

Section 1. Background papers

This chapter provides more background papers, which can be referred to when considering the legislative and licensing landscape in which content will be created, accessed and used.

1.1 Creative Commons Licences – Briefing Paper³

1.2 Web 2.0 and IP Factsheet⁴

1.3 Web 2.0 and Legal Issues Factsheet⁵

³ Based on a paper originally produced by JISC Legal in collaboration with the JISC IPR Consultancy

⁴ Based on a resource produced by the JISC-funded Web2Rights Project (www.web2rights.org.uk)

⁵ Based on a resource produced by the JISC-funded Web2Rights Project (www.web2rights.org.uk)



1.1: Creative Commons Licences – Briefing Paper

Naomi Korn and Professor Charles Oppenheim, March 2009

1. Introduction¹

Creative Commons licences (also referred to as CC licences) permit the copying, the reuse, the distribution, and in some cases, the modification of the original owner's creative work without having to get permission every single time from the rights holder. The Creative Commons licence is associated with a broad movement looking for a re-balancing of intellectual property rights legislation.

The purpose of this briefing paper is to provide content creators and other SCA stakeholders with information that can be used to make judgements as to when the use of open content licences, particularly Creative Commons licences, may be appropriate. Examples of such usage might be:

- The creation of e-learning materials by staff
- The display of holdings of museums and galleries
- The dissemination of popular material for the public
- The dissemination of broadcasts
- The output from research work (both data and text)

In addition, organisations need to know when external Creative Commons licensed materials can be used as part of their own materials and what are the limitations on the use of such materials.

This document focuses on Creative Commons licences although there are other open content licence models, including Creative Archives and AShareNet, which have comparable characteristics.

2. Open Content Licences Generally

Open content licensing is a way for the author or rights holder of a copyright work to grant a wide range of permission for use and reuse of their work via a non-transactional copyright licence, while retaining a relatively small set of rights. In other words, permission is pre-granted to the user, without requiring the user to request permission every time they wish to use the work. This style of licensing, like any other, can usually only be used on works by someone who owns the copyright in the work or otherwise has permission to do so. Those who create works can use the licences to protect their works while encouraging certain uses of them.

3. Creative Commons

Creative Commons is a licensing system under which authors or producers of a work offer some of their rights to others to reuse their work under certain specified conditions.

The licence is attached to the content and is available in various forms (see Section 4 below), allowing the rights holder to retain a level of control over how their work is treated.

¹ This paper is based upon a resource published by JISC in March 2009, which was developed by the JISC IPR Consultancy and JISC Legal

Creative Commons licences have various advantages, including ease of use, widespread adoption and familiarity, choice and flexibility, human-readable, machine-readable and symbolic representations of the licences, and a direct link between the resource and its licence.

4. Nuts and Bolts

Works created under Creative Commons (CC) licences can be copied at no charge. Furthermore, there is no fee payable for employing CC licences. They allow creators easily to grant permission for use of their works, by using user-friendly symbols. A simple set of terms and conditions enables users to recognise the types of usage the rights owner is offering.

Creative Commons licences allow rights holders to maintain a basic level of control by offering something between an 'all rights reserved' copyright licence and waiving all of their rights.

The main Creative Commons licences offer a series of 'baseline rights' together with four 'licence elements' that can be mixed and matched to produce a customised licence through a point-and-click web interface:

- Attribution (BY) – you must credit the licensor of the work;
- Non-Commercial (NC) – you can only use the work for non-commercial purposes
- No-Derivatives (ND) – you may not create adaptations of the work
- Share Alike (SA) – you may create adaptations of the work, but these must be under the same licence as this work

Attribution forms a part of all CC licences. These four elements lead to the six basic CC licences, with their common abbreviations in brackets:

- Attribution (BY)
- Attribution – No Derivatives (BY-ND)
- Attribution – Non-Commercial – No Derivatives (BY-NC-ND)
- Attribution – Non-Commercial (BY-NC)
- Attribution – Non-Commercial – Share Alike (BY-NC-SA)
- Attribution – Share Alike (BY-SA)

Jurisdiction-specific licences are available for Scotland, and England and Wales. There is not a variant for Northern Ireland at present.

