March 2011

Legal Aspects of the Use of Child Images in OERs

Please Note: This guidance is for information only and is not intended to replace legal advice when faced with a risk decision.

Table of Contents

Key points to note..........................................................................................................................2
Introduction ..................................................................................................................................3
Data Protection and Privacy ....................................................................................................3
e-Safety and Images of Children .................................................................................................6
The Meaning of Indecency ...........................................................................................................6
  Child Images as Art in OER .......................................................................................................7
  Child Images in Medical Teaching and in Research .................................................................8
Defamation ...................................................................................................................................11
Copyright ...................................................................................................................................12
  Including a Photograph or Other Image Legally in the OER ................................................13
OER User Rights .........................................................................................................................15
Accessibility Law and OERs the Equality Act 2010 ..................................................................18
Key points to note

- This paper is a user friendly broad overview of the main areas of law which impact on the use of child images in an Open Educational Resource. It should be recognised that the legal issues identified in this paper also apply to all images with limited exceptions, however the focus here is on images of identifiable children and on indecent images of children.

- Images of children may be used in OERs. If the image is of unidentifiable children or the child is not the focus of the image but incidental, or if it is an old photograph and you can be certain that the image is not of a living child, then the image will not give rise to data protection issues. If you wish to use the image of an identifiable child the consent of the child and parent should be obtained before inclusion. Ensure the consent covers the proposed OER use and subsequent use. For children whose understanding may be limited, parental consent is essential. However, be aware that under data protection law consent can be withdrawn at any time.

- The restrictions in all creative commons (CC) licences offer some protection in that a subsequent user must not distort, mutilate, modify or take other derogatory action in relation to the image which would be prejudicial to the original author’s honour or reputation. However an OER creator should avoid where possible, the use of child images depicting nudity or of a sexual nature or other offensive manipulation. Their use may bring the creator, the host institution and the user within the radar of the strict law on possession of indecent images of children, even though the defence of legitimate use does exist.

- Copyright law applies to images of children. If the use is not fair dealing (unlikely in the case of an image in an OER) then permission from the rights holder will be required. Check the permissions — you may already have it. Otherwise seek permission and ensure that that permission includes your proposed used under CC licence. This can be a difficult and time consuming process, so do consider using images which are already free to use under a CC Licence, as alternatives to images where the provenance is uncertain.

- Use a model release form where appropriate e.g. when taking photographs – it will clarify the information given to the child who is the subject of the photograph and to parents, and will help manage the expectations of all parties.

- In general, using images in an OER will give rise to accessibility considerations for your users, which should be addressed at the outset as part of the process of creating an OER.

- Check that your institution’s data protection/information policy provides specific instructions for users on how they can report any offending material (e.g. copyright infringing, breach of DP rights, defamatory, obscene content) found in the OER.
Introduction

This paper considers the legal issues which arise in relation to the taking of or possession of images (still and moving) of children for use in an Open Education Resource. An individual is considered a child if they are under eighteen years of age. Images involving vulnerable adults can present their own difficulty and require to be treated with caution.

The paper will focus on the law as it applies to the creator of an OER but the creator does have to bear in mind that what is done will have a legal risk impact on the subsequent users of the OER and the creator’s employer e.g. the institution as well as any repository where the OER may be stored.

Many of the legal issues raised in using images of children in an OER apply to the use of images in general, for example copyright and defamation. Where additional care needs to be taken is in the areas of data protection and e-safety to protect the integrity of the image and thus protect the child, the institution, and its employees and the future users of the OER.

Data Protection and Privacy

The Data Protection Act 1998 (DPA) gives individuals rights of control over the collection and use of their personal data. These rights should only be exercised by another person (e.g. a parent) on their behalf if they are not capable of exercising them independently.

The DPA requirements are a separate issue from the right to privacy which is discussed below. It is accepted that personal data can include photographs or other images of identifiable individuals where they are the focus of the photograph and so capable of being identified. This means making sure that the subject of the photograph is aware of the collection of information about them (i.e. the taking of the photograph), the processing of that information, and ensuring that the information is kept securely and is only released in accordance with the DPA. However it is less likely that incidental inclusion in an image, for example in a street scene, will fall within the DPA provisions.

The DPA imposes obligations on those processing personal data. Data controllers must ensure that any processing of personal data for which they are responsible complies with the Act. Failure to do so risks enforcement action, even prosecution, and compensation claims from individuals.

The DPA applies to all organisations that hold and process personal data relating to any identifiable living individual. This includes children. The Act covers ‘personal data’ and ‘sensitive personal data’.

