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Key Points

- The creators of many copyright works have moral rights separate from copyright
- Performers also have moral rights in their performance
- Moral rights are retained by the authors, directors or performers even in situations where copyright or performance rights transferred to another party
- Institutions will need to give consideration to moral, as well as other, rights before embedding such works within OERs
1. Introduction

The purpose of this Moral Rights and OERs Essentials paper is to provide publishers of open educational resources (OERs) with a summary of when and how moral rights impact on the creation of OERs. For a more in depth guide to moral rights in OER including practical examples refer to JISC Legal’s paper Moral Rights and OERs – Overview.

2. Moral Rights and How They Are Protected

What are moral rights in relation to copyright?

Moral rights (enshrined in Chapter IV Copyright, Designs and Patents Act 1988 (CDPA)) are specific rights that the author of an original literary, dramatic, musical or artistic work, and the director of a film, enjoys in his or her creation. Moral rights include:

(a) the right to be identified as author or director of a work when the work is commercially published or otherwise issued to the public (paternity right)
(b) the right to object to derogatory treatment of a work (integrity right)
(c) the right to object to false attribution of authorship or directorship
(d) the right to privacy of certain photographs and films (privacy right)

Performers also have moral rights which include:

- The right to be identified as the performer and
- The right to object to derogatory treatment of their performance.

What is required to respect the right to paternity?

If the moral right of paternity is asserted, the creator of the work to be included in an OER should be identified as such in a form which brings the creator’s identity to the notice of those receiving the disseminated work. The Creative Commons (CC) suite of licences require that a licensed work is attributed to its creator unless the creator has waived that right. Attributing a work to the parties identified in the CC licence applicable to the work and in the manner specified therein should avoid infringing the right to paternity.

In relation to moral rights, what is derogatory treatment of a work?

The author of a work has the right to object to ‘derogatory treatment.’

‘Treatment’ means an addition to, deletion from, alteration to or adaptation of the work. In previous cases the addition of a rap line to a music track was deemed to be treatment of the work as was the scaling down of the size of a cartoon.

The treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.

Where a derivatives-permitted CC licensed work is to be edited for inclusion in an OER, the creator of the OER should consider whether there is a risk the editing would be considered prejudicial to the
honour or reputation of the author or director to avoid infringing moral rights or the CC licence. If a work is subject to a No Derivatives (ND) CC licence then an author or director will be able to challenge the creation of an adaptation or derivative work as being contrary to the licence terms irrespective of whether or not treatment can be shown to be derogatory.

**What constitutes false attribution?**

The CDPA provides protection against false attribution of authorship or directorship. ‘Attribution’ means a statement, express or implied, as to who is the author or director of the work.

The following scenarios can give rise to a claim of false attribution of authorship:

- Where words are added to the author’s work and the whole work attributed to him
- Where a newspaper column parodying an MP’s diaries purports to be by the MP himself
- Where the author of a second edition of a book promotes the book with reference to the first edition, implying that the two works are by the same author

To avoid a claim of false attribution the creator of an OER should ensure that any attribution of the work is accurate and, where a work is licensed under a CC licence permitting derivative works, take reasonable steps to clearly label changes from the original.

**What is the privacy right in relation to photographs and films?**

Unless agreed otherwise the owner of copyright in a photograph is the photographer, not the person who commissioned the taking of the photograph. Therefore the photographer can sell copies of the photograph or permit others to reproduce it even if the individual commissioning the photograph does not want the photograph to be seen publicly.

The CDPA establishes the right of a person who has commissioned the making of a film or taking of a photograph for private and domestic purposes, where copyright subsists in the resulting work, to prevent copies of the work being issued to the public, the work being exhibited or shown in public or communicated to the public without his/her permission.

Where a photograph or film made for private or domestic purposes is to be included in an OER permission will be required from the party who commissioned the making of the film or photograph or an undertaking from the photographer that the individual has waived their moral right to privacy.

### 3. Works Affected by Moral Rights

**Do moral rights apply to other types of intellectual property as well as copyright?**

Paternity, integrity and privacy rights only exist in relation to copyright works.

**Do moral rights apply to all types of copyright work?**

Moral rights apply to literary, dramatic, musical and artistic works and films. The right to privacy exists in relation to photographs and films commissioned for private and domestic purposes.

There are a number of situations within which moral rights do **not** apply, for example:
• Where the work is a computer program
• Where the material is being used in newspapers, magazines or similar periodicals
• Reference works such as encyclopaedias or dictionaries
• Where ownership of a work originally vested in an author’s employer

How long do moral rights last?
Moral rights of paternity, integrity and privacy last for as long as copyright lasts in the work. In the case of literary, dramatic and artistic works this usually means 70 years from the end of the year in which the author dies.

