

Intellectual Property Rights (IPR) In Networked E-Learning

A Beginners Guide for Content Developers

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Disclaimer: This document is intended to provide guidance towards developing expertise in the area of IPR in e-learning content development. The author is not a lawyer and this document does not constitute legal advice. The author has taken care in compiling these guidelines but does not accept any responsibility for any omissions or inaccuracies that may have occurred.

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Preface

This guide is based on my experience of working for the L2L project (part of the JISC-funded X4L programme) investigating the technical and educational aspects of finding, reusing and sharing educational resources in learning object formats. The project is a consortium made up of Stirling University and the four Further FE colleges of Clackmannan, Cumbernauld, Falkirk and Lauder, and is due to run until late 2005, the website isat: <http://www.stir.ac.uk/departments/daice/l2l/>

Because our project chose to create mostly 'real' learning objects (ie. collections of actual files etc.) rather than metadata for virtual web links I had to confront and deal with the issue of IPR in content development. Like many resource developers in higher education this is a subject I have studiously avoided for many years.

Following an old educational maxim that the best way to learn something is to have to teach it I decided to write a guide aimed at others in my situation. It has certainly helped me come to terms with the subject and while in no way claiming to be an expert I hope it is of use to those who face similar challenges in their work. The guide is not a complete self-contained guide to copyright and IPR (if there is such a thing). But it is intended to provide a good and readable foundation to act as a jumping-off point for your own exploration of this important area of e-learning.

John Casey, March 2004

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2 Introduction

2.1 Background

Intellectual Property Rights (IPR) have until recently been relatively obscure parts of the e-learning world but they are now rapidly becoming crucial to future development, and with good reason. E-Learning materials are expensive to create, so a lot of effort is currently being put into developing ways to store them in an accessible manner in digital libraries and repositories to enable people to find and reuse them with ease. IPR information is vital for digital libraries and repositories as it records who owns the e-learning resource, who can access it and use it, and under what conditions the resource is made available. The issue of IPR is one of growing importance and seems to increasingly permeate discussions of e-learning (Duncan, C., & Ekmekcioglu, C., 2003).

This guide deals with the basic aspects of IPR, especially copyright, in e-learning content development, with an emphasis on reusing third party materials to create new resources.

The technology that enables new types of digital publishing is currently racing ahead of the law. This is not a new situation, the history of IPR law is one of adaptation to technical and commercial change. It is important that we, as the producers and consumers of content in e-learning, have a clear idea of what we want others to be able to do with the product of our labours – and what we don't want them to do. In this sense the business of e-learning is finally coming of age and joining the rest of the media industry.

2.2 Aims

This guide aims to provide a user-friendly introduction to IPR issues for e-learning content developers. It is intended to act as a point of entry to the field of IPR in e-learning that will provide a good foundation for building expertise in the e-learning developer community.

The main aims of the guide are to:

- act as an awareness-raising device about IPR, especially in the public sector e-learning community in the UK;
- simply describe the relevant aspects of IPR;
- provide basic guidance on IPR in e-learning, especially on the use of third party materials;
- persuade developers of the potential benefits of including IPR management in their project planning and management activities;
- provide flow diagrams, templates, case studies and further sources of information and guidance.

2.3 Who is this guide for?

This guide is intended for those who are involved in e-learning content development, especially those who are thinking of using third party materials to create new learning resources and want to know more about the legal implications of doing so, especially their legal responsibilities to others. The guide is also intended for those who are thinking about making their e-learning content available for others to use in shared digital repositories and libraries and want to find out about the legal rights they might have in doing so and any responsibilities to which they may be liable.

2.4 User notes

The guide assumes two main types of reader. The first will need a quick introduction to the general area of IPR in e-learning content development to get a general orientation and overview of the subject, and may return to the guide for a quick reference. This user should read all of sections 1 to 4 of this guide.

The second type of reader will be looking to develop a deeper understanding of the way IPR can affect the practicalities of e-learning content development and distribution. This reader may be thinking of organising the management of IPR in their own work as well as understanding the basics of copyright and moral rights and the role of licensing arrangements. After reading the whole of this guide a good next step would be to consult the JISC-funded TASI website (The Technical Advisory Service for Images). This is an excellent set of short guides to aspects of IPR regarding the use of images, most of which are relevant to the e-learning development community. The TASI resource nicely complements this more general guide and would make a good next step for this reader before some more 'heavier' reading. After this the reader should refer to the *JISC/DNER Copyright and Licensing Guidelines* (2001) and *Buying and Clearing Rights* (1995) by McCracken and Gilbert, both of which are referenced extensively in this guide. Full details of these resources can be found in section 10.

For both types of reader this guide is intended as a user-friendly starting point that can act as a good foundation to support rapid further development and is written from the point of view of an e-learning content developer. To build expertise in the area will require further readings and guidance, as well as appropriate legal advice when it is needed. For a list of further readings and sources of guidance, see section 10 of this guide.

The guide has been written in such a way that it develops a set of arguments in a linear fashion with each building upon the other. Of course the reader may read this guide in any order they choose and dip into it when they like but the author recommends that at least once they read the guide from start to finish to get the most benefit from it.

2.5 The IPR knowledge gap

E-Learning programmes are complex and expensive to devise, therefore they represent valuable assets that need to be protected and managed. However there is a lack of awareness about IPR issues in e-learning in British educational institutions, especially regarding the use of third party materials. Closely connected to this problem is a more general lack of knowledge and expertise about IPRs and how to manage them. There is also a lack of training opportunities about IPR issues in general and in e-learning in particular, those that are available tend to be confined to the library world. In addition, educational institutions need to understand that the management of IPR has serious resource implications.

This description of the problem areas of IPR in e-learning is drawn from the report of a working group to investigate these issues set up by Higher Education Funding Council for England (HEFCE), Standing Conference of Principals (SCOP), and Universities UK. This report is heavily referenced in this guide and is referred to as 'the HEFCE report' for brevity (for the full reference see the bibliography and further readings in section 10).

E-learning is in its early days and many teaching staff are still developing all their own teaching materials. An educational institution's teaching materials are an important resource -

a form of ‘intellectual capital’. Currently, most of this resource is locked in teachers’ and lecturers’ heads, filing cabinets, and personal computer hard drives. As tools such as local and national digital repositories come on line and are developed, more and more of these valuable resources are going to be stored and shared digitally. These resources are already subject to IPR law, but storing and sharing them in this new and very public manner makes it important to ensure that these resources comply with IPR law and can be protected by it. For those that want to share their content with others it is also important that they understand the legal environment that they are operating in.