‘Personal data’ is any information, including photographs or other images, about an identifiable living individual regardless of the format of information. The overriding test is whether the information in question on its own or when combined with other information, is significant biographical information which would identify the child.

‘Sensitive personal data’ includes information regarding an individual’s race or ethnic origin, and physical or mental health.
The DPA is built around good practice principles for the handling of personal information. A data controller must ensure that personal data is processed fairly and lawfully. For example, the principles require that any processing of personal information is necessary, and that any information processed is relevant, not excessive and securely kept. Processing is a wide concept covering collection, use, sharing and disclosure. The principles are intended to provide a technology-neutral framework for balancing an organisation’s need to make the best use of personal data, while safeguarding that information and respecting individuals’ private lives.

What is meant by ‘fair and lawful processing’ of data and how can it be done in FE and HE institutions in the specific context of creating an OER?

Fair and lawful processing means that the data subject will have to be informed that their data (i.e. the image) is being ‘collected’, who will hold their data, what it will be used for and who will have access to it.

An OER is designed with the aim of unrestricted access to a user from anywhere so it is difficult to envisage a situation where a photograph or other image in an OER which has been identified as being personal data, would fulfil the data protection principles of being kept secure or not being transferred to another country. Further, it is unlikely that any of the other additional conditions which need to be complied with under the DPA would be able to be met other than by the subject of the photograph i.e. the child, giving his or her consent to the use (or the parent if the child is not capable of giving consent).

Guidance from the ICO\(^1\) states that photographs for personal use are exempt from the DPA, for example, photographs taken by parents at a school function for the family album. However the DPA does apply when photographs of children are taken for official use by a school or institution such as for issuing identification passes. In the other instances where the DPA does apply, if the photographer has obtained permission from the parent or individual to take a photograph, then this will usually be enough to ensure compliance. It should be noted that under the DPA, consent may be withdrawn at any time by the data subject. Further, even with parental or subject consent, the possession of photographs which could fall within the area of ‘indecent’ will introduce the area of law on child protection and pornography which is discussed below.

\(^1\) ICO: Data protection Good Practice Note: Taking photographs in Schools at http://www.ico.gov.uk/tools_and_resources/document_library/data_protection.aspx
**Scenario:** I want to make my largely text-based open educational resource more visually interesting, and photographs of children would be appropriate.

**Legalities:** In this case, there is little justification for using an image of an identifiable child. By using a generic image where the child is unlikely to be identified by the public in general, and is not connected with any other information about the child, data protection issues are unlikely to apply. Care must still be taken to ensure that the image is cleared in terms of copyright for inclusion in the OER. In order to avoid potentially troublesome rights clearance, use might be made of images which are already CC licensed. As an indication, a quick search using a popular search engine for photos of children under a liberal CC licence (allowing commercial and derivative uses), returns more than one thousand hits.

**Privacy and Images**

Photographing children also raises the question of an expectation of privacy and the right to privacy which is a developing area in UK law. The judgement in the 2008 court action raised by JK Rowling is an indication of current legal thinking\(^2\). Her young son was intentionally photographed without permission in his pushchair in the street by a photographer and this image was subsequently published. It raised the question of whether there was any expectation of or general right to privacy where a photograph is taken of an identifiable child in a public place. It was stated that Article 8 of the Convention on Human Rights (the right to respect for a person’s privacy) is a vitally important right, that the rights of a child may be separate to those of his parents, and that even the most harmless activities in a public place may (but not always) give rise to a reasonable expectation of privacy and could give rise to the emerging tort of misuse of private information.

The significance of the Rowling case is that in order to minimise the likelihood of later accusations on misuse of private information, the consent of the child and the parents should be sought wherever possible prior to the photographing of children. This consent should include advising the purpose for which the photographs will be used. A consent form should be used that indicates the proposed use and is a formal record that permission has been obtained.

Scenario: I’m creating an open educational resource relating to teacher education. I plan to go around the local school and take some general photos of the children to include within it.

Legalities: First, the use of generic, pre-licensed images should be considered, as the actual identity and locality of the school and children are unlikely to be important. Otherwise, it may be easiest to consider a stylised photograph (for example, using focus on a near object to blur the images of the children in the background). In any event, you will need to work with the school to ensure that you comply with their rules, remembering that their approach may go beyond what is legally required in order to deal with parents’ sensitivities.

