

Introduction

These FAQs and Scenarios have been created to help provide context of use for the resources formed as part of this IPR Toolkit.

FAQs

1. Do you need a ‘©’ for a work to be protected by copyright?

Copyright protection is granted automatically when a creative, original work is made. A copyright symbol is not a requirement for protection, but instead is useful in showing that work is protected. In some cases, it may be a contractual requirement with a rights holder, that you display a copyright credit line including the use of a ©.

2. Who owns the rights in works produced by students, volunteers, contractors and freelancers?

As long as they are not paid employees, such as some research students etc, the rights owned by non-members of staff will belong to the authors, unless there are contractual arrangements in place, which either assign the rights to the commissioning party, or else a licence is granted for any use of works that are created. In the case of students, they will own the rights in any work that they produce as part of their studies. This means that the reuse of any of their work will require their permission. A study carried out by JISC Legal (www.jisclegal.ac.uk) into IP and student works (see www.jisclegal.ac.uk/publications/studentipr.htm) has unveiled some complexities and possibly irregularities in the case where students assign their IP to their university or college as a condition of being accepted on to a course of study. Resources provided within this toolkit, ‘3.14 Model contractual clauses for requesting permissions from students/volunteers’ and ‘3.15 Model contractual clauses for requesting permissions from freelancers/subcontractors’ can be adapted and used to suit these circumstances.

3. Who owns the rights in works produced by staff in their own time?

Under the Copyright Designs and Patent Act 1988, the default position is that employers will own the rights in any work produced by staff for or on behalf of their organisation. This will vary according to custom and practice, as well as formal contractual clauses made between staff and their organisations. In terms of work produced by staff in their own time, this is not a straightforward answer and will depend on the nature of the work that staff are creating and whether it is directly for or on behalf of their organisation or whether there is an indirect relationship (such as articles in which they are either using their formal job titles or that they are writing as a result of their association with a particular organisation). In such cases, where there is a lack of clarity, it is sensible to treat each instance on a case-by-case basis and, moreover, ensure that there are the procedures in place for staff to discuss such issues with line managers. Clearly in cases where staff are involved in the creation

of works with no connection to their day jobs, they are likely to retain the rights and negotiation between both parties would be advisable. Template resources that might assist can be found within this toolkit: '3.12 Model contractual clauses for requesting permission from staff'.

4. If a rights holder cannot be traced, would a disclaimer provide coverage against any infringement?

The onus of responsibility to use content generated by third parties, which is still in copyright, is placed on the user of the content. This means that permission will need to be sought by way of some kind of licence agreement, unless you have a defence to an action of infringement under 'fair dealing' or one of the other exceptions. There may, however, be some cases where the rights holders can neither be traced or found (so called 'orphan works'), and in these cases it is important that if a disclaimer is used, this is in conjunction with some kind of reasonable search, a clear paper trail of what you have done to trace holders and proportionate risk management. Even if you do carry these out, it is important to remember that use of the work would still infringe, but your efforts may mitigate the risks. Furthermore, consideration of activities that might be employed if rights holders were to come forward will also be of benefit to your organisation. Further information about the possible issues, risks and actions relating to these issues are outlined in the following resources found within this toolkit: '3.1 Getting Permissions Paper' and '3.2 IPR Risk Assessments'.

5. Is playing or reproducing content from a content-sharing website or social networking site an infringement?

This will depend upon the permissions that the creator of the content has granted any users, which will normally be expressed within some kind of licence, such as a Creative Commons licence and/or a copyright statement. The lack of such a licence should be taken to mean that the content cannot be used without further permission. However, even if there is a licence to use content, reproduce and broadcast content etc, it is important that the person who is granting the licence has the authority to grant it – ie they own the rights. In some cases, people think that because they own a work, this allows them the right to both post it on social networking sites and also allow others to access it. In cases where they do not have this authority, any subsequent permissions that they grant to users will be invalid contracts. Further information about Creative Commons licences can be found in the following resource contained within this toolkit: '1.1 Creative Commons Licences – Briefing Paper'.

6. Who is liable for an infringement of copyright carried out by staff and/or students?

Some organisations will have Acceptable Use Policies or clauses within staff contracts and/or staff handbooks that spell out what will happen if a member of staff and/or a student breaks the law, which would include any infringements of third-party rights. However, despite the fact that the organisation has taken such responsibility for ensuring that staff and/or students are aware of their legal responsibilities, if any repercussions were to arise following an infringement, the organisation may still be liable as well as possibly the member of staff/student. In addition, the member of staff will be in breach of their contract with the organisation in question and subject to possible disciplinary measures, whilst students will also be subject to disciplinary actions.