2.6 IPR

Intellectual Property Rights is a catchall term used to describe the legal status and protection that can be claimed for information and knowledge. It is fair to say that the law is lagging behind the digital technology that is changing the way that the creation, publication and access to the products of intellectual activity now happens.

But the law regarding IPR is well established and has a history of changing to accommodate new technologies and economic relationships; the first law governing copyright (the Queen Anne Statute of 1710) was enacted to protect publishers using the recently invented printing press from piracy. The law for IPR is fairly clear in terms of the principles and guidelines that it embodies. However, the education sector is currently characterised by low levels of awareness and understanding of IPR law and how it is applied to e-learning.

2.7 E-Learning

This guide is being written at a time of rapid transformation in the way that education is being conducted in our society and digital technologies are providing powerful tools to enable change. But technology alone is not responsible for this transformation. The main drivers of this change are those connected with the trend towards a UK economy that is increasingly based on information and knowledge. As in any period of change there are different contesting visions of what the future should be and this applies as much to e-learning as any other field of work.

E-learning is a rather vague and inadequate term to describe educational activity and means many different things to different people. One useful definition has been developed by a group of educators through a series of Economic and Social Research Council (ESRC) workshops, although aimed at HE it applies equally well elsewhere. Below is a short definition.

“1. A working definition of Networked E-Learning:

Networked e-learning refers to those learning situations and contexts, which, through the use of ICT, allow learners to be connected with other people (for example, learners, teachers/tutors, mentors, librarians, technical assistants) and with shared, information rich resources. Networked e-learning also views learners as contributing to the development of these learning resources and information of various kinds and types.”

From: *Towards E-Quality in Networked E-Learning in Higher Education 2002*, University of Sheffield – change to Networked learning guide???

3 Copyright and rights - getting the right ‘mind set’

Copyright and IPR law can seem a bit abstract to start with, as they exist to protect intellectual work. They are separate from the physical form of that work and the notion that we can sell or rent something that is not a physical object often seems odd at first. Our best way into this field is to start from some basics and take it step-by-step until we have built up a general overview. Getting the hang of the general principles involved in this section is central to understanding the rest of this guide. After a while you should begin to appreciate that copyright and rights law has its own kind of rationale and inner logic. When you start to see this you are ‘getting the right mind set’.

3.1 The law in general

Most of us in the educational sector have little to do with the law and when we do it is often handled by specialists who are familiar with the subject and the terminology. In addition, many in the public educational sector are traditionally not comfortable with thinking in terms of who has ownership and control of the materials that they create in the course of their work. But in other areas of professional work an involvement with and working knowledge of IPR law is fairly routine, such as for those involved in journalism, making TV programmes, creating software products, writing, acting and so on.

The law in general provides a set of principals that are intended to govern, and in a sense express, the way people and organisations should conduct themselves in a society. In addition to these principals the law usually includes guidelines for how it should be applied. The law is intended to provide remedies or means to protect those, whose interests might be harmed by the actions of others. It may also lay down obligations that are placed on individuals and organisations in various spheres of activity.

3.2 IPR law

One key thing to remember in IPR law is that the ‘P’ stands for property and just as in the rest of the legal system, someone either owns the property or can lay a claim to owning it. Although much intellectual property may not be physically tangible it can nevertheless be owned, sold, rented and otherwise exploited by those with a legal right to do so. Unlike physical property it may also exist in more than one place at once i.e. it may be copied. The legal right governing who may copy a piece of intellectual property, called copyright, is one of the most important laws affecting e-learning. But before we go any further it is useful to briefly consider some of the other laws and rights that govern IPR in the UK and elsewhere. These are shown below in bullet point format.

- Copyright
- Moral Rights
- Performers Rights
- Database Right
- Patents
- Confidentiality
- Know How
- Trademarks

- Design Right
- Specialist IPR

The areas of IPR law that most affect e-learning content development are those of copyright and moral rights and it is on these that this guide concentrates.

3.3 Copyright

The *owner* of the copyright in an intellectual work enjoys the right to grant or withhold the right to others to make copies of the work; copyright is often described as a *restrictive* right because it is concerned with stopping others doing something with the work. Copyright itself is made up of other rights, which we shall describe later. Copyright exists immediately for the creator of a work as soon as it is *fixed* or recorded in some material form such as in writing or on film or video etc.

The law that covers copyright in the UK is based on the Copyrights Designs and Patents Act 1988 (as amended). This act has been regularly updated and also incorporates relevant E.U. Directives, so you will need to refer to the latest version if you are going to look at it in detail. At the time of writing the E.U. has just passed a new Directive (2001/29/EC) on IPR, which came into force on 31/10/03. The Directive can be downloaded from the UK government website at: <http://www.legislation.hmso.gov.uk/si/si2003/20032498.htm>.

The new law gives protection to Technological Protection Measures, or TPMs and action, including criminal action, can also be taken against those who make or distribute equipment designed to overcome TPMs. Digital rights management is also protected and includes the ability to gather information about users. Copying for research and private study under fair dealing has been restricted to non-commercial purposes only

3.4 Characteristics of Copyright

3.4.1 Originality and Skill

Generally copyright law assumes that some level of skill and originality is required to create the work that is protected, but you should be aware that the level required to gain copyright protection is very low. For instance, holiday photographs and bus timetables are protected by copyright law.

3.4.2 Copyright Exists Automatically

When a piece of intellectual work is created and *fixed* in a material form such as in a drawing, a video recording, notes, or a printed text etc then it's creator can enjoy and claim the protection of copyright law immediately. In the UK there is no need to register the copyright in a work but in any argument over copyright you will certainly have to be able to prove your ownership.

3.4.3 Copyright and Ownership

Copyright can and does exist separately from the physical form or manifestation of the work. For instance owning or possessing the holiday photographs referred to in 3.4.1 does not automatically include the copyright to the photographs. That would still reside with the person who took the holiday photographs and they could make more copies and sell them or give them to whoever they liked.

The copyright in an intellectual work is a 'property' that can also be owned and sold separately from the physical form of the work. For instance the copyright of a Hollywood film might change hands even though you might already own a videotape or DVD copy of the film. The new owner might choose to issue a new version of the film using previously unseen footage, a 'directors cut' for example, perhaps with a completely different ending that you do not like.

3.4.4 Ideas and Concepts are Free to Use

The ideas and concepts contained in a work cannot be copyright. For instance in our example of a holiday photograph someone is not prevented from photographing the same subject. So, those who independently develop and create a similar work are not breaking copyright as long as they do so without 'copying'.

