IPR Toolkit
Overview, Key Issues and Toolkit Elements
JISC, British Library, BBC, National Health Service, Becta, and Museums, Libraries and Archives Council working together to fully realise the potential of e-content for all users. For more information on the Strategic Content Alliance, please visit:

www.jisc.ac.uk/contentalliance

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1 Based on a paper produced by JISC Legal in collaboration with the JISC IPR Consultancy
2 Based on a resource produced by the JISC-funded Web2Rights Project ([www.web2rights.org.uk](http://www.web2rights.org.uk))
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4 Based upon a paper produced by the JISC IPR Consultancy on behalf of the JISC IPR Working Group
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9 Based on resources produced by the JISC-funded Web2Rights Project ([www.web2rights.org.uk](http://www.web2rights.org.uk)) and modelled on the JISC Model Licence
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12 Based on resources created within the HEFCE 'Intellectual Property Rights in elearning programmes’ report
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17 [www.web2rights.org.uk](http://www.web2rights.org.uk)
Section 1. Introduction and overview of the toolkit

This chapter provides an overview of the key issues to understanding the role and importance of Intellectual Property Rights and licensing within an e-content framework

1.1 Why, what, who...?

Why are IPR and licensing issues important to public-sector bodies?
Intellectual Property Rights (IPR) and licensing issues will be central to the creation, sharing and delivery of e-content, amongst sponsors of the Strategic Content Alliance (SCA) and other public-sector organisations. However, the complexity of rights and permissions associated with the broad range of e-content held by public-sector bodies, plus the necessity for succinct processes, documentation and staff awareness to manage such issues, means that access and use of e-content may not always be optimised. In typical circumstances where public-sector bodies are likely to generate their own IPR, as well as be responsible for providing access to IPR owned by third-party rights holders, it is important that these issues are addressed in order to maximise opportunities and also remove potential barriers in the sharing of e-content within and across the public sector.

The SCA IPR Consultancy, led by Naomi Korn and Professor Charles Oppenheim, has been dedicated to identifying the optimal legal, technical and organisational structures that can lower barriers and allow its sponsors to take advantage of opportunities for effectively using internet technologies to provide access to e-content.

This work has included the creation of an interoperable IPR framework of best practice, outlined in this guide, which takes into account the eclectic nature of content that is generated and held by the sponsors of the SCA.
The types of e-content that are typically encountered, owned and generated by public sector bodies include a combination of both born-digital and digital surrogate material, including:

- Research data and derived data
- Photographs and images
- Audio visual material such as broadcasts, footage, sound recordings and film
- Journals, books, newspapers, policy documents, and other print material
- Ephemera (postcards, posters, flyers etc)
- Archival and unpublished material such as manuscripts, letters and diaries
- User-generated content
- Databases
- Multimedia

Much of this content, particularly in digital form, will combine various different varieties of content-types.
Crucially, the length of copyright protection, the heterogeneity of this content and the likelihood of mash-ups and creations of media-rich works, will result in multiple layers of rights, owned by a diverse range of rights holders.

For example, a piece of music found on iTunes may include the words, which will be protected as a text based work, the music, and the recording of the piece. All will potentially be protected by copyright and may require permission for reuse from more than one rights holder.

Rights holders can include any of the following and a combination thereof located across international jurisdictions:

- Public-sector bodies themselves
- Creators
- The Crown
- Licensing agencies and other nominated agents and administrators
- Business and other sectors
- Non-staff and other third-party rights holders

However, out of all these, a growing and unresolved issue for public-sector bodies remains the vast quantity of culturally, historically and academically valuable works, usually of low commercial value, for which the rights holders are unknown or cannot be traced, [so called 'orphans works']. A recent survey of 503 respondents across the public sector, carried by the SCA and the Collections Trust, has revealed the figure to be around 5–10% of all works, which at a minimum extrapolation, would amount to 25 million works across the cultural heritage sector alone. Evidence pulled from the SCA IPR Case Studies also reveals that in most digitisation projects, the costs of identifying and negotiating with rights owners exceed the costs of acquiring the actual licences.

Dealing with copyright-protected works and, specifically, those that might be classed as 'orphan works' reinforces the importance of basic IPR and licensing literacy across the public sector. In particular, the effective management of rights needs to be supported by standard forms, documentation systems and high levels of staff awareness about copyright and risk management. This is important in order for public-sector bodies to make informed decisions to take full advantage of their content, providing public access and reducing risks. Certainly, rights management should be seen as an ongoing process within a broader IP ecosystem of events, workflows and standards, rather than an occasional, one-off event.

1 www.collectionstrust.org.uk
Who is this toolkit for?
This toolkit, aimed to raise levels of IPR and licensing literacy across the public sector, has been produced by Naomi Korn and Professor Charles Oppenheim on behalf of the Strategic Content Alliance.

It has been written for a range of people working across the UK public sector who are involved in:
- The daily management and/or clearance of rights
- The management of staff and/or projects who are involved in managing and/or clearing rights
- Establishing or responsible for setting corporate policies
- Establishing or responsible for setting policies regarding the provision of public-sector funding
- The negotiation and/or receipt of public-sector funding
- The procurement of contracted services and/or skills

It is primarily aimed at non-experts who are likely to have some kind of involvement with IPR and licensing issues as part of a broad range of other activities in which they are involved. It is therefore likely to be most useful for people in small organisations/services, or those conducting small projects in larger organisations.

What is in this toolkit?
The SCA IPR Toolkit comprises a composite set of resources for use and adaptation to suit specific needs of content creators and content users across the public sector who are responsible for rights management and rights clearances. The tools provided here comprise basic building blocks to enable you to adapt and conduct your own rights management and clearance procedures. What this toolkit will not provide you with is a ready-made IPR and licensing toolkit that is specifically designed for your own requirements.

This toolkit is built upon current good practice and a starting point for further reading, which is provided in Appendix A (Bibliography). Over the course of time and in response to user requirements it is intended that these essential resources will be supplemented by further tools.

1.2 Using the toolkit
The resources contained within this toolkit have been specifically created as well as derived and adapted from a number of sources, as indicated. They can be divided into the following types of basic tools, which provide:
- The legal and legislative context of rights issues across the public sector
- Basic resources for seeking rights permissions, management of rights and assessment of risks
- An outline of proposed policy considerations, which facilitate sharing of content across the public sector

This toolkit is likely to be of benefit across the following organisations:
- Cultural Heritage
- Education
- Research
- Health
- Public Broadcasting

The tools and resources, created as templates and information resources, can be used and repurposed to suit issues such as these, whilst taking into account the following factors associated with the public-sector bodies:
- There is a vast range of organisations, staffing (and non-staffing) structures and needs
Organisations vary in their funding sources and governance structures

Many use a range of business models and sustainability activities to support their core activities

The tools are supplemented by a number of case studies, which map the flow of content, rights and value across the public sector according to a number of rights clearance models, as well as referencing how the SCA IPR Toolkit might play a role.

1.3 Navigating the toolkit

This guide contains some basic scenario use cases and a navigation map, which can provide access points to the various tools and resources.

Whilst the scenarios link back to the numbered resources, the navigation map works on the principle, established by the JISC-funded Web2Rights project, that cultural perceptions about the relevance of IPR and licensing issues associated with e-content often present greater obstacles than the issues themselves. In particular, where to find authoritative and appropriate resources and, once found, what tools should be used, when and how, can present some of the biggest obstacles to engaging fully with IPR and licensing issues.

Collectively, the scenarios and navigation map provide the types of scenarios that might arise within public-sector organisations, as well as diagrammatic workflows outlining critical points of tensions within a dynamic IP ecosystem. They also help by providing the right questions to be asked and reference to the appropriate resources to ensure that rights and permissions are dealt with.

### Scenarios

The types of uses anticipated for the tools and resources within this toolkit include the following scenarios, which have been linked to the resources in the toolkit that are likely to be of greatest benefit:

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>A researcher wishes to reproduce third-party content in an article that they are writing and wants to know how they might seek permission?</td>
<td>3.1 Getting Permissions 3.5 Top Tips for Requesting Licences</td>
</tr>
<tr>
<td>A teacher in a school wishes to play a film in class, which they have found on an online content sharing site. Would this use be legally permissible and, if not, what should they do about seeking permission?</td>
<td>3.1 Getting Permissions 3.2 IPR Risk Assessments 3.3 Terminology Toolkit 3.4 Top Tips for Issuing Licences 3.5 Top Tips for Requesting Licences 3.7 IPR Model Licence 3.8 Template Email Permissions Form 3.9 IPR Template Permission Letter 3.11 FAQs</td>
</tr>
<tr>
<td>A college is planning on digitising its students’ theses, which include a number of works for which the rights holders are unknown or cannot be traced ‘orphan works’. They would like to understand more about how any risks might be managed, where they might look to trace any rights holders and what they might do in order to carry ‘due diligence’ efforts.</td>
<td>3.1 Getting Permissions 3.2 IPR Risk Assessments 3.5 Top Tips for Requesting Licences 3.11 FAQs</td>
</tr>
<tr>
<td>A museum wishing to digitise its collection works, many of the rights in which are owned by third parties, needs to know whom should they ask for permission, how and what types of forms and permission agreements should they be using and how should they be managing the rights and permissions once granted.</td>
<td>3.1 Getting Permissions 3.2 IPR Risk Assessments 3.3 Terminology Toolkit 3.4 Top Tips for Issuing Licences 3.5 Top Tips for Requesting Licences 3.7 IPR Model Licence 3.8 Template Email Permissions Form 3.9 IPR Template Permission Letter 3.10 Rights Management Template</td>
</tr>
<tr>
<td>A funding body wishes to commission a project, but is unsure of the rights and licensing issues that might arise and what it should be considering.</td>
<td>2.2 IPR and Licensing Blueprint for Funding Bodies and Recipients of Funding</td>
</tr>
<tr>
<td>A curator wishes to document rights and permissions associated with their collections in their collections management system and would like some kind of template?</td>
<td>3.10 Rights Management Template</td>
</tr>
</tbody>
</table>

Continued overleaf...
Several public-sector bodies are working in partnership on a digitisation project. They want to establish a framework that outlines their respective roles and responsibilities, particularly regarding the ownership and use of rights that they bring to the project, as well as those that are generated as a result of the project.

3.13 Example Consortium Agreement

An archive wishes to provide access to its collections under a Creative Commons licence, but it wants clarification about whether it should use it or not, and if so, which type of licence might be the most suitable.

1.1 Creative Commons Licences – Briefing Paper

A health library is receiving funding from external sources to create a repository. However, they are unsure whether they can use the funding to seek permissions.

2.2 IPR and Licensing Blueprint for Funding Bodies and Recipients of Funding

A project manager working in a public-sector organisation wants to create an online wiki for users to contribute content, but is unsure about what measures to put in place to safeguard their organisation in case any of the content is inappropriate or infringes third-party rights.

3.2 IPR Risk Assessments
3.3 Terminology Toolkit
3.16 Template Terms and Conditions of Service

A public broadcaster wishes to record a member of the public communicating their views about a particular issue, and wants to know what type of consent they should request.

3.5 Top Tips for Requesting Licences
3.6 Model Consent

An e-learning specialist wishes to engage with next-generation technologies to create personalised learning spaces and wants to find out the types of IPR and other legal issues that might arise.

1.2 IPR and Web 2.0 Factsheet
1.3 Web 2.0 and Legal Issues Factsheet

A university wishes to create a wiki for students to upload course work and comments about work produced by their peers and would like to know whether they need to seek students’ permissions if they wish to reuse any of the content uploaded.

3.1 Getting Permissions
3.5 Top Tips for Requesting Licences
3.11 FAQs
3.14 Model Contractual Clauses for Requesting Permission from Students/Volunteers
3.16 Model Terms and Conditions of Service

A historic palace wants to use material produced by volunteers.

3.2 Getting Permissions
3.14 Model Contractual Clauses for Requesting Permission from Students/Volunteers

A public-sector body is considering seeking funding for a project, but is unsure of the types of rights and licensing issues that might arise and what its obligations may be.

2.2 IPR and Licensing Blueprint for Funding Bodies and Recipients of Funding

A library wishes to use photos of children on a website and would like to find out more about some of the issues as well as have access to a model consent form.

1.3 Web 2.0 and Legal Issues Factsheet
3.6 Model Consent

A teacher wishes to use photos of children on a website and would like to find out more about some of the issues as well as have access to a model consent form.

1.3 Web 2.0 and Legal Issues Factsheet
3.6 Model Consent

A web designer working in a public-sector organisation has been asked to develop an ‘Acceptable Use Policy’ but is uncertain about what this means?

3.3 Terminology Toolkit

A volunteer is producing a learning module for a public-sector organisation and wants to use content that they find on an image-sharing website, together with content found on a social networking site.

1.2 IPR and Web 2.0 Factsheet
1.3 Web 2.0 and Legal Issues Factsheet
6.5 IPR and the Web Animation

A gallery is approached by a film company to make a film on its premises. It is supplied with a standard form, but is unsure about the meaning of some of the terminology that is used.

3.3 Terminology Toolkit
3.5 Top Tips for Requesting Licences

A historic palace wants to use material produced by volunteers.

3.2 Getting Permissions
3.14 Model Contractual Clauses for Requesting Permission from Students/Volunteers

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2.2 IPR and Licensing Blueprint for Funding Bodies and Recipients of Funding
Section 1. Introduction and overview of the toolkit

Useful Links
- Web2Rights: www.web2rights.org.uk
- JISC IPR Animation: www.web2rights.org.uk
- JISC Collections Copyright: http://jisc-casper.org/contect/view/tools

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Section 2. Understanding the issues

This chapter provides more detailed information about the nature of Intellectual Property Rights and licensing within an e-content framework

2.1 IPR, Licensing and their Importance across the Public Sector

Substantial amounts of public-sector investment have taken place in digital assets, infrastructure and services to support enhanced engagement with e-content for formal and informal learning, research and skills development. There is clearly a risk that unless IPR and licensing is dealt with appropriately, content will continue to be provided within individually branded content silos, tied up in differing licensing regimes. Users will not fully benefit from the public investment that has been made in these initiatives nor participate in a Digital Britain. Overcoming these barriers, and ensuring that public-sector bodies are kitted up to deal with content use, creation and management for the future, requires a common understanding and concerted action on the part of all agencies and organisations in the field. It needs a recognition and commitment that IPR and licensing needs need to be met by implementation of a series of processes, policies and information management-related practices, such as those identified within this Toolkit.

2.2 Overview of IPR

IPR underpins any level of engagement with creative content and the Creative Industries. It provides legal protection for the fruits of human imagination, skill, invention and endeavour. Subsequently, IPR issues are prevalent within the use, creation, repurposing, alteration, transaction and dissemination of content. They will underpin to some degree public-sector engagement with content and a variety of related activities.

There are a number of IPRs that are likely to be relevant to public-sector bodies. These are likely to include:

- Copyright
- Trademarks
- Design Rights
- Patents
- Moral Rights
- Confidentiality/Trade Secrets
- Performers’ Rights
- Database Rights

More information about each of these can be found in resource ‘1.2 IPR and Web 2.0’, as well as possible exceptions to copyright, which might be used as defences to certain types of copying.

IPRs are robustly protected by the law, which means that unauthorised use may result in civil, and sometimes even criminal remedies. Whilst some IPRs are proprietary (ie can be asserted against all third parties and transferred to others), such as the ownership of trademarks, patents and copyright, others are personal or relational (ie they bind only persons in a specific and normally direct relationship).
For example:

- A performer’s right to authorise the recording of a live performance and to control the distribution of illicit recordings is personal and non-transferable except on death. An example might include the ability of a freelance lecturer to control how their lecture is disseminated, which will require their permission. This toolkit provides a model consent form which can be adapted and used to help ensure that such permission is appropriately sought.

- Computer programs may be protected by copyright (as literary works) and may also in some circumstances be patentable, particularly in the USA.

- Films or audio recordings of learning events – various rights may be owned by different persons: thus, if a film or audio recording is made of a learning event such as students performing a scene from a play, the right to the film or recording would belong to the person who made the arrangements for it (the producer), the play has separate protection as a dramatic work, and the performers must authorise the recording or filming of the performance.

- A database may have full copyright protection and/or may be protected under the specific database right. Individual pieces of data or content included within the database might each be protected by copyright and the software in which the database is built might be protected by patents. There may also be trademarks in the name of the database or its software.

Most IPR require no formalities, notably copyright is automatic, but some require registration, in particular patents. Designs need not be registered, but registered designs obtain specific and stronger protection.

### 2.3 Moral Rights

Moral rights are personal to authors. They include, for example, the right of authors of scholarly publications to ensure that they are suitably credited. The various kinds of rights are generally cumulative so that the same activity or product may be protected by more than one right and potentially all the rights will require clearance.

Moral rights were introduced in the UK in the Copyright Designs and Patents Act 1988, and therefore only apply to content created after 1 August 1989 (the date that the Act was implemented), as well as only applying to works protected by copyright. They are quite separate from the economic rights associated with copyright-protected works. The Moral right protections given under UK law are much less extensive than in other countries. In the UK they are as follows:

a) The right of attribution, ie to be identified as the author or director of a work, which depends on the author having formally asserted it. It does not apply to a computer program, works that appear in a periodical (it is not clear if that includes scholarly articles in journals), computer-generated work, the design of a typeface, or a work made for the purpose of reporting current events. In the case of works created by employees in the course of their employment, it does not apply to any acts done with the authority of the copyright owner, ie the employer or anyone to whom copyright has been transferred. It only applies to works in Crown or Parliamentary copyright if the author has previously been identified as such on published copies.

b) The right to object to a false attribution, ie not to have a work falsely attributed to you as author or director. It also applies to a false attribution of an adaptation or copy of a work. This right lasts for only 20 years after the death of the person falsely attributed as author. It is infringed by various kinds of acts of issuing copies, exhibiting, performing or showing a work to the public, or dealing with it in the course of business, either knowing or having reason to believe the attribution is false.

c) The right of integrity, ie to object to derogatory treatment. In the UK this is limited to a distortion or mutilation of a work, which the courts have considered to require prejudice to the honour or reputation of the author. UK courts are not as willing as those in other countries to accept the artist’s view of what is a distortion, but apply an objective test based on how the public would perceive it. In the case of a work created by an employee in the course of employment, when copyright vests in the employer, it does not apply to acts done with the authority of the copyright owner, except that if the employee has been identified as the author, there must also be a clear and prominent indication that the author has not consented to the treatment. It does not apply to a computer program or computer-generated work, or a work made for the purpose of reporting current events. There are also some other specific exceptions.
d) There is also a right to privacy of photographs or films commissioned for private and domestic purposes, to prevent copies being issued to the public or the work being shown in public or communicated to the public, which is regarded as a moral right.

Public-sector organisations need to be aware of the importance of respecting the moral rights of third parties, above all to ensure that they suitably credit the author of a piece of content. It may also be necessary to obtain permission or a waiver from the author in editing or manipulating content created by a third party, if it might be regarded as a derogatory treatment.

2.4 Licences

Licences are the tools to facilitate permissions to use and sometimes even access to content that is created by third parties. These permissions are normally granted by the rights holder or a third party represented to act on behalf of the rights holder. These licences can take a number of different forms, sometimes even for the same content. The most common types of licences which public-sector bodies are likely to encounter include the following.

Transactional licence
These are agreements to use content in which rights are owned by third parties, on a case by case basis.

For example:
A doctor wishes to use a graph in a research paper, which has been created by a colleague from another institution. Unless permission had been provided already, for example, via an open content licence (see below), then permission would probably be sought using an agreement for a one-off use. Template licences are supplied within this toolkit, which can provide assistance with this issue.

Open content licences
These are licences that provide the rights holder with the tools to pre-grant users’ permissions to use their content, usually under terms that place the least restrictions upon the user. There are a number of different types of open content licences, but the most commonly used and known are the Creative Commons licences.

For example:
A teacher wants to use images found in an image-sharing site for developing into online learning games. These have been licensed under a Creative Commons Attribution Non-Commercial licence. It is important that the teacher understands what can and cannot be done with the image under the specific terms of this licence.

Blanket licences
These licences refer to permissions that rights holders can grant users in advance for a number of uses of a particular piece of material, as well as permission granted by a collecting society acting on behalf of a number of rights holders granting permissions for a range of uses by a number of users.
For example:

- A gallery seeks permission from an artist to reproduce an image for online access. At the same time, they also seek permission for other uses within the gallery for which the work might be used.
- A university library pays annually for a photocopying and scanning licence, which permits staff and students to create copies of a broad range of published text-based works under certain conditions. Subscription-based agreements: these might take the form of subscriptions to specific types of resources.
- A Health Service Procurement Unit pays an annual subscription fee for access to a range of electronic resources, which can used across the Health Service.

