

## F.4 Access and charging policies

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## F.4 Access and charging policies#

It has been recommended that HER officers develop and implement an access and charging policy ([ACAO 1993](#)). Such a policy should be made explicit to all users and depositors of information. A clear formal access and charging policy should state the information available from an HER, what information may be withheld, the reasons for this, any charges that requesting HER information may incur and any information expected from the user in order for them to access the HER. Establishing a user's declaration form, perhaps in conjunction with Benchmark 1.3's goal of maintaining a register of users, could prove a useful tool in monitoring interest in sensitive sites.

### F.4.1 Public information#

HERs should be considered public information, having been compiled through national and local government funds and should aim to provide access as fully as is possible to all users. However the dual role of the resource in also supporting planning and conservation matters may mean that in certain circumstances full access to information for all users could be limited. The archaeological results contained within fieldwork reports produced in support of planning applications are public information and cannot be withheld. It is the responsibility of the depositor to ensure no commercially sensitive information is available within the report. Personal information held within HER documents is covered by the [Data Protection Act](#) regulations and should be withheld.

### F.4.2 Commercial value of HER information#

Since the introduction of PPG16 there has been a substantial expansion in the volume of enquiries from developers and consultants and HER information has acquired a commercial value. Some HERs have considered charging for access to information. In England and Wales it has been established through the courts that it is illegal for local authorities to charge for accessing information for pre-planning-application discussions between council planning officers and developers ([McCarthy and Stone vs. London Borough of Richmond, ACAO 1993](#)). No directly similar case has been brought before the Scottish courts, although the McCarthy & Stone case has been used as supporting evidence in other successful cases against Scottish local authorities re the legality of charges for information - [SPH \(Scotland\) Ltd v The City of Edinburgh Council 2003 CA13/03](#) and [Stirrat Park Hogg v Dumbarton District Council 1996 SLT 1173](#).

Whilst HERs should not charge for 'information', reasonable costs could be recovered, when dealing with commercial users, by charging for staff time and the cost of replicating and sending the information to the user. Recovery of costs from all users for photocopies, photographs and other copy materials is common practice.

### **F.4.3 Acceptable use#**

HERs may contain information of a sensitive nature such as the accurate location information of vulnerable sites or the personal details of individuals. HER officers could consider including a deliberate time lag in certain cases if sensitive information is being made widely available to all users. It may be necessary that the locational data of certain sites is less precise than others. This issue is especially pertinent when making HER information available over the Internet, where users may be less easily monitored. ALGAO advises that those HERs in receipt of Portable Antiquities Scheme Data should use a NGR of no more than four figures if published online. Benchmark 1.2 ([Chitty 2002](#)) 'Access to Services' advises that where remote access is provided to the HER it should be a 'read-only' facility and capable of blocking access to sensitive information.

### **Images#**

Images held within the HER are also the subject of several access issues, especially where they are 'published' on the Internet. Any images of children must have express parental permission. Any image that reveals an individual's identity should not be used without their permission. Car number plates should not be visible without the owner's permission. Images should only show property visible from a public right of way unless the owner's permission has been sought and given. Experience of the '[Images of England](#)' project has demonstrated that even this policy is unacceptable to certain property owners who may have security and privacy concerns. Consequently even images taken from a public right of way may be withdrawn as a courtesy. The way that people are depicted should also be considered in terms of negative images and discrimination.

Promoting acceptable and responsible use of HER information to users prior to allowing access to HER information should also be considered. A document highlighting the role that HERs play in the important task of conserving and preserving the historic environment should instil in users feelings of a collective responsibility in this process.

HER managers are recommended to seek legal guidance from their local authorities on this issue. Managers should be aware that policies to restrict the access by certain groups of people to information might be viewed as discrimination. User declaration forms are recommended because they both provide a clear statement to users and also form basis for action should any breach come to light. Examples of these forms are available on-line, such as: <http://www.gloucestershire.gov.uk/index.cfm?articleid=10033&detailid=&contactid=&articleaction=form&formid=1219>, [http://www.cornwall.gov.uk/media/pdf/8/o/her\\_users\\_declaration\\_form\\_1.pdf](http://www.cornwall.gov.uk/media/pdf/8/o/her_users_declaration_form_1.pdf)

### **F.4.4 Copyright, database rights and licensing#**

Control of intellectual property rights (copyright, database right and licensing) are complex legal areas in which this manual can only give common-sense guidelines. HER officers can find out more about these issues either by consulting published works (see References [Section H](#)) or their local authority's legal advisors.