However you should be aware the ideas and concepts in a work may be protected by other aspects of IPR law such as the law of patent.

3.4.5 Employment and Rights

This is an area of particular importance for those involved in the creation of e-learning content and one that we shall come back to later. In general, the copyright will reside with the employer on whatever an employee creates in the course of their work.

"The general principle here is that the product of an employee's work belongs to the employer, in return for which the employee is paid."

(Wienand, Booy, & Fry, 2000)

However, many situations are not seen as so clear-cut to the different people involved and some basic awareness and simple precautions here can save a lot of trouble later on. In the educational sector (HE) it is the custom and practice that that copyright in articles and monographs etc (publications) belong to the author. The copyright of teaching materials has not really been an issue until recently with the advent of the digital storage of learning materials. Many institutions might not have any provisions for this in their contract clauses.

The question of copyright in universities, including teaching materials delivered over the internet, is discussed in a report entitled *Intellectual Property, The Internet, & Higher Education* (Farrington, 2002) featured by the Observatory on Borderless Higher Education (OBHE). In it, a convincing case is made that such learning materials are indeed the property of the institution. The report also goes on to describe the options open to senior management to develop policy in this area and presents some draft policy documents for development. This and other reports commissioned by the OBHE can be found on their website at: www.obhe.ac.uk this service is available to institutions that have a subscription.

The HEFCE report advises taking a fair approach to this issue and employers might be wise to aim for an equitable and fair arrangement with their staff that recognises the characteristics of the educational workforce such as mobility. Bearing this in mind it may make sense for the employer to assert ownership of the e-learning materials produced by teachers and lecturers but to grant them back a non-exclusive license to use the material in their teaching elsewhere. This way the employer gets to be able to adapt and reuse the materials they have paid for and the author is able to use their own materials elsewhere. As you might see this is where it makes a lot of sense to get advice. Some trade unions, such as the AUT, operate specialist advice services (see section 10).

3.5 Types of work that are protected

The 1988 Act, which itself evolved from earlier legislation, defines the type of intellectual works that can have the protection of copyright. As we shall see, the more modern forms of work such as computer programmes have been squeezed into the law where legislators think they fit best. The main categories are briefly summarised below.

3.5.1 Literary Works

The written word in the form of novels, poems, letters, reference works, song lyrics etc. This category also includes computer programmes, the reasoning being that a computer programme can be transcribed as a textual record (although not necessarily readable by a human).

3.5.2 Dramatic Works

Plays, dance etc recorded in some manner such as by audio or videotape or special notation schemes.

3.5.3 Databases

These can have copyright protection (independently of the protection given to the software that the database uses to operate – which is also protected separately). The information in the database itself need not be particularly original but the organisation and structure and classification of the information is original and is the copyright of the database designer. Note there is also a separate ‘database right’ which can be claimed by those who take the initiative in commissioning the database, paying the costs and publishing it.

The rights relating to databases are potentially very important for e-learning as more content enters digital repositories and libraries. More detailed information about this can be found in the JISC/DNER Copyright and Licensing Guidelines.

3.5.4 Musical Works

These are protected if they are recorded as musical notation or as sound recordings

3.5.5 Artistic Works

You should note that the artistic merit of the work itself is not a consideration when claiming copyright!

This is a very wide category that includes 2 and 3 dimensional works such as:

- paintings, drawings, plans, maps, prints, engraving, sculpture, photographs,
- original designs such as typefaces,
- architecture,
- works of craftsmanship (for a discussion on craftsmanship see page 15 of Wienand, Booy, & Fry, 2000).

Note: It is important to understand that the images, graphics or diagrams in a text are covered separately by their own copyright.

3.5.6 Sound Recordings

This may be a recording of any sounds and may exist in any reproduction media such CD-ROMS or audiotapes etc. A duplicate does not have it's own copyright separate from the original. Film sound tracks are included under the film category.

3.5.7 Films

Films are classed as any recording of a moving image on any medium; this includes the sound track if there is one and any single frames as stills.

3.5.8 Broadcasts

This category includes Terrestrial TV and radio as well as satellite broadcasts.

There is a subtle but important legal difference here between a programme played back from a tape or DVD etc that has been bought and one that is transmitted by ‘wireless telegraphy’ (as the Act describes it) and is received by a device such as a TV or video recorder. It is the *transmission* that is protected here. We shall examine this distinction later on in the context of licensing the right to record these broadcasts as third party material to use.

3.5.9 Cable Programmes

This category gives similar rights to programmes that are transmitted over cables as those under the Broadcast category.

3.5.10 Typographical Arrangements

This covers the form and layout of any work such as a book or magazine – but it could extend to a part of web page or computer display. This copyright is usually held by the publisher.

3.6 UK and International Copyright

Copyright law in the UK is a domestic law and exists to protect UK copyright holders from infringement and damage. To ‘qualify’ for benefit from the protection of UK copyright law, the work must have some connection with the UK. If the creator of the work or the publisher is based in the UK or the work was first published here, then it qualifies for protection.

As far as international copyright is concerned, the UK is a signatory to international conventions on IPR that gives protection in the UK to the copyright of works created in other countries (see section 2.8 of the JISC/DNER Guide) and this is reciprocal. The net effect of this for us is that it is usually safe to assume UK law will almost certainly protect any resource you are contemplating using from outside the UK, and your work is protected in many other countries.

3.7 Moral Rights

These are rights the original author has automatically as the creator of the work. One of the reasons these rights are called ‘moral’ rights is that they are not economic in nature -they cannot be sold or bought. These rights stay with the author even when the copyright to the work has been sold or given to someone else; they also can be passed on to others after the author has died. However they can be waived (see below).

One of the effects of EU IPR law is to increase the importance of the moral rights of authors. This approach to the moral rights of authors (and employees) is relatively new in the UK. This is because the EU ‘harmonisation’ process, as it is called, is tending to incorporate the most restrictive (or protective – depending on your own view), aspects of member states’ laws into new European legislation. Many of the European countries have legal traditions where the legal rights of authors have considerable protection. McCracken and Gilbert (1995) give the example of an old Hollywood film that was re-released in France after the director’s death in an altered form. Even though the director was dead his estate objected and successfully stopped the film being shown.

The main moral rights of the author are:

- The right to be identified as the creator – the ‘right of paternity’
- The right not to have their work subjected to ‘derogatory treatment’ – the ‘integrity right’
- The right not to have work falsely attributed to them.