Creative Commons licences are normally attached to the digital content and authorise anyone who copies the work to use it in accordance with the terms of the licence.

This means that if one user has a copy of a Creative Commons-licensed work, that user can give a copy to a second user and the second user will be authorised to use the work consistent with the original Creative Commons licence. As a consequence of this, the original rights owner has a licence agreement separately with both the first and second user. Further users are similarly able to use the work consistent with the terms of the licence.

For example Creator A authors material, which she marks as licensed as Attribution – Non-Commercial (BY-NC). Author B can use all or parts of A's material to compile their own work so long as the use is non-commercial and is attributed. B must mark his own work as (BY-NC) (or at least the parts that came from Creator A). If Author C plans to use some of B's material that consists of Creator A's work then C's use is also restricted to Attribution – Non-Commercial.

Recent developments in Creative Commons licensing have included the Creative Commons Plus² licence and the Creative Commons Zero³ licence. The Creative Commons Plus licence facilitates the add on of an additional licence on to the Creative Commons licence in order to facilitate the granting of more permissions by the content creator to the user, thus introducing greater flexibility to the type and range of permissions that are granted. Using the Creative Commons Zero licence creators are able to waive all copyrights and related or neighbouring interests that they may have over a work such as moral rights, publicity or privacy rights, rights protecting against unfair competition and any rights protecting the extraction, dissemination and reuse of data. Like all uses of Creative Commons licences, these permissions can only be granted if the creator holds the necessary rights for the work.

5. The Licence Agreement

The contractual status of Creative Commons licences differs by jurisdiction. In Scotland, Creative Commons licences are regarded as a contract.⁴ In England and Wales, for a licence to have contractual force, some form of consideration is normally necessary. Consideration ‘...may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other’ (*Currie v. Misa* (1875) L. R. 10 Ex. 153, 162). The English and Welsh licence itself specifies that:

‘...the licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.’
(<http://creativecommons.org/licenses/by-nc/2.0/uk/legalcode>)

The text of the licence itself does not refer to contract law. A valid contract in English law requires an agreement (consisting of an offer and acceptance). Acceptance is usually established by the signing of an agreement. However, even without a signature, acceptance can be inferred by the conduct of the person who has been made the offer. So, if that person carries out their side of the agreement, then a valid acceptance can be implied and a contract is formed.

Whether the acceptance and consideration criteria are met in any particular case will depend upon the actions of the parties involved. If it is tested in court and it is determined that the conditions are not sufficient to have formed a valid contract, it is likely that the Creative Commons licence will be unenforceable.

6. A Policy Decision

Organisations need to be able to both license-in materials from outside as well as to control how their own materials are used.

Sharing resources amongst similar organisations makes sense financially, and there are many policy reasons to do so. Digital resources produced by publicly funded organisations are a valuable asset to the community. Many people in the sector believe that access to and use of these digital resources could be better and that the wider use of open content licences would help to improve the situation.

Creative Commons licences enable organisations to release electronic materials to the wider community. This attitude of creating and sharing knowledge resonates with the culture of the sector.

7. What Your Organisation Should Know

Below is a non-exhaustive list of factors to be considered before deciding to implement the use of Creative Commons licences for materials produced by staff, volunteers or other third parties.

The Benefits/Advantages of Using Creative Commons Licences:

² <http://wiki.creativecommons.org/Ccplus>

³ <http://labs.creativecommons.org/license/zero>

⁴ www.jonathanmitchell.info/cc/cc_sco_licence.html

- **Simple Legally** – They provide a quick solution to the complexities of content licensing by content creators and rights holders

For example Content creator Z can attach symbols to the electronic version of his work and those who access the content will know what rights they have to copy and then use the material.