Data protection permissions will be needed if any children are the subject of the photograph (rather than being part of a general crowd).

e-Safety and Images of Children

It is an offence to possess, take, make, distribute or publish indecent images involving children (or convincing depictions thereof). The main legislation is contained in the Protection of Children Act 1978 (PCA) at s1 which makes it an offence to take distribute or show, possess with intention to distribute or publish indecent photographs or pseudo photographs of a child (defined by later legislation as under 18). The Criminal Justice Act 1988 (CJA) at s160 (1) broadened the scope by making it an offence to possess any indecent photo etc. – whether or not with the intent to distribute. Scotland and Ireland have similar provisions.

The Meaning of Indecency

One of the major difficulties for a creator of an OER is what ‘indecent’ means in this context and also the somewhat misplaced notion that the concept of indecency would not apply to images included in an OER for purely educational purposes.

In this section we will focus on two main areas, child images in art and child images in medical teaching and research.

Unfortunately, as far as both these areas are concerned, there is no clear definition of what is ‘indecent’ in UK law. According to case law, indecency is what could be considered to breach recognised standards of propriety. Simple nudity may amount to indecency according to one ruling\(^3\) whereas in another case the same year, it was stated that simple nudity would not amount to

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\(^3\) R. v. O’Carroll [2003] EWCA Crim 2338
indecency⁴. Thus each use of an image needs to be considered on its own merits without consideration of motive as was confirmed in the R. v. Murray⁵ appeal where it was stated that:

‘the jury had been correctly directed: ..motive is not for you to consider. It is simply: is it (is it) indecent? So the circumstances in which it came to be taken as you see it are not relevant. You simply have to apply recognised standards of propriety…’

**Deciding Whether to Include a Child Image in an OER**

In general, deciding whether or not to include a particular image of a child in an OER in this context is a two stage process. Firstly, the question needs to be asked whether the image is indecent and if the answer to this is yes then secondly, is there a legitimate reason to have the image in the OER.

If the answer to the first question is no then inclusion can proceed subject to privacy and consent requirements. If the answer to the second question is no then the image should not be included in the OER. If there is a legitimate reason to have the image in the OER then inclusion can proceed subject to privacy and consent requirements. However ‘legitimate reason’ is interpreted narrowly as discussed below.

**Child Images as Art in OER**

One image in particular that has focused this debate relatively recently (2009) concerns the photograph of a ten year old Brooke Shields posing naked in her bathtub.⁶ The controversial image shows her wearing make-up and critics argued that it could constitute a sexual pose and indecent in terms of the law. The display was due to go on show to the public at the Tate Modern Gallery in London, however, was removed after a warning to the gallery from the police that the image could breach child protection laws. However when an action was brought in a US court, it was held, ‘that the photographs are not sexually suggestive, provocative or pornographic; they do not suggest promiscuity. They are photos of a prepubescent girl in innocent poses at her bath.’⁷

If this case had gone to court in the UK, media lawyers suggested that the Tate Modern would be unlikely to lose an obscenity case in this instance on the basis that the Obscene Publications Act 1959 defines as "obscene material" anything that would "tend to deprave and corrupt" the public. Whilst the PCA might come into play, the key tests would be whether the child is posed provocatively,

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⁴ R. v. Oliver et al [2003] 1 Cr App R 28
⁵ R. v. Murray [2004] EWCA Crim 2211
whether there was an element of lewdness or erotic detail to distinguish it, for example from ordinary family snapshots.  

In 2001 in another case, a photograph taken by Tierney Gearon was the subject of a police raid on the Saatchi Gallery. The supposedly provocative shot showed two naked children at the beach wearing masks. After a standoff with officials on the basis that the images might contravene the Protection of Children Act, the gallery decided not to take down the shots and the police did decide that no offence had been committed. Klara and Edda Belly Dancing by Nan Goldin (a photograph owned by Sir Elton John) was also seized from an art exhibition but it was decided by the Crown Prosecution Service (CPS) that it was not an indecent image. The CPS had first considered the image of two naked young girls dancing in 2001, and it was then deemed not to be indecent. However, the image caused further concern later in 2007 when it was due to appear as part of a wider exhibition at the Baltic Centre for Contemporary Art, Manchester. The CPS said they had to consider whether "standards of propriety" had changed since 2001, but concluded that they had not.

The above illustrates the difficulty for creators of an OER with regard to the use of images of children which may fall within this area of law. Art certainly tests the boundaries of the law. In the UK a risk adverse approach is tended to be adopted particularly on sensitive subject areas such as the use of naked images of children. Indeed the law is geared towards the protection of children which is understandable when dealing with straightforward examples of obvious indecency. However, the law is less able to cope when the image in question is borderline, where some say an image is indecent and others disagree.