With the potential of using and creating vast amounts of content, both singularly and also mash-ups, public-sector bodies need to be mindful of the range and number of licences they might encounter. In particular, they need to anticipate and plan for the likelihood of:

- Multiple rights
- Multiple licences
- So called ‘licence pollution’, where licences associated with one type of content are not compatible with licences issued in association with other types of content

These resources and case studies supported within this Toolkit can help to identify such issues, as well as provide appropriate entry and starting points for managing the associated information.
Section 3. 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 Paper

1.2 Web 2.0 and IP Factsheet

1.3 Web 2.0 and Legal Issues Factsheet

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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. Introduction

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 AEShareNet, 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.
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 Plus\(^2\) licence and the Creative Commons Zero\(^3\) 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](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](http://wiki.creativecommons.org/Ccplus)

\(^3\) [http://labs.creativecommons.org/license/zero](http://labs.creativecommons.org/license/zero)

\(^4\) [www.jonathanmitchell.info/cc/cc_sco_licence.html](www.jonathanmitchell.info/cc/cc_sco_licence.html)
1.1: Creative Commons Licences – Briefing Paper

- **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
8. Issues for Staff and Employers

- **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.

- **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 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.
1.1: Creative Commons Licences – Briefing Paper

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.
- 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.
- TrustDR: Trust in Digital Repositories http://trustdr.ulster.ac.uk

Please note: this guidance has been prepared for information purposes only and is not, nor is intended to be, legal advice. This information is not intended to constitute, and receipt of it does not constitute, a contract for legal advice or the establishment of a solicitor–client relationship.
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. 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
1.2: Web2.0 and IP Factsheet

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

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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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
1.3: Web 2.0 and Legal Issues Factsheet

- 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](http://www.ico.gov.uk/upload/documents/pia_handbook_html/files/DP_checklist_final.doc)


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).


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 necessarily 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:

- 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 profiling 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.
Section 4. Practical tools

This chapter provides specific tools and agreements, which can be adapted and used to help you deal with the rights and licensing issues associated with using content generated by third parties.

Introduction

The tools in this section can be adapted and used to help you deal with rights and licensing issues associated with the use and generation of content.

3.1 Getting Permissions Paper
3.2 IPR Risk Assessments
3.3 Terminology Toolkit Paper
3.4 Top Tips for Issuing Licences
3.5 Top Tips for Requesting Licences
3.6 IPR Model Consent Form
3.7 IPR Model Licence
3.8 Template Email Permission Form
3.9 IPR Template Permission Letter
3.10 Rights Management Template
3.11 FAQs
3.12 Model Contractual Clauses for Requesting Permission from Staff
3.13 Example Consortium Agreement
3.14 Model Contractual Clauses for Requesting Permission from Students/Volunteers
3.15 Model Contractual Clauses for Requesting Permission from Freelancers/Subcontractors
3.16 Model Terms and Conditions of Service
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 should be read in conjunction with:

- 3.5 Top Tips for Requesting Licences
- 3.7 Model Licence
- 3.8 Template Email Permission Form
- 3.9 Template Permissions Letter

Clearance of Rights

The clearance of rights for the use of works protected by copyright can often be a complex and time-consuming exercise. Nevertheless, it is essential to get such clearance before you start using the material and/or let others use the material, as you might be infringing copyright if you or your users perform any restricted act without permission.

Assuming you have located the bona fide owner (or their agent) you should have the following information to hand when approaching them:

- Exact details of material you want to use and for how long
- How you want to use the material, permitted uses by third parties and for what purpose
- Description of the target audience and the service
- Description of the method of distribution and geographical territories to which the work may be marketed and used

You should also have considered and have answers to the following questions to ensure that there is compatibility between the rights that you need ‘rights in’, and those that you want in order to grant access to users ‘rights out’:

- Will the distribution of the work be restricted to a small group, to anyone within your organisation, to visitors to your organisation, or will be open to anyone in the world?
- Is there an intention to charge for the use of the service – now or at a later stage?

Remember that repeatedly going back to the rights holder for additional permission will add to the cost of the project and could seriously frustrate the progress of the project. It is therefore essential that before you contact the rights holder you have a clear picture of the long-term aims and objectives of the project.
3.1: Getting Permissions

Rights Clearance Checklist

The following checklist provides a rights clearance framework for content creators and content users. Before initiating, if the answer to any of the following is YES, it is likely that rights will need to be cleared, by the use of licence or another form of permissions letter.

- Does the content that you wish to create include third-party rights? YES/NO
- If so, is the work that you want to reproduce still in copyright? YES/NO
- Is the material created by (or in conjunction with) an individual who is not a paid member of staff, such as a student, volunteer or a freelancer? YES/NO
- Is the use of material beyond the scope of any of licensing schemes (such as the CLA Licensing Scheme or individual licences entered into) or beyond the scope of any Exceptions and Limitations to copyright? YES/NO
- Will the content be ‘communicated’ or made available to members of the public, a body of students, staff or other users? YES/NO

Checklist for Rights Clearance

- Make plenty of time to clear rights – it takes longer than you think!
- Allocate resources for rights clearance (staff time and salaries, administration costs and potential rights clearance fees)
- Understand your rights clearance obligations to any third-party funders and other third parties with whom you may be working
- Identify the range of rights that will require clearance, and for how long the rights will be needed
- Record information relating to any rights research on a rights management database
- Carry out an IPR risk assessment, prioritise high risks and incorporate risk-mitigation strategies into project planning
- Finalise how the material will be reproduced and any other treatment (ie interaction, manipulation and alteration)
- Compile a list of the various ways in which the material will be used now and in the future
- Identify rights holders and request permissions to reproduce the material in the ways that you require (including the terms under which you wish to make it accessible). This permission should be requested in writing before the material is reproduced, using the guide below to the type of likely risk associated with material types and specific uses
- Adapt the template email, letter and licence supplied in the SCA IPR Toolkit or draft a licence for your specific purposes
- Carry out reasonable searches and document all your efforts in cases where rights holders are unknown or cannot be traced (‘orphan works’), ie exercise ‘due diligence’
- Update your IPR risk assessment to incorporate rights that have not been cleared or any other issues not determined at the beginning of the project (ie orphan works). Initiate mitigation strategies where appropriate
- Ensure that all permissions, rights which have not been cleared and status of rights clearance (pending, rights holder cannot be found, etc) are recorded on the rights management database. Any funding bodies should be kept closely informed of situations where permissions have not been received.

1 It is likely that that if the answer is Yes, there are unlikely to any exceptions to copyright that will apply to your specific usage and therefore copyright permission will need to be sought.
3.1: Getting Permissions

What approach should you take?

When you approach the rights holder, different approaches can be taken depending on low, medium or high-risk content, as well as other factors such as the purpose of the use (i.e., educational, non-commercial or commercial), as well as the likelihood that the reputed rights holder is actually the rights holder. There may be some circumstances in which even though the material might be low risk, the purpose of use may be such that it is advisable to use a formal detailed licence.

For all types of material, it is important that all agreements regarding copyright and associated rights are put in writing. Everything agreed by you for your project must be recorded with evidence of the acceptance of the terms by the rights holder. You must at least keep all agreements for the life of the project or as long as permission is granted for, so that you have proof of such permission.

Clearing rights can be time consuming and demands good negotiating skills, but setting up a good system of recording early on will save valuable time in the long run.

Low-risk content

Low-risk material is likely to include content such as documentary photographs, sound recordings of members of the public, and amateur films. The initial contact can always be done by phone or email, but make sure that the content of each and every telephone call is confirmed by you in writing to the rights holder and every email and letter is saved. Allow plenty of time for approval, as the process is usually fairly slow. This is the type of content you are likely to encounter for which the rights holders may be unknown or cannot be found (so called ‘orphan works’).

Medium-risk material

Medium-risk material is likely to include artworks created by less well-known artists, certain types of archival material such as letters and diaries as well as semi-professional photographs. In these instances, a letter might be sufficient in ensuring that permissions to reproduce the material in which third parties own the rights have been secured. In instances where it is not 100% certain who the rights holder is, or the work is being used in a high-risk environment, such as commercial use – then it is advisable that the material is treated as if it were high risk and a more formal detailed licence is used (as below).

High-risk material

For high-risk material, such as music, commercial films, artworks created by high profile artists, broadcasts etc., it is better to opt for a formal detailed licence rather than a letter or an email. This should not come as a surprise, as a licence creates a clear and controllable environment for the parties involved. Licences are governed by contract law. The basic notion of contract law is contractual freedom. This means that parties to a contract are free to negotiate the terms and use of copyright material or indeed waive rights that the copyright law grants them. The level of access and use of copyrighted material heavily depends on the terms and conditions of the licence. Since the negotiation of a formal licence can be a very time-consuming process, it will be important to consider this issue within project timelines and budgets accordingly.
Where might you look to trace rights holders?

Tracing rights holders can be the most time-consuming part of any rights clearance project and there are a number of sources that might be explored. Even if all possible avenues are explored for tracing rights holders and these efforts are documented, any use of the material without consent (apart from the limited uses that can be justified under the Exceptions and Limitations) will present risks. In these instances, further information and guidance about the types of risks and how to assess them can be found in ‘3.2 IPR Risk Assessments’. Further information can also be found in the i2010 Digital Libraries Due Diligence Criteria for Orphan Works.²

The types of places that might be explored for rights holders include:

- Examining the material itself for any provenance information. This might be found, for example on the back of a photograph, the bottom of a sculpture, in the metadata and/or credit lines associated with digital material
- Referring to information that might be held about the material, such as acquisition forms and registers, contracts and catalogue files
- Checking with curatorial staff and/or information professionals for any further information
- Liaising with colleagues in other organisations who might own works by the same author and/or related works
- Checking with collecting societies who administer the rights for a wide range of creators dependent upon the type of media, such as:
  - Visual works
    Design and Artist Copyright Society (DACS) [www.dacs.co.uk]
    Bridgeman Art Library [www.bridgeman.co.uk]
  - Text-Based Works
    The Publishers Association [www.publishers.org.uk/en/home]
    The Authors Licensing and Collecting Society [www.alcs.co.uk]
    The Society of Authors (www.societyofauthors.org)
  - Sound Recordings and Music
    The Performing Rights Society – collecting society representing song writers, performers and musicians
    [www.mcps-prs-alliance.co.uk/Pages/default.aspx]
    Phonographic Performance Ltd (PPL) – representing the interests of music performers and record companies [www.ppluk.com]
- Check the WATCH File Database [Writers and Artists And Their Copyright Holders] [http://tyler.hrc.utexas.edu]
- Search on the internet
- Check trade journals, exhibition catalogues and other relevant publications
- Listing the names/titles of works on your website where you are unable to trace the rights holders or the rights holders are unknown, together with your contact details should the rights holders come forward

How to carry out Due Diligence

It is vital that you document all efforts to trace rights holders (due diligence), to use as a possible defence in cases where you choose to use works but where the rights holders are unknown or cannot be traced. Such documentation, which ideally should be kept in a separate file (as well as noted in any digital rights management system), might include:

- Taking notes about any phone calls that you make, including to whom, when, and what was said
- Keeping copies of all letters that are sent
- Keeping copies of any letters that are returned

3.1: Getting Permissions

- Sending letters by recorded delivery or registered post
- Printing emails that you sent and those that you receive, even if the response is negative
- Putting money to one side in case the rights holder does come forward
- Use of a statement if you do decide to take the risk and reproduce the works. The following statement below is an example used by National Portrait Gallery:

> Every effort has been made to obtain permission from copyright holders to reproduce this material. Owing to the age of some of this content, and given the resources available to us, this hasn’t always been possible or practicable. We have acted in good faith at all times, and any queries relating to copyright in this content should be referred to XXXX for immediate attention.

REMEMBER – EVEN IF YOU HAVE CARRIED OUT REASONABLE EFFORTS TO TRACE RIGHTS HOLDERS, KEPT A DUE DILIGENCE FILE AND DOCUMENTED THE ATTEMPTS THAT YOU HAVE MADE – THIS IS STILL UNAUTHOURISED USE AND YOU COULD STILL BE CHALLENGED BY THE RIGHTS HOLDERS.

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4  See ‘3.2 IPR Risk Assessments’ for further information about risk-mitigation strategies

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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Introduction

The set of resources contained within this paper has been adapted for SCA sponsors and other organisations across the public sector. It is intended as the basis of a toolkit to be issued to content creators and content users across the public sector who are responsible for rights management and rights clearances. It includes:

- Template IPR Risk Assessment Table for evaluating risks associated with content creation and user
- Template take-down notice
- Scenarios

The resources that have been drawn upon include:

- Papers written by the JISC IPR Consultancy for the JISC IPR Working Group
- Content produced as part of the IPR toolkit created by the JISC-funded Web2Rights project
- The JISC-funded TrustDR Project

IPR Risk Assessments

The risk assessment component of this paper draws heavily upon the work of the JISC-funded TrustDR project. Further information about a managed approach to risk, particularly within a web environment, can be found in briefing papers produced by the JISC-funded Web2Rights project (www.web2rights.org.uk).

Content creators and content users across the public sector are likely to encounter a varying range of IPR-related risks associated with the creation and use of print, digital and online teaching materials. The scale of rights issues will vary in accordance with the scope of each project, but even projects involving relatively small amounts of content creation and use may encounter complex rights issues. This is because of:

- The differences in status of content creators who are likely to include staff, volunteers, students as well as freelance contractors and commercial entities and content created in collaboration with other organisations and third parties both based in the UK and internationally
- The likely incorporation of third-party content, which can be obtained from a wealth of sources (including user-generated content) and under various terms and conditions, some explicit and some implicit
- The potential range of content that can be created, including born-digital, digital surrogates and composite works incorporating images, text, film, graphics, music and sound as well other audiovisual material and the likelihood of layers of rights within each, many or all of which will require clearance

1 Whilst the focus of these resources is copyright and database rights, patents and trade marks are also covered briefly.
2 www.web2rights.org.uk
3 www.hefce.ac.uk/pubs/hefce/2006/06_20. This report was a follow-up to an earlier report issued in 2003 with the same title [available at: www.hefce.ac.uk/pubs/hefce/2003/03_08.htm]
4 http://trustdr.ulster.ac.uk
3.2: IPR Risk Assessments

- The longevity of copyright in most creative works and the fact that different media have different rules on ownership and lifetime
- The applicability of the limited copyright Exceptions and Limitations in the copyright legislation offered to public-sector bodies for the full range of uses of content, which in turn means that much third-party content will require clearance before it can be used
- The restrictions within blanket licences, such as the CLA (Copyright Licensing Agency) Photocopying and Scanning Licences, particularly regarding storage and reuse of electronic material
- The quasi-commercial and commercial nature of some of the uses of content across the public sector
- The levels of injunctive relief offered to rights holders in cases where their rights have been infringed
- The problems of tracing rights holders of third-party materials and of how to deal with so-called orphan works (those third-party materials where the rights owner cannot be traced or are unknown)

Figure 1
A Risk Management Framework

As a means to help develop suitable rights clearance frameworks, embedded within appropriate mitigation strategies, it is crucial that risks are identified, assessed, treated and monitored as per the Figure 1 below (after John Casey and Jackie Proven, 2007):

The IPR Risk Assessment Table below provides an overview of the types of IPR-related risks that may be encountered by content creators and content users, together with some recommended mitigation strategies that can be used to ‘treat’ the risk.

Assessing the Risks

Since the likely impact and probability of the specific risks encountered by content creators will vary per project, in order to fully understand the risks it will be important to consider the following factors in accordance with each type of project. These will include:
- The type of content being used
3.2: IPR Risk Assessments

- The scale of the project
- The likelihood that the rights holder is litigious
- Non-litigious types of risk that may be encountered
- The relationships and/or potential relationship that the content creator/organisation has with the rights holder
- The context of use of the content
- The audience and distribution of the content, including the scale of what is being copied or adapted
- Whether the content is being commercially exploited
- The employment of risk mitigation strategies

Once these have been established, IPR risks can be calculated by the application of the following framework to determine the level of impact and probability, and thus the level of risk:

- **Evaluating the level of impact**
  This is the negative impact of any of the risks described below materialising, and the impact (financial and non-financial) upon the organisation. Impact can be calculated by allocating a score of 1–5, 1 being the lowest and 5 the highest level of impact

- **Assessing the probability or likelihood**
  This might be based upon the likelihood of the problem arising, the probability of the rights holder coming forward and/or the likelihood of the rights holder seeking legal or other types of redress. Impact can be calculated by allocating a score of 1–5, 1 being the lowest and 5 the highest level of impact

- **Calculating the risk**
  The risk score can be calculated by multiplying the impact x probability: the higher the score, the greater the risk

![Figure 2](image)

Figure 2
Illustration of a Risk Profile

Risk-Mitigating Strategies

Apart from the mitigation strategies offered in the risk-assessment table below, it is worthwhile considering the use of the following to help mitigate any potential risks:
3.2: IPR Risk Assessments

- Use of credit lines to show the works in which rights are owned by third parties.

- Use and observation of copyright statements and licences, which make it easy for the user to understand the terms under which content can be accessed and used. See ‘1.1 Creative Commons Licences – Briefing Paper’ for further information about one of the options that might be considered.

- Access restricted by password to certain types of high commercial-value content.

- Use of indemnity clauses: for use in agreements and licences for materials in which permission is granted by third parties, to ensure that the parties who are granting permission have legal title to do so.

- Acceptable Use Policy: an agreement that is physically or digitally signed or accepted to acknowledge the user is aware of the organisation’s stance on copyright infringement and will exercise due diligence and care when making contributions not to breach this policy.

- Notice and Take-Down Policy: a policy ideally linked to every page that has contributor content, highlighting the organisation’s stance on copyright infringement and specifying the conditions for removing content. It must have a formal procedure that is triggered when someone gives ‘notice’ of a complaint regarding possible infringement – on receiving notice the organisation the ‘takes down’ content from the repository while the complaint is checked. It must provide a contact mechanism, such as an email address, to report suspected breaches, under the terms of the Electronic Commerce (EC Directive) Regulations 2002, 6(1). Liability can be reduced by showing ‘due diligence’ in the form of prompt action. Note: this needs to be viewed as a ‘last ditch’ protection measure that works best when all the other elements in this list are in place and not as a legal panacea.

In addition, clear instructions should be given as to where and to whom notification of allegedly infringing content should be sent, along with details of the complainant’s interest in the matter and where the complainant 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. Such a take-down notice is provided below:

**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 [INSERT: your contact details here/or a link to contact details] and we will withdraw your material from our website forthwith on receipt of your contact details, 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 your organisation) should be investigated. Many public-sector bodies in the UK will have professional indemnity insurance but it is important to check if any material which might present risks is covered. If you are working in partnership with other organisations, each project partner will have to check this unless the consortium agreement says otherwise.

- Technical protection measures: as part of the planning process for a 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 (ie 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, for example, a specific 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 most professionals working across the public sector is that of being sued for infringement of copyright. Firstly, it is likely that there is a long way that a disgruntled rights holder will go before they sue. In all probability, they will contact you first in writing and ask that you take the infringing work down and probably ask you to pay the fee that they usually would have charged for such a use of their work.

In the event that an owner of copyright did sue, the legal remedies 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/she would have been had the infringement not happened. Within a Web 2.0 environment, for example, 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
- Delivering 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, they may be annoyed that you have used their content without prior authorisation – an apology and promise of swift action, such as credit, payment and/or removal of content, can go a long way! It is important to note that across the public sector, it is more likely that the ramifications of unauthorised use of content will include loss of trust, damage to reputations and/or relationships as well as potential removal of services. Subsequently, these potential consequences need also to be factored into any risk assessments.

These case studies are helpful in providing an insight into certain circumstances that might go wrong, and the ways in which they are dealt with, which can result in a favourable conclusion or not!

1) Case Study One

A photographer approaches you stating that there are photographs on your website in which he owns the copyright. The photographer has not given permission for these photographs to be used. You take the photographs down immediately. The photographer demands money from you for the use of the photographs. You point to the Notice and Take-Down 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. The photographer argues that the provisions do not apply to you and he will raise an action. The photographer also states that there are many other owners of the copyright in creative content on websites owned by you being used without permission and who are watching this case with interest and will be contacting you shortly with their own demands. The photographer raises an action in the local court. Due to the importance of the case not only for you, but also for similar bodies, you request that the lower court remit the case to the higher court. Lower court agrees. The photographer drops the action and has not been heard of since.