- **Easy Sharing and Re-use of Information and Resources** – SCA members may need to adapt and develop resources to meet different requirements from that intended by their original creators. The Creative Commons derivative work licence allows materials to be reused in this way
- **Flexibility** – Creative Commons licences are available in three formats, including machine-readable code, which can be processed by search engines. This is also useful for tracking licence usage
- **Improved Access** – Digital resources produced by publicly funded organisations are a valuable asset to many communities. Access to, and easy use of, these digital resources could be better; the wider use of open content licences would help to improve the situation
- **Administrative Simplicity** – One of the benefits of Creative Commons licences lies in their ability to be clearly and simply administered. Creative Commons licences allow some level of control, but without introducing a need to manage complex variants. The flexibility of the Creative Commons icons system enables individual works within a large collection to carry different licence terms. This avoids having to grant a licence for all items in a collection and means some components can be more freely used than those governed by more restrictive licences. This removes the need for lengthy negotiations. Creative Commons licences are also non-transactional and so using content issued under a Creative Commons licence removes the requirement for requesting permission from the rights holders every time a work is used

The case against:

- **Uses and Reuses** – Creative Commons licences may be unsuitable for certain types of outputs. Organisations may wish to permit certain types of reuse of the licensed material but not necessarily all. Unfortunately, the Creative Commons licences do not make such subtle distinctions. The non-derivative licences do permit incorporation of material into larger works, but once a licence grants derivative use, there is no control over subsequent reuse
- **Third-party Content** – Creative Commons licences cannot be used to make material available for which third parties own the rights, unless they have explicitly granted permission for this use. Where there is unauthorised use of third-party content, this will invalidate the licences. Because of the viral nature of Creative Commons licence distribution, an organisation that has made outputs available under a Creative Commons licence may find it difficult or even impossible to withdraw this material if an infringement of this type has occurred, and possibly face penalties. These additional risks will need to be assessed and managed
- **Uncertain Legal Status** – There is some lack of clarity with regard to the enforceability of CC licences. A licence must satisfy local law and its validity will vary according to the legal jurisdiction by which it is tested. There is also some uncertainty about the legality of using Creative Commons licences in the context of authenticated or restricted access services
- **Modification** – The consequence of permitting others to use materials within the terms of the Creative Commons licence is that they will be able to copy, use and adapt the work. Risks arise that the work might be substantially modified in ways that the creator or licensor feels would undermine the work's integrity. CC licences offer a stark choice – permit no reuse or agree to unlimited reuse
- **'Commercial' or 'Non-commercial'** – One of the main issues with Creative Commons licences is whether a resource can be used for 'commercial' or 'non-commercial' purposes. Unfortunately, the licence itself does not clearly distinguish the difference. Organisations providing purely commercial services need to clarify whether material licensed in this way will be available to them. If an organisation plans to sell materials at some date in the future, it should not offer them with a CC licence at any stage
- **Irrevocability** – The irrevocability of the Creative Commons licences represents another lack of flexibility for institutions that might otherwise adopt these licences. There are a number of scenarios where rights owners initially made available a resource on the basis of a Creative Commons licence and subsequently wished that all copies had been licensed in accordance with a different licensing regime. If this scenario is a real possibility, then CC licences should not be used

- **Databases** – The Database Right is not explicitly covered in the Creative Commons licence, which might cut off a range of resources to this form of licensing. The Creative Commons licences are not entirely clear about whether extraction from databases is permitted or not. A great deal of the reuse of material is for this purpose, and this may operate as a constraint on the adoption of Creative Commons licences in some circumstances.