Note: Paternity Right is unique in having to be asserted, the other moral rights do not. This means the author can object to your treatment of their work as a derogatory treatment even if you do not know who they are – this has particular relevance for those who source their materials from the world wide web.

The UK has opted to implement a very restricted form of moral rights for employees from EU law. Despite this, employees still have the right to ask for their names to be removed from unapproved versions and to request that a notice be attached stating that the work is being issued against their wishes.

At first sight moral rights might appear as a ‘showstopper’ for e-learning content development, but they can be waived in writing such as by a contract of employment or in freelance contracts. But they certainly present difficulties and need to be taken seriously; simple, clear, fair and reasonable employment policy and practice are probably your best defence in this area.

By evolving appropriate strategies to cope with moral rights, and copyright, e-learning developers can turn these potential difficulties to their advantage by adopting more systematic approaches to their work. We shall explore the benefits of using a systematic approach to rights management in e-learning development later in section 7.

3.8 Rights cultures in different industries

We have discussed the general aspects of copyright and moral rights and this seems an appropriate point to introduce the concept of ‘rights cultures’, i.e. the existence of different ways of handling rights in different media industries (see section 3.3 of the JISC/DNER copyright guide). This should come as no surprise - every area of work develops conventions and practices that reflect the particular nature of that enterprise. As an e-learning developer trying to gain permission to use other peoples materials for use in your projects (often for no material gain to the creator) you need to understand that your are a] in a weak negotiating position and b] operating on their ‘turf’.

To operate effectively you will therefore need to take the time and effort to understand how the different sectors of the media industry work. Novelists, journalists, actors, scriptwriters, photographers, graphic designers, computer programmers etc all have different ways of exploiting and controlling the IPR in the work that they produce. This will be expressed though different terminologies and conventions that are particular to each industry sector, but all have protection from the same general legal framework. McCracken and Gilbert (1995) give an excellent description of the different rights cultures, rights conventions and clearance procedures in the different media industries. Although this work was published in 1995 the fundamental rights issues it covers for the different media industries are still very relevant in 2004.

3.9 Consequences of rights infringement

Copyright is a restrictive right (see the JISC/DNER guide section 2.4). The owner of the copyright has the right to prevent others doing certain acts with the copyright work.

To break or infringe copyright law a person must have carried out a restricted act with a work that is protected by copyright. These are:

- Copying the work
- Issuing copies to the public
- Renting or lending copies to the public
- Performing, showing or playing the work to the public
- Broadcasting the work
- Including the work in a cable programme service
- Adapting, or amending the work.

There are two forms of infringement:

1. Direct – where you carry out the act that is restricted by copyright.
2. Authorising or Secondary – where you authorise or encourage others to break the copyright laws, or where you are negligent in preventing copyright infringement. The top person in the institution is normally prosecuted for this offence – e.g. the Principal, Secretary, Registrar, and Vice Chancellor etc.

Infringement of Copyright law is covered by both civil and criminal law. For educational institutions and individuals most infringements are likely to be civil offences and financial penalties are the most likely outcome of losing a case. If a more serious and organised form of copying and distribution is being carried out such as the mass copying of audio CDs or video DVDs, especially for profit, then this is likely to be viewed as piracy and that is a criminal offence (for which imprisonment may be imposed).

In a civil case the copyright owner can sue for damages and can also apply for an injunction to stop someone doing something they object to. The claim for damages can be both financially and publicly harmful to an institution. An injunction may cause severe disruption to an institution by, say, closing down a virtual learning environment (VLE) or parts of a computer network, or by requiring the disclosure of records. Some rights holders; especially those in the large media industries are taking an increasingly aggressive and punitive approach to prosecutions. The American music industry is hoping a high-profile anti-piracy campaign will have a powerful deterrent. The Washington based Recording Industry Association of America has issued over a 1000 subpoenas forcing telecom companies and internet service providers to open their records for examination. So far over 260 lawsuits against individuals have been filed, the highest profile one in September 2003 being the prosecution of the mother of a 12 year old girl in New York. (Sources: The Guardian, BBC News, USA Today).

3.10 Copyright in practice

The key to understanding this section is that copyright is not bound up in a particular physical entity - rather it is a concept. The other main thing to understand about copyright is that it is not a single monolithic right but is a collection of rights that can be sold or granted separately in many different ways (see section 2.5 of the JISC/DNER guide).

3.10.1 Copyright is not embodied in a physical object and is not a single unitary whole

Copyright exists separately from the physical form of the work and controls how ‘copies’ of the copyright work may be made. This distinction between the copyright work and the physical expression of the work is a crucial one to understand and explains how copyright can be sold or rented to different people at the same time.

Copyright is composed of a collection of rights that allow the owner to stop others doing different things with the protected work. These are listed above in 3.9.

3.10.2 Copyright as a multidimensional right – people, time, space, format

Because copyright is not tied up in any one physical copy of the work and is itself composed of different rights, the owner can grant permission in more than one way to use the same material at the same time.

Space

For instance, the owner may grant or sell the right to copy the work to one person in a certain format such as print, in a certain location such as the UK. This is what a novelist and their agent might negotiate with a book publisher in return for a payment. The novelist and agent might also negotiate a similar agreement with a publisher but just for the territory of Australia.

Formats

In addition, the novelist and agent may negotiate a separate deal with another company to convert the book into a film.

Time

The novelist and agent might negotiate a deal with a magazine to publish extracts from the novel in a serialisation that occurs over a matter of weeks, with a separate publisher to the one that has been given the rights to publish the book.

People

The novelist may be approached by an e-learning content developer with a request to allow the inclusion of an extract from the novel in a course. The novelist and agent agree a deal to allow the developer to do this as long as the e-learning course that the extract appears in is restricted for use to the students and staff of publicly funded further and higher educational institutions and only those within the UK.

4 Practical approaches

As we have seen the owner of the copyright in a work has considerable control over the conditions they can impose over the granting of those rights. Obtaining permissions and clearances to use copyright works, can be a time consuming and expensive business that requires the application of some knowledge about copyright and the media industry concerned as well as the exercise of judgement.

4.1 What can be used for free?

This section looks at what we might use freely and what defence we might employ under the law.

4.1.2 Out of copyright works

Under current UK law works remain in copyright typically for 50 or 70 years after the death of the author or owner (depending on the type of work, see below). After that they may be used freely. But outside the EU, in the USA for example this may differ.