2) Case Study Two

Commercial image supplier approaches you stating that several images on your website infringe its copyright, and appropriate fees should be paid. You originally sourced the images from the internet and had not sought permission for the images to be used in the first place. You do not respond. Very shortly after this, the commercial image supplier demands immediate take-down. Again, you choose not to respond. The commercial image supplier swiftly sends you an invoice for several times the initial amount and a letter with threats of naming and shaming. You discuss with your lawyers, who have not been contacted until this point, and payment is settled.

3) Case Study Three

A photographer approaches you stating that there are photographs on your website in which he owns the copyright, which he had placed on an image sharing site, for reference and personal use only. The photographer has not given permission for these photographs to be used and asks you to credit him and to pay a small amount for each photograph. You agree and the issue is settled amicably.
3.2: IPR Risk Assessments

## IPR Risk Assessments

<table>
<thead>
<tr>
<th>Risk Type</th>
<th>Risk Impact</th>
<th>Risk Probability</th>
<th>Risk Score</th>
<th>Risk Responsibility</th>
<th>Risk-Mitigation Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorised use of third-party materials</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Training content creators and content users; provision of access to pre-cleared content such as JISC Collections and content created as a result of other public-sector funding initiatives</td>
</tr>
<tr>
<td>Theft of copyright materials by third parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Use of copyright credit lines; deployment of copyright notices and terms and conditions to educate users; display of digital content in low resolution; possible use of digital watermarks and other encryption devices; password-protecting content of high value</td>
</tr>
<tr>
<td>Granting more rights to users to use third-party generated content, than permissions to use it have been secured</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Ensuring that there is compatibility between rights granted by third parties and those granted to subsequent users of the content</td>
</tr>
<tr>
<td>Inappropriate licences selected for providing access and use of content</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Making sure that licence types selected reflect organisational and departmental policies on access and use of content</td>
</tr>
<tr>
<td>Rights clearance costs exceeding budget</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Earmarking funds to clear rights within project planning</td>
</tr>
<tr>
<td>Insufficient resources to clear rights</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Allocating staff and administrative support to identify and clear rights at the start of the project. Identifying rights that need to be cleared and estimations of anticipated associated costs as early as possible. Creation of a contingency fund</td>
</tr>
<tr>
<td>Breaching IPR conditions from funding bodies, for example not clearing any third-party rights for use by funding bodies or breaching warranties that all third-party rights have been cleared</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Ensuring that any IPR clauses are understood and can be complied with within funding agreements. Any clauses that present difficulties will need to be negotiated with funding bodies, or alternative strategies applied, such as allocating extra funds to clear additional rights</td>
</tr>
<tr>
<td>Disputes over ownership of IP amongst consortium partners</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Discussing ownership or co-ownership of rights and other models (such as non-exclusive and exclusive licences) prior to the commencement of the project. Incorporating appropriate IPR clauses within consortium agreements to reflect the outcomes of these decisions. Ensuring consortium agreements are signed before work starts</td>
</tr>
<tr>
<td>Risk Type</td>
<td>Risk Impact</td>
<td>Risk Probability</td>
<td>Risk Score</td>
<td>Risk Responsibility</td>
<td>Risk-Mitigation Strategy</td>
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<tr>
<td>Breach of IPR conditions within consortium agreements</td>
<td></td>
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<td></td>
<td>Ensuring that any IPR clauses are understood and can be complied with within consortium agreements. Any clauses that present difficulties will need to be negotiated with partners, or alternative strategies applied, such as allocating extra funds to clear additional rights</td>
<td></td>
</tr>
<tr>
<td>Lack of responsibility for clearing rights in projects with multiple partners</td>
<td></td>
<td></td>
<td></td>
<td>Allocating roles and responsibilities for rights clearance to specific project partners, as well as embedding progress within project reporting mechanisms</td>
<td></td>
</tr>
<tr>
<td>Inadequate identification of the layers of rights that might exist in any one piece of content, for example, copyright in an artwork, and subsequent copyright in its photograph</td>
<td></td>
<td></td>
<td></td>
<td>Allocating staff with a clear understanding of IPR issues and appropriate administrative support to identify and clear rights at the start of the project. Identifying rights that need to be cleared and estimations of possible associated costs as early as possible</td>
<td></td>
</tr>
<tr>
<td>Inadequate recording of rights requiring clearance</td>
<td></td>
<td></td>
<td></td>
<td>Creation or bolt-on of a rights management database to describe content and rights associated with it</td>
<td></td>
</tr>
<tr>
<td>Inadequate recording of licences granted to use third-party content</td>
<td></td>
<td></td>
<td></td>
<td>Establishment of a paper-based filing system for permissions that have been granted (as well as printout of licences for content used under open content licences). Creation or bolt-on of a rights management database to describe content, rights associated with it and permissions granted to third parties to use their content</td>
<td></td>
</tr>
<tr>
<td>Inadequate recording of licences granted to third parties to use content that is created</td>
<td></td>
<td></td>
<td></td>
<td>Establishment of a paper-based filing system for permissions that have been granted (as well as printout of licences for content used under open content licences). Creation or bolt-on of a rights management database to describe content, rights associated with it and permissions granted to third parties to use their content</td>
<td></td>
</tr>
<tr>
<td>Expiry of permissions granted by third parties</td>
<td></td>
<td></td>
<td></td>
<td>Establishment of a paper-based filing system for permissions that have been granted (as well as printout of licences for content used under open content licences). Creation or bolt-on of a rights management database to forewarn of expiry dates of permissions</td>
<td></td>
</tr>
</tbody>
</table>
### 3.2: IPR Risk Assessments

<table>
<thead>
<tr>
<th>Risk Type</th>
<th>Risk Impact</th>
<th>Risk Probability</th>
<th>Risk Score</th>
<th>Risk Responsibility</th>
<th>Risk-Mitigation Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceeding use of permissions granted by third parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Establishment of a paper-based filing system for permissions that have been granted (as well as printout of licences for content used under open content licences). Creation or bolt-on of a rights management database to describe content, rights associated with it and permissions granted to third parties to use content</td>
</tr>
<tr>
<td>Lack of appropriate IPR clauses (and waiver of moral rights) when working with contractors and freelancers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Use of assignment of rights clauses in commissioning contracts and requests for rights to be waived</td>
</tr>
<tr>
<td>Lack of suitable prior art checks when using or incorporating material protected by patents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Need to ensure that staff are aware of the risks of using patented materials without permission. Incorporation of patent searches prior to developing or using material that could be protected by patents</td>
</tr>
<tr>
<td>Use of third-party Trade Mark within unsuitable context</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Staff training. Ensuring that permissions to reuse Trade Marks (particularly within a commercial context) are identified material requiring clearance, and incorporated within a rights clearance strategy</td>
</tr>
<tr>
<td>Lack of IP strategies to ensure long-term sustainability</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Discussions at project initiation to evaluate and implement possible strategies relating to IP exploitation. This will then be a common thread running through subsequent use of the material and the terms under which it can be used</td>
</tr>
<tr>
<td>Lack of expertise in negotiating rights clearances</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Staff training. Need to bring in expertise to help where appropriate (perhaps from consultants)</td>
</tr>
<tr>
<td>Lack of procedures to deal with infringements of rights</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Implementation of rapid and effective notice and take-down procedures</td>
</tr>
<tr>
<td>Lack of copyright notices and credit lines on content</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Development of standard copyright notices and credit lines used in association with content that is created. Credit lines will need to reflect rights in content generated by the organisation, as well as rights in third-party material</td>
</tr>
<tr>
<td>Circumvention of technical protection measures (without authorisation or under a copyright exception) that protect third-party content</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Staff training regarding the severity of penalties for unauthorised circumvention</td>
</tr>
</tbody>
</table>
### 3.2: IPR Risk Assessments

<table>
<thead>
<tr>
<th>Risk Type</th>
<th>Risk Impact</th>
<th>Risk Probability</th>
<th>Risk Score</th>
<th>Risk Responsibility</th>
<th>Risk-Mitigation Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cannot trace or find rights holder (orphan works)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Use of reasonable searches ('due diligence') and the retention of paper-based proof to show that these have been carried out; disclaimer and possibility of putting money aside</td>
</tr>
<tr>
<td>Insufficient due-diligence procedures to trace rights holders</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Established set of due-diligence procedures across the organisation</td>
</tr>
<tr>
<td>Inability to exploit content in which rights are owned because exclusive licences have been issued</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Identification of any pre-existing exclusive agreements. Re-negotiation if applicable</td>
</tr>
<tr>
<td>Difficulties in updating content, particularly with regards to moral rights</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Upon the creation of content by non-staff, processes should be implemented to ensure that moral rights are waived</td>
</tr>
</tbody>
</table>

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3.3: Terminology Toolkit
Naomi Korn and Professor Charles Oppenheim, March 2009

Context

This resource is based upon the IPR Terminology 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 can be used as a guide to understand the different licence terms that a public-sector body may encounter when presented with a rights-related contract.

‘Acceptable Use Policy (AUP)’ is a set of rules, which the owner of the web-based technology will specify must be complied with by the user. The purpose of the AUP is to minimise exposure of the owner/operator of the technology to legal liability for behaviour of users [such as defamatory comments].

‘Accessibility Laws’ in the context of e-content and web-based technologies, means the requirement through such legislation as the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) to ensure that websites are accessible to and usable by all users regardless of ability or disability.

‘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, ‘Assignation’ 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 and be signed.

‘Clinical Content’ includes clinical content, such as photos of patients, in which the patient can be identified.

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

‘Contempt of court’ includes the failure to abide by a court order such as an injunction (interdict) prohibiting a particular course of action.

‘Content’ can include printed content, content on floppy disk, websites, 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 and rating. Content can be produced by individual authors or may be the result of collaborative effort between two or more individuals.

‘Contract of employment’ means the contract between the employer and employee setting out the rights and obligations of the parties. The employment relationship is also subject to the broader regulatory framework governing such matters as non-discrimination, termination of employment etc.
3.3: Terminology Toolkit

'Cookie' refers to information that a website puts on your computer so that it can remember you the next time you visit the site.

'Defamation' is the publication of a statement that lowers the standing of a person in the eyes of right-thinking members of society. The defamation can be in any form – such as words or pictures.

'Due Diligence' is the documentation of any number of reasonable searches undertaken to try and find rights holders for works protected by copyright. It is often used as a defence in instances where rights holders cannot be traced or are unknown ('orphan works').

'E-security' refers to the laws and technologies involved in keeping information secure on the web.

'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 nor being able to exploit the materials for the same purpose themselves. 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.

'Freedom of Information' means the policy and attendant regulatory framework that allows individuals to obtain information from public-sector bodies.

'Incitement of Racial Hatred' refers to any act that directly or indirectly incites racial hatred, which is a criminal offence.

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

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

'Irrevocable' means that the terms of the licence cannot be revoked by either party. This term is often used when royalty-free licences are granted.

'Libel' means the writing or printing of a defamatory statement.

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.
‘Moderation’ means the process whereby the ISP or other party watches over content posted on a Web 2.0 technology by third parties and removes inappropriate/unlawful content. The moderation policy is most often underpinned by an acceptable use policy.

‘Moral Rights’ mean certain rights given to the creator of some copyright works, including literary works, artistic works and films. The first is the right of the author of a work to be acknowledged as the author or creator. The second is the right to object to his or her name being attributed to something he or she did not create. The third is the right not to have his or her work subjected to ‘derogatory’ treatment, ie treatment of the work (or copies of the work), which is detrimental to integrity or reputation.

‘Negligence’ refers to the doing or failing to do something that a reasonable and ordinary person in the circumstances would do or not do. It is conduct that falls below the standard that has been established by the law for protecting others from harm. It requires three major elements to be proved:

- The defendant breached that duty by failing to conform to the required standard of conduct
- The defendant had a duty to the claimant
- The defendant’s negligent conduct was the cause of the harm to the claimant.

It must also be shown that the claimant was in fact harmed or damaged.

‘Non commercial’ refers to uses which do not directly or indirectly gain monetary or financial rewards or benefits.

‘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.

‘Not for profit’ refers to uses that might derive monetary or financial rewards or benefits, but for which profit is not generated.

‘Notice and Take-Down’ means the procedure whereby notice is given to an organisation of unlawful content (such as material infringing copyright; defamatory statements) hosted by the organisation, which is then removed by the organisation reducing liability for making the content available.

‘Orphan Works’ refers to works where the rights holders for works still in copyright cannot be traced or are unknown.

‘Personal data’, within the data protection regime, personal data are data about living identifiable individuals.

‘Publication Scheme’ means the procedure under the UK Freedom of Information Acts whereby public-sector authorities must make information publicly available in a number of classes including: information on the public authority and what it does; what is spent by the public authority and how; and the priorities and performance measures of the public authority. If information is not included in a publication scheme an individual may still make an individual request.

‘Recitals’ are a set of paragraphs that 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’ is a recurrent payment for, for example, the right to exploit copyright in a particular work.

‘Royalty Free’ means that the granting of the licence is without payment or financial remuneration.

‘Sensitive personal data’ within the data protection regime means data that discloses any of the following about a living identifiable individual: racial or ethnic origin; political opinions or persuasion; religious beliefs or other beliefs of a similar nature; trade union membership or affiliation; physical or mental health or condition; sexual life; commissioned or alleged commission of offences; any proceedings for any offence, committed or alleged, including any sentencing decisions made by the court.

‘Slander’ means words, speech or gestures of a defamatory nature.
3.3: Terminology Toolkit

'Staff' includes staff, research associates, technicians, or any other members of staff who are employed under a contract of employment (whether fixed term or permanent). It does not include freelancers or volunteers, since they do not have contracts of employment. It also does not include students, researchers or any other members of the general public who enter the establishment and make use of any of its services or exhibitions.

'Tagging; reviewing; rating; favouring' refer to terms used to describe methods to highlight, refer to, flag, sort, order or rate content that exists on the web.

'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, it 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 timeframe. 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 of its belief’ create a heavy burden of proof on the licensee as the licensor might honestly but misguidedly believe 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 see also:


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3.4: Top Tips for Issuing Licences to Third Parties Wishing to Use Your Content
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 some headline issues to consider when issuing licences to third parties who wish to use content generated by public-sector bodies.

Top Tips

Whatever use you allow:

- Remember that if you have obtained licences from others (staff, volunteers, freelancers, etc) to use their content and/or technology, the licences you issue to users cannot go beyond any limitations in these licences that have been granted to you.
- Make sure you clarify who you want to allow access to the content, and how your users will be able to use it.
- Ensure that any licence you propose to issue to users (whether in the form of a template, one you have developed with your own terms and conditions, or if you have decided to use an open content licence) is fit for purpose: if it does not do what you want it to do, then find or develop another one that is more appropriate.
- If you are using a ‘ready made’ licence, read the provisions and make sure that it covers what you want to allow and under what conditions.
- Where possible issue a licence that is governed by the law and courts of the country/region where your institution is located.
- Check with your institution who has the authority to grant the licence.
- Consider issuing a licence that disclaims liability for any subsequent unauthorised activities by users.
- Ensure that the licence does not include any clauses that might present legal risks for your institution, or your users.
- Copyright is not the only legal issue – make sure you cover other legal issues that may arise, such as defamation and liability for inaccurate information.
- Take legal advice if you are at all uncertain.

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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3.5: Top Tips for Requesting Permission from Third Parties Whose Content You Wish to Use

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 some headline issues to consider when requesting permission from third parties whose content/technology may be required for use by public-sector bodies. NB: You may often find that when you want to ask for permission to use content from a third party, you can present them with your own model licence or use their licence.

Top Tips

- Give yourself plenty of time, enough resources and support to take account of what you need to do
- Try and factor rights clearances into project budgets and project management issues before you start
- Before you start, clarify what you want to do with the content; for how long; who you want to allow access to the content; and how and for what purpose your users will be able to use it
- Make sure that the licence granted to you reflects this

Do not forget

- Different audiences may require a different version of the same licence
- Some rights owners will not be grateful for a 20-page licence: understand the nature of your content, who your rights holders are likely to be and assess whether the content is high or low risk!
- Ensure that you understand your obligations to funders, eg if your outputs may need to be made accessible wherever possible, for free, perpetual, unlimited usage (for content) or under open source principles (for technology) – this usage needs to be reflected in the licence
- Ensure that any licence that you issue is fit for purpose: if it does not do what you want it to do, then find or develop another one that is more appropriate
- Think about the rights that you need, how long you need them for, and the rights that the content supplier retains
- Don’t ask for more than you anticipate you need, whilst considering your long-term aims and uses
- Permission can be obtained in different ways, such as a faxed-back agreement, email, or countersigned letter. It is safest to have the confirmation in a letter or a fax
- Make sure that the person/body who signs the licence or otherwise says ‘yes’ to what you ask for is authorised to grant permission (ie, they are the owner of the rights, or have the authority to sign on behalf of the owner of the rights)

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Context

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This form should be used to acquire consent from individuals who have agreed to be photographed, filmed or recorded prior to such activity taking place. This form should be adapted to suit specific requirements.
### Model Consent Form

<table>
<thead>
<tr>
<th>VENUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>DATE</td>
</tr>
<tr>
<td>NAME OF Photographer/CREATOR OF RECORDING</td>
</tr>
</tbody>
</table>

This form is to be signed by the person who has agreed to be photographed and/or filmed and/or recorded for [insert name of project here]. The purpose of this form is to seek consent for the photographs and/or films and/or recordings to be taken and subsequently to be used in a number of media, including print and the web by [insert name of organisation here]. [Insert name of organisation here] in turn offers a commitment to only allow said pictures and recordings to be used appropriately and sensitively.

I, the undersigned, consent to the use of my image and/or recordings of my voice being used within [insert name of project here]. I understand that the image and/or recordings will be used for [insert details] purposes only and that copyright in the image and/or recordings will be retained by [insert name of the organisation].

I acknowledge that the image and/or recording may also be used in, and distributed by, media pertaining to [insert name of project or organisation here] other than a printed publication, such as, but not limited to, CD-ROM or the World Wide Web.

Copyright restrictions placed on [insert name of organisation here] prevent the content being sold or used by way of trade without the express permission of the copyright holder. Images and recordings may not be edited, amended or reused without prior permission from [insert name of project or organisation here]. Personal details of those taking part are never made available to third parties.

I require/do not require that my name is removed/retained in association with the shots and/or recordings. {please delete as appropriate}

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<tr>
<th>FULL NAME AND TITLE</th>
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<tr>
<td>NAME OF ORGANISATION</td>
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<td>CONTACT TELEPHONE</td>
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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.

© HEFCE, on behalf of JISC. The contents of this IPR Toolkit are licensed for use under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence.
**Context**

This agreement can be used to request permission to use third-party content. This resource should be adapted to suit specific requirements. It is based upon the JISC Model Licence, which was adapted for the JISC-funded Web2Rights project [www.web2rights.org.uk](http://www.web2rights.org.uk). It should used in consultation with 3.1 Getting Permissions and 3.2 IPR Risk Assessments contained within this toolkit.
SUBJECT TO CONTRACT

[Please customise the highlighted sections]

DATED 2009

[LiCENSOR]

-and-

[LiCENSEE]

________________________________________

[NAME OF RESOURCE] SUPPLY AND LICENCE AGREEMENT

________________________________________
[NAME OF THE RESOURCE] SUPPLY AND LICENCE AGREEMENT

THIS AGREEMENT is made day of 2009

BETWEEN: [NAME OF THE LICENSOR], whose principle place of business is at [address] ('Licensor')
AND [NAME OF THE LICENSEE], whose principle place of business is at [address] ('Licensee').

WHEREAS:

a) The Licensor holds or controls the rights in [name of the resource] as further specified in Schedule 2;
b) The Licensee is the lead institution of the project called [name of the project], which aims to make [name of the resource] available free of charge to the public via [name of the Service] as hereafter defined;
c) The parties are desirous of reaching agreement to make access to [name of the resource] available online to the public on the terms as set out in this Agreement.

