

Web2Rights

Copyright Strategy

Developing a copyright strategy to deal with your rights issues

In developing, deploying and adapting next generation technologies and content, a copyright-related strategy should be in place from inception of the project. This will underpin the project, help in achieving the project's goals and minimise specific copyright-related risks as far as possible.

This strategy will be important for projects which are:

- Developing next generation technologies and content
- Deploying next generation technologies and content
- Adapting next generation technologies and content

There are three areas to consider in developing a suitable strategy:

1. *The scope of the project*
How the technology and content is to be used over the short and long term and possible sustainability issues
2. *Authorship and ownership of the copyright in the technology and the content*
Identification of the person/entity who may give permission for the re-use of the technology and content
3. *Identification of risks associated with the project*
The level of risk and how risks might be mitigated
(see http://www.web2rights.org.uk/documents/Making_informed_decisions_-_risk_management_v1.doc)

1. *The scope of the project:*

What are you doing?

- Decide at the outset on the short, medium and longer term goals for the development and use of the technology and the content and plan how those goals will be achieved.
- Identify all the uses and audiences (such as educational; commercial; jurisdictional extent) and forms (e.g. conversion of content from one form to another; migration to different platforms; making available in a different resolution) that will be made of the technology and content.

This type of breakdown will enable the preparation of a full list of the types permissions that will be needed from contributors to the project and for the use of third party material.

What permissions do you need?

The acts restricted by copyright and for which permissions need to be secured from the creators of the works or other rights holders are:

- Reproduction (copying the work)
- Issuing copies to the public
- Rental or lending the work to the public
- Performing, showing or playing the work in public
- Communicating the work to the public (e.g. making content available over the Internet, or through handheld devices)
- Broadcasting the work

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence
Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice

Web2Rights

- Adapting the work

Key points to remember:

- The onus of responsibility to clear copyright lies with the user of the content and not the rights holder.
- When copyright is pre-licensed (such as content pre-licensed under a Creative Commons Licence), permission to use the protected work may cover all or just some of these restricted acts.
- Permissions may also be limited in time, geographically and/or for certain uses. It is therefore important to ensure that the permissions that you have been granted match those that you need for your project's requirements.

What types of work are involved in the project?

You need to identify the types of works attracting protection that will be developed and for which permission needs to be secured.

Copyright protects works created by authors including

- Literary works (e.g. books, articles, software; contributions to wikis)
- Dramatic works (e.g. plays)
- Musical works (e.g. scores)
- Artistic works (e.g. pictures, photographs)
- Films (moving images, or stills derived from moving images)
- Typographic arrangement
- Broadcasts
- Sound recordings (such as podcasts).

Key points to remember:

- Digital copyright protection is no different in the web environment, just easier to infringe!
- Many works will have a number of different copyright issues associated with them, because there may be content produced by more than one rights holder.

2. Authorship and ownership of the copyright in the technology and the content

In any project where technology and/or content is developed, deployed or adapted, matters of authorship and in particular of ownership of rights must be clarified. This is so permissions can be secured from the appropriate individual or entity for use and exploitation.

Steps

- Identify those directly involved in the project (academic staff, students, research assistants, consultants etc.).
 - If academics, investigate the copyright ownership strategy of collaborating academic Institutions.
 - If consultants or freelancers, ensure that suitable agreements are in place to ensure that any work that they create can be freely used by your project
- If the project is in receipt of external funding consider the terms of that funding.
- Determine whether third party content is to be incorporated
- Decide whether outside technologies are to be used and/or adapted.

a. Those directly involved in the project

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence
Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice

Web2Rights

- It is essential to identify the author, and in particular the owner of the rights in the constituent elements of the project (content and technologies) to ensure that the appropriate individual(s) or Institution(s) give consent in respect of the use works developed for the project. Only the owner(s) of the rights may give permission for use of the works in ways that would otherwise infringe the law.
- The author of copyright is the first owner and thus the person able to give permission for the use of the work. This is except where she is an employee acting in the course of employment. If this is the case, then the first owner will be the employer and thus the entity whose permission must be secured for use of the work.
- The owner of copyright may assign copyright in works to a third party. The third party will be the owner of the copyright and the person who must enter into the permissions agreement.
- An academic Institution may have policies on ownership of copyright belonging to academic staff and/or students. For instance the Institution may assert copyright ownership in works developed by students during the course of their studies. In this case, it is the Institution that must give consent to use the works.
- The development of next generation technologies and content are characterised by input from multiple sources and thus result in multiple authorship and ownership. Where the separate contributions in a work are not identifiable or separable the resultant work will be one of joint (multiple) authorship and ownership of the copyright. Ownership could thus vest in a number of individuals and/or a combination of individuals and legal entities. Permission needs to be secured from each joint owner.
- A project may build upon a pre-existing work (technology and/or content) in which copyright subsists and so permission should be secured from the first owner(s). For example if you want to adapt an existing web2technology, permission would need to be secured from the owner(s) of the copyright in the first program.
- Moral rights. Consider also the moral rights of attribution and derogatory treatment. The moral right of attribution (identity) requires to be asserted before it can be infringed. The right to object to derogatory treatment can be waived (as can the right of attribution). Do copyright authors (rather than owners) wish to be identified and to be able to object to derogatory treatment?

b. External Project funding

Ensure that the project complies with JISC terms and conditions of funding. These will include the ownership of rights in the final output and specify that the outputs are made available under open access and/or open source principles. These obligations need to be taken into account when securing permissions from contributors to the project to ensure that the funding conditions can be met and appropriate consents obtained.

c. Third party content

If third party content and/or technologies are to be used, a strategy must be developed to ensure appropriate permissions are sought and the terms of permissions adhered to. Where using third party content permissions should be obtained and copies kept. It is important that any licence given is confirmed in writing and not only covers the permitted uses, for how long it can be used, warranties of copyright ownership by the licensor and who is liable for what in case something goes wrong. For a case study on digitising copyright and the licence used see <http://ahds.ac.uk/creating/case-studies/tracing-copyright/>). Where copyright is assigned (ownership is transferred), then the assignment needs to be in writing. Copies of assignments and licenses should be kept and reviewed periodically to ensure that the content is being used in accordance with the permissions.

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence

Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice

Web2Rights

Key points to remember:

- Establish a permissions register or rights tracking database to ensure that the types of permissions granted can easily be reviewed.
- Although seeking permission may be costly and time-consuming, this is not a defence to an action for infringement...the onus is on you to clear rights, although there may be circumstances in which the use of third party works will not be an infringement of copyright and/or a defence may be available (see below).
- A work which is outside the term of protection may be freely used and adapted in any manner or form without the need to seek permission from the owner of the copyright. The term of protection for authorial works (literary, dramatic, musical and artistic works and films) is 70 years after the death of the author. For derivative works (sound recordings and broadcasts), the term of protection is in general 50 years after the making available of the work. To find out whether/when an author died, similar searches could be conducted as for Orphan Works (see below).
- Remember that works may include more than one layer of copyright, and so copyright may well have expired in one aspect of the work, but still be active in other parts.
- Ideas, facts, short phrases and titles are unprotected and may be freely used without infringing copyright. (Note that a short phrase or title might be protected by way of a registered trade mark. If so, use by an unconnected third party will only infringe if that use impinges on the essential function of a trade mark, which is to guarantee origin).

Defences to an action of infringement

1. Works of unknown authorship

If the copyright owner cannot be found by a reasonable inquiry and the date when the copyright expired is uncertain, but it is reasonable to assume that the copyright has expired then, if the work is used, the user will have a defence to an action of infringement. This defence is only available in those cases where it is reasonable to assume that the copyright has expired.

2. Fair dealing

There are certain defences available to an action of infringement of copyright where a substantial part of a work is used. These are:

- non-commercial research,
- private study,
- reporting current events
- criticism and review

Thus, for example, if third party content is used for the purposes of non-commercial research then fair dealing may mean that a defence is available to an action for infringement that would not be available if the same work was used for the purposes of, for example, administration.

For a defence to succeed the use of the work must both fall within one of the specified categories and be fair. While it is commonly assumed that the defences are relatively narrow, they have been little tested in the educational environment.