### **Copyright#**

The main legislation governing copyright issues, as amended by various additional regulations, is the [Copyright, Designs and Patents Act 1988](#) (UK wide). This specifies the rights of creators of dramatic, artistic (including photography), sound recording, broadcast and artistic works. To qualify, the work must be an original work, or a published edition of works, involving labour, skill or judgement. Copyright in the UK is automatic ? it does not need to be specified on the work itself. However, the law in the UK is currently likely to undergo subtle amendments following the adoption of a recent [EU directive](#) that seeks to harmonise copyright regimes across Europe. This is likely to impact on definitions of 'fair dealing', restricting the current fair dealing exemptions to 'non-commercial' uses.

The creator of the work is awarded a number of rights relating to their work, preventing the uncontrolled copying, distribution, sale, renting or performing of the work in a range of medias, including on-line. Copyright is a property right, so can be transferred ? bought, sold or inherited ? meaning that the creator and copyright holder can be different people. In addition, the creator of a work retains an inalienable and perpetual 'moral right' to be identified as the originator, and to prevent distortion or mutilation of the work. These two rights, together with a number of others such as patents and publication rights, are often referred to collectively as intellectual property rights.

Copyright is of limited duration:

- **Literary, dramatic, artistic (including photographs) or musical works**

Copyright lasts for 70 years from the year of the author's death, or, if the author is unknown, the date when the work was made available to the public by, for example, performance, exhibition.

- **Typographical arrangement of published editions**

Copyright lasts 25 years from the date of publication.

- **Films**

Copyright lasts 70 years from the death of the last principal director, author or composer or, if these people are unknown, from the date when the work was made available to the public.

- **Sound recordings and broadcast works**

Copyright lasts 50 years from the date when the work was made available to the public.

As a general rule, any use of a work which involves its copying and occurs within the duration described above is a breach of copyright. This blanket restriction comes with strict penalties, but it also has a number of exceptions sometimes referred to as 'fair-dealing'. Fair-dealing allows the use of copyrighted material for defined purposes. Limited uses of copyrighted works are permitted provided that it is for personal non-commercial research and study, teaching in schools, judicial proceedings, criticism and review or reporting current events. Even if the above criteria are met, however, if the copying involves making multiple copies or copying large amounts of materials, then it may still be necessary to obtain permission from the copyright holder. It is usually necessary to acknowledge the copyright holder appropriately.

Failure to honour copyright could lead to a court injunction to prevent the misuse, an order to deliver up the infringing goods or damages for copyright infringement.

## **Database rights#**

There are two aspects of copyright law which relate to databases:

- **Normal copyright**

As explained above, the normal provisions of copyright law apply to the information content of databases and copyright remains with the authors of the data. Where the originator of the information is the HER, then copyright resides with the HER. If material has been copied into the HER from another source (assuming that permission has been obtained) then copyright resides with the original author. In addition to this, however, the creation of the database itself earns copyright on the database even if the data is derived from copyright-free sources. As with literary or artistic works, the duration is for 70 years.

- **Database rights**

Database rights are a distinct form of copyright and apply to information held in databases that may not be covered by normal copyright. These rights are set out in the Copyright and Rights in Databases Regulations 1997 (<http://www.legislation.gov.uk/ukxi/1997/3032/contents/made>), they subsist alongside copyright and do not override the rights of the individual copyright owners. Individual pieces of information from sources consulted by the HER during its compilation or enhancement may have their own copyright associated with them. If third parties own copyright in some of the entries then the database rights owner cannot authorise the reproduction of the part of the database containing those entries without their permission (and may be required to acknowledge their copyright). Such permission may have been obtained when the data was entered, or may have to be requested at the time of proposed reproduction of that part of the database. However, the HER will be something wholly different from the sum or its constituent pieces of information. As a whole the HER would be by reason of the selection or arrangement of the contents of the database the database constitute the author's own intellectual creation?. The author 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". So here the author of the database would be the local authority responsible for the HER with the HER staff providing the intellectual input by selecting information, deciding which records to add it to, comment on, index etc. This would represent a substantial investment in obtaining, verifying or presenting the contents of the database.

Database rights exist from the moment the database is created and then lasts for 15 years from its completion, or if it was published during that period 15 years from the end of the year of in which it was first made available to the public. If there is a substantial change to the contents of the database then the 15 year protection period recommences.

It can be argued that compilation of an HER is never complete. It is easier to make the case that a database has been substantially altered if the figures for the number of newly added and amended records over the year has been kept for each month in order to prove substantial change had taken place over the preceding calendar year and thus another 15 year term of database rights has commenced. In this way the constant updating of a database (such as an HER) renders the database right renewed on a regular basis.