IT IS AGREED AS FOLLOWS

1. DEFINITIONS

1.1 In this Agreement, the following terms shall have the following meanings:

- 'Commercial Use' means use of the Licensed Material for the purpose of monetary reward by means of the sale, resale, loan, transfer, hire or other form of commercial exploitation of the Licensed Material. For the avoidance of doubt, the placing of advertisements next to the web-delivered version of the Licensed Material is not deemed to constitute Commercial Use.
- 'Derivative Works' means a work based upon the Licensed Material to which enough original creative work has been added so that the new work represents an original work of authorship.
- 'Educational Purposes' means for all such purposes that are conducive to education, teaching, distance learning, private study and/or research.
- 'Effective Date' means the date that all parties have signed the Agreement.
- 'Fee' means the applicable fee payable by the Licensee to the Licensor in accordance with Schedule 1 for the rights granted herein.
- 'Intellectual Property Rights' means patents, Trade Marks, trade names, design rights, copyright (including rights in computer software and moral rights), database rights, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world.
- 'Licensed Material' means the resource licensed in this Agreement known to the parties as '[name of the resource] being [description] as further specified in Schedule 2.
- 'Third-Party Consents' means all licences, permissions and consents in writing and payments to any third-party owner of Intellectual Property Rights in the Third-Party Material, which may be required for the use and exploitation of Third-Party Material for the purposes envisaged under this Agreement.
- 'Third-Party Material' means that part of the Licensed Material identified in Schedule 3 that is not owned by or licensed to the Licensor.
- 'User' means any person accessing the Licensed Material from anywhere in the world.

1.2 Headings contained in this Agreement are for reference purposes only and shall not be deemed to be an indication of the meaning of the clause to which they relate.
1.3 Where the context so implies, words importing the singular number shall include the plural and vice versa and words importing the masculine shall include the feminine and vice versa.

2. AGREEMENT

2.1 The Licensor agrees: (a) to provide the Licensee with a copy of the Licensed Material; (b) to permit the Licensee to mount, communicate and make available the Licensed Material to Users in accordance with this Agreement; and (c) to permit the Licensee to use and sub-license such use of the Licensed Material in accordance with this Agreement.

2.2 In consideration for the Licensor’s licensing of the Licensed Material pursuant to Clause 3, the Licensee undertakes to pay to the Licensor the Fee in accordance with the provisions of Schedule 1.

3. LICENCE GRANT

3.1 The Licensor hereby grants to the Licensee: a non-exclusive royalty-free licence in perpetuity to mount on any network or platform, preserve, communicate and make available the Licensed Material through any networked or un-networked electronic means and to provide access and allow use of the Licensed Material by Users.

3.2 The Licensor hereby agrees that the Licensee may appoint third parties to act on its behalf to perform the tasks and activities as set out in Clause 3.1. This arrangement shall be subject to an agreement between the Licensee and any third party, which is consistent with the terms of this Agreement where relevant.

3.3 The Licensee acknowledges and agrees that the Licensor grants no rights in respect of any Third-Party Material and the Licensee undertakes at the Licensee’s expense before using the Licensed Material and as a condition precedent to the grant of the licence under Clause 3.1 to obtain, or to require that its sub-licensees obtain, all Third-Party Consents and any other consents that may be required for the use of the Licensed Material as envisaged pursuant to this Agreement.

4. COMMENCEMENT AND TERM

4.1 This Agreement commences on the Effective Date and will remain in full force and effect in perpetuity. For the avoidance of doubt, the parties agree that the perpetual licences granted by the Licensor to the Licensee in Clause 3 are irrevocable and will survive any termination or repudiation of this Agreement.

5. USE OF THE LICENSED MATERIAL

5.1 Throughout the term of this Agreement the Licensee or a distributor duly appointed by the Licensee may:

5.1.1 mount the Licensed Material and incorporate the Licensed Material in the Service or any other database from time to time; and

5.1.2 make such copies of the Licensed Material as are technically necessary to provide access to Users and for preservation purposes.

5.2 Throughout the term of this Agreement the Licensee may permit Users:

5.2.1 to access the Licensed Material in order to search, retrieve, display and view, and otherwise use portions of the Licensed Material;

5.2.2 to electronically save parts of the Licensed Material;

5.2.3 to print out copies of parts of the Licensed Material;
5.2.4 to use the Licensed Material for non-commercial purposes;

5.2.5 to incorporate parts of the Licensed Material in printed and electronic course packs, study packs, resource lists and in any other material (including but not limited to multimedia works). Each item shall carry appropriate acknowledgement of the source, listing title and copyright owner. Materials in non-electronic non-print perceptible form, such as Braille, may also be offered to Users;

5.2.6 to incorporate parts of the Licensed Material in printed or electronic form in assignments and portfolios, theses and in dissertations [the Academic Works], including reproductions of the Academic Works for personal use and library deposit. Reproductions in printed or electronic form of Academic Works may be provided to sponsors of such Academic Works. Each item shall carry appropriate acknowledgement of the source, listing title and copyright owner;

5.2.7 to display, download and print parts of the Licensed Material for the purpose of promotion of the Licensed Material, testing of the Licensed Material, or for training Authorised Users;

5.2.8 to publicly display or publicly perform parts of the Licensed Material as part of a presentation at a seminar, conference, or workshop, or other such similar activity;

5.2.9 to deposit in perpetuity any learning and teaching objects in electronic repositories and /or in the JORUM Repository. The access and use of such learning and teaching objects shall be governed by the terms and conditions of the applicable repository;

5.2.10 to create Derivative Works; and

5.2.11 to use the Licensed Material for any other purposes that are conducive to education, teaching, learning, private study and/or research.

5.3 This Agreement shall be deemed to complement and extend the rights of the Users under the Copyright, Designs and Patents Act 1988 and the Copyright (Visually Impaired Persons) Act 2002 and nothing in this Agreement shall constitute a waiver of any statutory rights held by the Users from time to time under these Acts or any amending legislation.

6. RESTRICTIONS

6.1 Save as provided herein, the Licensee and Users may not:

6.1.1 sell or resell the Licensed Material or use the Licensed Material for any other Commercial Use unless the Licensee or a User has been granted prior written consent by the Licensor to do so; and

6.1.2 remove, obscure or modify copyright notices, text acknowledging or other means of identification or disclaimers as they appear.

7. INTELLECTUAL PROPERTY RIGHTS

7.1 The Licensee acknowledges that all Intellectual Property Rights in the Licensed Material are the property of the Licensor or duly licensed to the Licensor and that this Agreement does not create, assign or transfer to the Licensee any right, title or interest in the Licensed Material except for the right to use the Licensed Material in accordance with the terms and conditions of this Agreement.

7.2 Save as provided for under Clause 7.1, any and all Intellectual Property Rights in and relating to any metadata and other works created by the Licensee or Users from the Licensed Material shall be the property of the Licensee or such Users absolutely.

7.3 Nothing in this Agreement conveys any other ownership rights to the Licensor in and in relation to any metadata and other works created by the Licensee from the Licensed Material.
8. REPRESENTATION, WARRANTIES AND INDEMNIFICATION

8.1 The Licensor warrants to the Licensee that the Licensed Material and all Intellectual Property Rights therein are owned by or licensed to the Licensor and that the Licensed Material used as contemplated in this Agreement and the Sub-Licence Agreement do not infringe any copyright or other proprietary or Intellectual Property Rights of any natural or legal person. The Licensor agrees that the Licensee shall have no liability and the Licensor will indemnify, defend and hold the Licensee harmless against any and all damages, liabilities, claims, causes of action, legal fees and costs incurred by the Licensee in defending against any third-party claim of Intellectual Property Rights infringements or threats of claims thereof with respect of the Licensee’s or any User’s use of the Licensed Work, provided that: (1) the use of the Licensed Work has been in full compliance with the terms and conditions of this Agreement; (2) the Licensee provide the Licensor with prompt notice of any such claim or threat of claim; (3) the Licensee cooperates fully with the Licensor in the defence or settlement of such claim; and (4) the Licensor has sole and complete control over the defence or settlement of such claim.

The foregoing does not apply to Third-Party Material or Derivative Works of the Licensed Material.

8.2 While the Licensor has no reason to believe that there are any inaccuracies or defects in the information contained in the Licensed Material, the Licensor makes no representation and gives no warranty express or implied with regard to the information contained in any part of the Licensed Material including (without limitation) the fitness of such information or part for any purposes whatsoever and, to the extent permitted by law, the Licensor accepts no liability for loss suffered or incurred by the Licensee or Users as a result of their reliance on the Licensed Material.

8.3 In no circumstances will the Licensor be liable to the Licensee for any loss resulting from a cause over which the Licensor does not have direct control, including but not limited to failure of electronic or mechanical equipment or communication lines, telephone or other interconnect problems, unauthorised access, theft, or operator errors.

8.4 The Licensee agrees to notify the Licensor within 48 hours and provide full particulars in the event that it becomes aware of any actual or threatened claims by any third party in connection with any works contained in the Licensed Material. It is expressly agreed that upon such notification, or if the Licensor becomes aware of such a claim from other sources, the Licensor may remove such work[s] from the Licensed Material. If the Licensor decides to remove such work[s] from the Licensed Material, the Licensee agrees to remove such work[s] from the Licensed Material and to notify any designated third parties that they must do the same. Failure to report knowledge of any actual or threatened claim by any third party shall be deemed a material breach of this Agreement.

8.5 Nothing in this Agreement shall make the Licensee liable for breach of the terms of this Agreement by any User provided that the Licensee did not cause, knowingly assist or condone the continuation of such breach after becoming aware of an actual breach having occurred.

8.6 The Licensor and the Licensee do not seek to exclude liability under this Agreement for fraud or for personal injury or death caused by its negligence and the negligence of its employees, authorised sub-contractors and agents.

9. ASSIGNMENT

9.1 Save as permitted for under this Agreement, neither this Agreement nor any of the rights and obligations under it may be assigned or sub-licensed by either party without obtaining the prior written consent of the other party, such consent shall not unreasonably be withheld or delayed. In any permitted assignment, the assignor shall procure and ensure that the assignee shall assume all rights and obligations of the assignor under this Agreement and agrees to be bound to all the terms of this Agreement.
10. GOVERNING LAW AND DISPUTE RESOLUTION

10.1 This Agreement shall be governed by and construed in accordance with English law and the parties irrevocably agree that any dispute arising out of or in connection with this Agreement will be subject to and within the jurisdiction of the English courts.

11. NOTICES

11.1 All notices required to be given under this Agreement shall be given in writing in English and sent by electronic mail, fax or first-class registered or recorded delivery to the relevant addressee at its address set out in this Agreement.

12. GENERAL

12.1 This Agreement and its Schedules constitute the entire agreement between the parties relating to the Licensed Material and supersede all prior communications, understandings and agreements (whether written or oral) relating to its subject matter and may not be amended or modified except by agreement of both parties in writing.

12.2 The Schedules shall have the same force and effect as if expressly set in the body of this Agreement and any reference to this Agreement shall include the Schedules.

12.3 The invalidity or unenforceability of any provision of this Agreement shall not affect the continuation in force of the remainder of this Agreement.

12.4 The rights of the parties arising under this Agreement shall not be waived except in writing. Any waiver of any of a party’s rights under this Agreement or of any breach of this Agreement by the other party shall not be construed as a waiver of any other rights or of any other or further breach. Failure by either party to exercise or enforce any rights conferred upon it by this Agreement shall not be deemed to be a waiver of any such rights or operate so as to bar the exercise or enforcement thereof at any subsequent time or times.
3.7: Model Licence

SCHEDULE 1: FEE

1. The fee payable by the Licensee to the Licensor for the rights granted herein to the Licensee and HEFCE shall be fixed at one peppercorn payable by the Licensee only if demanded.
SCHEDULE 2 – LICENSED MATERIAL
SCHEDULE 3 – THIRD-PARTY MATERIAL
### 3.7: Model Licence

IN WITNESS the hands of the above parties on the date first above written:

#### LICENSOR

| SIGNED by: | (Signature) |
| Position: | |
| for and on behalf of: | |

| WITNESSED by: | (Signature) |
| Position: | |
| Address: | |

#### LICENSEE

| SIGNED by: | (Signature) |
| Position: | |
| for and on behalf of: | |

| WITNESSED by: | (Signature) |
| Position: | |
| Address: | |

---

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.

© HEFCE, on behalf of JISC. The contents of this IPR Toolkit are licensed for use under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence.
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 template email for requesting copyright permission should be customised as indicated and used in conjunction with the guidance provided within ‘3.1 Getting Permissions Paper’ and ‘3.2 IPR Risk Assessments’ resources contained within this toolkit.
3.8: Template Email Permission Form

[Please customise the highlighted sections]

Dear Sir/Madam [or insert name of rights holder if you have this information available]

Request for Rights Permissions

[Provide description of your project, URL (where appropriate) and name of lead institution]

[Provide details of how the content/technology/software/databases etc will be made available to users, eg over the web/print/pda/repository etc]

We understand that you are the rights holder for [provide details of the material that you wish to reproduce, provenance and any other identifying information].

We wish to copy and use [reference the material here] and to provide access to it to [insert details of who will get access] for [educational/cultural/research, etc] purposes under the terms of [insert information about the terms under which users will be able to access the material, eg non-commercial research or private study; if you are using a Creative Commons licence or another open content and/or open source licence to provide access, reference it here].

We would therefore be most grateful for your permission to make use of [reference material here] for the purposes described above. Could you please confirm your consent to this proposed use of your copyright works by return of email, including details of how you wish to be credited.

We look forward to hearing from you in due course.

With kind regards

[Insert your name, job title/project role, the name of your institution and/or name of your project and contact details]
Template Permissions Letter for Using Third-Party Materials

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.

The draft shown below is an example of the sort of letter that might be sent out when requesting permissions to use third-party rights. The wording should be amended and customised in the light of the specific request detail and the type of content/technology for which rights clearance is necessary. It should be used in conjunction with the guidance provided within ‘3.1 Getting Permissions Paper’ and ‘3.2 IPR Risk Assessments’ resources contained within this toolkit.

It is recommended that two copies of the letter, on letter-headed paper, are sent to the rights holder together with a stamped addressed return envelope and/or fax number.
3.9: Template Permissions Letter

[date]

[name and address of rights holder]

Dear [add name and title],

Request for Rights Permission to use [include name of work and creator]

We are currently [include details about your proposed use and context of use here].

We would like to seek your permission to make use of your works/works for which you administer the rights [delete as appropriate] for the purposes described above. Could you please confirm your consent, by countersigning both copies of this letter and returning one to us in the envelope provided or by return of fax.

We look forward to hearing from you in due course.

Yours faithfully,

[add signature and date]

[add name, position and organisation]

[Counter-signature of rights holder]

[Name]

[Date]

Schedule

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<tr>
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<th>Title of work</th>
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Introduction

The set of resources contained within this paper have been adapted for SCA sponsors and other organisations across the public sector. They are intended as the basis of a toolkit to be issued to content creators and content users across the public sector who are responsible for rights management and rights clearances. They include:

- Standard rights management fields for capturing information about the progress of rights clearance and rights creation

Rights Management Template

Within any rights clearance strategy, it is vital to ensure that any rights, subsequent permissions granted or not granted, rights holders who have not been traced etc, are recorded in an appropriate format to ensure that there is clarity regarding the status of works, crucial information is captured and this information can be easily accessed and shared across a public-sector body. As a means to ensure the information is recorded comprehensively, it is recommended that all information is recorded, including rights for which permission has already been granted.

The template below is based upon SPECTRUM, the National standard for collections management, produced by the Collections Trust (www.collectionstrust.org.uk/stand.htm). The types of fields, which can be mapped into pre-existing collections management databases or used to create the headings of fields in simple off-the-shelf spreadsheets and databases, might include:

Ref No
The reference number of the content for which rights clearance is required, if appropriate (patent number, an internal reference number, etc).

Object Name
The type of piece of content for which rights clearance is required.

Title
The title of the piece of the content; this might be the name of painting, title of a book, etc.

Content_description
Reference to specific born-digital image on a website etc, or another piece of content if it does not have a name or formal title.

Right_type
The type of right for which permission is required.

Right_begin_date
The date that the right began (the date when the patent was granted; the date copyright in an image, in an unpublished piece of text etc, started).

1 Whilst the focus of these resources is copyright and database rights, patents and Trade Marks are also covered briefly.
3.10: Rights Management

**Right_end_date**
The date that the right expired or is due to expire (the date when the patent was first applied for plus 20 years; the expiry date of copyright in an image, in an unpublished piece of text, etc).

**Right_holder**
The name of the rights holder (where known).

**Org_address**
The address of the rights holder (where known).

**Rights_in_begin_date**
The date from which any permissions to use content have been granted.

**Rights_in_end_date**
The expiring date of any permissions to use content (eg, whilst some permissions might be granted in perpetuity, others may be time or product limited).

**Rights_in_note**
Field for recording any extra information, such as any `due diligence` carried out in order to trace the rights holder etc.

**Rights_in_consent_status**
The status of the rights clearance – ie cleared, permission pending, permission refused, rights holder not found, etc.

**Rights_out_begin_date**
The date from which any permissions to use content by third parties (including users) have been granted.

**Rights_out_end_date**
The expiring date of any permissions to use content by third parties (eg, whilst some permissions might be granted in perpetuity, others may be time or product limited).

**Rights_out_holder**
Details of the any users of the content that this created, or details of the open licence that has been chosen in order to facilitate further use of the content.

**Rights_out_note**
Field for recording any extra information associated with the permissions that have been granted.

**Rights_out_consent_status**
The status of the rights clearance – cleared, permission pending, permission refused, etc.

**Author_record**
The name and job title of the person who created the record.

**Date_record**
The date that this record was last updated.
Introduction

These FAQs and Scenarios have been created to help provide context of use for the resources formed as part of this IPR Toolkit.

FAQs

1. 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 ©.

2. Who owns the rights in works produced by students, volunteers, contractors and freelancers?

As long as they are not paid employees, such as some research students etc, the rights owned by non-members of staff will belong to the authors, unless there are contractual arrangements in place, which either assign the rights to the commissioning party, or else a licence is granted for any use of works that are created. In the case of students, they will own the rights in any work that they produce as part of their studies. This means that the reuse of any of their work will require their permission. A study carried out by JISC Legal (www.jisclegal.ac.uk) into IP and student works [see 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 of being accepted on to a course of study. Resources provided within this toolkit, ‘3.14 Model contractual clauses for requesting permissions from students/volunteers’ and ‘3.15 Model contractual clauses for requesting permissions from freelancers/subcontractors’ can be adapted and used to suit these circumstances.

3. Who owns the rights in works produced by staff in their own time?

Under the Copyright Designs and Patent Act 1988, the default position is that employers will own the rights in any work produced by staff for or on behalf of their organisation. This will vary according to custom and practice, as well as formal contractual clauses made between staff and their organisations. In terms of work produced by staff in their own time, this is not a straightforward answer and will depend on the nature of the work that staff are creating and whether it is directly for or on behalf of their organisation or whether there is an indirect relationship [such as articles in which they are either using their formal job titles or that they are writing as a result of their association with a particular organisation]. In such cases, where there is a lack of clarity, it is sensible to treat each instance on a case-by-case basis and, moreover, ensure that there are the procedures in place for staff to discuss such issues with line managers. Clearly in cases where staff are involved in the creation
3.11: FAQs

of works with no connection to their day jobs, they are likely to retain the rights and negotiation between both parties would be advisable. Template resources that might assist can be found within this toolkit: ‘3.12 Model contractual clauses for requesting permission from staff’.

4. If a rights holder cannot be traced, would a disclaimer provide coverage against any infringement?

The onus of responsibility to use content generated by third parties, which is still in copyright, is placed on the user of the content. This means that permission will need to be sought 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 a disclaimer is used, this is in conjunction with some kind of reasonable search, a clear paper trail of what you have done to trace holders 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 efforts may mitigate the risks. Furthermore, consideration of activities that might be employed if rights holders were to come forward will also be of benefit to your organisation. Further information about the possible issues, risks and actions relating to these issues are outlined in the following resources found within this toolkit: ‘3.1 Getting Permissions Paper’ and ‘3.2 IPR Risk Assessments’.

5. Is playing or reproducing content from a content-sharing website or social networking site an infringement?

This will depend upon the permissions that the creator of the content has granted any users, which will normally be expressed within some kind of licence, such as a Creative Commons licence and/or a copyright statement. The lack of such a licence should be taken to mean that the content cannot be used without further permission. However, even if there is a licence to use content, reproduce and broadcast content etc, it is important that the person who is granting the licence has the authority to grant it – ie they own the rights. In some cases, 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 permissions that they grant to users will be invalid contracts. Further information about Creative Commons licences can be found in the following resource contained within this toolkit: ‘1.1 Creative Commons Licences – Briefing Paper’.

6. Who is liable for an infringement of copyright carried out by staff and/or students?

Some organisations will have Acceptable Use Policies or clauses within staff contracts and/or staff handbooks that spell out what will happen if a member of staff and/or a student breaks the law, which would include any infringements of third-party rights. However, despite the fact that the organisation has taken such responsibility for ensuring that staff and/or students are aware of their legal responsibilities, if any repercussions were to arise following an infringement, the organisation may still be liable as well as possibly the member of staff/student. In addition, the member of staff will be in breach of their contract with the organisation in question and subject to possible disciplinary measures, whilst students will also be subject to disciplinary actions.

