

Web2Rights

FREQUENTLY ASKED QUESTIONS

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2. Do you need a “©” for a work to be protected by copyright?
3. Who owns the rights in works produced by students?
4. Would a disclaimer cover my project against an infringement??
5. Is playing a video from YouTube in a classroom an infringement?
6. Can resources be used again by staff who move institutions?
7. Who is liable for an infringement of copyright carried out by students?
8. What are the rights issues that arise in using next generation technologies?
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11. What are the rights issues arising from tagging, reviewing, rating & favouriting?
12. What are the legal issues arising from linking?
13. How far does copyright cover “generic” website/service layout?
14. What rights do participants have if their image (likeness)?
15. Who owns the IPR in products produced by students for external clients?
16. Can events be recorded in the virtual world and who would own the IP?
17. What is non-commercial use?
18. What is the status of works created collaboratively?

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1. Does copyright really matter in a Web2.0 environment?

Nature of copyright Copyright does matter. We are all both users of other content, as well as potential publishers ourselves. Copyright therefore matters to us as creators of works. Since it is a fundamental issue about mutual respect, it should also matter to us as publishers of others works. Copyright is as much about ownership, reuse and control as it is about preserving and encouraging good relationships and working practices.

Web1.0 v. Web2.0 Whilst Web1.0 was about managing who created content, within a Web 2.0 environment anyone is a publisher. 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 any infringements of copyright and ultimately who is responsible for infringements. NB: Web2.0 is not just about user generated content, but also the use of social networking sites, shifting platforms of delivery, ePortfolios, the web as an active interface etc.

The Law The Law has not, however, changed who is responsible, and copyright is amongst a suite of other legal issues which will also need to be considered, such as data protection, obscenity, defamation and libel.

Understanding risks Since Web 2.0 applications are very public, the key issues are to determine the pragmatic approaches to minimize harm and risk and also ensure that approaches are taken to avoid missed opportunities. Risks to be considered also include non legal risks and it is important to build a subtle understanding of risks in different sectors, such as Universities paying retrospective licence fees and the negative impact upon restricted budgets. Publishers, music industry, films and image suppliers are likely to be active in enforcing their rights; a good example is the Ordnance Survey which is very active in enforcing its rights. In addition, it is important to recognize that universities could also sue each other for infringements of rights particularly when involved in collaborations with commerce. Risks may not be those that projects can choose to take –projects may be subject to terms and conditions of funding which stipulate that all third party rights require clearance – therefore any infringement of copyright may also be a breach of contract!

Staff responsibilities Individuals developing, deploying and adapting Web 2.0 technologies are often carrying 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. Within any project, there are likely to be a number of stakeholders from various levels, such as project staff, institutions, funding bodies and Government, and so responsibilities towards copyright need to flow from a top down and bottom up approach to ensure respect towards rights holders, and also ensuring that stakeholders are not unduly affected by any ramifications from issues that may arise from copyright etc.

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2. 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 ©.

3. Who owns the rights in works produced by students?

As long as they are not paid employees, such as some research students etc, students will own the rights in any work that they produce as part of their studies. This means that if you wish to reuse any of their work, you will need to ask their permission. A study carried out by JISC Legal www.jisclegal.ac.uk into IP and student works (see <http://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 being accepted on to a course of study.

4. Would a disclaimer cover my project against an infringement??

The onus of responsibility to use content generated by third party rights is placed on the user of the content. This means that you will have to get permission 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 you use a disclaimer, this is used in conjunction with some kind of reasonable searches, a clear paper trail of what you have done 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 investigations would act to mitigate the risks.

5. Is playing a video from YouTube in a classroom an infringement?

This will depend upon the permissions that the creator of the video has granted any users, which will normally be expressed within some kind of licence, such as a Creative Commons licence. However, even if there is a licence to use content, reproduce and broadcast content etc associated with a video, it is important that the person who is granting the licence has the authority to grant it – i.e. they own the rights. In some case, 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 licences that they grant will be invalid contracts.

