when teachers created educational materials in the course of their employment, copyright in those materials was assigned by common law (also known as judge-made law – in other words, "law" developed through court cases) to the teacher. This approach represented an exception to the "work made for hire" rule, which typically allocated ownership for work prepared in the scope of an individual's employment to his or her employer. (In other words, courts generally identified the employer as the "author" of any employee work, which meant that the employer controlled the use and any distribution or redistribution of that work.) The "teacher exception" that courts developed meant that teachers were considered the authors of and able to claim a copyright in their teaching materials and scholarship, thus controlling how the materials could be used and repurposed.

Today, ownership of teacher-developed materials is less certain. As noted above, copyright automatically is assigned as soon as the work is created, and the author (the copyright holder) reserves all rights to use of the work.<sup>2</sup> The Copyright Act of 1976<sup>3</sup> gives the author the exclusive rights to display and adapt his or her work. Section 101 of the Copyright Act acknowledges and defines "work made for hire," explaining that it includes "a work prepared by an employee within the scope of his or her employment." And, as explained above, if a work is made for hire, the employer or other person for whom the work was prepared is the initial owner of the copyright unless both parties involved have signed a written agreement to the contrary.

Meanwhile, neither the language nor the legislative history of the Copyright Act of 1976 mentions the "teacher exception," or any other exception to the "work made for hire" rule. Therefore, it is unclear whether Congress intended to leave this judicially created right intact. When a teacher creates content in the course of his or her employment, does the teacher or the employer own that content under federal copyright law? The answer is uncertain, with judicial opinions that go both ways. The crux of the difference in opinion turns on whether the Copyright Act should be interpreted literally or in light of its history and purpose. The statute makes no mention of the teacher exception, but Congress intended to codify existing law, which included the exception. In addition, academic publishers and university copyright policies treat teachers as the authors of the teaching materials and scholarship they produce.

When addressing ownership, legal considerations beyond the Copyright Act also may come into play. State laws may differ regarding the identity of a teacher's employer; it could be the state, a school district, or some combination, for example. Additionally, educators may be developing digital materials pursuant to federal, state, or privately funded grants that establish their own intellectual property obligations.

### **Policy Options for Copyright and Licensing**

Uncertainty about teachers' ownership of the materials they develop at work and an absence of digital-era state and district policies about the use of state- and district-owned materials represents a potential hindrance on innovation. To address this problem, state and district policymakers could

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<sup>2</sup> One exception to copyright is "fair use," which permits the limited use of copyrighted materials without first obtaining permission from the author. Examples of fair use include quotations of excerpts in a review or criticism, use in a parody, summary with brief quotations in a news report, and reproduction by a teacher or student of small part of the work to illustrate a lesson. Fair use is expressly included in the Copyright Act of 1976. See *infra*, note 3.

<sup>3</sup> 17 U.S.C. §§ 101-810.

establish standard copyright policies that expressly address the question of educator ownership and the use rights associated with state- and district-owned materials and tools. Policymakers have options when creating copyright rules that facilitate opportunities to develop, share, and redesign digital educational materials, including the following:

- If the policy is designed to have the teacher be the author of the educational resources she creates, a belt-and-suspenders approach would be (1) to take the position that the teacher is the author under the teacher exception and (2) also to enter into a written agreement with the teacher that states that if these materials otherwise would be considered works made for hire under the Copyright Act, the parties agree that the teacher is the author. If a state or district takes this approach, the state or district could also require that the teacher grant it a license to use, and to authorize others to use, the materials.
- Alternatively, if a state or district takes the position that educator-created materials are works made for hire, it can grant licenses to educators in their own works so that they can use, share, redistribute, and refine educator-created materials. In other words, the employer retains the copyright but provides the creator of the content and others with a license so that reuse, revision, and redistribution rights are defined upfront.
- States and districts can choose to license other state- and district-owned content, where the state or district owns the copyright in that work (such as teacher training materials), as open educational resources.

