

## 3.3: Terminology Toolkit

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### Context

This resource is based upon the IPR Terminology Toolkit created by the JISC-funded Web2Rights Project ([www.web2rights.org.uk](http://www.web2rights.org.uk)) and adapted for SCA sponsors and other organisations across the public sector. It is intended to form part of a toolkit, which can be further adapted to suit specific requirements and issued to content creators and content users across the public sector who are responsible for rights management and rights clearances. This paper can be used as a guide to understand the different licence terms that a public-sector body may encounter when presented with a rights-related contract.

**‘Acceptable Use Policy (AUP)’** is a set of rules, which the owner of the web-based technology will specify must be complied with by the user. The purpose of the AUP is to minimise exposure of the owner/operator of the technology to legal liability for behaviour of users (such as defamatory comments).

**‘Accessibility Laws’** in the context of e-content and web-based technologies, means the requirement through such legislation as the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) to ensure that websites are accessible to and usable by all users regardless of ability or disability.

**‘Arbitration’** is a process for settling disputes out of the formal court system (although appeals against a decision made by an arbiter can be made to a court on limited grounds). A neutral arbitrator is generally appointed to hear the evidence and decide the dispute. Arbitration is often considered to be cheaper and quicker than court litigation.

**‘Assignment’** in England and Wales, **‘Assignment’** in Scotland, is, in this context, the transfer of IPR in action by one person (the assignor) to another (the assignee). Having assigned the IPR, the assignor has no further legal title in the IPR. An assignment **MUST** be in writing to take legal effect and be signed.

**‘Clinical Content’** includes clinical content, such as photos of patients, in which the patient can be identified.

**‘Commercial exploitation’** is exploitation for financial return, or an equivalent consideration. There is considerable ambiguity in this term such that it is not possible to give a precise definition; for example, is material placed on a free-of-charge website for ‘commercial exploitation’, as it may directly or indirectly lead to increased income for the organisation? Some licences may attempt to define the term more precisely.

**‘Contempt of court’** includes the failure to abide by a court order such as an injunction (interdict) prohibiting a particular course of action.

**‘Content’** can include printed content, content on floppy disk, websites, online databases and CD-ROM, and can comprise any combination of text, still images, moving images, artistic works, drawings, maps, photographs, collections of data, sound, music on any medium, and might include hypertext links, tags and other material produced as a result of reviewing and rating. Content can be produced by individual authors or may be the result of collaborative effort between two or more individuals.

**‘Contract of employment’** means the contract between the employer and employee setting out the rights and obligations of the parties. The employment relationship is also subject to the broader regulatory framework governing such matters as non-discrimination, termination of employment etc.

**'Cookie'** refers to information that a website puts on your computer so that it can remember you the next time you visit the site.

**'Defamation'** is the publication of a statement that lowers the standing of a person in the eyes of right-thinking members of society. The defamation can be in any form – such as words or pictures.

**'Due Diligence'** is the documentation of any number of reasonable searches undertaken to try and find rights holders for works protected by copyright. It is often used as a defence in instances where rights holders cannot be traced or are unknown ('orphan works').

**'E-security'** refers to the laws and technologies involved in keeping information secure on the web.

**'Exclusive'** refers to the restriction imposed upon the licensor in being restricted in not being able to grant others the same rights as those granted under the terms of the licence nor being able to exploit the materials for the same purpose themselves. The licensee (the person to whom the licence is granted) is the only person who will be able to exercise the rights granted under the licence.

**'Exploit/exploitation'** is offering the content to third parties to use for their own purposes. The third party will be able to exploit the content within the terms of the licence.

**'Force majeure'** is a condition beyond the control of the parties such as war, strikes, floods, power failures, destruction of network facilities, etc, which was not foreseen by the parties and which have prevented performance under the contract. Most licences build in provisions that any party's failure to perform any term of condition under the licence due to a force majeure will be excused and the failure to perform in those circumstances will not be deemed a breach of the Agreement.

**'Freedom of Information'** means the policy and attendant regulatory framework that allows individuals to obtain information from public-sector bodies.

**'Incitement of Racial Hatred'** refers to any act that directly or indirectly incites racial hatred, which is a criminal offence.

**'Indemnities'** are the protection or insurance offered by the party making certain assurances outlined in the 'warranties' that these have been met. If these obligations are not met, they will indemnify (ie pay) the other party for any losses, expenses, actions, liabilities etc with which they might be faced. Warranties without indemnities are of limited use; therefore each warranty should be accompanied by a corresponding indemnity.

**'In perpetuity'** refers to the duration of the terms of licence, which are granted without end.

**'Intellectual Property Rights' (IPR)** includes patents, Trade Marks (whether registered or not), design rights, database rights, copyright and confidential information/trade secrets. Patents, Registered Trade Marks and registered designs are obtained only through a formal application process. Copyright, database rights and confidential information/trade secrets are created automatically without any formal process. Intellectual Property (IP) is the name given to the rights that protect creations of the mind.

**'Irrevocable'** means that the terms of the licence cannot be revoked by either party. This term is often used when royalty-free licences are granted.

**'Libel'** means the writing or printing of a defamatory statement.

A **'licence'** is a formal authority to do something that would otherwise be unlawful. In this context, it refers to a licence by the owner of IPR to copy, adapt, etc, content or technology even though copyright law prohibits such copying without authorisation. Unlike assignment, the owner of the IPR remains its owner and, depending on the terms of the licence, may be able to continue to do whatever they like with the IPR.