6. Can resources be used again by staff who move institutions?

This type of issue will depend upon the terms of any institutional IP policy in place at the institution in which staff were based when they created the original resources. Employers will normally own the rights in any works produced by employees for or on behalf of their employer. However, in some cases, employees may have created the resources during their own time and not as part of their work, and in these cases, they may own the rights in any resources. If in doubt, it is recommended that policies are checked and if necessary, managers are consulted.

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7. Who is liable for an infringement of copyright carried out by students?

Usually Higher and Further Institutions will have in place Acceptable Use Policies that spell out what will happen if a student infringes copyright during the course of studies. However, if, despite the fact that the institution has taken such responsibility for ensuring that students are aware of their responsibilities regarding IP, the students do infringe IP, the Institution may still be liable as well as the student. The student will, in addition, be in breach of their contract with the institution in question.

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, our institutions, but also in accordance with JISC terms and conditions of funding etc
- Copyright is part of bigger discussions about normalizing the use of Web 2.0 technologies in HE/FE
- The fact that some rights holders do not recognize 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?

9. What are the rights issues arising in Second Life in using student works?

In terms of rights, the best place to start would be to break down the content into layers of rights and ensure that there were appropriate permissions for each thus:

- Model releases from student
- Permissions from authors/creators of screen shots, videos and transcripts
- Permissions from any other creators of third party generated content identified within the mixed media

Beyond the permissions required, there are indeed ethical questions about using student contributions in this way, such as:

- Are the students fully apprised of what they are letting themselves in for?
- What will happen to the content on second life?
- Who will be using it and for what purposes?
- Who will have access to that content? (stories about future employers seeing contributions on Facebook spring to mind)
- Do the students know anything about the Policy & Guidelines, including the Terms of Service, of Second Life?
- What about data protection issues? Is sensitive personal information likely to be disclosed? How will Second Life deal with their personal information?

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- What happens if a student wants content removed? Can he/she request that this is done?
- Does the student have any control over how the content is made available?

10. How relevant are Creative Commons licences for Web 2.0 projects?

These are highly relevant and important licences in helping to achieve the principles of open access within a dynamic Web2.0 environment. They have the enormous benefits of being delivered via the web and 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 utilization.

Any projects wishing to use CC licences, need to ensure that they own the rights (or have permissions from any third party rights holders) to make content available under the respective CC licence.

11. What are the rights issues arising from tagging, reviewing, rating & favouriting?

Tagging, reviewing, rating and favouriting are all terms used to describe different types of methods used to highlight, refer to, flag, sort, order or rate content that pre-exists on the web. The likely end result of any of these will be some kind of user generated content. This content, where it consists of single words, will not be protected by copyright. Where there are full sentences/paragraphs (which may occur with reviewing) then copyright may subsist in the text. Copyright is unlikely to subsist in the typographic arrangement (if it subsists in the web page at all - see other FAQs) as the content would only make up a small part of the whole of the site. Database rights are unlikely to subsist in the collection as the investment is not of the right kind. Thus permission will seldom be needed to re-use this content. However, and as many users may be unaware of the underlying law and thus hesitant to re-use this content, a statement in the Terms and Conditions of Service that it may be freely re-used is likely to give the user the necessary comfort.

12. What are the legal issues arising from linking?

Linking is a vital mechanism on the web which creates a means by which the user can find and gain access to 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 giving an implied licence for the act of linking. However, linking to content which itself

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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 which are owned by the entertainment industry, the sector which 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 which 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 which is a diversion from the home page, the web site 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 web site 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, 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 which 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 which infringes copyright nor where the content may be otherwise objectionable) practicalities may dictate that a robust

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notice and take down procedure should be put into place to deal with any objections that might arise.