Child Images in Medical Teaching and in Research

Clinical photography is used for the purpose of research publication and teaching and this may include naked images of children. The question arises whether these images are 'indecent' under UK child protection laws and whether there is any defence or exception which might permit their use. If someone is found to be in possession of indecent images under the CJA s160(1) there are three defences:

- that he had a legitimate reason for having the image in his possession;
- that he had not himself seen the image and did not know, nor had any cause to suspect, it to be indecent; or

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8 Razi Mireskandari quoted in Time Magazine
http://www.time.com/time/world/article/0,8599,1927555,00.html
10 Alisdair A. Gillespie discusses the legal difficulty in Child Nudity (2009). op. cit
that the photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

Under the Protection of Children Act 1978 there are limited defences to the possession and distribution of indecent images of children but not to the making of indecent images. The one of most relevance in relation to the use in and potential ‘distribution’ via an OER is that of ‘legitimate reason’.

The elements of this defence were discussed in the case of R. v. Wrigley\textsuperscript{11} where it was accepted that genuine academic research could be a legitimate reason and a defence to possession in terms of intent to distribute indecent images. However it was maintained that Wrigley’s research was for “his personal gratification and/or his sexual orientation” and in addition there was no supporting evidence regarding research and specifically none of his tutors knew about his research programme.

In Atkins v. DPP\textsuperscript{12} this view was confirmed by the court:

‘The question of what constitutes “a legitimate reason” (for the purposes of both s160(2)(a) of the CJA and s.1(4)(a) of the PCA) is a pure question of fact (for the Magistrate or jury) in each case. The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of “legitimate reason” advanced. They will each have to be considered on their own facts. Courts are plainly entitled to bring a measure of scepticism to bear upon such an enquiry: they should not too readily conclude that the defence has been made out.’

In a 2004 case R. v. Murray, the defendant taped a tv programme which showed a doctor examining the genitalia of a naked child with accompanying commentary. The defendant modified the recording by slowing it down and focusing on a particular area and this was found to be indecent.

In the commentary to the case, the view is put forward that

‘The court gives short shrift to the defence argument that that which had been abstracted from a decent image could not be treated as indecent. This was not a case of looking at a concededly decent image by some method of magnifying or ....zooming or slow playing, it involved a different set of images which, when viewed independently and as created, were indecent. The definition of indecency is one of an objective nature to be determined by the jury....The breadth of the s160 offence is ameliorated slightly by statutory defences, including a “legitimate reason” for possession. Thus, a lecturer in a medical school who created such enhanced, zoomed, slowed-down images for teaching, would still be in possession of indecent images, but would not be liable.’\textsuperscript{13}

\textsuperscript{11} [2000] EWCA Crim 44
\textsuperscript{12} : [2000] EWHC Admin 302
\textsuperscript{13} Crim.L.R. 2005, May, 387-388
Decisions to retain indecent images should not be taken without approval from senior management. What this means is that if images that are considered legally to be indecent are to be used for teaching or research then as part of a risk assessment exercise, detailed scrutiny of the legitimate reasons for the activity by a senior authorised officer of the institution should take place.

A high standard of proof is needed for legitimate reason to be an effective and valid defence and it is unlikely that uncontrolled distribution by inclusion in an OER would meet this standard.¹⁴

**Consent – Lawful Activity**

Current use of images in medical research, publication and teaching rely on consent of the patient and parent.¹⁵ Legal opinion would suggest that for all child images, specific informed parental consent should be obtained to both the obtaining and to the use to be made of them. In the Brooke Shields case it was the actress’s mother who gave consent for the photograph to be taken as the child did not have the capacity to give informed consent. It is argued that for this kind of use child subjects are simply being exploited. This need for parental consent also applies, and arguably more so, to the use of images in medical teaching and publications as the images may also contain sensitive information on medical conditions. It is worth remembering that images are a permanent record and before any naked images of children are taken for any purpose, the interest of the child must be considered carefully in order to avoid any breach of child protection as well as privacy laws.

It is clear that any photographic images of children that are of a sensitive or personal nature should not be retained any longer than necessary and it is likely that it would only be in exceptional cases that such an image would be legitimately used in an OER.

Given the restrictive nature of the law in this area, combined with the lack of control inherent in OERs, consideration should be given to not using ‘complete’ images of children in what could be construed as an indecent pose. However it may be possible to use images of specific areas of the body where the child cannot be identified provided full informed consent has been obtained as to the breadth of the use.