There are multiple licensing options to support these policy approaches. Creative Commons, a nonprofit organization that offers free copyright licenses to facilitate sharing and use of teacher-created work, has six main licenses so that reuse, revision, and redistribution rules are defined at the outset. The six options (with corresponding symbols) are as follows:

	<p>Attribution: "lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered."</p>
	<p>Attribution ShareAlike: "lets others remix, tweak, and build upon your work, even for commercial purposes, as long as they credit you and license their new creations under the identical terms....All new works based on yours will carry the same license, so any derivatives will also allow commercial use."</p>
	<p>Attribution No Derivatives: "allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you."</p>
	<p>Attribution Non-Commercial: "lets others remix, tweak, and build upon your work, and although their new works must acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms."</p>
	<p>Attribution Non-Commercial ShareAlike: "lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms."</p>
	<p>Attribution Non-Non Commercial No Derivatives: "is the most restrictive..., allowing others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially."</p>
<p>Creative Commons, "About The Licenses," available at <a href="http://creativecommons.org/licenses/">http://creativecommons.org/licenses/</a>.</p>	

## Policy Recommendations

Effectively managing the increased use of digital educational resources in elementary and secondary schools requires strong and proactive state and district leadership that embraces a culture of innovation and flexibility while simultaneously establishing good ground rules that frame and guide this development. **State and district policymakers should consider establishing a clear vision for the use and sharing of digital content and communicate that vision to content-creators, including educators.**

To support the state's vision, this guidance recommends the following:

- 1. The state and its districts should have up-to-date policies and practices regarding digital educational content and resources, including policies on ownership.**

States and districts need up-to-date policies that govern the acquisition and use of digital learning content. Policies should apply to both purchased content from traditional and new vendors as well as teacher-created content. Policies can be established in statute, regulation, and/or guidance and should facilitate the use and sharing of quality digital learning materials, as appropriate. Considerations of digital content quality control and access to content (both discussed below) should be addressed in state and district guidance and reflected in practice.

The shift to digital educational resources requires that states and districts address copyright and licensing explicitly in their policies. With analog resources, such as printed textbooks, copyright considerations generally were limited to issues of photocopying because copyright law does not apply to the redistribution or use of printed copies that have been lawfully purchased. However, procuring digital resources involves procurement of both digital copies of the resource and a copyright license that governs the use of the resource. Some resources come with quite restrictive licenses accompanied by technological protections that prohibit making additional copies or using the power of technology to modify, enhance, combine, or update the materials. And with respect to educator-created content, policies should answer the question "who owns the content?" by addressing considerations of copyright and licensing at the outset of any project.

- 2. Where the use of OER aligns with the vision for digital educational content, the state and districts should ensure that digital content can be licensed in ways that encourage sharing and customization.**

States and districts can advance their vision for the use and sharing of quality content where they enable a marketplace for the creation, distribution, and use of digital content. OER licenses that make this possible, like those offered by Creative Commons, should be easily understood, with clear terms. States and their districts also should put into place efficient procedures to handle any disputes that arise in the course of the sharing of digital materials – for example, where an educator modifies material in violation of the terms of a license.

States and districts have options when thinking about default license models. Some may choose to adopt a policy that digital resources developed with public funding must be shared freely (with the least restrictive licenses). States also may enact or endorse local policies that support a single common license with standard terms for all digital resources. Additionally, to the degree that states wish to support the development and use of OER and where the state must approve learning materials, it should ensure that OER can be included on approved instructional materials list.

### **3. The state and its districts should empower educators to create, use, and modify digital learning materials.**

Educators (with their students) are the primary users of digital content and increasingly are content-creators themselves. Rather than leave it to teachers, specialists, and administrators to determine ad hoc what qualifies as quality content, the state and its districts should ensure that educators are provided with technical assistance and professional development opportunities to select and use, create, and modify digital materials. These opportunities should:

- explore ways in which digital content can be integrated into the classroom to improve the educational experience of all students;
- empower educators by providing pedagogical and technical strategies to design, develop, and deliver digital learning experiences; and
- inform educators about copyright and licensing options, including the free licenses developed by Creative Commons, to enable sharing and refinement.