- Literary, Dramatic, Musical, Artistic Work 70 years
- Broadcasts 50 years
- Sound recordings 50 years
- Cable transmissions 50 years
- Film 70 years
- Typographical arrangements 25 years
- Performances 50 years
- Designs 15 years

But, you need to remember that the publisher's copyright in the typographical arrangement of a text lasts for 25 years from the date of publication. So if using an out of copyright work in printed form to digitally scan into your project, you must use an edition over 25 years old.

4.1.3 Fair Dealing under the 1988 Copyright Act

Criticism and review

The act allows for the reproduction of parts of a work for the purpose of criticism and review' such as by a film or literary critic. This meaning has been interpreted to exclude general educational use apart from the analysis or criticism of the work in a course that (for instance) deals specifically with that work or genre. This right is usually used by, for instance, film or literary critics to illustrate their work and back up their conclusions.

Reporting on current events

Works may be quoted / reproduced as an aid to reporting on current events. In this instance the public interest is taken to override the interests of the copyright holders. Unfortunately this use is unlikely to be understood as including education unless commenting on a very recent event – and that right would pass as the event became no longer 'current'. This right is used by, for example, TV news programmes to show excerpts of rival TV company programmes to help report the news – such as goals being scored in football matches.

Private research and study

Works may be copied for individual 'private research and study' i.e. private means individual and self-directed and this does not include public taught courses. In other words teachers or institutions cannot freely copy works for their students and make out this is for private study uses, neither can they direct the students to make copies for these courses (that would be secondary infringement). Although a student may copy freely under their own initiative for their own research as part of taking a publicly taught course.

4.1.4 Free use of an insubstantial part

An 'insubstantial' part of a work may be reproduced, but the Act does not define what either 'insubstantial' or 'substantial' means. To guide us here some idea of legal precedents are required. There are some industry guidelines (from McCracken & Gilbert 1995):

- for a long work such as a novel, 400 words of continuous prose or 800 words of discontinuous text, provided no single extract is longer than 300 words
- for shorter works such as newspaper and magazine articles no more than 10% of the original.

You should be aware that the rights owner may have very different views as to what might constitute an ‘insubstantial’ part, which is where precedent comes in. A short extract from a poem, song or film might not be viewed as insubstantial.

4.1.5 Employees

The work of your employees is ‘free’ in IPR terms (but not that of sub-contractors and freelancers – see section 7). For many of us this will be a major source of content. It is very important to have the correct contractual clauses and job descriptions and admin procedures (such as moral rights waivers) to deal with this effectively. For more information see section 7.

4.2 Public digital collections

This category covers various public digital collections that are accessible in the UK, many of which are supported and funded by government bodies. These collections are growing and developing rapidly, so it is a good idea to monitor them. To an individual user in an institution these collections appear to be ‘free’, although often they are actually paid for in a number of ways. The materials will often be cleared with the rights holders for educational use. These collections represent a very efficient way of gaining access to quality assured third party materials. There will be restrictions on the uses that may be made of the content of these collections in the form of a licence agreement that you will be required to comply with. Some educational organisations may be required to pay an institutional subscription to access some of the collections. A list of these collections can be found in section 10.

4.3 The internet, shareware, freeware

This is a surprisingly short section. All the aspects of copyright and moral rights we have been discussing govern the use of these materials on the internet, whether they are proprietary, shareware or freeware. Many of these will have a licence statement describing the use that the materials may be put to, on the authority of the rights holders. If there is no licence statement with these materials then it is safe to assume that they are fully protected by copyright law, and that should govern your use of them. It is worth stating the obvious - that if there is a licence agreement you should read it carefully and comply with it, as your conception of say, ‘shareware’ may be completely different from the author’s.

Because someone has published something on the internet, does not mean they have given up their copyright or moral rights over it. Unless it is stated in a copyright statement, Terms of Use or a licence we certainly cannot assume that a website can be downloaded, chopped up, and republished on our own websites.

Another issue is how we link to web based resources in our e-learning materials. If we ‘deep-link’ (i.e. provide a link into a web site to access just the piece of material we need) then we are bypassing the home page of the website that the author originally intended all users to come to first. The homepage and the path from there to the resource that we have deep-linked to, might have materials that the author intended us to see first or in a certain order before viewing the resource we are deep-linking to. In this sense our deep-link might be seen as an adaptation of the web site, which is a restricted act under copyright law. It is best to either link to the home page and give the path from there or to contact the rights owner to get permission to deep-link to their site.

Using ‘frames’ in a web site to display other websites’ content is also likely to infringe copyright and moral rights as it may entail:

- reproducing without permission
- breaking the integrity right of the original work and author
- denying the paternity right of the author by making it appear to be part of your site.

4.4 Economic solutions - licensing organisations

There are a number of organisations that represent authors and rights holders in different media sectors that grant licences which allow reproduction of copyright works under set conditions in return for a subscription or fee payment from the user or institution. See section 10 for a list of these organisations.

4.4.1 Text

The Copyright Licensing Agency (CLA) <http://www.cla.co.uk> is a joint venture between the Publishers Licensing Society Ltd. and the Authors Licensing and Copyright Society Ltd. A CLA licence for educational institutions allows photocopying of a copyright work within set limitations. Although paper based, this is still an important and easy to use facility in the compilation of course packs to support e-learning. The CLA are also developing a similar digital licensing agreement that will allow the digitisation of printed materials. They are introducing a pilot scheme for the FE sector here is a statement from their website:

“Following research into incorporated FE colleges' digital use of copyright material, CLA is developing a trial blanket licence that offers digitisation rights in addition to the existing photocopying and acetate rights. The intention is for the new, 1-year licence to be available to the state sector from 1 August 2003.”

http://www.cla.co.uk/have_licence/fe/index.html

HERON is service that started as a JISC project and is now a commercial organisation that specialises in providing a copyright clearing and digitisation service to organisations that want to use printed materials in a digital form for online access by students. The licensing scheme for this service does not include the right to adapt or alter the material. More details can be found at:

<http://www.heron.ingenta.com/>

4.4.2 Music

In the UK the Mechanical-Copyright Protection Society (MCPS) represents most (but not all) of the music industry and licenses the rights of its members to users in return for a fee. The fee will differ according to the material and the uses proposed.