**Institutional liability**

Generally where individual students or staff engage in ‘illegal’ activity, for example making indecent images of children available to download, by means of an institution’s communications system it is unlikely that the institution would be held liable for possession of the material under the CJA s160.

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¹⁴ For a more detailed study of the defences see Yaman Akdeniz: Possession and dispossession: a critical assessment of defences in possession of indecent photographs of children cases (2007), Criminal Law Review 274

There is an ‘awareness-related’ defence to such liability. No liability will arise provided that the person in possession—the institution or more specifically those employees responsible for management of the computer systems—had not seen the images in question and did not know that they were there, or had no reason to believe that they were in possession of indecent images of children. Situations where this defence would not be available would be rare: typically those individuals who are determined to access and collect indecent images of children are very adept at hiding their material in information systems, and it is unlikely in the general run of things that the institution would expect to find such information being stored on its systems. Of course, the availability of this defence carries an implied obligation that as soon as the institution is notified of the presence of indecent images of children, it is immediately reported to the appropriate authorities—the police. It is therefore imperative that the creator of an OER recognises the risk in using such images both for himself but also for subsequent users and their institutions.

Defamation

Defamation is, essentially, concerned with the publication of lies, or untruths and a defamatory statement is one which lowers the claimant in the estimation of right thinking members of society. It was established in case law over a century ago that the defamatory statement may be made in a permanent form other than writing, (Monson v. Tussauds [1894] 1 QB 671) thus images may be defamatory. The general rule of UK defamation law is that the publisher of a defamatory statement faces liability and this applies to institutions as publishers in the same way as to any other publisher.

An example of an arguably defamatory statement involving an image of a child could be a hard hitting article about child promiscuity in a specific area of a city illustrated by a photograph of an identifiable young girl from that area, unconnected with the article or its content.

Institutions are legally responsible for their own published content and they must ensure that it does not infringe the rights of others. In general, making materials available as part of an OER will be considered publishing where the institution exercises editorial control over the content. Institutions may also be held liable where the actions of employees in the course of their employment cause harm to others (known as vicarious liability). Likewise, where as a result of action or inaction they cause harm to their own users or others, or fail to fulfil duties placed upon them, they could be held to be negligent. The legal position is further complicated where an institution acts as an intermediary, for example, as a service provider or as a ‘host’ of information for others. Usually it will be clear when an institution is publishing its own materials in the traditional sense. However with information which is accessed via, or stored on, an institution’s computer network and, with the provision of OERs where users are able to upload their own content or adapt and modify existing content, it may be less clear where responsibility for its publication lies.

The UK’s first internet defamation case, Godfrey v. Demon Internet Ltd16 dealt with the liability of an internet intermediary and internet service providers (ISPs) for publication of content. The case laid

16 [1994] EWHC 244
the foundation stone for the proposition that internet intermediaries who actually knew that defamatory material was hosted or cached on their computer systems, but failed to take steps to remove or disable access to that material were ‘publishers’ for the purpose of defamation law. However, in the landmark decision Bunt v. Tilley17, the UK courts narrowed down the liability of internet intermediaries for passively posting defamatory content. The court ruled that ISPs are not liable simply by playing the passive role of a facilitator to publishing content on the Internet. While this decision recognised the role of ISPs as facilitators and exempted ISPs from strict liability for any defamatory content that they may communicate, the court did not go so far as saying that ISPs will be relieved of liability under all circumstances. It is thus strongly arguable that institutions hosting OER materials and who know that they are hosting defamatory material are publishers under defamation law and will not be exempt from liability.

Defences

One of the defences available for an OER publisher will be that under s1(3)(e) of the Defamation Act 1996 “a person is not a publisher of a statement if he is only involved as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control”. It is unlikely that content managers will be considered as mere ‘operators of services’ if they also perform the duty of checking content that is to be posted in the OER collection. Upon receipt of notice of a claimed defamation, the institution should, of course, remove the posting straight away.

Copyright

One of the major legal issues that will impact on the production and use of an image of a child is that of copyright. Copyright protects the expression of ideas in the form of various types of work, including artistic works such as photographs and video images.

The relevant legislation for copyright is the Copyright, Designs and Patents Act 1988 (CDPA) which provides certain exclusive rights to copyright owners, including the right to copy, communicate, distribute, perform and adapt their works. Infringement may occur where a ‘substantial part’ of a work is copied without permission, usually in the form of a licence, from the copyright owner. What is a ‘substantial part’ is a qualitative judicial test that can be difficult to define or determine but use of a complete image would qualify as substantial, and any institution relying on this test will be taking a risk.