Some states and districts further may determine that incentivizing educators to create and share digital content will advance their vision for the use of digital learning materials. Incentives could include public acknowledgement or credit in educator evaluation systems that inform human capital decisions.

### **4. The state and its districts should ensure that educators have access to online repositories that store quality digital educational content.**

Housing content in accessible, organized repositories will facilitate the use of high-quality digital learning materials. These repositories can be maintained by various actors including the state, a consortium of states, districts, or third-party entities and have the capability to house content from more than one state. Online warehouses should provide clear information to those accessing the materials about the licenses associated with the digital content to ensure legal and appropriate use and, where permitted, modifications.

Educators also will benefit where repositories allow tagging and otherwise make OER materials discoverable. Educators will be better able to navigate a repository where items are searchable and browsable by various classifications, including by copyright/license type. For example, requests for proposals might include requirements that publishers of digital content or repository providers ensure that digital material are discoverable through available metadata and can be organized by license type.

### **5. States and districts should provide guidance on quality control.**

Digital learning materials should be appropriately vetted to ensure they are accurate, aligned to state standards, and appropriate for elementary and secondary classrooms. States and their districts should have in place guidance on evaluating digital content, particularly before it is included in any repository for broader dissemination. Evaluative instruments, such as the rubrics created by Achieve to evaluate OER objects<sup>4</sup>, can assist with this work. States and districts might rate teacher-created content on various metrics, including the degree to which the materials align with standards; to assist with this exercise, states should establish and publish technical metadata standards (information embedded within the digital framework that describes the material's content and context) associated with state content standards.

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<sup>4</sup> Achieve, Rubrics for Evaluating Open Educational Resource (OER) Objects (Nov. 18, 2011), available at <http://www.achieve.org/files/AchieveOERRubrics.pdf>.

Ultimately, OER, including teacher-created content, can be rated using various metrics. An advisory approach, that gives guidance on existing materials without prohibiting their use, may prove best for OER materials since, using most OER licenses, these resources can be altered and improved over time. Indeed, determinations regarding the quality of particular OER materials may be best accomplished where longitudinal data – including, for example, usage information, user ratings, and student learning outcomes – can be considered.

#### **6. States and districts should invest in and/or support research on digital learning materials.**

Research and evaluation will assist the state and its districts in understanding the impact of digital learning materials, including OER, on teaching and learning practices and student achievement. Partnerships with institutions of higher education and research organizations, as well as philanthropic support, could be explored as avenues to assist with research and evaluation capacity. Whether conducted informally or formally, in-house or not, research also will assist schools with identifying best practices regarding the development and dissemination of digital learning materials, practices that then can be shared broadly.

#### **7. States and districts should address questions of funding implicated by the use and sharing of digital educational content.**

Although digital content may reduce certain costs associated with learning materials (e.g., printing, shipping, and, at least where the materials are licensed as OER, purchasing), funding will be required to ensure students have access to the material, not only via necessary technological devices but also with the adequate bandwidth/network access both in and outside of school. Additionally, where states or districts aim to host or support digital repositories of resources, the costs associated with storing – and, as appropriate, distributing – digital materials should be considered.

States and districts should assess the costs, and costs saving, associated with digital learning materials when setting budgets. States also should assess and, as appropriate, update their regulations and guidance governing local spending – for example, by enabling greater flexibility for instructional materials in local budgets.

### **Conclusion**

The increasing presence of digital educational materials and resources used, created, shared, and modified by educators necessitates the thoughtful consideration of appropriate state and district policies, both to reflect and to inform this development. Policy refinement can be initiated by various state actors, depending on state contexts. To best facilitate the use and sharing of quality digital learning materials, state and, as appropriate, district policy must address the question of ownership and approved use of digital content at the outset. OER and corresponding licensing options offer one promising approach for answering this foundational question.

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