A useful article summarising Database Rights has been published by Out-Law (<http://www.out-law.com/page-5698>).

## **Licensing#**

Licensing provides suppliers of information with a means of controlling the use of that information. The license is legally enforceable but limits the rights of both the supplier and the user.

HERs are normally involved in a number of licensing arrangements. Those that impact on HER work most significantly are licensing arrangements with the Ordnance Survey, for map data of various kinds, or with national agencies for the supply of information from [Historic England](#) or the NMRs and for other datasets such as the Thesaurus of Monument Types. Other datasets recently supplied under license include the Defence of Britain project data and HERs may have signed local licenses for other datasets.

License agreements will usually place restrictions on the use of the information and these can often be severe. Licenses from [Historic England](#) (first established by English Heritage) imposes limitations on how material may be referenced in the HER, how they may be passed to third parties, what uses they may be put to and also requires HERs to submit user figures to Historic England on a quarterly basis.

HERs may wish to consider creating a user license for their own data in order to permit the use of materials held within the HER which are subject to copyright and database right. Similarly, HERs may

wish to create a deposit license that sets out the HERs legal rights and conditions of use of materials deposited with the HER.

An example of a deposit license is provided by the Arts and Humanities Data Service: <http://archaeologydataservice.ac.uk/advice>

## **Implications for HERs#**

### ***Dissemination of materials***

Because copyright does not need to be asserted, almost all of the archaeological reports held by HERs are copyright, usually owned by both contractor and developer, even if there is no copyright statement attached to them. Similarly, articles in journals and monographs will also be copyright. HERs should be careful, therefore, in controlling to whom they transmit copies. Where the material is copyright they will have to be sure that the purpose of the copying is non-commercial. Particularly problematic will be the status of archaeological contractors. These will often be non-commercial in themselves, but if undertaking work for a commercial developer then the purpose of their work counts as commercial.

Copyright is in fact more restrictive than many people think and includes issues such as photocopying for office use. The British Library website provides a useful review of potential copyright scenarios. (<http://www.bl.uk/services/information/copyrightfaq.html>)

### ***Incorporation of materials into HER records***

HER managers should be aware of copyright restrictions when incorporating materials into HER records. Copying sections of archaeological reports or journals into HER records without permission not only risks copyright infringement, but would also prevent the HER passing on the records to third parties. Citing the author is no substitute for obtaining proper copyright permission, nor should copyright be assumed to have lapsed if the publisher is no longer in business. An individual quote from a work in copyright should be up to a maximum of 50 words long and multiple quotes from the same source must not total more than 300 words. Referencing is important and all quotes must be properly cited. The quote must also be material which is in the public domain and extend no further than that required to fulfil the purpose of the HER record. The Book Trust provides a useful guide for tracking down copyright holders. (<http://www.booktrust.org.uk/about/faqs.php>)

### ***HER databases and database rights***

Many HERs use commercial software as their main HER database, most frequently HBSMR supplied by exeGesIS SDM Ltd. Increasingly, HERs need to manipulate tables within their database in order to supply information to users in an appropriate form. Similarly, many HERs are creating websites to disseminate data in web-databases that may, in some cases, be derived strongly from their main HER database. This raises the issue of whether by manipulating and adapting their databases, HERs may be infringing database right. In most cases this will not be so, as extracting data from databases for conversion into a new format is usually permissible, but the issue does reflect the complexities of copyright and database right. HERs are advised to take appropriate advice from their license issuers before commencing, or declining to commence, substantial work on their databases.

### ***Copyright and the internet***

Under UK law, the Internet is regarded as simply another publishing medium and all normal copyright restrictions apply. HERs wishing to publish materials on the Internet, or to use materials from the Internet, should ensure that they have the proper permissions. The UK Patent Office recommends that web-publishers mark each page with the internationally recognised © symbol followed by the name of the copyright holder and year of publication

## **Recommendations#**

- **Never** copy information into publicly accessible records unless you are sure of your right to do so

- **Always** ensure that originators and/or originating organisations of that information are credited
- **Always** ensure that copyright notices are attached to any items for which third-party copyright applies
- **Never** pass copyright information to third parties unless your license specifically allows it
- Before creating applications derived from your HER database, discuss your plans with the license issuers to ensure database rights are not infringed
- Check the terms of all licenses to which you are a signatory
- Consider whether issuing users of HER information with a license would be beneficial

### **General references#**

Wienand, P, Booy A and Fry, R (2000) *A Guide to Copyright for Museums and Galleries*, Routledge.

[Access and Charging Policy Template](#)