

Web2Rights

Making Informed Decisions: Risk Management

Identification of risks associated with the project

Properly identified and managed, it should be possible to secure appropriate permissions from those contributing directly to the project. However more tricky are the decisions to be made in relation to third party content should it not be possible to secure permission for use, such as where some rights holders cannot be found or unknown.

Using content/technology without permission

In the event that permission cannot be obtained to use a work, most commonly because the owner cannot be found through reasonable enquiry, then it will be a matter of assessing the level of risk to the project as to whether the work should be used.

Factors to bear in mind:

- If the work is to be used in a commercial context (i.e. to generate financial gain) then a rights owner who later becomes aware of the use of their work may be more likely to pursue an action for infringement of copyright than if the work is being used for educational purposes.
- The risk of using, without permission, a third party work that is vital to the project might be considered high. An example might be where a next generation technology is to be adapted from an existing program. In these circumstances it may be preferable (even if more time consuming) to program from scratch.
- The nature of the content that you wish to use, for example, the rights in high value content, such as commercially produced films, music and software, are likely to be actively enforced, infringements sought out and acted upon.

To mitigate these risks, the project might consider instituting a notice and take down procedure, investigating liability insurance and considering whether technical controls might be deployed

Notice and take down

Whether or not the project will be shielded from liability by the provisions in the E-commerce Directive which provides that a service provider will not be liable for infringing content so long as that infringing content is taken down once notification is given of its presence, instituting such a procedure would be good practice. One of the tremendous benefits of working within a Web environment is that content can be swiftly removed.

Clear instructions should be given as to where and to whom notification of allegedly infringing content should be sent, along with details of the complainer, the complainer's interest in the matter and where the complainer can be contacted. Processes should be put in place to act expeditiously on such a notification. While the E-commerce Directive does not require content to be replaced if the notice is challenged, it may be good practice in the academic community to investigate the complaint and, if it turns out to be frivolous, re-instate the content.

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"TAKE DOWN NOTICE"

In the event that you are the owner of the copyright in any of the material on this website and do not consent to the use of your material in accordance with the terms of conditions of use of this website, please contact us and we will withdraw your material from our website forthwith on receipt of your written objection and proof of ownership."

Liability insurance The possibility of taking out liability insurance to cover the risk of being sued for infringement of copyright (or investigating whether such insurance exists for example in terms of the general insurance policy of an academic institution) should be investigated. Most higher education institutions in the UK have a professional indemnity insurance but it is important to check if the project and the use of the material in connection with the project is covered. Each project partner will have to check this unless the consortium agreement says otherwise.

Technical protection measures As part of the planning process for the project, decisions will be needed as to how the technology and content is to be made available – whether freely available to all or only from behind technical protection measures/password protected sites/ for use by the academic community. While the route chosen will not change liability should copyright be infringed (i.e. infringing content behind a password protected site will still infringe) the circulation of the content is more limited where circulation/distribution of content is restricted by technical controls. Where circulation is limited to the academic community, this could inform decisions as to, for example, whether an orphan work should be used; or if fair dealing for the purposes of non-commercial research would form a creditable defence to an action for infringement

What happens if it all goes wrong?

The risk that seems to worry Web 2.0 project developers most is that of being sued for infringement of copyright. In the event that an owner of copyright did sue, the legal remedies that they could seek include:

- Damages: The measure of any damages granted would be, so far as possible, such as to put the copyright owner in the position as he would have been had the infringement not happened. Within a Web 2.0 environment this will be difficult to establish as the sharing is potentially endless and the chance to stop the sharing even smaller than within a closed environment;
- An injunction/interdict: An order to stop infringing the work and/or to refrain from infringing again in the future;
- Delivery up of infringing copies.

Sometimes rights holders do not sue and instead may no longer trust you and/or the organisations affiliated with your project. Infringement of rights can also cause damage to reputation and the possibility of further ramifications relating to removal of services and/or funding.

Ultimately, it is important that you are both proportionate about possible risks, whilst at the same time prepare suitable mitigating strategies in the eventuality that a rights holder does come forward. Whilst not all rights holders will employ legal remedies, an apology and promise of swift action to rectify can go a long way!

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1) Case Study One

Photographer approaches University X stating that there are photographs on the University website in which he owns the copyright. Photographer has not given permission for these photographs to be used. University X takes down photographs immediately. Photographer demands money from University X for the use of the photographs. University X points to the Notice and Takedown provisions in the E-commerce directive and Regulations whereby they are absolved from liability if content is removed as soon as they know it infringes copyright belonging to a third

Party (although this is not necessarily permitted by the E-commerce Directive). Photographer argues that the provisions do not apply to University X (or any other University) and he will raise an action. Photographer also states that there are many other owners of the copyright in creative content on websites owned by University X (and other Universities) being used without permission and who are watching this case with interest and will be contacting the University shortly with their own demands. Photographer raises an action in the local court. Due to the importance of the case not only for University X, but also for other Universities, University X requests that the lower court remit the case to the higher court. Lower court agrees. Photographer drops the action and has not been heard of since.

2) Case Study Two

Commercial Image Supplier approaches University Y stating that several images up on their website infringe copyright, and appropriate fees should be paid. University Y originally sourced the images from the internet and had not sought permission for images to be used in the first place. University Y does not respond. Very shortly after this, Commercial Image Supplier demands immediate take down. University Y does not respond. Commercial Image Supplier swiftly sends University Y an invoice for several times the initial amount and threats of naming and shaming. The University Y liaises with in-house legal team, who have not been contacted until this point and the payment is settled.