7. 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 has 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 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.

Further information about Creative Commons licences can be found in the following resource contained within this toolkit: ‘1.1 Creative Commons Licences – Briefing Paper’.

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

More information about the opportunities and obstacles associated with IPR and the web are outlined in the JISC-funded Web2Rights resources (www.web2rights.org.uk).

9. How relevant are open content licences for providing access to e-content?

Open content licences, like Creative Commons licences, are highly relevant and important licences in helping to achieve the principles of Open Access within a dynamic web environment. These licences have the enormous benefits of being delivered via the web and, in the case of Creative Commons licences, are 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 utilisation.

Any organisations/projects wishing to use open content licences need to ensure that they own the rights (or have permissions from any third-party rights holders) to make content available under the terms of these licences.

Further information about Creative Commons licences can be found in the following resource contained within this toolkit: ‘1.1 Creative Commons Licences – Briefing Paper’.
10. What are the issues arising from reusing and providing access to content whose component parts are licensed for use under different terms by a number of rights holders?

In these circumstances, the least permissive licence terms become the lowest common denominator. This means that uses of the entire content can only be made under the terms of the most restricted licences. For uses beyond these terms, permission should be re-sought for all the licensed content whose use falls beyond scope.

11. What are the legal issues arising from linking to content hosted by third parties?

Linking is a vital mechanism on the web, which creates a means by which the user can find, connect and access 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 given an implied licence for the act of linking.

On the other hand, linking to content that itself 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 that are owned by the entertainment industry, the sector that 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 that 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 that is a diversion from the home page, the website 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 website 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 be, 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 that 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 that infringes copyright nor where the content may be otherwise objectionable), practicalities may dictate that a robust notice and take-down procedure should be put into place to deal with any objections that might arise.
12. What rights do participants have in 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, however recent cases and settlements out of court, including those involving Sienna Miller and Max Mosely, are increasingly shifting the balance in favour of rights of individuals privacy. 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.

13. 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 licensed the IPR to the external client. This may take the form of specific terms and conditions within funding agreements and is 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.
3.12: Model Contractual Clauses for Requesting Permission from Staff

Naomi Korn and Professor Charles Oppenheim, March 2009

Context

These contractual clauses can be used to cover work produced by staff. We recommend that these clauses are incorporated into standard contracts of employment. Please customise the highlighted sections.

This resource should be adapted to suit specific requirements. It is based upon resources produced from the HEFCE-produced ‘Good practice guidance for senior managers: Intellectual property rights in e-learning programmes’1 and reused within the JISC-funded Web2Rights project (www.web2rights.org.uk).

It should used in consultation with the following resources contained within this toolkit:

- 3.1 Getting Permissions Paper
- 3.2 IPR Risk Assessments

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1 www.hefce.ac.uk/pubs/hefce/2006/06_20/06_20.doc
Model contractual clauses of employment for members of staff

Definitions

1. ‘Materials’ means any materials, text, image, audio and visually based, created within the institution or created on behalf of the institution by members of staff.
2. ‘IPR’ means patents, Trade Marks, trade names, design rights, copyright, confidential information, rights in know-how and other Intellectual Property Rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.
3. ‘Member of staff’ means academic staff, research associates, technicians, or any other members of staff of the institution who are employed under a contract of employment (whether fixed term or permanent).

Primary obligation

4. The parties foresee that the member of staff may make or discover or create intellectual property in the course of his or her duties under this agreement and agree that in this respect the member of staff has a special duty to further the interests of the institution.

Title to rights

5. Subject to the provisions of the Patents Act 1977, the Registered Designs Act 1949 and the Copyright, Designs and Patents Act 1988, all IPR in the materials originated by the member of staff and arising out of the performance of his/her duties under this agreement shall be the property of the institution, and the member of staff undertakes to do all acts and things as may be thought by the institution to be necessary to vest any such property in the institution and to register title in such property in the institution.
6. In the event that the member of staff fails (for whatever reason) within 30 days of a demand by the institution to do all acts and things effectively to vest any such property in the institution, the member of staff hereby authorises the institution in his/her name and on his/her behalf to execute all such deeds or documents as may be necessary or desirable to transfer such property in the materials to the institution and register title in the materials in the institution.
7. If material from other copyright works is included in the materials, the member of staff shall identify such material to the institution and shall obtain all necessary written permissions from the owners or from any rights organisation authorised by the owner to grant such permissions in respect of such material. Alternatively, the member of staff shall, if the institution so agrees, provide the institution with sufficient information to enable the institution to obtain such permissions, but the institution shall not thereby be obliged to secure such permissions and may require that the member of staff omit any such material from the materials.
8. The institution hereby agrees and acknowledges that all performers’ rights in any video or other recording of the member of staff’s own lectures or presentations or similar works are owned by the member of staff. The member of staff grants to the institution and its authorised users an irrevocable royalty-free non-exclusive licence to use such material for administrative, educational, teaching and research purposes.
9. Nothing in this agreement shall constitute a waiver by the member of staff of any moral right under the Copyright, Designs and Patents Act 1988, and nothing therein shall constitute an exclusive recording contract within the meaning of Part II of that Act or consent by the member of staff to the exploitation of any qualifying performance for the purposes of that Part.

Exploitation and income

10. The institution is free to exploit (whether for financial gain or not) such materials as it sees fit, including licensing or assigning the IPR in the materials to third parties, or merging said materials with other materials created within the institution or elsewhere.
3.12: Model Contractual Clauses for Requesting Permission from Staff

11. In the event that the institution fails to exploit the materials within a period of [to be inserted], the member of staff or his/her representative may give notice thereof to the institution, and in such event the institution shall declare within thirty (30) days in writing whether or not it intends to exploit the materials in the foreseeable future. The institution agrees it will enter into good faith negotiations with the member of staff with a view to assigning its rights in the materials to the member of staff if no prospect of commercial exploitation of materials is to be expected. In return, the member of staff shall grant the institution and its authorised users an irrevocable royalty-free licence to use such material for administrative, educational, teaching and research purposes.

12. Should the materials prove to be profitable, the institution agrees that it shall, in accordance with its normal procedures, enter into good faith negotiations with the member of staff regarding possible rewards.

Credits

13. The institution agrees to credit the member of staff for any significant contribution to the materials. The institution shall comply with any request by the member of staff in writing that his/her name be removed from the materials where such request is on grounds that the whole or parts of the materials are out of date or changed in a manner that might damage his/her reputation.

14. The institution may update or in any other way amend the materials to suit its requirements. The institution agrees to consult the member of staff over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Permitted uses

15. The institution grants to the member of staff a royalty-free non-exclusive licence to use the materials created by the member of staff or jointly with others for non-commercial teaching or research purposes only for as long as the member of staff remains employed by the institution. Such licence may continue after the termination of this agreement provided that the use of the materials does not damage the exploitation of the materials by the institution or prejudice in any way the interests of the institution.

16. Should the contract of employment of the member of staff terminate, the member of staff shall be entitled to enter into negotiations with the institution with a view to permitting the member of staff to make and retain a copy of the materials for his/her use for non-commercial teaching and research purposes. In the case of disagreement over these negotiations, dispute settlement procedures in accordance with Clause 20 of this agreement shall be invoked. Neither the member of staff nor his/her new employer is permitted to commercially exploit the materials without the express permission of the institution.

17. Nothing herein shall grant to the member of staff any right or licence to copy or use any versions of the materials updated or in any way amended by the institution after termination of the employment whose terms and conditions are governed by this agreement.

Prohibited uses

18. The member of staff is not permitted to assign or enter into any licence for the exploitation of the materials. In the event that the member of staff becomes aware of any third party wishing to exploit the materials, such third party shall be advised by the member of staff to contact the institution as the owner of the IPR in the materials.

Termination

19. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of the employment whose terms and conditions are governed by this agreement in respect of all IPR in the materials originated by the member of staff during the member of staff’s employment under this agreement, and shall be binding on his/her representatives.
3.12: Model Contractual Clauses for Requesting Permission from Staff

Dispute settlement

20. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties, within thirty (30) days after a request for a reference is made by either party, [eg] nominated on the application of either party by the chairman for the time being of the Bar Council.

[There might be a reversion of rights clause also inserted. Public-sector bodies and, in particular, HEIs, FEIs and schools should allow for the possibility of reversion of rights if, should the HEIs, FEIs and schools choose not to exploit the materials commercially, the individual or team that developed the materials wishes to take on the exploitation of the materials. Negotiations should be entered into in good faith and should be based on the premise that the HEIs, FEIs and schools should not unreasonably refuse the individual or the team the IPR if the HEIs, FEIs and schools have no interest in exploiting the materials. Appropriate arbitration procedures should be in place in case of disagreement. In return for the acquisition of the IPR, the member of staff should always grant his/her employer and its authorised users a royalty-free licence to use the materials for administrative, educational, teaching or research purposes. Any such clause should forbid the individual from exploiting the material in a way that the HEIs, FEIs and schools in their reasonable opinion deems to be competitive to their own activities.]
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 agreement should be adapted to suit specific requirements. Further legal advice should be sought where necessary.
EXAMPLE OF A BASIC Consortium Agreement

[INSERT PROJECT NAME] CONSORTIUM AGREEMENT

THIS AGREEMENT is made the day of 2007

BETWEEN: [INSERT NAME OF PARTY A], whose registered office is at [insert address].
AND [INSERT NAME OF PARTY B], whose registered office is at [insert address].
AND [INSERT NAME OF PARTY C], whose registered office is at [insert address].
AND [INSERT NAME OF PARTY D], whose registered office is at [insert address].

[hereinafter referred to individually as a 'Party' and collectively as 'the Parties']

RECITALS

WHEREAS the Parties wish to cooperate over [insert details];
AND WHEREAS this Consortium Agreement sets out the relationship between the Parties and the organisation of the work.

IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS

1.1 In this Agreement, the following terms shall have the following meanings:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Background IPR'</td>
<td>means all patents, designs, copyright (including copyright in software), database rights, and any other Intellectual Property Rights excluding Foreground IPR, owned by any of the Parties, in the field and which are necessary for the exploitation of Foreground IPR in accordance with this Agreement.</td>
</tr>
<tr>
<td>'Business Day'</td>
<td>means any day other than a Saturday or Sunday or a public or bank holiday in the United Kingdom.</td>
</tr>
<tr>
<td>'Confidential Information'</td>
<td>means all information that is marked as Confidential and that is disclosed by one Party to the others for the purpose of conducting the Project, including, without prejudice to the generality of the foregoing, any ideas; finance; financial, marketing, development or manpower plans; computer systems and software; products or services, including but not limited to know-how and information concerning relationships with other parties and all records, reports, documents, papers and other materials whatsoever originated pursuant to this Agreement.</td>
</tr>
<tr>
<td>'Consortium'</td>
<td>means the Parties collectively.</td>
</tr>
<tr>
<td>'Effective Date'</td>
<td>means the date when all Parties have signed this Agreement.</td>
</tr>
<tr>
<td>'Foreground IPR'</td>
<td>means all patents, designs, copyright (including copyright in software), database rights and any other Intellectual Property Rights arising as a direct result of and in the performance of this Agreement.</td>
</tr>
<tr>
<td>'Intellectual Property Rights'</td>
<td>means patents, Trade Marks, trade names, design rights, copyright (including rights in computer software and moral rights), database rights, rights in know-how and other Intellectual Property Rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world.</td>
</tr>
</tbody>
</table>
### 3.13: Example Consortium Agreement

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Project’</td>
<td>means the collaborative [insert name of the project] as described in Schedule 1.</td>
</tr>
<tr>
<td>‘Project Manager’</td>
<td>means the person appointed by the Steering Group to run the day-to-day operation of the Project.</td>
</tr>
<tr>
<td>‘Personnel’</td>
<td>means any employee, director, agent, subcontractor or other person engaged by a Party.</td>
</tr>
<tr>
<td>‘Steering Group’</td>
<td>means the committee appointed to be responsible for managing the Project whose individual members are set out in Schedule 2.</td>
</tr>
</tbody>
</table>

1.2 Headsings contained in this Consortium Agreement are for reference purposes only and shall not be deemed to be an indication of the meaning of the clause to which they relate.

1.3 Where the context so implies, words importing the singular number shall include the plural and vice versa and words importing the masculine shall include the feminine and vice versa.

[This section provides clear definitions for key terms in the Agreement, as appropriate]

### 2. LEAD INSTITUTION

The Parties hereto agree that the [insert name of institution] will be the lead institution ('Lead Institution') and authorises it as their agent to sign agreements in their name and on their behalf in relation to the Project. The Parties agree that the Lead Institution will grant a licence to [insert name of any funding bodies] of the rights set out in [insert reference to any funding agreement]. The Lead Institution will open and maintain a dedicated bank account for the benefit of the Parties and the use of the Project. Without prejudice to its authority to contract on behalf of the Parties in relation to the Project, the Lead Institution agrees to take all reasonable steps in every occasion to seek and obtain the prior consent of each of the other Parties before signing agreements for the benefit of the Project and the other Parties.

[This section identifies the Lead Institution and explains its role]

### 3. PURPOSE OF THE CONSORTIUM

The purpose of the Consortium is:

- To specify the organisation of the work between the Parties in carrying out the Project and to set out the rights and obligations of the Parties
- Carry out the Project and to produce the Deliverables as described in Schedule 1

[This section states the purpose of the Consortium, as decided by the Project partners, which may be wider than simply carrying out the funded Project]

### 4. COMMENCEMENT AND DURATION

This Agreement shall commence on the Effective Date and shall continue until the completion of the Project on [insert Date].

The duration of this Agreement may be extended beyond [insert Date], at any time prior to that date, by written agreement of the Parties, for such period or periods as are deemed appropriate.

[This section states the starting date and duration of the Agreement but also makes provision for continuation of the Agreement after the initial funding period, should this be necessary]
5. OVERRIDING CONDITIONS

In all instances, until the completion of the Project, conditions laid down for the Project by the [insert name of the Funding Body] or its successor will override any agreement between the Parties concerning the Project, including any terms contained in this Agreement.

[A Funding Body may sometimes require, as part of the funding award contract, that a project Consortium Agreement contains a clause allowing the Funding Body to intervene in decisions made by the Project partners]

6. PROJECT MANAGEMENT

6.1 STEERING GROUP

The Parties shall establish, within thirty days after the Effective Date, a Steering Group, which shall be composed of one duly authorised representative of each Party. After having informed the others in writing, each Party shall have the right to replace its representative and/or to appoint a proxy, although it shall use all reasonable endeavours to maintain the continuity of its representation. The composition of the Steering Group is set out in Schedule 2. The Steering Group shall appoint a Chair from amongst its members. There shall also be a Project Manager, who shall be Secretary to the Steering Group.

6.2 RESPONSIBILITIES OF THE STEERING GROUP

6.2.1 Project Oversight

The Steering Group shall be responsible for the delivery of the Project outcomes and to this end will keep the Project plan, and progress towards meeting it, under review.

6.2.2 Appointment of Project Manager

The Steering Group shall be responsible for appointing a Project Manager. The Project Manager will have responsibility for the day-to-day management of the Project and will report to the Steering Group.

6.2.3 Financial Management

The Steering Group shall be responsible for the financial management of the Project, and will manage the Project in accordance with appropriate project management techniques. The Steering Group may choose to take advice from third parties as required.

6.2.4 Publications and Press Releases

The Steering Group shall decide procedures for dissemination of publications and press releases relating to the Project.

6.2.5 Commercial Exploitation Strategy

The Steering Group shall hold two Special Meetings, the first twelve months prior to the end of the Project, and the second at the end of the Project, whose business shall be exclusively to review the Deliverables, discuss the potential for the commercial exploitation of the Project Deliverables and the creation of products based on those Deliverable. and develop a strategy for such exploitation and development.
6.2.6 Exit Strategy

The Steering Group shall establish a Sustainability Sub-Group to plan for the future development of the Deliverables. The Steering Group shall hold two Special Meetings, the first twelve months prior to the end of the Project, and the second at the end of the Project, whose business shall be exclusively to develop a suitable strategy or strategies for future development of the Deliverables, including the pursuit of additional funding from appropriate sources.

In the event that additional funding is secured for future development of the Deliverables, the Steering Group shall be responsible for making such financial and administrative arrangements as are necessary to secure the effective and efficient continuation of the Consortium including any necessary revisions of this Consortium Agreement, for approval by the Parties.

6.2.7 Division of Exploitation Income

The Steering Group will decide the division of income derived from exploitation of the Deliverables. The sharing of revenue applies to those Parties remaining at the end of the Project. If a Party withdraws or is expelled prior to the completion of the Project their entitlement to a share in the income derived from commercial exploitation will be determined by the Steering Group and will take account of the proportion of the total Project undertaken by that Party.

6.3 STEERING GROUP MEETINGS

The Steering Group shall determine the frequency of its meetings, but shall meet at least twice yearly. Additional meetings may be called by two or more Parties or at the request of the Project Manager. Meetings will operate under the following rules:

6.3.1 At each meeting, the Steering Group will agree on a date for the next meeting. Otherwise the Secretary, in consultation with the Chair or his nominee, shall call meetings, giving notice that is reasonable in the circumstances.

6.3.2 The Secretary shall circulate an agenda before the meeting.

6.3.3 Each Steering Group member (including the co-opted members, but not the Secretary) will have one vote, except the Chair who has a casting vote. A member may not vote on matters concerning a dispute with the Consortium where the member is the subject of the dispute.

6.3.4 The quorum for a meeting will be five (5) voting members.

6.3.5 With the approval of the Chair, Steering Group members may nominate a representative to attend meetings and vote on their behalf.

6.3.6 Votes, with the exception of a vote to terminate a Party’s membership of the Consortium, will be decided on the basis of a majority vote of those attending and eligible to vote.

6.4 RESPONSIBILITIES OF THE INDIVIDUAL MEMBERS OF THE STEERING GROUP

In addition to the Steering Group’s collective responsibility, individual members of the Steering Group will have specific responsibilities as determined by the Steering Group from time to time.
distribution of revenue from such exploitation, and planning for the end of the initial period of funding. The section also
details the Steering Group meeting procedures, and provides that Steering Group members will have both collective
and individual responsibilities under the Agreement.]

7. PROJECT RESOURCES

7.1 ALLOCATION

The total funding to be paid, subject to progress against Project milestones as agreed with the [insert name of
the funding body] is as follows:

Financial Year 1 [insert Date] – [insert Date] [insert amount £XX,XXX]
Financial Year 2 [insert Date] – [insert Date] [insert amount £XX,XXX]
Financial Year 3 [insert Date] – [insert Date] [insert amount £XX,XXX]
Financial Year 4 [insert Date] – [insert Date] [insert amount £XX,XXX]

7.2 DISTRIBUTION

Payments are made from the [insert name of the funding body] to the [insert name of Lead Institution].
Thereafter [insert name of Lead Institution] shall apportion the budget between the Parties on the basis of
financial plans approved from time to time by the Steering Group.

7.3 INVOICING/CLAIMS

Where claimable costs and expenses [that is, approved by the Project Manager or Steering Group] are incurred,
claims should be passed to the Project Manager as soon as they have been paid with supporting evidence of the
expenditure attached. The Project Manager will be required to make financial reports to the Steering Group from
time to time.

[This section describes what the project resources from the initial funding are, and how they will be distributed.
In this example, the detailed financial planning is left largely to the discretion of the Steering Group, but it could
instead have been dealt with within the Consortium Agreement itself]

8. RESPONSIBILITIES OF THE PARTIES

PERFORMANCE

8.1 Each Party undertakes to each other Party to perform and fulfil on time the tasks assigned to it by the
Steering Group and all other of its obligations under this Agreement.

8.2 Towards the Steering Group and the Project Manager, each Party hereby undertakes to supply promptly
to the Project Manager all such information or documents as the Project Manager and the Steering Group
need to fulfil obligations pursuant to this Agreement.

8.3 Towards each other, each Party undertakes to:

8.3.1 Notify each of the other Parties as a Party becomes aware of any significant delay in performance;
3.13: Example Consortium Agreement

8.3.2 Inform other Parties of relevant communications it receives from third parties in relation to the Project.

8.4 Each Party shall use all best efforts to ensure the accuracy of any information or materials it supplies hereunder and promptly to correct any error therein of which it is notified.

8.5 Each Party agrees not to issue any press releases or other such publicity materials relating to the work of the Consortium without obtaining prior approval from the other Parties.