4.4.3 Broadcast Radio and TV Programmes

The 1988 Copyright Act gave the right to educational institutions to record broadcast programmes off-air free of charge if the broadcast industry did not offer a certified licensing scheme to the education sector. The UK government could do this because it controls who can broadcast upon its territory from within the UK. Not surprisingly the broadcast industry came up with a licensing scheme that requires a subscription from institutions to record materials that are broadcast. This is the Educational Recording Agency (ERA) scheme that most colleges and universities in the UK are members of. The scheme allows members to

record programmes, extract clips and make copies and exchange them between member institutions, for 'educational purposes'. More details can be found at the ERA website, <http://www.era.org.uk>

The Open University operates a separate licensing scheme for recording their broadcast programmes off-air. More details on this scheme can be found at <http://www.ouw.co.uk/info/record.shtm>

Other broadcast material, including satellite transmissions, that are not covered by the ERA licence may be recorded freely under the terms of the 1988 Copyright Act. But remember this right does not extend to cable TV, as it is not broadcast by 'wireless telegraphy' under the terms of the Act.

The British Universities Film and Video Council (a membership organisation) operate a very useful recording service and searchable database of programmes that have been transmitted and the facility to order copies. For more information see <http://www.bufvc.ac.uk>

4.4.4 Newspapers

The Newspaper Licensing Agency (NLA), this was set up in 1996 to licence the photocopying of cuttings taken from national newspapers, including digitally. More information can be found at their web site at:

<http://www.nla.co.uk/>

4.5 IPR management and risk evaluation

4.5.1 Management - gathering IPR information

The first step (and the most important) in managing IPR and the risks associated with it in the e-learning content you are developing, is to keep accurate and detailed records about all the component materials you are using in your work. This includes who was involved in creating it and the rights status it has (for the types of information you will need to collect see section 7 and Appendix 2). Clearly, if you do not know where the components in your e-learning content have come from, who created them and what their rights status is then you cannot manage the IPR involved. You need to collect this information even if all the content comes from within your organisation and is created by employees (see section 7). This type of information is regarded as a basic administrative need in most of the media industries and is also closely linked to cost, estimate and budget control activities in most media development projects.

Gathering this information does represent a significant resource load (as the HEFCE report states). The fact that this is not currently the norm and is likely to come as shock to many developers (especially those in the public sector) is an indication of the newness of the e-learning sector compared to the more established parts of the media industry. Chapter 12 of McCracken and Gilbert (1995) has a very useful explanation of the types of documentation that are required, together with some sample forms that can be adapted to particular needs.

Currently, many e-learning content development projects reflect the rather ad-hoc, informal, and personal arrangements that are made to produce paper-based learning materials for supporting face-to-face teaching. For the same reason many of the outputs from these projects are also hard to find and reuse because they are designed and stored in the same way as face-

to-face learning materials. This situation is a major obstacle to IPR management and is exacerbated by the high expectations currently placed on e-learning by senior managers.

As institutions continue to expand and resources are limited many students' experience of campus education comes increasingly to resemble that of a distance learner:

“Instead of lecturing to manageable groups and providing individual guidance at higher levels, the academic staff is forced to teach huge crowds of students at lower and intermediate levels. Even within one institution this resembles distance education ” (Ask and Haugen, 1995, 206)

Inevitably e-learning is seen as part of the solution, but e-learning is not the same as face-to-face teaching, even on-campus. We have much to learn from the experiences and methods of open education practitioners, especially in the field of IPR. It is more realistic to view e-learning as a type of open and distance learning (ODL) where major resources are invested in the creation of learning materials that support and deliver the pedagogic strategies of a course to supplement the activities of ‘real’ teaching staff and the learners’ own activities. To effectively manage the creation of these resources and the IPR associated with them, this activity has to change from one carried out by individuals to one that is seen as a team activity. This simple, but profound, change in working culture is the single biggest step towards managing IPR and the risks associated with it. It is only in this organised environment that adequate IPR information can be gathered and managed. This need not restrict teachers and lecturers from using their own materials elsewhere if they are allowed to do so by contract or licence. The main point here is that the institution needs to be able to own the IPR in the e-learning materials it has already paid for and be able to adapt them as they see fit without having to constantly refer to the original authors.

The e-learning content that has been created and the IPR information about it needs to be archived and maintained on a long-term basis. An institutional library is an obvious candidate for this function and many already carry out a similar role for the administrative and legal documents of the institution.

As final observation in this section it is worth pointing out that although many institutions are using VLE's, very few have so far invested in digital repositories. The adoption of digital repositories is, arguably, going to provide major step-change in the establishment of e-learning in our educational systems and the transformation of professional and institutional teaching cultures. But a discussion of this topic is outside the remit of this guide.

4.5.2 Risk evaluation and management

It may be stating the obvious, but, as we have pointed out in section 4.5.1 you have to have some information about the IPR in your content development activities before you can evaluate the risks that might be involved in using them. You can then use this guide (and others) to assess the IPR status of the materials involved. It is a good idea to have one person whose job it is to record this information and keep track of any changes as the materials are changed or the rights negotiations process proceeds.

Richard McCracken of the OU Rights Department uses the simple flow diagram shown below in Fig. 1 as a quick check on the IPR status of a work that is under consideration for inclusion in a course.

Note: the term ‘Work’ refers to a piece of intellectual property protected by copyright.

Can I Use It?