Copyright allows the rights holder in the images to control copying and restrict uses made of their works subject to the permitted uses set out in the CDPA. This affects how images are placed in OER

17 [2006] EWHC 407
and used and distributed. Where images are created by non employees an institution will generally require permission, or a licence from the copyright owner to include them in an OER.

The two main copyright issues with regards to use of images of children are –

- copyright permission to include an image legally in the OER (sometimes called upstream rights) and
- copyright permission for a user in accessing and using the image legally from the OER (sometimes called downstream rights)

**Including a Photograph or Other Image Legally in the OER.**

It will firstly be necessary to check whether permission is needed to use the image in an OER. Some images may be out of copyright or may already have permission to be used under a creative commons licence which may provide the range of permission required for use in an OER. Essentially an image will require permission from the rights holder unless the use falls within the fair dealing provisions of the CPDA or permission has been obtained for its use. The fair dealing provisions of the CDPA in relation to non-commercial research and private study are very unlikely to be relevant, as they do not extend to multiple copying and making material openly available on the internet. In terms of fair dealing for the purposes of criticism and review, where the image has been previously published, and is being used for the purposes of criticism and/or review, then CDPA s30 may permit the inclusion of the image (accompanied by acknowledgement of source). However, a judgement has to be made as to whether the activity is strictly criticism and/or review (rather than, say informing and illustrating), and whether the use is fair. The test of fairness includes weighing factors such as how substantial the portion of the work used is and gauging how significant the likely economic impact of the use on the copyright owner is.

**Obtaining Permission**

Having concluded that permission is needed for use, the main area of difficulty is in trying to ascertain who owns the copyright in the image you wish to use in order to get permission. The person who has the photograph in their possession may not necessarily be the copyright owner. Usually the first copyright owner in a photograph is the person who took the photo. However if the photographer is employed by for example an institution, then the situation may differ. Where an employee creates an artistic work, in the course of their employment, the default position in law is that copyright in the work will belong to the employer, unless there is a contract or agreement to the contrary (s11(2) of CDPA). Accordingly, where photographic or video images of children are created by the lecturer or photographer (employee) working within their course of employment, and there is no agreement that states otherwise, the institution will own copyright in the works and it will then be a question of confirming that the institution agrees to the image forming part of an OER under a CC licence.
Scenario: I want to release a video resource on the psychological effects relating to child abuse. As well as the presenter’s “talking head”, I’d like to include stills and short video clips of children.

Legalities: In this situation, the connection of the photograph of the child with the subject of child abuse will give rise to a more careful approach to data protection issues. Using a generic photograph or video would entail linking the subject of the photo or video to child abuse. In this situation, to avoid data protection issues, the use of an image containing an identifiable child would be best avoided – for example, by showing a photo of an adult interviewing a child, taken from behind the child, or by the use of a video panning across an empty play park to accompany a voiceover. In each case, copyright will still have to be considered, either through the photographer giving permission for release under a CC licence, or by using previously CC-licensed material.

If the institution has commissioned the work done by a photographer, then the default position is that the photographer and not the person or organisation that has commissioned the work is the first copyright holder. This can be altered in a written contract between the parties.

Where an image that is to be included is owned by a third party and has not been cleared for use under a CC licence then permission will need to be obtained for use in the OER. Third party copyright material cannot be released under an OER licence without the copyright owner’s permission. If a resource which contains both “self IPR” and third party IPR is included in an OER under a CC licence, and the owner of the third party copyright hasn’t given permission for a CC licence, then users are restricted in their use of that third party material.

If the owner of the image is unknown or the image is thought to be an orphan work then it is up to the creator of the OER to assess the risk of inclusion in the OER. Orphan works are explained in more detail on the JISC Legal website at - http://www.jisclegal.ac.uk/orphanworks.

Rights of the Photographic Subject

The question needs to be asked whether the subject of a photograph has any rights in their image. An individual's proprietary rights in their personality are often referred to as "image rights". Where a photograph invades an individual’s privacy they may be able to take legal action to restrict further intrusion and to seek compensation for damage suffered as a result of that intrusion. This is distinct from any image right that a celebrity may have in some specific situations. The law of passing off
may be considered in the UK to protect the subject’s image especially in the case of a well known subject or celebrity where their image is a financial asset, for example. In claiming passing off, the subject of the image would need to show there is a reputation to protect, and that there has been misrepresentation which has or is likely to cause damage. In that case the celebrity may have the right to prevent unauthorised use of their likeness.