The right to object to false attribution subsists for 20 years following the death of the author or director.

A performer’s moral rights in a performance subsist for as long as the performer’s economic rights: 50 years from the end of the year in which the performance takes place or, if during that period a recording of the performance is released, 50 years from the end of the year in which it is released.

4. Who is Covered

What is an author?
The person who creates the work.

How do moral rights apply where works are created within the course of employment?
The right to be identified as the author of a copyright work and the right to object to any derogatory treatment of the work will not apply to materials such as OERs created by a member of university staff in the course of employment. Employees cannot object to subsequent treatment of those works. However, moral rights will apply to an employee’s performance where they choose to assert such rights. An employee giving a performance will have the right to be identified as such and to object to derogatory treatment of their performance.

In order to avoid the potential infringement of moral rights in any copyright work or performance a university would be advised to consider requiring all relevant parties to sign a waiver of their moral rights, in writing, prior to creating the OER.

Do students have moral rights?
A student will own copyright in copyright works they have created unless there is an agreement to the contrary. In circumstances where a student has assigned copyright to the college or university or to a commercial partner they will retain moral rights unless they have been waived.

5. Assertion

What is required for an author to have asserted his or her moral right?
The right to be identified as the author of a work (the paternity right) cannot be exercised unless it has been asserted. For an author or director to have asserted his or her moral right to be identified as author, they must have indicated their wish to exercise the right by giving notice to this effect (which
generally has to be in writing and signed) to those seeking to use or exploit the work or film. The right
to be identified as the author can be asserted on an assignment of copyright in the work or by another
instrument in writing signed by the author or director.

No particular form of words is required to assert the moral right of paternity. A typical example would be: “[the author] hereby asserts his right to be identified as the author of [the work].”

A performer’s moral right to be identified as the performer cannot be exercised unless it has been
asserted. Such rights are asserted in a similar manner as an author or director’s moral rights in their
copyright work.

The moral right of integrity does not have to be asserted.

6. Exemptions and Waivers

Are there permitted acts which will not constitute breach of an author's moral rights?

There are a number of permitted acts which by virtue of the fact they do not constitute an infringement
of copyright will also not be an infringement of moral rights. These include fair dealing for the purposes
of reporting current events by means of a sound recording, film or broadcast and things done for the
purposes of an examination.

Similarly there are permitted acts which do not infringe a performer’s moral rights by virtue of the fact
they would not infringe a performer's economic rights in their performance including things done for
the purpose of examination and news reporting.

Not every permitted act in relation to copyright will be exempt from infringing moral rights since the
essence of some permitted acts is that in order to constitute fair dealing sufficient acknowledgement
and therefore respect for the moral right of paternity is required. An example is fair dealing for criticism
and review.

Any act carried out with the consent of the author will not constitute breach of an author’s moral rights.

There are rights granted to broadcasters to alter works where, for example, laws of public decency
might be contravened, good taste might be offended, or works might be seen to be incitements to
crime, violence or terrorism.

Can an author be asked to transfer their moral rights to a college or university?

Moral rights, being personal to the author, can never be transferred. They remain with the author even
if he or she assigns the copyright to the college or university.

Can an author be asked to waive their moral rights, and if so, can they ever go back on that?

Yes, the author may waive their moral rights, or consent to an act which otherwise would be an
infringement.

It is possible for moral rights to be given up or waived by an instrument in writing signed by the person
giving up the right. However, a waiver by one joint author does not affect the rights of the other joint
authors.
A waiver may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works. A waiver may be conditional or unconditional and may be expressed to be subject to revocation.

The agreement to license a work under a CC0 licence is likely to be taken to be a waiver of the paternity right.

7. Infringement and Enforcement

What are the consequences for an institution that breaches an author’s moral rights?

The remedies for breach of moral rights relate to damages and injunction. A successful application for injunction by an author would make the OER unusable and would mean that anyone using the OER would have to take down material and could lead to damage to reputation.

About JISC Legal

JISC Legal, a JISC Advance service, provides guidance to prevent legal issues being a barrier to the development and adoption of new ICT within the further and higher education sectors. Through a range of activities including guidance publications, webcasts, an enquiry helpdesk, talks and seminars, it supports a wide range of staff, including managers, IT directors and staff, library and learning resource staff, administrators, researchers and academics, enabling them to make best use of technology to improve organisational efficiency, enhance learning and teaching, make the most of external engagement and underpin research.

Visit our website at www.jisclegal.co.uk, or contact us at info@jisclegal.ac.uk, 0141 548 4939

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