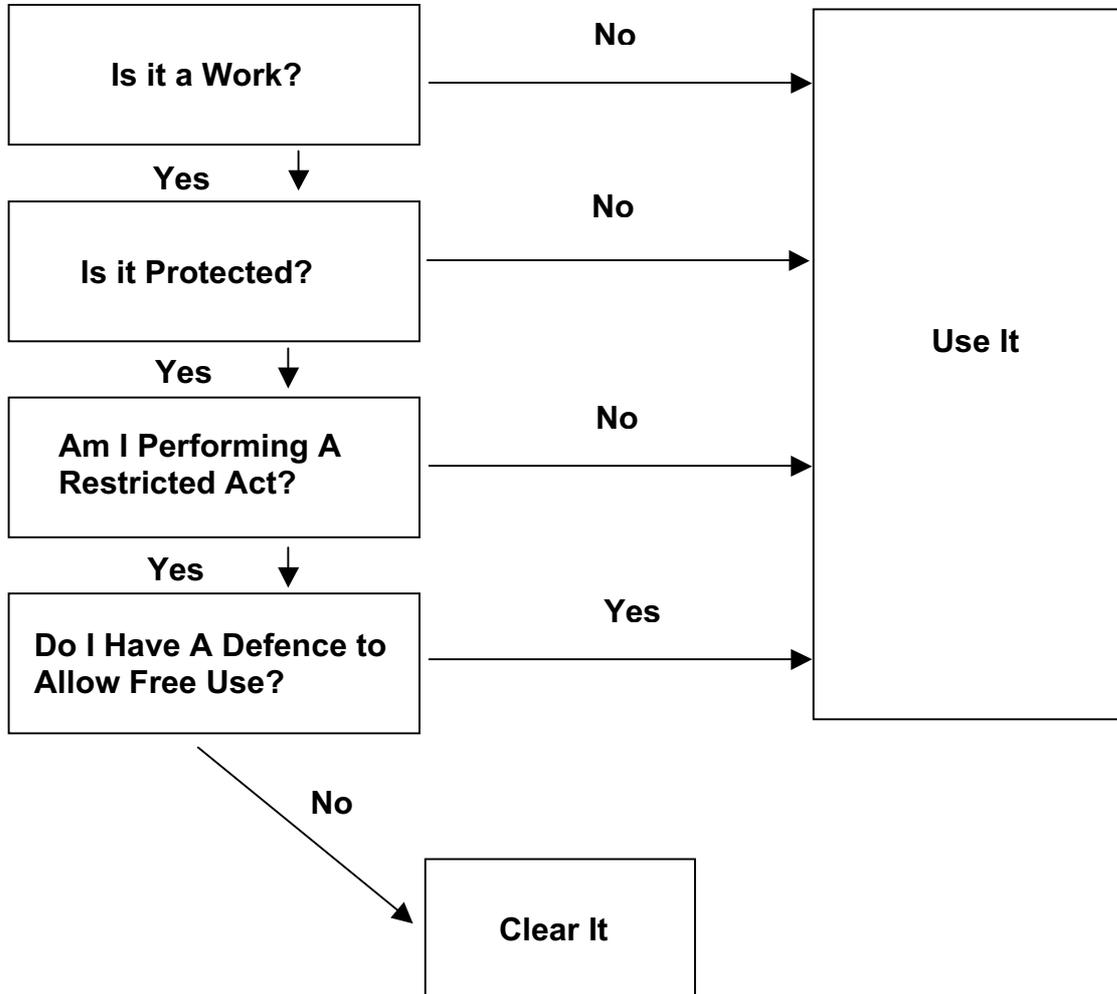


Fig. 1

You might find yourself in the position of considering using material for which you have not been able to gain rights clearances because you have not been able to find out who the author is. Before proceeding with this course of action, remember you may be able to summarise or describe the resource you want to use without actually reproducing it. If you cannot find the rights owner but can show good intent and diligence in your efforts by having a good IPR audit trail you may have some protection.

There are no easy answers here and you have to weigh up the importance and value of the materials to the author in terms of moral rights and to the rights holder in terms of commercial interests and the likelihood they might object. You will also need to consider the apparent intentions of the author and publisher in creating and publishing the work and whether they would be likely to approve of or permit your proposed use of their work (sometimes this is called an 'implied licence'). But you will need to be careful here;

remember your reasoning might be persuasive or acceptable to your colleagues (who may be desperate for the project to proceed) but it might not be so in court. You need to record this information in your project records, as you might need it in the future.

If you are challenged about the moral rights or copyright content in your work you should remove the material from your website immediately until the matter is resolved. By doing this you are likely to receive more lenient treatment by the court. If you have a well-documented record of the IPR in your work it also makes it much easier for you to explain and defend your actions in court. If you have no IPR information you will certainly appear as being negligent, or worse.

4.6 Clearing & buying rights

There will be times when you will have to deal direct with the rights holder to gain permission to use their materials. Publishers and other media companies often have rights departments who deal with these matters. Public sector organisations may have people whose job it is to deal with such requests, although procedures and awareness for administering rights can vary enormously.

Remember when you buy services from freelancers and media design companies you must include arrangements for dealing with the rights involved (buy or licence) – they are not transferred directly to you. The next section provides some basic guidance on negotiations about obtaining and granting rights.

5 Negotiating

You will need to be able to negotiate with rights owners or content creators if you are not able to source your material by any of the following:

- using copyright-expired or non-copyright resources
- using material that is available under ‘fair dealing’ in copyright law
- finding something suitable in a public collection
- using a licensing organisation to clear your proposed use of a copyright work

You have two choices:

1. negotiate a clearance for your proposed use from the rights owner
2. commission a work from scratch and, usually, pay for it.

5.1 Rights clearances

We shall deal with the commissioning of work separately below. McCracken and Gilbert (1995) provide a very useful and thorough guide to the rights cultures of the different media sectors and a chapter on the practicalities of negotiating. Here we shall restrict ourselves to some short but important points and observations:

- Choose a person to negotiate who has:
 - patience, tact and communication skills

- knows about the project and its timescales
- knows something about IPR
- can understand rights licences
- Rights negotiations can take a long time so keeping records is vital
- Planning for rights clearance is crucial at the start of the project
- Be clear about what you want from the rights owner before you contact them
- Have a backup plan in case of failure to get permission
- Devise budgets for managing and administering the rights clearance process and for purchasing rights (10% is a common figure allowed for rights purchases in projects in some media industries)
- Make sure you are talking to the person who actually has the authority to negotiate
- Do not lose your temper or take things personally
- Keep detailed records of the process – you will need them
- Under no circumstances tell a rights owner or organisation that you will assume they are granting permission if they do not reply to your enquiry
- You may do a lot of work on the phone so try to:
 - Prepare your ‘lines’
 - Cultivate a good working relationship with the people you are dealing with
 - Try to assemble an organisational diagram of the people you are dealing with
 - Do not waffle
 - Be positive
 - Take your time – don’t be rushed
 - Keep records of your conversations up to date – they may extend over months
 - Remember an agreement is not an easily proved agreement until it is written down – don’t accept a ‘verbal’.

5.2 Commissioning content

Paying for content creation can be an attractive and viable solution. Of course you will need to have the resources to pay for or create the materials you need.

The great advantage of pursuing this course of action is that things are much more under your control, especially the control or ownership of copyright. This section presents a set of very short tips and suggestions to consider when negotiating with prospective suppliers:

- Remember as a buyer of content you are in stronger negotiating position with the supplier - because you are purchasing their services and are able to set the terms. You may have to consciously change your negotiating style and frame of reference
- Has the supplier obtained all necessary rights permissions in their own work? You might want to develop a standard licence agreement for use with suppliers that gives you protection (often called indemnity) against unwittingly breaking copyright by using their work
- Clearly specify the rights you want to buy or license at the start of your negotiations. As a rule you should buy the copyright completely (called an assignment- see section 6) but be aware that some professions do not normally sell their copyright (such as photographers) or give an exclusive licence to use their work and that you probably do not need it.
- Include a waiver of the moral rights – this is especially important for allowing you to adapt materials now and in the future.
- Specify the technical standards (file formats, especially metadata etc) you want the content to comply with – this can be very expensive to correct after production.