**'Licence fee'** can be included in the main clause or in a separate Schedule. It is important to ensure that any licence fee is an inclusive fee, covering everything that will need to be paid for and that 'hidden' costs cannot be charged at a later stage. However, it is acceptable to have VAT charged separately to the all-inclusive fee.

**'Limitation of liability'** means that the financial or legal liability of a party or both parties is limited instead of open ended (sometimes a fixed amount is given) in the event that the terms of the licence are breached.

**‘Moderation’** means the process whereby the ISP or other party watches over content posted on a Web 2.0 technology by third parties and removes inappropriate/unlawful content. The moderation policy is most often underpinned by an acceptable use policy.

**‘Moral Rights’** mean certain rights given to the creator of some copyright works, including literary works, artistic works and films. The first is the right of the author of a work to be acknowledged as the author or creator. The second is the right to object to his or her name being attributed to something he or she did not create. The third is the right not to have his or her work subjected to ‘derogatory’ treatment, ie treatment of the work (or copies of the work), which is detrimental to integrity or reputation.

**‘Negligence’** refers to the doing or failing to do something that a reasonable and ordinary person in the circumstances would do or not do. It is conduct that falls below the standard that has been established by the law for protecting others from harm. It requires three major elements to be proved:

- The defendant breached that duty by failing to conform to the required standard of conduct
- The defendant had a duty to the claimant
- The defendant’s negligent conduct was the cause of the harm to the claimant.
- It must also be shown that the claimant was in fact harmed or damaged.

**‘Non commercial’** refers to uses which do not directly or indirectly gain monetary or financial rewards or benefits.

**‘Non exclusive’** refers to the ability of the Licensor to also grant others the same rights as those granted under the terms of the licence.

**‘Not for profit’** refers to uses that might derive monetary or financial rewards or benefits, but for which profit is not generated.

**‘Notice and Take-Down’** means the procedure whereby notice is given to an organisation of unlawful content (such as material infringing copyright; defamatory statements) hosted by the organisation, which is then removed by the organisation reducing liability for making the content available.

**‘Orphan Works’** refers to works where the rights holders for works still in copyright cannot be traced or are unknown.

**‘Personal data’**, within the data protection regime, personal data are data about living identifiable individuals.

**‘Publication Scheme’** means the procedure under the UK Freedom of Information Acts whereby public-sector authorities must make information publicly available in a number of classes including: information on the public authority and what it does; what is spent by the public authority and how; and the priorities and performance measures of the public authority. If information is not included in a publication scheme an individual may still make an individual request.

**‘Recitals’** are a set of paragraphs that give a brief overview of what is intended to be achieved by the licence. Their role is to form a brief record of the parties’ objectives and the factual context in which the licence was originally written for use when, at some date in the future, the licence comes to be interpreted when disputed.

**‘Royalty’** is a recurrent payment for, for example, the right to exploit copyright in a particular work.

**‘Royalty Free’** means that the granting of the licence is without payment or financial remuneration.

**‘Sensitive personal data’** within the data protection regime means data that discloses any of the following about a living identifiable individual: racial or ethnic origin; political opinions or persuasion; religious beliefs or other beliefs of a similar nature; trade union membership or affiliation; physical or mental health or condition; sexual life; commissioned or alleged commission of offences; any proceedings for any offence, committed or alleged, including any sentencing decisions made by the court.

**‘Slander’** means words, speech or gestures of a defamatory nature.

**'Staff'** includes staff, research associates, technicians, or any other members of staff who are employed under a contract of employment (whether fixed term or permanent). It does not include freelancers or volunteers, since they do not have contracts of employment. It also does not include students, researchers or any other members of the general public who enter the establishment and make use of any of its services or exhibitions.

**'Tagging; reviewing; rating; favouring'** refer to terms used to describe methods to highlight, refer to, flag, sort, order or rate content that exists on the web.

**'Termination'** refers to the mechanism or circumstances upon which the licence terminates. The licence will often specify when it might terminate, such as due to expiry of the term or due to a breach. If a party materially breaches the agreement (fails to carry out their essential tasks under the agreement) the agreement can be terminated by the party not in default. If this happens there will often be provisions in the agreement to remedy such breach within a certain timeframe. If the breach is not remedied within the given period the agreement will automatically terminate and the party not in default can sue the other for damages.

**'Warranties'** are the guarantees that a specific party to the licence gives that certain obligations have been met or that they have sufficient rights to grant the licence. These might include, for example that 'the IPR is owned by or duly licensed to the licensor'. An ambiguous warranty is one that says that the licensor is 'to the best of its belief or knowledge' the owner of the copyright in the licensed material. The words 'best of its belief' create a heavy burden of proof on the licensee as the licensor might honestly but misguidedly believe he/she was entitled to grant the licence. Typical warranties are: that the licensor owns the IPR in the materials, or is authorised to act on behalf of the owners; that the materials offered do not infringe any third-party's IPR; and that the content does not break any laws, such as those of defamation, data protection, anti-terrorism legislation, pornography, etc.

#### Please see also:

Giavarra, E. (2000) Licensing Digital Resources: how to avoid the legal pitfalls, *Serials: The Journal for the Serials Community*, Volume 13, Number 2 / 1 July 2000, pp 111–19. Available at: <http://uksg.metapress.com/app/home/contribution.asp?referrer=parent&backto=issue,11,20;journal,23,60;linkingpublicationresults,1:107730,1>

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