WARRANTIES AND UNDERTAKINGS

8.6 Each Party warrants that under its contractual relationships with each of its Personnel, any Intellectual Property Rights arising out of or relating to work done by the Personnel for the Party will vest in such Party and that the Personnel will have no right, title or interest, whether legal or beneficial, in any such Intellectual Property Rights. A Party shall, if so required by the Steering Group, produce written evidence of this to the Steering Group signed by its Personnel.

Each Party acknowledges that it is and shall remain liable for the consequences of any failure on its part or on the part of its Personnel to fulfil the tasks and work packages assigned to it under this Agreement and shall accordingly:

8.6.1 Procure and maintain its own insurance, with insurers of good repute, to cover its own liabilities and those on behalf of its Personnel

8.6.2 Keep true and accurate records of all things done by its Personnel in relation to the tasks and work packages assigned to it under this Agreement

8.6.3 Comply and assist the Consortium, the Steering Group and the Project Manager in complying with all relevant statutes, laws, regulations and codes of practice relating to its tasks and work packages from time to time in force

8.6.4 Comply with all recommendations and requirements of its insurers and

8.6.5 Indemnify, keep indemnified and hold harmless the other Parties from and against all costs (including the costs of enforcement), expenses, liabilities, injuries, direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss), damages, claims, demands, proceedings or legal costs (on a full indemnity basis) and judgments which they incur or suffer as a result of a breach of this Agreement or negligent acts or omissions or wilful misconduct of the Party and/or its Personnel including without limitation any resulting liability the Consortium has to the funder or to any third party.

8.7 Each Party shall be responsible for providing all appropriate facilities and services as shall be necessary in the proper performance of the tasks and work packages, which will be entirely at the Party’s own expense.

8.8 Each Party agrees and undertakes at its own expense to make the Personnel available to attend a working group meeting with the Project Manager to review progress at such times and locations as the Steering Group shall reasonably specify.

8.9 Each Party shall provide the Steering Group with:

8.9.1 Quarterly statements of expenditure incurred in relation to the provision of the tasks and work packages assigned to it, together with copies of staff timesheets, invoices and other relevant documentation for audit purposes

8.9.2 A declaration that confirms that expenditure has been incurred in accordance with the Funding Agreement and
8.9.3 A final statement of expenditure within 4 weeks of the termination of this Agreement.

[This section outlines the responsibilities of the Project partners – these may vary according to the nature and scope of the Project. It includes warranties and undertakings between the Project Partners on issues including Intellectual Property, insurance, record keeping, and legal compliance, as well as an indemnity provision to protect the Project partners from financial and other damage arising from acts or omissions on the part of any of the Project partners. It also makes provision for a Project Working Group without fixed membership to be convened, at the discretion of the Steering Group, to review progress. Finally, it deals with issues of Project Partner financial accountability, and record keeping.]

9. ADDITION OF PARTIES TO THE CONSORTIUM

Institutions may be invited to join the Consortium only by the unanimous decision of the Steering Group and on the condition that the new institution becomes a party to this Agreement.

[This section makes provision for third-party institutions to join the Consortium. The conditions laid down for joining may vary according to the nature and scope of the Project. In this case, for a third party to join the Consortium they must agree to the same terms and conditions as the original Parties. As such, an agreement for a third party to join the Consortium which did not meet those criteria would not be valid, unless the Parties agreed to amend this Consortium Agreement accordingly.]

10. REMOVAL OR WITHDRAWAL OF PARTIES FROM THE CONSORTIUM

10.1 REMOVAL OF PARTIES

Without prejudice to any other rights or remedies open to the Consortium, the Steering Group may, after a two-thirds majority vote of the full Steering Group in favour of termination, and via a written notice served on the Party, terminate a Party’s membership of the Consortium, if the Party:

10.1.1 Is in material breach of any of the terms of this Agreement and, where the breach is capable of remedy, the Party fails to remedy such breach within 30 days’ service of a written notice specifying the breach and requiring it to be remedied or

10.1.2 In the opinion of a majority of the Steering Group, is incompetent, commits any act of gross or persistent misconduct and/or neglects or omits to perform any of its duties or obligations under this Agreement or

10.1.3 Fails or refuses after written warning from the Steering Group to carry out the duties or obligations reasonably and properly required of it under this Agreement or

10.1.4 Being a company, summons a meeting of its creditors, makes a proposal for a voluntary arrangement, becomes subject to any voluntary arrangement, is unable to pay its debts within the meaning of s.123 Insolvency Act 1986, has a receiver, manager or administrative receiver appointed over any of its assets, undertaking or income, has passed a resolution for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation), is subject to a petition presented to any court for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation), has a provisional liquidator appointed, has a proposal made for a scheme of arrangement under s.425 Companies Act 1985, has an administrator appointed in respect of it or is the subject of an application for administration filed at any court or a notice of appointment of an administrator filed at any court or a notice of intention to appoint an administrator given by any person or is the subject of a notice to strike off the register at Companies House

10.1.5 Ceases to operate its business or undertaking

10.1.6 Provides the Steering Group with any false or misleading information with regard to its ability to perform its duties or obligations under this Agreement or
10.1.7 Has done anything which brings or might reasonably be expected to bring the Parties or the Project or the Funder into disrepute or otherwise damage other contractors, employees, agents, customers, other business associates or the general public including, but not limited to, committing an act of fraud or dishonesty, whether or not connected with the Project.

10.2 WITHDRAWAL OF PARTYS

A Party may withdraw from the Consortium only with the unanimous agreement of the remaining Parties.

10.3 CONDITIONS CONSEQUENT ON REMOVAL OR WITHDRAWAL

In the event of withdrawal or expulsion of a Party, the Consortium will be liable to meet only the cost of any work undertaken up to the point at which a Party ceases to be a member of the Consortium. The balance of any payments made to the Party will be returned to the nominated representative of [insert name of Lead Institution] within 30 days of withdrawal or expulsion. In all cases, the Consortium reserves the right of access to any work produced in the course of the Party’s work as part of the Consortium.

[This section makes provision for removal or withdrawal of Project Partners from the Consortium. In the case of removal, it provides a set of clear grounds that would justify removal and a specific procedure that must be followed. The section also makes provision for determining the financial outcomes of withdrawal or expulsion, and ensures that work carried out by an expelled or withdrawn Partner remains accessible to the remaining Project Partners. This should be read in conjunction with the Intellectual Property provisions below.]

11. DATA MANAGEMENT

11.1 DATA COLLECTION

In the course of the Project, each Party is involved in the production and collection of data in the form of [insert description]. The data are to be sent to the Project Manager and stored in an archive at [insert name of Institution/Project Partner] (‘the Project Archive’). Each Party agrees to ensure that all data submitted to the Project Manager are accompanied by documentation detailing the origin of the data, together with any necessary consents.

11.2 DATA MAINTENANCE

The [insert name of Institution/Project Partner] hereby undertakes to maintain the Project Archive for the duration of the Project and for a period of at least three (3) years after the end of the Project. This period is subject to extension if the Steering Group so decides.

11.3 DATA PROTECTION

As a member of the Consortium, each Party will be processing personal data for the purpose of the [insert name of Project]. Each Party must be a signatory of the [insert name of Project] Data Controllers Agreement, and must sign a Data Processing Agreement with the [insert name of Institution/Project Partner], prior to processing personal data for the purposes of the Project.

[This section makes provision for data management within the Project, in terms of archiving and preservation of both Project administrative data and Project outputs. This may be particularly important from the Funding body’s perspective, but also in terms of ongoing project management and future strategic planning. The section on data protection may, or may not, be necessary depending upon the nature and scope of the Project. It links the Consortium Agreement to a further set of DP-specific Agreements.]
12. CONFIDENTIALITY

12.1 Each Party hereby undertakes to the other Parties that it shall procure that its employees, agents and subcontractors shall:

12.1.1 Keep confidential all information of a confidential nature (whether written or oral) concerning this Agreement and the business affairs of another Party that it shall have obtained or received as a result of the discussions leading up to or entering into or performance of this agreement (the 'Information')

12.1.2 Not without the prior written consent of the relevant other Party disclose the Information either in whole or in part to any other person save those of its employees, agents and subcontractors involved in the implementation or evaluation of the Project who have a need to know the same for the performance of their duties

12.1.3 Use the Information solely in connection with the implementation of the Project and not otherwise for its own benefit or the benefit of any third party

12.1.4 These provisions above shall not apply to the whole or any part of the Information to the extent that it can be shown by the receiving Party to be:

12.1.4.1 Known to the receiving Party prior to the date of this Agreement and not obtained directly or indirectly from any other party or

12.1.5.1 Obtained from a third party who lawfully possesses such Information which has not been obtained in breach of a duty of confidence owed to any party by any person or

12.1.6.1 In the public domain in the form in which it is possessed by any other party other than as a result of a breach of a duty of confidence owed to such other party by any person or

12.1.7.1 Required to be disclosed by legal process, law or regulatory authority

12.2 Each Party hereby undertakes to the other Parties to make all relevant employees, agents and subcontractors aware of the confidentiality of the Information and provisions of this clause and without prejudice to the generality of the foregoing to ensure compliance by such employees, agents and subcontractors with the provisions of this clause.

(This is a standard confidentiality clause. It is important that if information of a confidential nature is to be made available between Project Partners, that the providing Partner makes it quite clear that it is to be considered confidential, and that the other Project Partners take all necessary steps to ensure that confidentiality is respected.)

13. INTELLECTUAL PROPERTY

13.1 IPR WARRANTIES

Each Party shall obtain the necessary assignments of Intellectual Property Rights or licences from all staff, agents, or subcontractors involved in the development and production of the Deliverables on its behalf. Each Party warrants to the other Parties that it is the owner of the Intellectual Property Rights in the Deliverables, or that it is duly licensed to use the Deliverables, and that the use of the content of the Deliverables as contemplated in this Agreement does not infringe any Intellectual Property Rights or other proprietary or rights of any natural or legal person.
13.2 BACKGROUND IPR

All Background IPR used in connection with this Agreement shall remain the property of the Party introducing the same or any other third parties. Each Party shall take responsibility for ensuring that all necessary permissions have been sought to use Background IPR.

13.3 FOREGROUND RIGHTS

All Foreground IPR arising from this Agreement shall belong to the Party generating the same.

13.4 ACCURACY

Each Party shall use reasonable endeavours to ensure the accuracy of any information or materials that it supplies to the other Parties under this clause and shall promptly correct any error therein of which it is notified. The donating Party will provide no warranties to recipient Parties in respect of the information and materials, and the recipient Parties shall be entirely responsible for the use to which they put such information and materials.

13.5 ACCESS RIGHTS

13.5.1 Each Party hereby grants to the other a royalty-free, non-exclusive, worldwide, irrevocable, assignable, perpetual licence to use its (and third parties) Background IPR and Foreground IPR for the purpose of performing their part of the Project.

13.5.2 Each Party hereby indemnifies the other Parties against any liabilities, loss, claims or expenses brought against or incurred as a result of its use of and/or sale of products containing the other Parties’ Background IPR and/or Foreground IPR.

13.5.3 After completion of the Project all Parties shall continue to have the right to use their Foreground IPR at no cost for the purposes of exploiting the materials in the carrying out of their usual educational activities.

13.5.4 After completion of the Project the Consortium shall provide on request, to any educational institution (as defined by s.65 (5) of the Further and Higher Education Act 1992), a free copy of the Deliverables subject to a royalty-free non-exclusive perpetual licence to use the Deliverables for non-commercial purposes.

13.5.5 Use of Background IPR and/or Foreground IPR by third parties other than Parties, and by educational institutions (as defined by s.65(5) of the Further and Higher Education Act 1992) for commercial purposes, shall be at the discretion of the Parties owning such Background IPR and/or Foreground IPR.

13.5.6 Each Party hereby grants to the Lead Institution a royalty-free, non-exclusive, worldwide, irrevocable, assignable, perpetual licence to use all Background IPR and Foreground IPR of the Parties for the purpose of performing its obligations under Clause 2 and in order to licence to [insert name of the funding body] the rights as set out in the [insert reference to the funding body agreement].

13.5.7 Each Party hereby indemnifies [insert name of the funding body] against any liabilities, loss, claims or expenses brought against or incurred as a result of its use of the Deliverable in accordance with the [insert reference to the funding body agreement].
13.6

FUNDING AGREEMENTS

The provisions of this clause shall at all times be subject to any conflicting provisions in the funding letter, and in the event of any conflict, the content of the funding letter shall prevail.

[This section deals with the issue of Intellectual Property. The Intellectual Property sections of a Consortium Agreement will be extremely important in terms of the development of a project and any future exploitation of project Deliverables, and it is vital that Project Partners are clear about the implications of their respective rights and obligations as outlined within it.]

14 TERMINATION

14.1 TERMINATION OF FUNDING

This Agreement shall terminate immediately with no liability between the Parties should the Funding Agreement terminate for any reason whatsoever, unless the Parties, by means of written agreement, decide to continue it.

14.2 TERMINATION BY MUTUAL AGREEMENT

This Agreement may be terminated at any time by the unanimous written agreement of the Parties.

14.3 RIGHTS OF PARTIES

The termination of this Agreement, howsoever arising, is without prejudice to the rights, duties and liabilities of the Parties accrued due prior to termination. The provisions in this Agreement which expressly or impliedly have effect after termination shall continue to be enforceable notwithstanding termination.

[This section outlines the conditions under which the Agreement may be terminated, other than its completion as set out in clause 4 'Commencement and Duration', and the implications of Termination for the Project Partners.]

15 GOVERNING LAW AND DISPUTE RESOLUTION

15.1

This Agreement shall be governed by and construed in accordance with English law and the parties irrevocably agree that any dispute arising out of or in connection with this Agreement will be subject to and within the jurisdiction of the English courts.

15.2

The Parties agree to use best efforts to resolve disputes in an informal manner. Where the Parties agree that a dispute arising out or in connection with this Agreement would best be resolved by the decision of an expert, they will agree upon the nature of the expert required and together appoint a suitable expert by agreement.

15.3

Any person to whom a reference is made under Clause 15.2 shall act as expert and not as an arbitrator and his decision (which shall be given by him in writing and shall state the reasons for his decision) shall be final and binding on the Parties except in the case of manifest error or fraud.

15.4

Each Party shall provide the expert with such information and documentation as he may reasonably require for the purposes of his decision.

15.5

The costs of the expert shall be borne by the Parties in such proportions as the expert may determine to be fair and reasonable in all circumstances or, if no determination is made by the expert, by the Parties in equal proportions.
3.13: Example Consortium Agreement

(This section provides a mechanism for resolving disputes between the Project Partners, which cannot be resolved within the Consortium (ie in this case, by the Steering Group). This example envisages a simple binding dispute resolution, but there are a wide range of alternative options for those drafting Consortium Agreements to choose between, including more formal arbitration processes. It is important to consider carefully which model of dispute resolution best suits the arrangements for a particular project. The section also determines which jurisdiction’s law will be used when there is any dispute about, or arising from, the Agreement. It also states which country’s courts should have jurisdiction to hear any case arising from the Agreement.)

16 GENERAL PROVISIONS

16.1 SOLE AGREEMENT

Subject to Clause 5 this Agreement contains all the terms that the Parties have agreed in relation to the subject matter of this Agreement and supersedes any prior written or oral agreements, representations or understandings between the Parties relating to such subject matters.

No Party to this Agreement has been induced to enter into this Agreement by a statement or promise which it does not contain save that this clause shall not exclude any liability which one Party would otherwise have to the other in respect of any statements made fraudulently by that Party.

16.2 SCHEDULES

The Schedules shall have the same force and effect as if expressly set in the body of this Agreement and any reference to this Agreement shall include the Schedules.

16.3 WAIVER

No failure or delay by any Party to exercise any right, power or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

16.4 SEVERABILITY

If any clause or part of this Agreement is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from this Agreement and shall be ineffective without, as far as is possible, modifying any other clause or part of this Agreement and this shall not affect any other provisions of this Agreement, which shall remain in full force and effect.

16.5 FORCE MAJEURE

No Party will be deemed to be in breach of this Agreement, nor otherwise liable to the other for any failure or delay in performance of this Agreement if it is due to any event beyond its reasonable control other than strike, lock-out or industrial disputes but including, without limitation, acts of God, war, fire, flood, tempest and national emergencies and a Party so delayed shall be entitled to a reasonable extension of time for performing such obligations.
3.13: Example Consortium Agreement

16.6 ASSIGNMENT

Save as permitted for under this Agreement, neither this Agreement nor any of the rights and obligations under it may be subcontracted or assigned by any Party without obtaining the prior written consent of the other Parties. In any permitted assignment, the assignor shall procure and ensure that the assignee shall assume all rights and obligations of the assignor under this Agreement and agrees to be bound to all the terms of this Agreement.

16.7 VARIATION

This Agreement may be amended at any time by written agreement of the Parties. No variation to this Agreement shall be effective unless in writing signed by a duly authorised officer of each of the written Parties. Any variation during the term of the Project shall be subject to the approval of the Funder.

16.8 NOTICE

Any notice in connection with this Agreement shall be in writing and may be delivered by hand, pre-paid first class post, Special Delivery post, or facsimile (but not by email), addressed to the recipient at its registered office or its address or facsimile number as the case may be (or such other address, or facsimile number as may be notified in writing from time to time).

- The notice shall be deemed to have been delivered by hand, when left at the proper address for service
- If given or made by pre-paid first class post or Special Delivery post, 48 hours after being posted or in the case of Airmail 14 days after being posted (excluding days other than Business Days)
- If given or made by facsimile, at the time of transmission, provided that a confirming copy is sent by pre-paid first class post to the other party within 24 hours after transmission

provided that, where in the case of delivery by hand or transmission by facsimile, such delivery or transmission occurs either after 4.00 pm on a Business Day, or on a day other than a Business Day, service shall be deemed to occur at 9.00 am on the next following Business Day (such times being local time at the address of the recipient).

[This section contains general provisions concerning the operation of the Consortium Agreement. For example, clause 16.4 provides that failure of one part of the Agreement does not invalidate the whole Agreement, clause 16.7 allows Project partners to amend the Agreement but only under specific conditions, and clause 16.8 covers the form that communications concerning the Agreement (ie not general day-to-day project messages, but messages specifically relating to the Agreement) should take, and when such communications will be considered to have been received.]

SCHEDULE 1 – Project

SCHEDULE 2 – Composition of Steering Group [List]
Context

These contractual clauses can be used to reuse work produced by students and volunteers. This resource should be adapted to suit specific requirements. It is based upon resources produced from the HEFCE-produced ‘Good practice guidance for senior managers: Intellectual property rights in e-learning programmes’ and reused within the JISC-funded Web2Rights project (www.web2rights.org.uk).

It should be used in consultation with the following resources contained within this toolkit:

- 3.1 Getting Permissions
- 3.2 IPR Risk Assessments

When working with volunteers

We recommend that this resource is also used in conjunction with the fact sheet on Volunteers and Copyright, located within CollectionsLink (www.collectionslink.org.uk).

When working with students

We recommend that any assignments of rights clauses should not form part of the standard contract between the HEI and its students, but is instead offered for voluntary signature by the student on a case-by-case basis. Please see the JISC Legal Investigation into Student Work and IPR for further information.

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1 www.hefce.ac.uk/pubs/hefce/2006/06_20/06_20.doc
2 www.jisclegal.ac.uk/publications/studentipr.htm
Model Contractual Clauses for Students/Volunteers

Definitions

1. ‘Materials’ means any materials created within the Institution or created on behalf of the Institution by Students and/or Volunteers.

2. ‘IPR’ means patents, Trade Marks, trade names, design rights, copyright, confidential information, performers rights, rights in know-how and other Intellectual Property Rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall exist anywhere in the world.

3. ‘Student’ means any person registered as an undergraduate or postgraduate student of the Institution or following any course as if such a student.

4. ‘Volunteer’ means any person providing support, help, advice or generating materials for the Institution without financial remuneration.

Title to rights

5. The Student/Volunteer [delete as applicable] hereby assigns all IPR in Materials originated by the Student/Volunteer [delete as applicable] to the Institution. The Student/Volunteer [delete as applicable] wherever requested to do so by the Institution, should (at the expense of the latter) execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

OR

The Student/Volunteer [delete as applicable] grants a royalty-free worldwide irrevocable non-exclusive licence to the Institution to use Materials as it sees fit.

Exploitation and income

6. The Institution is free to exploit (whether for financial gain or not) the Materials as it sees fit, including licensing or assigning the IPR in the Materials to third parties, or merging said Materials with other materials created within the Institution or elsewhere.

7. Should the Materials prove to be profitable, the Institution agrees that it shall enter into good faith negotiations with the Student/Volunteer [delete as applicable] regarding possible rewards.

