

1.2: Web2.0 and IP Factsheet

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Context

This resource is based upon the *IPR Toolkit* created by the JISC-funded Web2Rights Project (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.

What is Web 2.0?

There is no agreed definition for Web 2.0, but most people use the term to cover the use of applications that involve web pages and which involve the networking and sharing of information, including data, text, images, moving images, sound recordings between two or more individuals, who may be anywhere in the world, ie users generating and distributing content, often with freedom to share and reuse.

In alluding to the numbers that commonly designate software upgrades, 'Web 2.0' (incorrectly) hints at an improved form of the World Wide Web, whereas it is a range of applications on the web. Blogs, social bookmarking services, wikis, podcasts, RSS feeds and social software all provide enhancements over read-only websites and are considered typical Web 2.0 applications. Web 2.0 websites allow users to do more than just retrieve information. They can build on the interactive facilities of 'Web 1.0' to run software applications entirely through a browser. This is in contrast to traditional websites, which limit visitors to viewing and the content of which can only be modified by the site's owner.

Web 2.0 websites typically include some of the following features/techniques:

- Folksonomies (in the form of tags for example)
- Syndication, aggregation and notification of data in RSS feeds
- Mashups, merging content from different sources, client- and server-side
- Blog publishing tools
- Wiki or similar software

Web 2.0 Across the Public Sector

The potential uses of Web 2.0 in the public sector are just now starting to be explored and the possibilities, particularly in using the technologies (which are already familiar to many) for the delivery of teaching and research materials, for the exploration of collections and for interaction between administrators and curators and their patrons, are extremely wide.

What is Intellectual Property?

The term 'intellectual property' covers a range of legal protections for things created by the human mind. Intellectual Property Rights (IPR) provide an incentive for innovation. In the case of copyright, for example, through the grant of a limited property right in creative works, so the owner of the copyright can exploit these rights and gain a reward from third parties who wish to use the works. In this way the creator is said to have an incentive to create more works and thus obtain more reward. In return the public interest is satisfied through having a wide range of works available for entertainment and education, parts of which may be used to build upon to create yet more works. Thus copyright serves both public and private interests.

Patents

These prevent any third party from making, using, selling or importing an invention without the permission of the patent owner for the duration that the patent is in force. Patents have to be applied for and are costly to obtain and then maintain. Their maximum lifetime is 20 years from the date when the patent was first applied for.

Copyright

Unlike patents, copyright is granted automatically and does not involve an application process. Copyright protects the skill and effort expended in creating something new, and protects literary works, images, music, moving images, films, TV and radio broadcasts, sound recordings and databases, amongst others. Copyright and/or the closely related database right protect all websites. The lifetime of copyright is typically 70 years after the death of the creator, although this will vary between content types. In some instances, such as unpublished text-based works, copyright can last until the end of 31 December 2039, irrespective of when the work was created.

Unlike the other forms of IPR, there are significant exceptions to the monopoly rights enjoyed by a copyright owner, allowing third parties to copy, adapt and disseminate copyright materials under certain controlled circumstances, eg for non-commercial research or private study. These, however, are limited within contexts in which works are either communicated or made available to the public, such as online use, Virtual Learning Environments or intranet usage. Other exceptions include:

1. Making temporary copies for inclusion of materials
2. Fair dealing for non-commercial research or private study
3. Fair dealing for criticism or review
4. Fair dealing for news reporting
5. Incidental use
6. Exceptions for visually impaired persons
7. Things done for instruction
8. Things done for examinations in education
9. Anthologies for educational use
10. Copying broadcasts in educational establishments
11. 11. Library and archive exceptions, including copying, document supply and preservation copying
12. Parliamentary and judicial proceedings
13. Statutory inquiries
14. Material open to public inspection
15. Material communicated to the Crown
16. Public records
17. Acts done under other statutory authority, eg Freedom of Information
18. Special permissions for computer software and databases

19. Assumptions that can be made about the age of a work
20. Public reading or recitation
21. Abstracts of scientific and technical articles
22. Folksongs
23. Advertisements of artistic pieces for sale
24. Lending rights for libraries
25. Time shifting of broadcasts

The precise details of what may be copied and under what circumstances vary from exception to exception. In each case, though, assuming one abides by the particular ground rules that apply to the exception, one can mount a successful defence against an allegation of infringement.

The current review of copyright law is being undertaken by the UK Intellectual Property Office¹ as a result of the Gowers Report, and other ongoing discussions and consultations. These are likely to lead to changes to some of these exceptions, and possible brand new ones, such as format shifting.

There are a number of other rights traditionally associated with copyright but which are distinct from it, including database rights, performers' rights and moral rights.

Trade Marks

These fall into two types – Registered and Unregistered. The former involve a formal application procedure with associated fees and renewal fees, which makes it easier to take legal action against infringements. The latter involve no such procedures or costs, but provide less robust protection. Trade Marks are typically a symbol, image or word (though can in some circumstances be a shape, a colour or a combination of these) that is associated with particular goods or services provided by the owner. Both types of Mark can last indefinitely so long as the owner still actively uses them and in the case of a Registered Trade Mark so long as the fees are paid. The owner of a Registered Trade Mark has the right to take legal action to prevent third parties from using its Mark (or something deceptively similar) in the course of trade. In the case of an Unregistered Trade Mark you can take action by using the common law of passing off. To be successful in a passing off action, you must prove that:

1. The Mark is yours
2. You have built up a reputation in the Mark
3. You have been harmed in some way by the other person's use of the Mark

It can be very difficult and expensive to prove a passing off action. Registering a Mark is not very expensive and gives a much better level of protection.