8. Issues for Staff and Employers

- Staff are often in favour of people reusing their material. However, often it is not clear whether or not their employer owns the copyright in the work. Some staff see themselves as the owners of the rights because of the way content is created. If the organisation has a policy of using Creative Commons licences for work produced by staff, this might go some way to resolving these issues. Uncertainty can largely be avoided by the organisation having an intellectual property policy that provides clarification with regard to the ownership of rights in staff-produced work
- Where staff-produced work involves collaboration with commercial partners, it is likely that agreements will have been reached in advance with the commercial partner with regard to the ownership of the intellectual property rights created as a result of this work. This may restrict what sharing can subsequently be done by means of Creative Commons licences. Materials that are expected to generate commercial gain are unlikely to be suitable for Creative Commons licensing. Equally, because some Creative Commons licensed material may already be restricted to non-commercial use, it is necessary to ensure that third-party materials obtained through a CC licence to be used for commercial activities are indeed available for such commercial use
- Funding bodies may insist that output from funded work is made freely available, and the Creative Commons licences offer a way of complying with such a requirement
- The licences reflect a different spirit to many other forms of licences. They allow minimal levels of control over freedoms to use copyright works, rather than allowing limited permissions. This fits well with the general ethical and philosophical stance of the SCA community, and is a significant reason why Creative Commons has penetrated the sector both in terms of finding support and of the usage of CC licences by rights holders
- One of the main attractions of Creative Commons licences is their simplicity. The ease with which they can be placed on digital materials will help people who create such materials
- When someone who is developing content wants to incorporate material that has been licensed under Creative Commons into their own materials, it is essential that the anticipated reuse complies with the terms of the licence. If it is expected that these materials will be put to non-Creative Commons licensed use, it may be appropriate to use another form of licence arrangement for the materials or to use home-made materials
- A Creative Commons licence cannot make infringing material lawful. If a section of material is included in Creative Commons licensed work for which there was no licence or other permission to use it in the first place, then this may be copyright infringement. The Creative Commons licence is invalid with respect to the infringing elements of the licensed work and any additional use of the infringing elements is likely to be a further breach of copyright.

Conclusion

Creative Commons and similar licensing frameworks are a significant development and have valuable potential application in fulfilling the need for wide and unobstructed access to electronic materials as well as a flexible and enabling approach to the use and reuse of outputs and materials.

Although Creative Commons may be suitable for many applications, this may not be the case where commercial considerations and third-party rights issues are present.

It is recommended that organisations should evaluate the use of Creative Commons licences carefully case-by-case, and should not assume that it is automatically the right or wrong solution. At the operational level, those who are using the licences need to understand copyright issues and rights management. Getting the right version of the licence for the particular material is important and the way ahead, it is suggested, is to experiment through practical usage, while closely monitoring the outcomes and the risks that arise along the way.

At a strategic level, committing to the irrevocable terms of Creative Commons licences raises issues of broader access and commercial goals for organisations. The use of Creative Commons licences should be a policy decision and should form part of the overall intellectual property policy of organisations, where the full implications can be examined and understood.

Further Reading

Sources used in the compilation of this briefing paper include:

- Study into the use of Creative Commons licences and similar model licences within HE and FE contexts – Final Report – commissioned by the Joint Information Systems Committee (JISC) and produced by Rightscom and managed by the IPR Consultancy/Rightscom Limited – 24 February 2007.
- The Common Information Environment and Creative Commons: Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences (Intrallect Ltd and AHRC Research Centre for Studies in Intellectual Property and Technology Law, The University of Edinburgh October 2005) – www.intrallect.com/cie-study.
- Creative Commons Licences in Higher and Further Education: Do We Care? Naomi Korn and Charles Oppenheim discuss the history and merits of using Creative Commons licences whilst questioning whether these licences are indeed a panacea – www.ariadne.ac.uk/issue49/korn-oppenheim.
- Intellectual Property Rights in e-Learning Programmes: Good practice Guidance for Senior Managers (July 2006) – Higher Education Funding Council for England (HEFCE) – www.hefce.ac.uk/pubs/hefce/2006/06_20.
- Snapshot Study on the Use of Open Content Licences in the UK Cultural Heritage Sector (November 2007) – Eduserv – www.eduserv.org.uk/foundation/studies/cc2007.
- TrustDR: Trust in Digital Repositories <http://trustdr.ulster.ac.uk>

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1.2: Web2.0 and IP Factsheet

Naomi Korn and Professor Charles Oppenheim, March 2009

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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1.3: Web 2.0 and Legal Issues Factsheet

Naomi Korn and Professor Charles Oppenheim, March 2009

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. This paper provides a brief overview of some of the other types of legal issues that public-sector bodies may encounter when engaging with e-content.

General

There are many legal ramifications that need to be addressed by public-sector bodies when dealing with e-content, the risk of which increase with Web 2.0 engagement. These issues include defamatory, race hate, terrorist-encouraging and pornographic materials being posted, identity theft and privacy/data protection. The overview below provides a brief summary of some of the key issues.