Credits

8. The Institution agrees to credit the Student/Volunteer [delete as applicable] for any significant contribution to the Materials. The Institution shall comply with any request by the Student/Volunteer [delete as applicable] in writing that his/her name be removed from the Materials where such request is on the grounds that the whole or parts of the Materials are out of date or changed in a manner that might damage his/her reputation.

9. The Institution may update or in any other way amend the Materials to suit its requirements. The Institution agrees to consult the Student/Volunteer [delete as applicable] over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Permitted uses for Students

[THESE CLAUSES CAN BE CONSIDERED FOR USE FOR STUDENTS IF THE STUDENT Assigns COPYRIGHT TO THE INSTITUTION, OTHERWISE IF THE STUDENT RETAINS THE IPR, THEN THESE CLAUSES ARE UNNECESSARY]
3.14: Model Contractual Clauses for Requesting Permission from Students/Volunteers

10. The Institution grants to the Student a royalty-free non-exclusive licence to use the Materials created by the Student or jointly with others for non-commercial teaching or research purposes only for the duration of the Student’s period of registration or course of study at the Institution, at the conclusion of which this agreement shall be treated as having terminated. Such licence may continue after the termination of this agreement provided that the use of the Materials does not damage the exploitation of the Materials by the Institution or prejudice in any way the interests of the Institution.

11. The Student is allowed to make and retain a single copy of the Materials for his/her use for non-commercial teaching or research purposes, for the purpose of supporting his/her c.v., or for any other job application purpose after the termination of this Agreement.

12. Nothing herein shall grant to the Student any right or licence to copy or use any versions of the Materials updated or in any way amended by the Institution after termination of this agreement.

Prohibited uses for Students/Volunteers

13. The Student/Volunteer [delete as applicable] is not permitted to assign or enter into any licence for the exploitation of the Materials. In the event that the Student/Volunteer [delete as applicable] becomes aware of any third party wishing to exploit the Materials, such third party shall be advised by the Student/Volunteer [delete as applicable] to contact the Institution as the owner of the IPR in the Materials.

Termination

14. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of this agreement in respect of all IPR in the Materials originated by the Student/Volunteer [delete as applicable] during this Agreement and shall be binding on his/her representatives.

Dispute settlement

15. Any dispute between the parties arising out of or in connection with this Agreement, except as otherwise provided in this Agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, [eg] nominated on the application of either party by the chairman for the time.
Context

These contractual clauses can be used to use work produced by freelancers and subcontractors. This resource should be adapted to suit specific requirements. It is based upon resources produced from the HEFCE-produced ‘Good practice guidance for senior managers: Intellectual property rights in e-learning programmes’ and reused within the JISC-funded Web2Rights project ([www.web2rights.org.uk](http://www.web2rights.org.uk)).

We recommend these clauses be incorporated into any contract signed between the HEI and a contractor. Please customise to suit your specific requirements.

It should used in consultation with the following resources contained within this toolkit:

- 3.1 Getting Permissions
- 3.2 IPR Risk Assessments
Model Contractual Clauses for Freelancers and Subcontractors

Definitions

1. ‘Materials’ means any materials created within the Institution or created on behalf of the Institution by Students and/or Volunteers.

2. ‘IPR’ means patents, Trade Marks, trade names, design rights, copyright, confidential information, performers’ rights, rights in know-how and other Intellectual Property Rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing, which shall exist anywhere in the world.

3. ‘Freelancer’ and ‘Subcontractor’ means an individual or organisation working for the Institution other than under a contract of employment.

Title to rights

4. All IPR in the Materials conceived or made by the Freelancer in the course of providing the services are assigned to the Institution. Wherever requested to do so by the Institution, the Freelancer and/or Subcontractor will at their own expense execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

Exploitation and income

5. The Institution is free to exploit (whether for financial gain or not) the Materials as it sees fit, including licensing or assigning the IPR in the Materials to third parties, or merging said Materials with other materials created within the Institution or elsewhere.

Credits

6. The Institution agrees to credit the Freelancer for any significant contribution to the Materials. The Institution shall comply with any request by the Freelancer in writing that his/her name be removed from the Materials where such request is on the grounds that whole or parts of the Materials are out of date or changed in a manner that might damage his/her reputation.

7. The Institution may update or in any other way amend the Materials to suit its requirements. The Institution agrees to consult the Freelancer over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Prohibited uses

8. The Freelancer and/or Subcontractor is not permitted to assign or enter into any licence for the exploitation of the Materials. In the event that the Freelancer becomes aware of any third party wishing to exploit the Materials such third party shall be advised by the Freelancer and/or Subcontractor to contact the Institution as the owner of the IPR in the Materials.

Termination

9. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of this agreement in respect of all IPR in the Materials originated by the Freelancer during this agreement and shall be binding on his/her representatives.
3.15: Model Contractual Clauses for Requesting Permission from Freelancers/Subcontractors

Dispute settlement

10. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, [eg] nominated on the application of either party by the chairman for the time being of the Bar Council.

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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3.16: Model Terms and Conditions of Service
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 tool kit, 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 should be read in conjunction with:

- 1.1 Creative Commons Licences – Briefing Paper
- 3.1 Getting Permissions

[Please customise the highlighted sections]
3.16: Model Terms and Conditions of Service

Terms & Conditions of Service

THE AGREEMENT

The following agreement (’this Agreement’) describes the terms and conditions on which [Institution] offers you access and use of material found on this website (’the Service’). This offer is conditional on your agreement to all the terms and conditions contained in this Agreement, including your compliance with policies, guidelines and terms linked by way of URLs in this Agreement (’Terms & Conditions of Service’).

By using the Service or by exercising any rights provided to parts of it, you accept and agree to be bound by the Terms and Conditions of Service. [Institution] only grants you the rights contained in this Agreement in consideration of your acceptance of the Terms and Conditions of Service.

If you do not agree to the Terms and Conditions of Service you should not use the Service and therefore decline this Agreement, in which case you are prohibited from accessing and/or using the Service. [Institution] may amend this Agreement at any time at its sole discretion, effective upon posting the amended agreement on [insert URL]. No variation or counter offer of this Agreement will be accepted by [Institution].

1. The Service

1.1 [include here a basic description of the Service]

1.2 You acknowledge that [Institution] is a service provider that may allow people to interact online regarding topics and content chosen by users of the Service, and that users can alter the Service environment on a real-time basis. As part of the nature of the Service, [Institution] does not always or will not always be able to regulate the content/communications created and made available by users of the Service or otherwise. As a result [Institution] has limited control, if any, over the quality, morality, legality, truthfulness or accuracy of various aspects of the Service.

1.3 You acknowledge that: (1) by using the Service you may have access to graphics, sound effects, music, video, audio, computer programs, animations, text and other creative output (’Content’); and (2) Content may be provided by [Institution] or by others such as the users of the Service (’Content Providers’).

1.4 You acknowledge that [Institution] and other Content Providers have rights in their respective Content under copyright and other applicable laws, and that except as described in this Agreement that such rights are not transferred by mere use of the Service. You accept full responsibility and liability for your use of any Content in violation of any such rights. You agree that your creation of Content is not in any way based upon any expectation of compensation from [Institution]. You acknowledge that this Agreement does not assign or transfer ownership, title or interest of the Intellectual Property Rights in the Service to you.

2. Licences and IPR

2.1 Subject to the terms of this Agreement, [Institution] hereby grants you a non-exclusive, royalty free and revocable licence to access and use the Service and use the Content in the Service in accordance with the Terms and Conditions of Service for as long as you are in compliance with such Terms and Conditions of Service.

2.2 Content owned or licensed to [Institution] as part of the Service can be used by any user of the Service for any such purposes that are conducive to education, teaching, learning, private study and/or research.

2.3 Users of the Service can create Content in the Service in various forms. [Institution] acknowledges and agrees that, subject to the Terms and Conditions of Service, you will retain any and all applicable copyright and any other Intellectual Property Rights with respect to any Content you create using the Service, to the extent that you have such rights under applicable law.
2.4 Notwithstanding the foregoing, 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 [Institution]: a non-exclusive, royalty free, perpetual licence to: (a) use, reproduce and communicate your Content within the Service and a right to sub-licence such use to users of the service as long as the Content is used by such user within the Service; and (b) to use and reproduce and to authorise 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.

2.5 You agree that by submitting your Content to any area of the Service you automatically grant to users of the Service who want to use your Content or parts of it outside the Service a non-exclusive, royalty free, perpetual licence in the form of [insert link here to user-user licence, such as Creative Commons Licence].

2.6 You understand and agree that by submitting your Content to any area of the Service you automatically grant (or you warrant that the owner of such Content has expressly granted) to [Institution] and to all other users of the Service a non-exclusive, worldwide, royalty free, perpetual licence under any and all patent rights you may have or obtain with respect of your Content, to use your Content for all purposes within the Service.

2.7 You agree to use all best efforts to ensure that your Content does not infringe any Intellectual Property Rights of a third party.

2.8 You agree that even though you may retain certain copyright or other Intellectual Property Rights with respect of the Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data [Institution] stores on servers submitted by others. Your Intellectual Property Rights do not confer ownership of others’ data stored by or on behalf of [Institution].

3. Community Guidelines and Policies

3.1 You agree to read and comply with the Community Guidelines and Policies as posted on [insert URL].

3.2 In addition to abiding at all times to the Community Guidelines and Policies, you agree that you shall not: (a) take any action of upload post, email or otherwise transmit Content that infringes or violates any third-party rights; (b) impersonate any person or entity without their consent, including but not limited to a [Institution] employee, or falsely state or otherwise misrepresent your affiliation with a person or an entity; (c) upload, email or otherwise transmit Content that violates any United Kingdom law or regulation; (d) upload, email or otherwise transmit Content determined by [Institution] in its reasonable opinion to be libellous. You agree that [Institution] may take whatever steps it deems necessary to abridge, or delete material on the Service in its sole discretion, without notice to you.

4. Releases, Disclaimers of Warranties, Limitation of Liability and Indemnification

4.1 As a condition of access to the Service, you release [Institution] from claims, demands, damages of every kind and nature, known and unknown, suspected or unsuspected, disclosed or undisclosed, arising out of or in any way connected with any dispute you have or claim to have with one or more users of the Service. You further understand and agree that [Institution] will have the rights but not the obligation to resolve disputes between users relating to the Service.

4.2 Any Content, or other data residing on [Institution]’s servers or the Service may be deleted, altered, moved or transferred at any time for any reason at [Institution]’s sole discretion without notice and without liability to you or any third party.
4.3 [Institution] provides the Service and Content strictly on an 'as is' basis and use of the Service and/or Content is at your own risk. [Institution] hereby expressly disclaims all warranties or conditions of any kind to the extent permitted by law, including without limitation any merchantability or fitness for a particular purpose. To the extent permitted by law, [Institution] accepts no liability for loss suffered or incurred by the user or any third party as a result of their reliance on the Service and/or Content.

4.4 To the extent permitted by law, in no circumstances will [Institution] be liable to you or you liable to [Institution] for any loss resulting from a cause over which [Institution] or you do not have direct control, including but not limited to failure of electronic or mechanical equipment or communication lines, telephone or other interconnect problems.

4.5 In no event shall [Institution] be liable to you or to any third party for any special, incidental, consequential, punitive or exemplary damages, including without limitation any damages for loss of profits arising (whether in contract, tort or otherwise) out of or in connection with the Service and/or Content. In addition, in no event will [Institution]'s cumulative liability to you for direct damages of any kind or nature exceed £50.00.

4.6 You agree to defend, indemnify and hold harmless [Institution] and users of the Service and Content from all damages, liabilities, claims and expenses, including without limitation reasonable legal fees and costs, arising from any breach of this Agreement by you, or from your use of the Service. You agree to defend, indemnify and hold harmless [Institution] from all damages, liabilities, claims and expenses, including without limitation reasonable legal fees and costs, arising from any claims by third parties that your activity or Content in the Service infringes upon or violates any of their Intellectual Property or proprietary rights.

5. Privacy

5.1 You acknowledge and agree that [Institution], in its sole discretion, may track, record, observe or follow any and all of your interactions within the Service. [Institution] may share general, demographic or aggregated information with third parties about [Institution]'s user base and Service usage, but that information will not include or be linked to any personal information without consent. [Institution] agrees that when exercising these rights, it shall abide by the Data Protection Act, 1998 at all times.

6. Governing Law and Dispute Resolution

6.1 This Agreement and the relationship between you and [Institution] shall be governed by and construed in accordance with English law. You and [Institution] agree that any dispute arising out of or in connection with this Agreement will be subject to and within the jurisdiction of the English courts.

6.2 You and [Institution] agree to use best efforts to resolve disputes in an informal manner. Where you and [Institution] agree that a dispute arising out of or in connection with this Agreement would best be resolved by the decision of an expert, you and [Institution] will agree upon the nature of the expert required and together appoint a suitable expert by agreement.

6.3 Any person to whom a reference is made under Clause 6.2 shall act as expert and not as an arbitrator and his decision [which shall be given by him in writing and shall state the reasons for his decision] shall be final and binding on the parties except in the case of manifest error or fraud.

6.4 You and [Institution] shall provide the expert with such information and documentation as he may reasonably require for the purposes of his decision.

6.5 The costs of the expert shall be borne by you and [Institution] in such proportions as the expert may determine to be fair and reasonable in all circumstances or, if no determination is made by the expert, by you and [Institution] in equal proportions.

7.1 This Agreement constitutes the entire understanding and agreement between you and [Institution] with respect of the subject matter hereof.

7.2 The invalidity or unenforceability of any provision of this Agreement shall not affect the continuation in force of the remainder of this Agreement.

7.3 The rights granted to you or [Institution] arising under this Agreement shall not be waived except in writing. Any waiver of any of your or [Institution]’s rights under this Agreement or of any breach of this Agreement by you or [Institution] shall not be construed as a waiver of any other rights or of any other or further breach. Failure by you or [Institution] to exercise or enforce any rights conferred upon it by this Agreement shall not be deemed to be a waiver of any such rights or operate so as to bar the exercise or enforcement thereof at any subsequent time or times.

7.4 The section headings contained in this Agreement are for convenient purposes only and shall not affect the interpretation of this Agreement.

7.5 Where the context so implies, words importing the singular number shall include the plural and vice versa and words importing the masculine shall include the feminine and vice versa.

7.6 All or any of [Institution]’s rights and obligations under this Agreement may be assigned to a subsequent owner or operator of the Service in a merger, acquisition or sale of all or substantially all of [Institution]’s assets.
Section 5. Template policy statements

This chapter provides draft policy statements and a blueprint for funding bodies and recipients of funding relating to IPR and licensing.

Introduction

The tools within this chapter can be used to provide a basic framework for IP and licensing policy and practice, and in particular be of relevance for:

- Organizations wishing to protect their own IP, particularly with regard to staff produced works.
- Recipients of funding needing to recognize the types of IP and licensing requirements that they and funding bodies may have, which might then be used as a basis for potential negotiation of funding agreements.
- Funding bodies to wishing to understand the types of IP and licensing issues that they might consider when establishing terms and conditions of funding.

Template policy statements

2.1 Draft Institutional IPR Policy Statements
2.2 IPR and Licensing Blueprint for Funding Bodies and Recipients of Funding
Introduction

The following Intellectual Property Rights (IPR) policy statements have been developed for SCA members and other organisations across the public sector. Their intention is to provide a basic framework for IPR management and create a minimum set of standards that are compatible across the public sector. The benefits for this include:

- Creation of more consistency in the management of IPR-protected materials across the public sector leading to enhanced collaboration
- Provision of greater public access to content
- More effective management of risks across the public sector
- Maximisation of opportunities relating to IPR ownership and subsequent exploitation

Intellectual Property Rights are key activities within any organisation. Public-sector bodies are likely to be both creators and users of IPR, and so must ensure that IPR created by staff and non-staff is managed appropriately, and that use of third-party materials does not infringe any of the rights of third parties.

The basic legal situation for all IPR is that anything created by an employee in the course of his or her employee duties automatically belongs to the employer unless there is some contract to the contrary. In the case of patentable inventions, the law also requires that should the patent result in income for the employer, then some equitable income-sharing scheme be set up with the employee. Curiously, there is no equivalent to such laws for other types of IPR, such as copyright. One crucial aspect is the wording in bold above. If someone creates something, even if done in work time and using the employer’s facilities and equipment, that was not part of his or her normal employee duties, then the default position is that the employee owns the IPR in that creation and not the employer. It should also be noted that if custom and practice in the past has been that the employer has chosen not to enforce its legal ownership of IPR from its employees, then a Court may decide there was implied waiver of ownership by the employer that was in place and continues to be in place.

For this reason, it is important that:

- A clear IPR policy is developed outlining roles, rights and responsibilities
- A policy outlines who owns what rights to ensure, for example, that staff understand that they may not actually have the rights to sign away, particularly to commercial publishers
- Any policy developed by the organisation is both widely disseminated and is adhered to
- The policy document should also take into account the particular types of materials that might be created.

For this reason, comments are made below regarding the types of materials it is likely to include:

i. Material created by researchers, including research papers, conference presentations and patentable inventions

ii. Educational materials, eg PowerPoint presentations, created by staff for teaching purposes; VLEs and any networked environment or intranet; whiteboards and PDAs; any type of authoring tool

iii. Broadcasts

iv. Materials relating to cultural content, such as exhibition catalogues and books
2.1: Draft Institutional IPR Policy Statement for SCA Members and Other Organisations across the Public Sector

The topics covered by these draft IPR policy statements include:

- Ownership of rights
- Use of third-party materials
- Access to content (such as images and their metadata)
- Crediting
- Management of Rights

It is expected that such draft IPR policy statements are tailor-made to suit organisational requirements, and supplemented by clear localised procedures, training and other implementation measures to ensure compliance.

The Appendix includes additional draft clauses, which might be included with regard to issues pertaining to materials and other work produced by staff during the course of their employment.

Possible Policy IPR Statements

A. Ownership of Rights

1. The default legal position is that ownership of the IPR in everything created by an employee in the course of his or her employee duties is owned by the employer, apart from performers’ rights, which will require a separate assignment of rights from the employee to the employer. Employees shall, however, own the copyright and related rights in works, performances, data, databases, software and designs created by them outside their contract of employment.

2. There is a distinction between the two types of IPR: Registered Designs, Registered Trade Marks and patents, which one can only obtain having gone through a formal application process and paid fees, and the other, copyright and related rights, which are automatic. The former are treated differently from the latter under this policy.

3. In the case of IPRs that involve formal application processes and fees, the following ground rules shall apply:

   a. If at any time in the course of his or her employee duties, a member of staff shall either alone or jointly with any person or persons make or discover any invention, or develop a design or Trade Mark that might reasonably be considered to be patentable (if an invention) or capable of commercial exploitation, such member of staff shall promptly give to the (Chief Operating Officer) full information and particulars in relation thereto fully freely and confidentially (disclosing the same to no other person) and at our request and cost shall join with and assist the employer (or its nominee as it shall direct) in obtaining Intellectual Property Rights in relation thereto in any parts of the world; the employee shall also at the request and cost of the employer execute and do all documents, acts and things that it may require for the purposes of vesting the beneficial right to an interest in such rights, which may have been obtained in relation thereto.

   b. The employer shall be entitled to undertake the further development and exploitation of the development and the member of staff shall do all things necessary to assist it in respect thereof.

   c. If the employer obtains Letters Patent in respect of any such invention for its own absolute and beneficial use and turns the same to profitable account, it shall pay half of the net resulting profit to the member or members of staff concerned with the invention (and if there be more than one such member in such proportions between them as the employer shall unilaterally direct). Such net resulting profit shall be struck after providing for the reimbursement to the employer of all the costs and payments incurred in and about applying for and obtaining protective rights for the invention and in developing and turning or seeking to turn it to profitable account. For the avoidance of doubt the provision for the division of net profit does not supersede the members’ rights under the Patents Act 1977 or any amendment thereto.

   d. If the employer does not desire to acquire the exclusive benefit thereof, then on receipt of written notice to that effect from the (Chief Operating Officer), the member or members of staff concerned shall be free to protect the same at their own cost and retain for themselves the exclusive rights thereto. Such notice by the (Chief Operating Officer) shall be given within a reasonable period but in no case shall it exceed a period of six months from the date of communication.
2.1: Draft Institutional IPR Policy Statement for SCA Members and Other Organisations across the Public Sector

4. The ownership of rights in the following staff-related activities can be applied accordingly:
   a) Where copyright materials result from the following activities, research undertaken by members of staff in the course of their employee duties, the employer waives its rights to ownership of copyright in such materials, subject to the following conditions: (a) the employer retains the right to copy any such copyright works into a digital repository, including, but not limited to, an Institutional Repository, a subject-based Repository, or the JISC-funded DEPOT service and to make such materials available under a Creative Commons or Open Source licence; (b) the employee agrees NOT to assign copyright in such materials to any third party without the prior agreement of the employer. We recommend that if the material is offered to a journal publisher, that the SURF licence be used [see http://copyrighttoolbox.surf.nl/copyrighttoolbox/authors].
   b) Where materials have been created for teaching purposes, the employer follows the policy outlined in the HEFCE Guidance on IPR and e Materials [see www.hefce.ac.uk/pubs/hefce/2006/06_20]. Its Model Contract is reproduced in slightly amended form as an Appendix to this policy and this amended contract forms part of this policy.
   c) Where broadcasts have been made by staff, all IPR in that broadcast shall be owned by the employer. Anyone who is not a member of staff and who is involved in the making of the broadcast, eg an interviewee, shall be required to assign all IPRs, including performance rights, to the employer.
   d) Where materials have been created in connection with cultural content, eg an exhibition catalogue or text associated with a museum’s or stately home’s collections, copyright in such materials created as part of employee duties shall vest with the employer.
   e) Where health-related materials have been created by staff, all IPR shall be owned by the employer.