7. What is non-commercial use?

The restriction of fair dealing to 'non-commercial use' was only introduced into the law in October 2003 and has caused confusion since. There is no definition in the legislation of non-commercial, neither have there been any court cases directly in point although in 2007 an English court found that the activities of a private research company amounted to commercial use where it had gained unlicensed access to the contents of a mapping database service made available only to universities and the public research communities in the UK. The company argued that it had been using the information for research – the development of a mapping tool and as the tool was not completed it was at a non-commercial stage. The court rejected the argument taking account of the eventual commercial usage of the mapping tool. The court was also unimpressed by the covert nature and extent of the copying.

The British Academy and Publishers Association has recently published guidelines on Copyright and Academic Research for researchers and publishers in the humanities and social sciences in which it is suggested that consideration should be given to the primary purpose for which the research is undertaken at the time of carrying out the research. Academic research, where the primary objective is to make material widely available for the public benefit, would ordinarily be seen as non-commercial and as such distinct from commercial research, which is undertaken either for the private purposes of a client or in the expectation of recovering the costs of the research. However, it is acknowledged in the guidelines that the British Academy and the Publishers Association 'take different views on whether any subsequent commercial publication of academic research comes within the exemption, or is rather likely to require consent or licensing in the normal way.' The British Academy believes this comes within the exemption; the Publishers Association does not.

Where an agreement regulates the rights and obligations of the parties, non-commercial may be defined in the terms and conditions. For instance, Creative Commons licences define 'non commercial' as 'not primarily intended for or directed towards commercial advantage or private monetary compensation'. However, this wording has been criticised as vague and does not seem to add much to the general law.

Further information about Creative Commons licences can be found in the following resource contained within this toolkit: '1.1 Creative Commons Licences – Briefing Paper'.

8. What are the rights issues that arise in using next-generation technologies?

The following have been identified as constituting major challenges:

- Copyright can act as a potential obstacle in the use of next-generation technologies; however, at the same time, we must engage with copyright if we want to do the right thing not only as part of our work for our projects and our institutions, but also in accordance with JISC terms and conditions of funding etc
- Copyright is part of bigger discussions about normalising the use of Web 2.0 technologies in HE/FE
- The fact that some rights holders do not recognise Fair Dealing in the digital environment, therefore the balance between rights holders and rights users is disrupted
- Orphan works pose major challenges (works for which the rights holders cannot be traced or are unknown)
- How to promote Open Access models and embedding of IP at institutional level

More information about the opportunities and obstacles associated with IPR and the web are outlined in the JISC-funded Web2Rights resources (www.web2rights.org.uk).

9. How relevant are open content licences for providing access to e-content?

Open content licences, like Creative Commons licences, are highly relevant and important licences in helping to achieve the principles of Open Access within a dynamic web environment. These licences have the enormous benefits of being delivered via the web and, in the case of Creative Commons licences, are available in three formats (including machine-readable code). As in the case of the use of any licences, it is important that they are fit for purpose and possible risks and benefits are carefully assessed prior to utilisation.

Any organisations/projects wishing to use open content licences need to ensure that they own the rights (or have permissions from any third-party rights holders) to make content available under the terms of these licences.

Further information about Creative Commons licences can be found in the following resource contained within this toolkit: '1.1 Creative Commons Licences – Briefing Paper'.

10. What are the issues arising from reusing and providing access to content whose component parts are licensed for use under different terms by a number of rights holders?

In these circumstances, the least permissive licence terms become the lowest common denominator. This means that uses of the entire content can only be made under the terms of the most restricted licences. For uses beyond these terms, permission should be re-sought for all the licensed content whose use falls beyond scope.

11. What are the legal issues arising from linking to content hosted by third parties?

Linking is a vital mechanism on the web, which creates a means by which the user can find, connect and access content. Depending upon the types of linking, there are varying rights issues which might arise:

Simple linking: this is where the user is taken to the home page of a site. It is generally accepted that this raises no copyright issues (if a reproduction is made it is made by the person who clicks on the link) and has been described as being 'analogous to using a library's card index to get a reference to particular items, albeit faster and more efficiently'. There is a tentative argument that linking could be said to be a 'communication to the public' under the Copyright Designs and Patents Act 1988 and therefore an infringement. However, this argument is untested in court and, even if found reasonable, would be likely to be met with the counter argument that the owner of the copyright in the linked-to work had given an implied licence for the act of linking.