The photographic subject is not a performer in terms of the CPDA so no moral rights or performers rights apply. If the image of a child is in a video format it may in some circumstances be classed as a performance, i.e. if it is a dramatic recording of a performance. The child will have performance rights and therefore will have the right to control the broadcasting of his performance via an OER, but if the video has been cleared for use under a CC licence, then this will include this permission (CDPA s180-197). The performer will also have moral rights to be identified as the performer and to object to any derogatory treatment of his performance.

OER User Rights.

In general the OER user’s rights will be contained in the licence under which their use of the material is authorised. As far as the use of images of children is concerned, the OER user needs to have confidence and clarity as to what use is permitted and that the permission is compatible with the proposed use i.e. in effect that the image is CC licensed and thus has the necessary clearance for use in an OER. The OER creator should endeavour to obtain necessary consents in order to protect themselves as well as subsequent users.

In summary if the creator of the OER is using an image to meet a general purpose then consider using something already licensed which will avoid the issues surrounding content clearance. If a specific image is needed then ensure that the photographer or other rights holder has agreed that the image may be used as an OER under a CC licence.

Scenario: I’m making a case study about the impact of technology on the life of a 12 year old African child to be available as an open educational resource. I’d like to include photos of the child, to be taken by a local photographer and sent to me.

Legalities: Two approaches are possible. The first is to consider whether the use of the actual name and image of the child in question are necessary for the pedagogic purpose. In nearly all cases this will not be the case, so use can be made of a fictional name and a generic, pre-licensed image. The second is to ensure that the photographer gets the child’s consent (ensuring that the child understands that the photograph will be available to everyone, everywhere in perpetuity, and to get parental consent if there is any doubt as to whether the child understands this), and that the photographer gives copyright clearance for the relicensing of the photograph under a CC licence.
What happens if a third parties rights are infringed in that the use of the image as an OER is unauthorised? Where does the liability lie?

The short answer is that liability for copyright infringement in child images is no different than as for all copyright material. It is likely that the copier of the work will have to defend/justify their copying when a rights holder alleges infringement of copyright in their work. So if a rights holder claims that their copyright has been infringed by an OER project member or creator/employee placing an image in an OER without their consent, then the institution (if the project member is an employee of the educational institution) or the creator must show that their use complies with the laws of copyright (essentially whether the use is fair dealing or they have a licence which permits the use).

A number of infringements can take place:

- It may be an infringement to copy the work onto a website.
- It may be an additional infringement to make that infringing copy available to the public (by the institution that publishes the infringing work)
- It may be a further infringement for a user of the website to copy the infringing work.

The reality is that pursuing the institution is the easiest route for a rights holder and whether a defence that the infringement was the result of an oversight would be upheld is a question of fact and degree in each individual case.

Mitigation may be enhanced where the institution can demonstrate that they have acted in good faith and had taken reasonable steps to prevent and avoid infringement. This involves the institution carrying out a risk assessment exercise. Where copying material of uncertain provenance takes place the institution would need to demonstrate that they had assessed the risks and taken reasonable steps to prevent infringement.

Simply providing the computers and networks that are being used to infringe copyright is unlikely to mean that the institution is liable. However, an institution is under a duty to take action once it has actual knowledge of infringing material on its computers or servers (such as by a notice sent on behalf of the copyright owner) or, through some other means, ought to have been alert to the likelihood of an infringement.

In addition including unauthorised images in an OER opens future users to the same risks and at the very least may reduce the benefit of using OERs and will do little to promote co-operation.

Don’t be blind to the obvious. There is no doubt that there is a risk that the copyright in images which purport to be licensed for use under a CC licence is in fact owned by a third party who has not consented to the use. Strictly each incident of copying without permission may be an infringement and as mentioned above a number of infringements can occur when an infringing copy of a work is copied further.
The risk is real. Take for example a publisher such as Getty Images. They will want revenue for any copying of images which they are the copyright holders of and have been known to aggressively seek compliance with their licence terms. In another example, (January 2011), an Israeli court case, Avi Re’uveni v Mapa inc, the user of Creative Commons (CC) licensed photographs was found to have infringed copyright by creating and selling collages using those images without complying with the particular CC licence conditions. In this case, no attribution was given, this use was commercial, and was a derivative work. This illustrates that whilst CC licences provide useful, relatively liberal permissions, they do not represent a free-for-all, and non-compliance with the licence conditions will make reuse unlawful (with consequent risk and uncertainty). The summary of the decision is available online at - http://creativecommons.org/weblog/entry/26115.

So how can third party child images be included in an OER?

The following approaches are likely to be available:

Only submit images of which you are the copyright owner, or clearly have the owner’s permission to licence under a CC licence. This is straightforward and certain, but limiting.

