

Web2Rights

Licence Terminology Toolkit

'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, **'Assigment'** 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.

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

'Content' can include printed content, content on floppy disk, web-sites, 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, rating and favouriting. Content can be produced by individual authors or may be the result of collaborative effort between two or more individuals.

'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. 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.

'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 (i.e. pay) the other party for any losses, expenses, actions, liabilities etc they might be faced with. 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.

'Institution' refers to a Further or Higher Education institution as construed under the Further and Higher Education Act 1992.

'Intellectual Property Rights' (IPR) includes patents, trade marks (whether registered or not), design rights, database rights, copyright and confidential information/trade secrets. Patents, registered trademarks 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 is the name given to the rights which protect creations of the mind.

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'Irrevocable' means that the terms of the licence cannot be revoked by either party.

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.

'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.

'Recitals' are a set of paragraphs which 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 Free' means that the granting of the licence is without payment or financial remuneration.

'Staff' includes academic staff, research associates, technicians, or any other members of staff of the HEI who are employed under a contract of employment (whether fixed term or permanent). It does not include freelancers since they do not have contracts of employment with the educational establishment, undergraduate students, or postgraduate students (whether taught or research based), unless the student has a contract with the educational establishment.

'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 time frame. 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 to its belief' create a heavy burden of proof on the Licensee as the Licensor might honestly but misguidedly believed 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 also see:

Giavarra, E. (2000) Licensing Digital Resources: how to avoid the legal pitfalls, *Serials: The Journal for the Serials Community*, Volume 13, Number 2 / July 01, 2000, Pages: 111 – 119. Available at <http://uksg.metapress.com/app/home/contribution.asp?referrer=parent&backto=issue,11,20;journal,23,60;linkingpublicationresults,1:107730,1>