On the other hand, linking to content that itself infringes copyright, is blasphemous, obscene, an incitement to racial hatred, a false endorsement etc is problematic. This is especially so when linking to works protected by copyright that are owned by the entertainment industry, the sector that has been behind most of the court cases. It should however be noted that these cases have concerned the most egregious examples of linking activity where links have been provided to hundreds of infringing works. Some sites, such as the BBC, include disclaimers, which state that the link is for information purposes only, although whether this would absolve the linker from liability is debatable. However, it should be noted that there have been no court cases concerning single links, which might have inadvertently been made to sites that contain infringing or otherwise objectionable content, meaning that the risk is minimal. If an objection is made, the link should simply be removed.

Deep linking: in situations where the user is taken to any part of a site that is a diversion from the home page, the website owner may have cause for grievance for a number of reasons: because the home page includes important user terms and conditions; the content may be accessible only via subscription; the home page may include sponsor information etc. If you are considering deep linking, in some situations it is advisable that either permission is sought from the website owner, or alternatively a link is provided to the home page with supplementary information about how to navigate to the required content. Perhaps the best known case on deep linking was *Shetland Times v Wills*, which took place in the Court of Session in Scotland. While no definitive judgement was handed down as the case finally settled out of court, at one point it looked as if deep linking would be classed as an infringement of copyright. However, it should be noted that the law has now changed and the category of 'cable programme' and 'cable programme service' referred to in the case no longer exist in the Copyright Designs and Patents Act 1988.

Framing: while certain types of framing are unlikely to be an infringement of copyright, framing can be, and has been classed as, unfair competition (an extended type of passing off). Framing is best avoided.

Embedded/object linking: many Web 2.0 services, such as YouTube and Flickr, provide the tools to allow users to embed links to objects on the service sites within their own websites. An example might include: a project which allows students to synchronise notes/comments with other people's audio or video recordings (played back but not saved/stored by the project), such as embedding YouTube clips of musical performances (or merely inserting links to YouTube clips) into PowerPoint slides, studying them in class, circulating slides to students after class, mounting the slides on the institutional VLE or departmental website.

In these situations, while the object is not being reproduced as such, the user is provided with a link to view the content that is still held by service servers, and the content may be 'performed' in public (in the class). While technically there may be an infringement of the performance right (and links should not be made to material that infringes copyright nor where the content may be otherwise objectionable), practicalities may dictate that a robust notice and take-down procedure should be put into place to deal with any objections that might arise.

12. What rights do participants have in their image (likeness)?

Two areas of law are relevant to the use of images, whether in video clips or otherwise. The first is breach of confidence, which has been developing into a right that might be described as a 'right of privacy'; the second is Data Protection law. Broadly, combining these two means that the image of an individual should not be used in a video clip or otherwise unless consent has been given. This is subject to countervailing interests and in particular the public interest in freedom of expression. This is an exception that is most often relied on by the press, however recent cases and settlements out of court, including those involving Sienna Miller and Max Mosely, are increasingly shifting the balance in favour of rights of individuals privacy. Where an individual does appear in a video clip then she may have performers' rights. Performers are not defined in the legislation but performance means 'a dramatic performance (including dance or mime), a musical one, a reading or recitation of a literary work or a performance of a variety act or any similar presentation'. Where the right exists, the performer has the right to object to fixation, reproduction, distribution, public performance and communication to the public of the performance without permission. Therefore if the participant can be classed as a performer, consent for these activities needs to be obtained.

13. Who owns the IPR in products produced by students for external clients?

Students are generally not considered as employees of the university and thus, unless there is an agreement to the contrary, the student will own his/her own IPR. Who owns the student IPR where products are produced for external clients will depend on whether the student has entered into any agreements with the external clients by virtue of which the student has assigned or licensed the IPR to the external client. This may take the form of specific terms and conditions within funding agreements and is likely if the student is funded to carry out research by a commercial company etc. However, note that the student needs to be a party to this agreement as it is the student who is transferring the IPR. If the student is not a party to the agreement then there needs to be an agreement between the student and the institution by virtue of which the student assigns or licences the IPR to the institution. The institution can then assign or licence the IPR to the external client.

Whilst we hope you find the contents of the SCA IPR Toolkit useful and informative, the contents are for general advice and best practice purposes only and do not constitute legal advice. Although we believe the contents are up to date and accurate as well as a true representation of best practice advice, we can give no assurances or warranty regarding the accuracy, currency or applicability of any of the contents in relation to specific situations and particular circumstances. In such circumstances, appropriate professional legal advice should always be sought.

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