13. How far does copyright cover “generic” website/service layout?

Copyright might subsist in the typographical arrangement of a website but it is not clear as the law refers to a 'published edition' and no court has yet decided whether a website is a 'published edition'. Copyright will subsist in each of the component elements most likely as literary or artistic works. Other elements, such as the name, mark or symbol might be protected as trade marks - either registered or unregistered. A mark which has a small R in a circle next to it will be registered (it is unlawful to use this symbol if the mark is not registered); an unregistered mark might have a small TM next to it. Reproducing an entire webpage will infringe copyright (although not necessarily the trade marks). Recently Microsoft objected to screen shots of their web pages being used without authorisation by a third party. There are of course generic practices and accessibility issues which may result in certain elements of a site, such as the copyright statement on the bottom of the page, or the search button on the top right corner, looking very similar. These need to be distinguished from the layout of a site which is unique to a specific service/company etc. You should not start to design a site by deliberately copying the layout of another. That way, even if your website ends up looking like another site, if you have not copied it, you will not be liable for infringement.

Practical steps forward to dealing with this issue also include:

- Checking website terms and conditions to check for any restrictions
- Seeking permission where necessary
- Finding something else to use where permission is already granted
- Possibly taking the concept of the required website and executing it differently, making sure that no key elements are copied

14. What rights do participants have if 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. 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.

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15. 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 licenced the IPR to the external client. This may take the form of specific terms and conditions within funding agreements and are 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.

16. Can events be recorded in the virtual world and who would own the IP?

The ownership of rights in the virtual world will depend upon the terms and conditions of service of the site which is being used. In the case of Second Life, Linden Labs permits users to retain all copyright and other IP rights, as long as a licence is granted to Linden Labs for reuse of this content. As in the case of most Web 2.0 derived content, there are likely to be layers of rights arising in a recorded event, and ideally the permission of each owner of content (or avatar) should be sought in writing prior to the recording being made, with explicit permission requested as to the type of subsequent purpose of the recording.

17. 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 have 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

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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.

18. What is the status of a work created collaboratively?

In any Web 2 project where many individuals are involved in creating works which are protected by copyright, it is possible, and indeed likely that the works will be ones of joint authorship and joint ownership. The rules on each are set out below.

Joint authorship

There are three conditions for the subsistence of joint authorship:

- Each of the authors must have contributed to the making of the work although that does not have to be in equal proportions
- The work must have been produced through a process of collaboration between the authors which can take place over long distances (e.g. internet)
- The respective contributions must not be distinct or separate from each other but must merge into an integrated whole – no author should be able to point to one bit and say ‘that is mine’.

For copyright to arise the correct ‘creative’ effort must be expended by each author and in addition, each contribution must have become an inseparable element of the work. Excluded from joint authorship are assistants such as persons who scan hard copy content into digital form, operate word processors, and make minor editorial changes and additions to the original work as they do not expend the correct creative effort. On inseparability, if it is possible to look at the work and attribute one part to one author (such as part of the content of a website) and another part to another author (such as the illustrations included within a website) then no joint authorship will arise in the work as a whole. It is important to note that in the UK there is no need for joint intention to create a joint work for joint authorship to subsist. Joint effort in furtherance of a common design is enough.

Joint ownership

Within the UK a work of joint ownership is one which is ‘produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

Joint authorship may result in joint ownership of the underlying work by the joint authors. However, that is not necessarily the case. Where legislation vests ownership of the

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copyright in an employer then it is possible for the employer to be the owner (if all authors are within the one Institution) or a co-owner (if the authors are in different Institutions). Further it may be that ownership will vest in one (or more) joint authors on the one hand, and an employing Institution on the other.

As can be seen, the situation could become complex with many individuals involved in a project, resulting in a combination of individual and employer owned rights. A consortium agreement between Institutions and any individuals is one of the most effective ways of resolving these issues because it provides the tool for specifying clearly where ownership of the works created during the course of the project will lie.