Strip materials of third party copyright material before submission, but include flags to what has been excluded. E.g. “[A clip from the film “Legal Eagles” was embedded in the original resource at this point, but has been removed for copyright reasons]”. This allows the end user to know what was there, and, if important, to go and find a licence to use that resource, or to insert an alternative (licensed) resource which still meets the pedagogic objective. This is a safe approach, but might leave the end user with quite a lot to do to use the resource.

Where the depositor has a licence or permission to do so, put the materials up in their entirety, but clearly mark third party material as not included under the CC licence, and warn users that it is their responsibility to clear the right to use the third party copyright parts. The third party copyright material could be included separately as an annex to make it clear that it’s not covered by the CC licence, or could be marked appropriately within the rest of the materials. This approach has the advantage of letting users’ read/see/hear the complete resource, but may lead to widespread infringement if users do not heed warnings, to the discredit of OER generally.

Where reliance is being placed on the fair dealing for criticism and review exception, the extent and limits of that must be made clear to users, and again, it should be clear that those inclusions are not CC-licensed. This may also seem quite tricky, but otherwise there would be -

- a risk of non-compliant materials being disseminated widely,
- the chaos that possible withdrawal of those materials might bring if the copyright holder objected,
- the reputational risk to creator, user, depositor and those involved in OER generally,
as well as possible legal damages and costs.

If the copyright issues are addressed, certainty and confidence are improved.

Finally, it’s worth pointing out that with future creation of resources, creators might have in mind the possibility of them being disseminated via a CC Licence, and therefore select third party materials which are suitable for such an approach: the best resource pedagogically is unlikely to be OER for a long time to come if it includes Disney film clips. However, finding and using CC-licensed film clips to include will permit it to be released as an OER.

Accessibility Law and OERs the Equality Act 2010

The Equality Act 2010 reforms and harmonises discrimination law. Disability discrimination law applies to institutions as service providers, employers and educational service providers, and is included in the Equality Act provisions. The Disability Equality duty is in force until 06 April 2011 when it will be replaced by the Public Sector Equality Duty.

Under the new Equality Act the definition of disability is similar but the Act extends and clarifies the definition of discrimination in relation to disability. The duty to make reasonable adjustments where a disabled person would be put at substantial disadvantage in comparison to non-disabled people continues.

As a creator of an OER, it is necessary to consider the users and accessibility at the outset of the project in order to ensure that the resulting OER is of maximum benefit to all potential users. This may include ensuring that images have accompanying text that describes fully the image so that learners with visual impairment can engage more fully with the contents.

The JISC Techdis service provides support in achieving greater accessibility and has information on creating accessible learning content - http://www.techdis.ac.uk/.

Further information can be found in the Equality Challenge Unit paper on the implications of the Equality Act 2010 for Higher Education online at - http://www.ecu.ac.uk/publications/equality-act-2010.

Further reading and sources:
JISC Legal for further information on OER and in depth guidance on the areas of law covered by this paper http://www.jisclegal.ac.uk/

Web2Rights for templates/model letters and release form, as well as IPR information http://www.web2rights.org.uk/documents.html

Information Commissioner’s office (ICO) for information and guidance notes on data protection and privacy http://www.ico.gov.uk/
Equality Challenge Unit for resources and publications for the Higher Education sector on the Equality Act 2010 http://www.ecu.ac.uk/


JISC TecDis for support and advice on disability and technology http://www.techdis.ac.uk/

Creative Commons for details of the licences used in OER and information on legal cases involving CC http://creativecommons.org/

JISC Digital Media for sources of rights cleared material http://www.jiscdigitalmedia.ac.uk

UK Intellectual Property Office (IPO) for information on copyright http://www.ipo.gov.uk/
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 education sector. It supports a wide range of staff within FE and HE, including managers, IT directors, administrators, and academics, with the aim to make best use of technology in developing institutional effectiveness, without legal issues becoming a barrier to appropriate use.

High quality, practical support is delivered through:

- **Written publications** e.g. Web 2.0 series, blanket copyright licences, e-repositories and the law
- **Multimedia presentations**, such as recorded webcasts on staying legal with web 2.0, and digital copyright. These offer the benefit of training delivered directly to lecturers and tutors at a time convenient for them
- **Events at various locations around the country**
- **A short turnaround help desk**. This enquiry service addresses problems specific to the enquirer. Common problems are then identified by the JISC legal staff and converted into helpful FAQs on the website
- **Commissioned research projects and joint activities** with other JISC Advance services

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