

Web2Rights

Terminology Toolkit

NOTE: these are mostly not legal definitions – but seek to describe the terms in the context they are used in JISC funded projects. Licence Terms follow the General Terms.

General Terms

Acceptable Use Policy (AUP): a set of rules which the owner of the Web 2.0 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 web 2 technology to legal liability for behaviour of users (such as defamatory comments).

Accessibility Laws: in the context of Web 2.0 technologies, 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.

Assignment (assignment): the transfer of ownership from the owner (assignee) to the assignor. For example, an assignment of copyright is the transfer of ownership of the copyright in a work from the owner (assignor) to the assignee.

Child Pornography: it is illegal to take, make, distribute, show or possess an indecent image of a child

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

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

Contract of employment: 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.

Cookie: information that a web site puts on your computer so that it can remember you the next time you visit the site.

Defamation: the publication of a statement which 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.

Libel: the writing or printing of a defamatory statement

Slander: words, speech or gestures of a defamatory nature

E-security: the laws and technologies involved in keeping information secure on the web.

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

Incitement of Racial Hatred: refers to any act which directly or indirectly incite racial hatred, which is a criminal offence

Licence: 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.

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Moderation: 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.

Negligence: the doing or failing to do something which a reasonable and ordinary person in the circumstances would do or not do. It is conduct which 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.

Notice and Take Down: 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

Personal data: within the data protection regime, personal data is data about living identifiable individuals.

Publication Scheme: 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.

Royalty: a recurrent payment for, for example, the right to exploit copyright in a particular work.

Sensitive personal data: within the data protection regime, sensitive personal data is that which 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.

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

Licence Terms

'Arbitration' is a process for settling disputes out of the formal court system (although appeals against a decision made by an arbiter' can be made to a court on limited grounds). A neutral arbitrator is generally appointed to hear the evidence and decide the dispute. Arbitration is often considered to be cheaper and quicker than court litigation.

'Assignment' in England and Wales, **'Assigment'** in Scotland is, in this context, the transfer of IPR in action by one person (the assignor) to another (the assignee). Having assigned the IPR, the assignor has no further legal title in the IPR. An assignment **MUST** be in writing to take legal effect.

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

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'Content' can include printed content, content on floppy disk, web-sites, online databases and CD-ROM, and can comprise any combination of text, still images, moving images, artistic works, drawings, maps, photographs, collections of data, sound, music on any medium, and might include hypertext links, tags and other material produced as a result of reviewing, rating and favouriting. Content can be produced by individual authors or may be the result of collaborative effort between two or more individuals.

'Exclusive' refers to the restriction imposed upon the licensor in being restricted in not being able to grant others the same rights as those granted under the terms of the licence. The licensee (the person to whom the licence is granted) is the only person who will be able to exercise the rights granted under the licence.

'Exploit/exploitation' is offering the content to third parties to use for their own purposes. The third party will be able to exploit the content within the terms of the licence.

'Force majeure' is a condition beyond the control of the parties such as war, strikes, floods, power failures, destruction of network facilities, etc., which was not foreseen by the parties and which have prevented performance under the contract. Most licences build in provisions that any party's failure to perform any term of condition under the licence due to a force majeure will be excused and the failure to perform in those circumstances will not be deemed a breach of the Agreement.

'Indemnities' are the protection or insurance offered by the party making certain assurances outlined in the 'warranties' that these have been met'. If these obligations are not met, they will indemnify (i.e. pay) the other party for any losses, expenses, actions, liabilities etc they might be faced with. Warranties without indemnities are of limited use; therefore each warranty should be accompanied by a corresponding indemnity.

'In perpetuity' refers to the duration of the terms of licence which are granted without end.

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

'Intellectual Property Rights' (IPR) includes patents, trade marks (whether registered or not), design rights, database rights, copyright and confidential information/trade secrets. Patents, registered trademarks and registered designs are obtained only through a formal application process. Copyright, database rights and confidential information/trade secrets are created automatically without any formal process. Intellectual Property is the name given to the rights which protect creations of the mind.

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

A **'licence'** is a formal authority to do something that would otherwise be unlawful. In this context, it refers to a licence by the owner of IPR to copy, adapt, etc., content or technology even though copyright law prohibits such copying without authorisation. Unlike assignment, the owner of the IPR remains its owner and, depending on the terms of the licence, may be able to continue to do whatever they like with the IPR.

'Licence fee' can be included in the main clause or in a separate Schedule. It is important to ensure that any licence fee is an inclusive fee, covering everything that will need to be paid for and that 'hidden' costs cannot be charged at a later stage. However, it is acceptable to have VAT charged separately to the all-inclusive fee.

'Limitation of liability' means that the financial or legal liability of a party or both parties is limited instead of open ended (sometimes a fixed amount is given) in the event that the terms of the licence are breached.

'Non exclusive' refers to the ability of the Licensor to also grant others the same rights as those granted under the terms of the licence.

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'Recitals' are a set of paragraphs which give a brief overview of what is intended to be achieved by the licence. Their role is to form a brief record of the parties objectives and the factual context in which the licence was originally written for use when, at some date in the future, the licence comes to be interpreted when disputed.

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

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

'Termination' refers to the mechanism or circumstances upon which the licence terminates. The licence will often specify when it might terminate such as due to expiry of the term or due to a breach. If a party materially breaches the agreement (fails to carry out their essential tasks under the agreement) the agreement can be terminated by the party not in default. If this happens there will often be provisions in the agreement to remedy such breach within a certain time frame. If the breach is not remedied within the given period the agreement will automatically terminate and the party not in default can sue the other for damages.

'Warranties' are the guarantees that a specific party to the licence gives that certain obligations have been met or that they have sufficient rights to grant the licence. These might include, for example that 'the IPR is owned by or duly licensed to the licensor'. An ambiguous warranty is one that says that the Licensor is 'to the best of its belief or knowledge' the owner of the copyright in the Licensed Material. The words 'best to its belief' create a heavy burden of proof on the Licensee as the Licensor might honestly but misguidedly believed he/she was entitled to grant the licence. Typical warranties are that the licensor owns the IPR in the materials, or is authorised to act on behalf of the owners; that the materials offered do not infringe any third party's IPR; and that the content does not break any laws, such as those of defamation, data protection, anti-terrorism legislation, pornography, etc.

Please also see:

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