3. Orphan works

An orphan work has been described as a work protected by copyright, but where the current owner of the copyright is unknown or untraceable by reasonable enquiry. There is currently no British

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence
Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice

Web2Rights

legislation that would permit the 'free' use of orphan works if the owner cannot be found (i.e. there is no defence to an action of infringement should the owner be subsequently identified and object to the use), nor any definition of 'reasonable enquiry'.

Avenues to investigate in search of the owner of copyright in a work might include:

- A Google search
- Copyright licensing agencies:
 - The British Copyright Council (BCC) <http://www.britishcopyright.org/>
 - Copyright Licensing Agency (CLA) <http://www.cla.co.uk/>
 - Design and Artists Copyright Society (DACS) <http://www.dacs.org.uk/>
 - Authors' Licensing and Collecting Society Limited (ALCS) <http://www.alcs.co.uk/>
 - Educational Recording Agency (ERA) <http://www.era.org.uk/>
 - Newspaper Licensing Agency (NLA) <http://www.nla.co.uk/>
- Office of Public Sector Information (Crown Copyright) <http://www.opsi.gov.uk/advice/index.htm>
- Public and academic libraries and other possible owners of the original works

If you exhaust the lines of enquiry but are unable to find the owner of the copyright the risk may be one worth taking. (Note below for notice and take down procedures).

d. Using third party technologies for content

If third party technologies are to be used to make content available, it is essential to determine what provider of the technology says about ownership/use of intellectual property in works placed on the site.

Key points to remember:

- Read the terms and conditions of the site that you are using.
- If staff/students/contributors to the project use these technologies they too will be bound by these terms which may differ as between applications.

For example, Linden Lab (Second Life) terms and conditions state the following:

'... you understand and agree that by submitting your Content to any area of the service, you automatically grant (and you represent and warrant that you have the right to grant) to Linden Lab: (a) a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and license to (i) use, reproduce and distribute your Content within the Service as permitted by you through your interactions on the Service, and (ii) use and reproduce (and to authorize third parties to use and reproduce) any of your Content in any or all media for marketing and/or promotional purposes in connection with the Service...' <http://secondlife.com/corporate/tos.php>

Developing a licensing strategy

There will thus be a range of individuals and entities who own copyright in elements of the project, both in works produced as a result of the project, and works fed into the project.

These could include:

- Individuals acting in their own capacity, such as consultants
- Academics
- Academic Institutions
- Funders
- Students
- Volunteers

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence
Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice

Web2Rights

- Third parties
- A combination of the above in the event that joint authorship and ownership arises.

The permissions obtained for the use of protected works should dovetail with the scope of the project and the funding conditions. In other words, the permissions obtained should be those needed to make the technology and/or content available in line with short and long term goals.

Project generated content and technologies: licensing strategies

- The copyright owners could assign the copyright (transfer ownership) to the entity in charge of the project (or funder if required), waiving rights to attribution and to object to derogatory treatment. While this would consolidate all rights in one entity the copyright owner would no longer be free to use the work.
- The content and/or technology could be made available by the copyright owner under a Creative Commons (cc) licence. The most simple cc licence to manage would be attribution only, although this will depend upon the level of control required by the project and how far permissions allowing for this type of usage could be secured from third party rights holders
- The copyright owner could grant a non-exclusive irrevocable licence to the project (or funder) to use the work for all purposes associated with the project. This would allow the copyright owner to continue to use the work for other purposes.
- The copyright owner could grant sufficient permissions to the project for the project to attain its goals.
- The copyright owner could dedicate its creation to the public domain by issuing a statement to that effect. An example of such statement is available from Creative Commons (<http://creativecommons.org>).

Key points to remember:

- It is crucial that terms of funding are complied with
- There is compatibility between the permissions granted and those secured from third party rights holders
- Only choose the licence to make your deliverables accessible, which is most compatible with the project's aims and objectives. Not all licences will be fit for purpose.

Third party materials

The extent of the licence for the use of third party materials will depend on the relationship between the project and the copyright owner, the extent to which the owner is prepared to license use of materials for the project and what conditions will attach to that permission. As suggested above, to the extent possible, the licence form itself should be simple but it is important that it establishes a legally binding and enforceable contract.

28 March 2008

© HEFCE, 2008. This paper is licensed under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence
Version 1.1

www.Web2Rights.org.uk

The contents of this paper are for information purposes and guidance only. They do not constitute legal advice