Data Protection

If you are dealing with information about individuals then you will need to consider the Data Protection Act 1998. This Act applies to personal data about living, identifiable individuals. Thus, if you collate information about users (for instance people contributing to a wiki), which might include personal details such as name and email address, then the Data Protection Act will apply.

The Act imposes obligations on the data controller. A data controller is the organisation that makes the decisions as to how and why personal data is to be processed. Processing data includes reading, using, amending, storing and deleting the data. Even where the information is passed to a third party to be processed, the data controller will remain liable for the obligations under the Data Protection Act where the controller is the entity that specifies what should be done with the data during processing. If you use, store and/or delete information about the users then it is likely you fall under the definition of data controller.

Data Protection Principles

The Act requires the data controller to act in accordance with eight principles:

- Personal data shall be processed fairly and lawfully
- Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes
- Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed
- Personal data shall be accurate and, where necessary, kept up to date

- Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes
- Personal data shall be processed in accordance with the rights of data subjects under this Act
- Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data
- Personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data

Sensitive Personal Data

Where personal data is 'sensitive', then the data controller has additional responsibilities. Data becomes sensitive if it includes any of the following types of information about an identifiable, living individual:

- Racial or ethnic origin
- Political opinions
- Religious beliefs
- Trade union membership
- Physical or mental health
- Sexual life
- Commission of offences or alleged offences

In general, consent to processing such data can only be granted with explicit written consent of contributors obtained before processing the data.

Any plan developed for the purposes of defining the organisation's copyright strategy can be used to define a data protection strategy. For a most useful Data Protection Compliance Check List, see: www.ico.gov.uk/upload/documents/pia_handbook_html/files/DP_checklist_final.doc

Retrieved from: www.web2rights.org.uk/team/wiki/index.php/Copyright_strategy

Freedom of Information

Public-sector bodies are subject to the Freedom of Information Act 2000 (or, for Scottish-based institutions, the Freedom of Information (Scotland) Act 2002). This requires institutions to have adopted a publications scheme, giving details of routinely produced information and how it may be obtained, and it requires institutions to supply information upon request (subject to certain exceptions).

Further information on the Freedom of Information legislation is available in the JISC Legal Freedom of Information Act 2000 Overview paper (www.jisclegal.ac.uk/freedomofinformation/freedomofinformation.htm) and the JISC Legal The Freedom of Information 2000 Essentials paper (www.jisclegal.ac.uk/freedomofinformation/FOIEssentials.htm).

Accessibility

Accessibility laws are in place to ensure that services are accessible by users with disabilities. The Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) requires service providers (including those offering education services) to ensure the accessibility of their services by users with disabilities. This includes a proactive duty to consider accessibility, and a requirement to make reasonable adjustments where necessary to allow access. Although the legal duty applies in relation to users with disabilities, accessibility should be seen in a positive light as benefiting all.

Prevention of Terrorism

The Terrorism Act 2006 aims to outlaw incitement to terrorist activities and will include incitement through websites and email communications and is of relevance to the educational sector. The Terrorism Act 2006 contains a comprehensive package of measures designed to ensure that the police, intelligence agencies and courts have the tools they require to tackle terrorism and bring perpetrators to justice. Although not specifically information technology related, new criminal offences have been created including:

- Acts Preparatory to Terrorism
- Encouragement to Terrorism
- Dissemination of Terrorist Publications
- Terrorist training offences

Many of these crimes may be committed or facilitated by computer use and public-sector bodies should play their part in ensuring that such crimes are not committed or facilitated on their computer systems. Reporting suspicious activity to the police is essential.

Universities and colleges are being urged by the UK government to take seriously the problem of extremism on their campuses. Practical guidance has been issued, which points out universities and colleges responsibilities within the law and clarifies the legal position (www.dfes.gov.uk/pns/DisplayPN.cgi?pn_id=2006_0170).