Database Right

The database right will often be relevant to many SCA members' projects. The database right is in addition to the underlying copyright in technology and/or content in a next-generation project. A database is defined as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'. Examples of databases relevant to the deployment of Web 2.0 technologies would include: a collection of audio recordings; a collection of digital stories; content in a repository or a museum; a collection of TV or radio broadcasts; a collection of social bookmarking tools; or a collection of educational materials. A database would also include metadata created by the compiler of a database with a view to adding or subtracting files and datasets where they relate to the structure and arrangement of the data in a database.

¹ www.ipo.gov.uk

The owner of the database right in a database is the maker. This is the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation. In a next-generation project the maker may be the project funder, the contributors to the project and/or a combination of these entities. Only the maker(s) may give consent to the extraction and/or re-utilisation of a substantial part of the contents of a database. In other words, the consent of the maker(s) is likely to be necessary to be able to use the technology and content in the ways envisaged.

In all these types of IPR, if a third party carries out an act, which is not permitted because it is one of the monopoly rights enjoyed by the owner, then that third party has infringed the IPR of the owner. The owner is then entitled to sue for damages and can under some circumstances have the offending item(s) destroyed or passed over to it. In certain extreme circumstances, usually where the infringement is carried out in the course of a business, infringement of an IPR is a criminal act punished by fines and/or prison.

Design Rights

Design rights protect the form, rather than the function of an object, etc. Different requirements must be met in order to register a design. However, due to the amendments introduced to comply with the European Directive, the types of designs that can be registered have in some respects been expanded, eg some spare parts may be registered if they are 'complex products', provided they are visible in use (eg hub caps, car doors). Registered design right subsists for five years from the date of application (which is deemed to be the date of registration if registration is granted), and may be extended for up to five further periods of five years.

Computer icons, trading names and project names, software fonts, software-related peripherals, such as dongles and on-screen displays, are eligible for registered design protection as well as possible Trade Mark protection.

Performers' Rights

Performers' rights issues may arise in any type of performance (theatrical, musical, oral, dance or even simply a lecture). In these cases, it is important that permission from individuals is sought if a performance is reproduced in whole or in part in a Web 2.0 application, such as a podcast.

IPR Issues Raised by the Web

There is a myth around, that the internet is lawless. This is untrue. The laws relating to IPR apply to the web. This is because everyone using the internet is a real person living in a country, and that all the computers are in defined places and are subject to local laws.

However, despite the theory, the law has some difficulty in keeping up with web-based activities. Someone might punch a command into a computer in the UK, that sends a message to another computer in, say, Argentina, instructing that computer to undertake a transaction with a third computer in Russia. This leads to some data held on a server in France being transferred to another site in the People's Republic of China. Furthermore, this complex trail of instructions has been encrypted along the way, and a number of the sites have employed pseudonyms or aliases. The law in principle applies to this set of transactions, but the practical problems of identifying the perpetrator and deciding which country's laws apply are enormous. Furthermore, the laws of each country concerning the transactions may well differ significantly and policing what is going on is difficult.

Because of the ease with which materials can be copied and re-disseminated, and because of the difficulty of tracking down who is carrying out certain acts and what country's laws apply, the web poses major IPR issues. Indeed, IPR law has shifted steadily in recent decades in favour of rights owners and against users.

This poses issues to SCA members as users of materials subject to IPR, but is also potentially a benefit to them as generators and owners of IPR.

IPR Issues that are Particularly Troublesome to Web 2.0

Whilst 'Web 1.0' was about protecting the interests of the (relatively) small number of people and organisations who created content, within a Web 2.0 environment anyone is potentially a creator of content. The collaborative nature of Web 2.0 and the likelihood of international multiple contributors, has resulted in the shifting of risks and blurring of who owns copyright and who is responsible for dealing with infringements. The key IPR issues that are raised by Web 2.0 are as follows:

- Lack of clarity regarding who owns the copyright, database, moral and performers' rights in materials created collaboratively within a Web 2.0 environment by people who work within different legal jurisdictions and/or people who might not be easily traceable
- Consequential difficulties in enforcing any infringements that might occur and establishing who is liable for what and when. The liability might shift from one minute to the next from one person to the other
- Difficulty of policing any illegality that may occur
- Lack of clarity of what may be permitted under exceptions to copyright, eg in the field of data and text mining, because of a lack of suitable case law
- The approach, already common on the internet but especially so amongst users of Web 2.0 services, that copyright is irrelevant and/or can be ignored
- The risk that large corporations, seeing considerable business potential in Web 2.0 applications, apply for and obtain patents and Registered Trade Marks that will prevent otherwise bona fide activities. (For example, a US company allegedly has applied for a Registered Trade Mark for the phrase 'Web 2.0')
- Individuals developing, deploying and adapting Web 2.0 technologies often carry out this work as part of their duties as employees and therefore they have responsibilities to their respective institutions to abide by the law and work within the terms of their employment contracts
- There are likely to be a number of stakeholders at various levels, such as staff, institutions, other contributors, funding bodies and Government, and so responsibilities regarding IPR are especially complex
- Gaining permissions from third parties for the incorporation of their materials/software into a particular Web 2.0 application
- The need for moderation of applications using Web 2.0 to ensure that third-party IPRs are not infringed
- The need for appropriate terms and conditions imposed on all involved in a Web 2.0 application to ensure that IPR problems do not arise
- Moral rights issues will arise if individuals' contributions to a Web 2.0 application are quoted out of context, are misquoted, or are not correctly attributed to the originator
- Performers' rights issues arise if any performance (theatrical, musical, oral, dance or even simply a lecture) is reproduced in whole or in part in a Web 2.0 application

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