5. There should be clear statements regarding situations where staff retain rights in works that they have created. Staff should be given maximum encouragement and leeway in the creation of such materials.

6. Non-staff such as volunteers, research students, commissioned parties, freelancers and other contracted parties, by law automatically own the rights in works they have created. There should, therefore, be clear statements in place regarding the ownership of such rights, and the necessary procedures required for assignments of rights, as well as training, where appropriate.

7. The organisation reserves the right to negotiate shared ownership, permission to reuse content and explore royalty opportunities resulting from collaborative projects and initiatives.

8. In cases where the organisation does not retain full rights, the organisation must ensure that it reserves the right to reuse the work for its own purposes and that its ability to commercially exploit the work is not unduly restricted.

B. Use of Third-Party Materials

It is likely that in the course of creation or development of materials by employees and non-staff, third-party materials might be included in the final product. These could include text, images, music, sound recordings, broadcasts, film or software. The legal position is that in general, such materials should not be incorporated into creations made by employees, or sold, copied or re-disseminated by employees without the express written permission of the owner of the rights in that third-party material. However, this general statement is subject to certain caveats:

1. Copyright expires after a while; the lifetime varies according to circumstances, but a good rule of thumb is that anything more than 100 years old is likely to be out of copyright. Under such circumstances, an employee would be free to copy materials as he or she sees fit. However, the employee should always take formal advice from (__) before undertaking any such copying. It is important to be aware that even if copyright may have expired there may be other rights that still subsist, such as reproduction rights. Care must be taken to distinguish between different rights, to ensure that they are not infringed.

2. There are a number of important exceptions to copyright that allow someone to copy materials that are in copyright without having to ask permission or pay any fees. These include requiring a copy for non-commercial research or private study, Library Privilege or if required in a legal hearing. Employees should always check with (__) before relying on any such exception, as many of them are restricted in scope and
2.1: Draft Institutional IPR Policy Statement for SCA Members and Other Organisations across the Public Sector

some are subject to misunderstandings. If content has been copied for one purpose, and is now going to be copied and/or disseminated for another quite different purpose, employees should check with (Ö..) before undertaking any such copying.

3. Patents have a lifetime of 20 years from the date that the patent was first applied for. A patent may, however, lapse, if renewal fees are not paid by the owner. Again, advice should be sought from (Ö..) before making or using the invention that is subject to the patent.

4. The use of Registered Trade Marks, logos and other organisations’ names is particularly problematic, and these should never be incorporated into outputs by employees without checking with (Ö..).

5. A particular problem arises in the case of so-called ’orphan works’, ie third-party works that are probably or definitely in copyright but whose owner cannot be identified. Copying such materials requires considerable caution, and efforts should be made (and such efforts documented) to identify the owner. Advice should then be sought from (Ö..) before any copying is then undertaken. Statements relating to orphan works should be linked to an organisation’s approaches to risk and risk management.¹

6. A quite different situation arises where the owner has been identified and has been approached for permission to copy, but has not replied. Under these circumstances, no copying should take place.

7. If what is being created is so-called ‘User-Generated Content’, for example a string of emails from various people in a discussion thread, or material contributed by several individuals on a wiki, blog or social networking site, then complex legal issues arise. The organisation follows the guidelines provided by the Web2Rights project (www.web2rights.org.uk) and in particular recommends that actions regarding reproducing such materials follow the guidance in www.web2rights.org.uk/iptoolkit/1.5_Copyright_Exceptions_Overview_Paper.pdf.

C. Access to Content

1. The organisation aims to provide free online public access to its content under Open Access principles subject to copyright restrictions.

2. The organisation aims to provide access to users in compliance with third-party rights and the contractual obligations of funding bodies, sponsors and other partners.

3. Employees, volunteers, contractors and formal visitors shall take necessary measures to ensure that they protect the rights in the organisation’s IP and those in third-party content.

D. Crediting

1. All use of content in which rights are owned by the organisation shall require the use of the appropriate credit line and/or digital watermark.

2. Credit to staff in works that they create during the course of their employment shall be made on a case by case basis.

3. Use of third-party content shall require the use of the appropriate credit line and/or digital watermark.

E. Management of Rights

1. Employees, volunteers, contractors and formal visitors are responsible for ensuring that they record rights management information, associated with rights and assets created and owned by the organisation and third parties, in accordance with internal procedures, systems and legal requirements.

2. Whilst the organisation shall remain the first owner of copyright in works produced by staff during the course of their employment, staff shall remain the authors of the works, upon which the duration of copyright shall be based. In these instances, wherever possible this information should be recorded.

¹ See the MILE Project website (www.mileproject.eu) for further developments in this area.
Appendix: Draft clauses that might be used in relation to staff-produced work

Definitions

1. ‘Materials’ means any materials created within the institution or created on behalf of the institution.
2. ‘IPR’ means patents, trade marks, trade names, design rights, copyright, database rights, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.
3. ‘Member of staff’ means staff, research associates, technicians, or any other members of staff of the institution who are employed under a contract of employment (whether fixed term or permanent).
4. ‘User’ or ‘Authorised User’ means only persons currently enrolled or employed by the institution in a research, employment or educational faculty or those who are entitled to use the facilities of the institution.
5. ‘Authorised Use’ means access to ‘Materials’ solely by ‘Authorised User’ for non-commercial, educational or research use and limited to certain activities, such as browsing, copying and reproduction in coursework, display and presentations.

Primary obligation

6. The parties foresee that the member of staff may make or discover or create intellectual property in the course of his or her duties under this agreement and agree that in this respect the member of staff has a special duty to further the interests of the institution.

Title to rights

7. Subject to the provisions of the Patents Act 1977, the Registered Designs Act 1949 and the Copyright, Designs and Patents Act 1988, all IPR in the materials originated by the member of staff and arising out of the performance of his/her duties under this agreement shall be the property of the institution, and the member of staff undertakes to do all acts and things as may be thought by the institution to be necessary to vest any such property in the institution and to register title in such property in the institution.
8. Any rights in performances in which a member of staff appears, shall be assigned to the institution in writing.
9. In the event that the member of staff fails (for whatever reason) within 30 days of a demand by the institution to do all acts and things effectively to vest any such property in the Institution, the member of staff hereby authorises the institution in his/her name and on his/her behalf to execute all such deeds or documents as may be necessary or desirable to transfer and/or assign in writing, such property in the materials to the institution and register title in the materials in the institution.
10. If material from other copyright works is included in the materials, the member of staff shall identify such material to the institution and shall obtain all necessary written permissions from the owner or owners of any rights organisation authorised by the owner to grant such permissions in respect of such material. Alternatively, the member of staff shall, if the institution so agrees, provide the institution with sufficient information to enable the institution to obtain such permissions, but the institution shall not thereby be obliged to secure such permissions and may require that the member of staff omit any such material from the materials.
11. The institution hereby agrees and acknowledges that all Performers’ Rights in any video or other recording of the member of staff’s own lectures or presentations or similar works are owned by the member of staff. The member of staff grants to the institution and its authorised users an irrevocable royalty-free non-exclusive licence to use such material for administrative, educational, teaching and research purposes.
12. Nothing in this agreement shall constitute a waiver by the member of staff of any moral right under the Copyright, Designs and Patents Act 1988, and nothing therein shall constitute an exclusive recording contract within the meaning of Part II of that Act or consent by the member of staff to the exploitation of any qualifying performance for the purposes of that Part.

Exploitation and income

13. The institution is free to exploit (whether for financial gain or not) such materials as it sees fit, including licensing or assigning the IPR in the materials to third parties, or merging said materials with other materials created within the institution or elsewhere provided that the commercial rights have been cleared, especially for any third-party content.

14. Should the materials prove to be profitable, the institution agrees that it shall, in accordance with its normal procedures, enter into good faith negotiations with the member of staff regarding possible rewards.

15. The materials will not be resold without prior permission of the rights holders involved, nor the rights assigned to any further party.

Credits

16. The institution agrees to credit the member of staff for any contribution to the materials. The institution shall comply with any request by the member of staff in writing that his/her name be removed from the materials where such request is on grounds that the whole or parts of the materials are out of date or changed in a manner that might damage his/her reputation.

17. The institution may update or in any other way amend the materials to suit its requirements. The institution agrees to consult the member of staff over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Permitted uses

18. The institution grants to the member of staff a royalty-free non-exclusive licence to use the materials created by the member of staff or jointly with others for non-commercial teaching or research purposes only for as long as the member of staff remains employed by the institution. Such licence may continue after the termination of this agreement provided that the use of the materials does not damage the exploitation of the materials by [the institution] or prejudice in any way the interests of the institution.

19. Should the contract of employment of the member of staff terminate, the member of staff shall be entitled to enter into negotiations with the institution with a view to permitting the member of staff to make and retain a copy of the materials for his/her use for non-commercial teaching and research purposes. In the case of disagreement over these negotiations, dispute settlement procedures in accordance with Clause 25 of this agreement shall be invoked. Neither the member of staff nor his/her new employer is permitted to commercially exploit the materials without the express permission of the institution.

20. Nothing herein shall grant to the member of staff any right or licence to copy or use any versions of the materials updated or in any way amended by the institution after termination of the employment whose terms and conditions are governed by this agreement.

Prohibited uses

21. The member of staff is not permitted to assign or enter into any licence for the exploitation of the materials. In the event that the member of staff becomes aware of any third party wishing to exploit the materials, such third party shall be advised by the member of staff to contact the institution as the owner of the IPR in the materials.
Rights in other material

22. Save as provided hereafter, the institution agrees and recognises that the IPR in texts shall be vested in the member of staff. Texts means textbooks and academic articles and works of a similar nature other than materials created through the intellectual effort of the member of staff in the course of employment. Texts are not confined to words, but could include images or other media. The member of staff grants to the institution and its authorised users an irrevocable royalty-free non-exclusive licence to use the texts for administrative, educational, teaching and research purposes.

23. If texts are to be used in the materials, IPR in texts shall not be assigned or licensed by the member of staff on an exclusive basis to any third party unless provision is made for the institution to use such materials for teaching and research purposes without charge.

Termination

24. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of the Member of staff’s employment contract in respect of all IPR in the materials originated by the member of staff during the member of staff’s employment under this agreement, and shall be binding on his/her representatives.

Dispute settlement

25. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties, within thirty (30) days after a request for a reference is made by either party, [eg] nominated on the application of either party by the chairman for the time being of the Bar Council.
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Introduction

1. Background and Context

Set within the backdrop of the i2010 Digital Libraries initiative, which seeks to optimise the contribution of creativity and creative industries to economic growth in Europe and JISC’s Libraries of the Future, there has been a series of local, national and international initiatives that have supported the preservation, access and reuse of digital content across the public sector.

Amongst SCA Sponsors and their constituent members, over the last decade these initiatives have been supported by various funding streams and include:

- The establishment of a repository programme across the NHS supported by central Government funding
- Digitisation of cultural heritage works, supported by Government funding such as Culture Online, New Opportunities Fund(NOF); Heritage Lottery Fund(HLF); People’s Network Service
- JISC’s Digitisation programme and Repositories and Preservation programme
- Mass scanning of works across the cultural heritage sector supported by commercial interests such as by Microsoft and Google
- BBC MemoryShare
- Venture capital investment such as ArtStor and The Bridgeman Art Library
- A range of locally funded, international and collaborative projects

Inherent with many of these funding agreements are a variety of clauses relating to Intellectual Property Rights and licensing. These are often encapsulated by various responsibilities imposed on the funded parties and third parties with whom they work in partnership.
2.2: IPR and Licensing Blueprint for Funding Bodies and Funding Recipient

Unsurprisingly, in light of the range of funding sources, these terms include varying obligations regarding Intellectual Property Rights and licensing. Sometimes, these are incompatible with each other, especially in cases where collections or projects receive funds from more than one source. In other cases, these requirements can also be unrealistic and thereby present difficulties for public-sector bodies. Specific instances have included:

- Obligations for funding recipients to warrant that rights have been cleared and indemnify the funding body if they have not, although large numbers of works may be those for which the rights holders cannot be traced or are unknown
- Responsibilities to provide the funding body (and other named organisations with whom it has an affiliation) with a non-exclusive licence to use the works, which may be perpetual or time limited
- Instructions not to use funding to pay for rights clearance
- Necessity to request that moral rights are waived by all third-party rights holders, although artists and rights holders maybe unwilling to do this or cannot by law in their territory

2. Aim of this Paper

The aim of this paper is to create a blueprint for the development of collaborative working practices across the public sector for both providers of funding and funding recipients. A number of benefits can potentially be realised from this, which include:

- Greater consistency, which would raise levels of awareness about expectations and obligations regarding IPR and licensing in the creation of e-content before projects are funded, thus ensuring better planning, more rights clearance upon the acquisition/creation of content and other implementations of good copyright practices
- More clarity about roles and responsibilities and the necessary resources regarding rights clearance and licensing activities, and in particular the identification of the need to resolve third-party rights issues from the onset. This is of specific importance with joint or collaborative projects
- Enhanced compatibility between IPR-related clauses if projects and/or organisations are in receipt of funding from more than one source
- Better management of copyright and rights issues through the establishment of shared practices and standards

In the future, such collaboration and engagement with funding bodies could lead to the reduction of related risks and obstacles that the lack of such clauses has provoked in the past, by ensuring that infringements of third-party rights are minimised and access options can be fully explored. This level of cooperation would also take into account the two-way nature of such funding agreements, and in particular the necessity to ensure that funding agreements encapsulate both the role of the funding bodies, as well as the roles and responsibilities of the funding recipients.

These issues have been captured below and form proposed minimum standards that might be adopted by funding bodies as well as the types of commitments that funding bodies may expect from recipients of their funding.

3. Suggested Roles and Responsibilities

3.1 Funding parties

- Ensure that clear internal policies are put in place and communicated indicating the funding party’s position on IP, including ownership of rights in funded outputs and associated access and use policies, such as the requirement that all outputs need to be made available under Open Access principles etc
2.2: IPR and Licensing Blueprint for Funding Bodies and Funding Recipient

- Ensure that funding initiatives and subsequent agreements should take into consideration the costs and time management implications of clearance procedures and the need for training of staff on IPR management and other rights (eg personal data) issues
- Ensure that funding recipients are provided with clear and consistent messages regarding any expectations from them relating to IP and access to outputs resulting from any funding
- Permit use of funds for the clearance of third-party rights
- Request only such rights (including the waiver of moral rights) that are realistic in light of the overall objective of the funding stream
- Establish clear procedures for recipients of funding for dealing with the rights in works for which the rights holders cannot be found or are unknown (so called ‘orphan works’), such as due diligence efforts
- Provide details, wherever possible, of any affiliates or other bodies etc, with whom the funding party has an existing relationship, for whom the recipient of funding may also need to seek permissions for the use of any third-party rights
- Ensure that recipients of funding must first outline anticipated IPR and licensing issues arising in their projects, within their funding proposals and within associated risk assessments
- Ensure wherever possible that IP and licensing lessons arising from funded outputs are recorded in an appropriate ‘lessons learnt’ section in the project report issued on completion of the project, and that this text is made available for access by newly funded projects
- Ensure that IP and licensing support can be provided for funding recipients, in the form of factsheets, training and other resources
- Explore sustainability opportunities arising from funded projects, including verification of the standards (eg file types and interoperability) that they propose

3.2 Recipients of funding:

- Grant the funding body (or assigned party thereof) a licence to freely reuse the deliverables (to be agreed by funding party)
- Ensure that the funded outputs are available to certain communities under certain conditions (as required by the funding party)
- Ensure best endeavours are carried out to clear third-party rights and permissions are documented and stored in accordance with recommended standards
- Ensure that funding initiatives should take into consideration the costs and time management implications of clearance procedures and the need for training of staff on IPR management and other rights (eg personal data) issues
- Notify the funding party at the earliest possible stage regarding situations where rights have not been cleared – including those in works for which rights holders cannot be traced or are unknown
- Carry out any ‘Due Diligence’ efforts in accordance with any funding requirements and be prepared to supply these to the funding party where necessary
- Deliver funded outputs in formats that are compatible with access, storage, preservation, reuse etc, requirements
- Ensure that all contractual obligations towards the funding party are fulfilled, including logging IPR and licensing lessons learnt, where stipulated

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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Section 6. IPR and licensing in practice

This chapter provides detailed case studies mapping the flow of content, rights and value across a range of public-sector projects and initiatives.

Please note:
This case study document is not reproduced here but is available separately from the same source as this document as either printed hard copy or a PDF format electronic file.
Appendix A
Bibliography for further reading

This section provides a bibliography of further resources and information, which can be used to supplement the tools created within this toolkit.

General resources and further information

Intellectual Property Office
www.ipo.gov.uk
Overview of the legislative framework and policy issues/developments regarding Intellectual Property Rights

Office for Public Sector Information
www.opsi.gov.uk
Information about Crown Copyright material, click use licence for reusing Crown Copyright material and access to the consolidated copyright legislation.

British Library Business and IP Centre
www.bl.uk/bipc
Provision of resources, support and advice relating to the creation and exploitation of IP within a business context

Licensing schemes and open content licensing initiatives

Copyright Licensing Agency (CLA)
www.cla.co.uk

Design and Artists Copyright Society (DACS)
www.dacs.org.uk

Creative Commons
www.creativecommons.org

Resources for health professionals

www.library.nhs.uk/Default.aspx

Resources for schools, colleges and universities

JISC Digital Media Online Image Finding Tutorial
www.vts.intute.ac.uk/he/tutorial/imagesearching
Interactive tool providing information about how to find images online that can be used with the least amount of restrictions
Web2Rights Project  
www.web2rights.org.uk  
JISC-funded project providing interactive copyright and other legal issues tools, resources and charts for use by JISC funded projects

JISC Casper  
www.jisc-casper.org/content/view/tools  
Interactive tools and associated resources for dealing with copyright issues in schools and projects who are reusing content

JISC IPR and Web2.0 Animation  
www.web2rights.org.uk  
IPR and Web2.0 animation commissioned by JISC and built around the Web2Rights project deliverables

BECTA  
http://schools.becta.org.uk/index.php?section=is&rid=9983  
Information about IPR for schools

JISC IPR Consultancy  
www.jisc.ac.uk/whatwedo/projects/ipr.aspx  
Briefing documents about IPR and monthly IPR Newsletter

JISC Open Content Licences Overview Paper  
www.jisc.ac.uk/search.aspx?keywords=open content licences guidance&filter=s  
Overview paper providing guidance about the use of open content licences for JISC-funded projects

JISC Model Licence Interactive  
http://restricted.jisc.ac.uk/freearea/copyright2/0000.html  
Interactive tool, which provides an overview of the benefits of the JISC Model Licence

TrustDR Project  
http://trustdr.ulster.ac.uk  
JISC-funded project providing supporting documentation relating to the establishment of a digital rights management system for repositories

JISC Legal  
www.jisclegal.ac.uk  
Support for HEIs and FEIs on legal issues

OSS Watch  
www.oss-watch.ac.uk  
Support for HEIs and FEIs on open source licences

Resources for the cultural heritage sector

Collections Link  
www.collectionslink.org.uk  
Comprehensive resources relating to IP and licensing for cultural heritage bodies

UKOLN  
www.ukoln.ac.uk
IPR Toolkit
Overview, Key Issues and Toolkit Elements

Further information about JISC:
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