E-Security

This is generally taken to mean the laws and technologies involved in keeping information secure. Issues that may arise and their relationship to specific legal regulations include:

- The lawful interception of data under controlled conditions (The Regulation of Investigatory Powers Act (2000) and Regulation of Investigatory Powers (Scotland) Act (2000) (RIPA) and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (Lawful Business Regulations))
- Security of personal data (Data Protection Act 1998)
- Regulating the information to be made available via cookies and other tracking devices (The Privacy and Electronic Communications (EC Directive) Regulations 2003 (the Anti-Terrorism Crime and Security Act 2001))
- Also of relevance are the Prevention of Terrorism Act 2005 and the Terrorism Act 1996 (which permit orders to be made in specified circumstances prohibiting the use of inter alia the internet), and the Human Rights Act 1998.

Incitement of Racial Hatred

Inciting either racial or religious hatred is a criminal offence. Publishing and disseminating online materials that are likely to incite such hatred is also a criminal offence. As corporate entities, public-sector bodies have a responsibility not to publish and disseminate racist materials in any format including electronically. As well as the likely reputational damage, public-sector bodies have a general statutory duty under the Race Relations Act 1976 (as amended) in carrying out their functions, to consider the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between people of different racial groups. Incitement to racial hatred is governed by section 21 of the Public Order Act 1986, whilst the Racial and Religious Hatred Act 2006 makes it illegal to threaten people because of their religion, or to stir up hatred against a person because of their faith. It is designed to fill gaps in the current laws, which makes it illegal to threaten people on the basis of race or ethnic background. This Act extends to England and Wales only.

Retrieved from "www.web2rights.org.uk/team/wiki/index.php/Obscenity%2C_Libel_etc"

Retrieved from "www.web2rights.org.uk/team/wiki/index.php/General_Issues_Paper_%28this_information_is_based_upon_resources_created_by_JISC_Legal%29"

Defamatory, Obscene and other Unlawful Content

Of particular concern to the providers of next-generation technologies may be the potential liability for hosting infringing material (for example if contributors post defamatory or obscene material or works which infringe copyright). The E-commerce Directive and Regulations provide for some immunity against liability for a service provider that hosts, caches or acts as a conduit for unlawful content so long as certain criteria are met. Broadly the service provider who hosts or caches unlawful information will not be liable for damages or for any other pecuniary remedy or for any criminal sanction so long as they do not have actual knowledge of the unlawful activity or information and is not aware of facts or circumstances from which it would have been apparent that the activity or information was unlawful. Neither should the service provider have had a hand in transmitting or in any way altering the information. Please note that the E-Commerce Directive and Regulations do not apply to ISPs located outside the European Union. So if the plan is to use an ISP located in the USA, make sure that the service complies with USA legislation.

Although the rules are somewhat complex (for instance they do not state what is meant by expeditiously, nor how actual knowledge is obtained by a service provider), in general service providers have sought to mitigate liability that might arise by putting into place a notice and take-down procedure and by making the service subject to specific terms and conditions (which usually exclude liability of the service provider). Such terms and conditions can be found on the website of the service provider. Most notice and take-down procedures provide that when a service provider receives notice that allegedly infringing material is on the site and/or on the equipment operated by the service provider, then the material is removed. While instituting such a procedure is good practice, there are factors that providers of Web 2.0 technologies within the public sector might like to consider:

- The procedure for taking down allegedly infringing material. Will any investigation be made as to the identity and provenance of the complainer prior to removing the material?
- Put-back procedure. Will the service provider consider instituting a 'put-back' procedure whereby the material is automatically re-instated should it be found to be non-infringing?

A number of jurisdictions are starting to require service providers to install filtering software (dealing notably with material that infringes copyright) in order to maintain immunity from suit. Whereas liability in these cases tends to arise where the provider of the next-generation technology is profiting from a business model that infringes copyright belonging to third parties (such as a service that makes clips of videos available whilst profiting from advertising revenue), some thought might be given to the possibility of building filtering tools in educational Web 2.0 technologies.

Contempt of Court

Although perhaps less likely to arise than the other issues with regards to the legal issues arising from engagement with next-generation technologies, disregard for the authority of the courts of justice, eg ignoring a court order, is a criminal offence.

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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