- Include a demand to be supplied with an editable version of the content to allow you to update and alter the work – and include this right to ‘adapt’ in the licence you negotiate. If you ask for this after a price has been agreed you are likely to be charged more! This way you can continue to use the resource if the firm goes bust, or the original developers leave (common occurrences in the media and software industries).
- If purchasing software programmes consider asking for an ‘escrow’ agreement to be included in the deal. This allows for the editable software programme to be deposited with a third party such as a lawyer in case the firm goes bust in which case the software is passed over to the purchaser to protect their investment.
- It is very important to understand that as the commissioner of a work you do not automatically own the copyright in that work – you must include that in your negotiations and contract. This applies to firms and individual freelancers who may supply your content. We will cover direct employee issues later in section 7.

If the supplier cannot or will not meet these requests, ask why and get advice. It might be worth considering another supplier.

5.3 Granting and selling rights

For many of us in the public sector, we will find it a novelty to be approached for permission to use our teaching material or offered money for it. Of course we will only be able to share our materials, if we actually own or control all the IPR in our materials, which is where accurate IPR record keeping comes into its own.

As a rule you should not consider selling (or assigning) the copyright completely or entering into an exclusive licence agreement as both will restrict your own ability to use the material. Flattering as it may be to think people will want to use your materials, you should remember that perhaps all the requests will come from other educational institutions with no money to pay. Administering these requests can represent a considerable cost – so it makes sense to make your materials available under a standard licence to the educational community by depositing it in a national repository (such as that developed by the JORUM project). This should minimise the administrative costs you might face.

6 Licences

There are two broad types of agreement that cover the transfer of copyright from one owner to the other (see section 6 of the JISC/DNER guide):

- Assignments – the actual ownership of the copyright is given over. It can be limited in various ways or complete. To be valid the assignment must be written.
- Licences – this gives no right of ownership but merely grants permission to undertake an act with the work, which would otherwise be restricted.

In e-learning content development, assignments or licences maybe used. This section will deal with licences

Licences fall into two categories: exclusive and non-exclusive.

6.1 Exclusive Licences

An exclusive licence gives the licensee (the person who is given a licence by the rights holder) the sole right, which no other person has, to undertake a specific act with the work, which would otherwise be restricted. For example the BBC might have an exclusive licence to transmit a particular Hollywood film in the UK over a period of 9 months. During the period of that 9-month licence no other rival commercial TV network in the UK can transmit the same film.

6.2 Non-Exclusive Licences

As you might be beginning to appreciate, a non-exclusive licence is not as valuable as an exclusive licence. The non-exclusive licence grants the same right to different licensees for the same kind of use of the work. An example would be two radio stations who are licensed to play the same pop music single at the same time.

If you are an e-learning content developer operating in the public sector applying to use third party material, you are probably only going to obtain permission to use the copyright work in the form of a non-exclusive licence from the owner. There are two very good reasons for this:

- This ‘costs’ the rights owner the least
- It is probably going to be quite adequate for your purpose.

6.3 Understanding licences

For some years JISC has been developing model licences for the educational sector to use with varying degrees of adaptation. At first sight the terminology in a typical licence may seem difficult to understand (many of us tend to ‘switch off’ when faced with such documents). But with a bit of background preparation and orientation, such as reading this guide and taking some time, licences will start to make more sense to you.

Section 6.3 of the JISC/DNER guide provides a useful breakdown and description of the main parts of a typical licence. We have adapted this to develop a commentary for the JORUM project licence used in the JISC X4L programme which is available in Appendix 1, to provide a practical example to help you get to grips with understanding a real licence.

First some useful background information about the JORUM licence and project. The JORUM licence referred to in Appendix 1 is part of a trial exercise in developing a national digital repository. JORUM is the name given to the project set up to carry out this exercise. The licence copied in Appendix 1 is a product of this trial and the legal entity behind the trial repository for IPR purposes is the University of Edinburgh. So in legal terms the actual agreement is between the depositor and the University of Edinburgh. In this licence the term ‘Depositor’ is used to refer to the person or institution that is putting a learning resource into the repository, in reality this will usually be an institution such as a university or college. Normally the term ‘Licensor’ would be used instead of ‘Depositor’ to describe someone who has the right to do grant this kind of permission to use a resource.

A useful exercise is to use this commentary as a guide to help understand and analyse the JORUM depositor licence that is contained in Appendix 1. The licence grants permissions to the users of the JORUM to do certain things with your work and it also states that you have

taken certain steps to clear the rights to any third party materials you have incorporated in your work. You will notice there is a section called Representations, Warranty, & Indemnification. This is a very common and important part of such licences. This section states that each party has:

- The authority and rights to agree to the licence
- That the depositor (you) owns or has licensed all the IPR in the work
- That the depositor (you) warrants that if the work is published it will not break any British laws and that if it does the depositor (you) will indemnify (i.e. protect and compensate) the JORUM (Edinburgh University) from any loss, damage, cost or liability arising
- The depositor (you) will notify the JORUM promptly, with details, if a claim is made against you in connection with any third party materials contained in the work.

This should give pause for thought – and it is meant to.

A very useful short guide to licences is *Licensing Digital Resources: How to avoid the legal pitfalls 2nd edition 2001* by Emanuella Giavarra. A web version is available at: <http://www.eblida.org/ecup/docs/licensing.htm>

This gives a very clear explanation of what licences are and useful tips on negotiating the content of licences. You should read this work before signing or arranging any licences.

6.4 Drawing up a licence agreement

There are a number of options:

- Use a specialist lawyer or legal firm
- Use an off the shelf standard licence
- Use a standard licence and adapt it to your needs

The first option is likely to be expensive, but might be suitable for large and complex arrangements. Using a standard licence is the cheapest and most efficient option if this meets all your needs. Adapting a standard license can be very useful if you or your organisation has the expertise to do so. Bear in mind that developing a plain prose agreement first can greatly reduce any possible misunderstandings between the parties involved and can reduce legal costs and the time needed to adapt a standard licence.

Ultimately professional lawyers must check any legal document such as a licence. It might be negligent to do otherwise. It will save time and money if you can present them with a draft and a plain English explanation of what you want to do. You have some comeback if a lawyer is negligent, they all (should) have liability insurance.

6.4.1 Granting a licence to allow others to use your materials

You could use a licence such as the JORUM licence as a template to draft new licences (as above, a lawyer should check the final version) to allow others to use your materials. But, a very economic solution to this task is to deposit your materials in the national repository that will succeed the JORUM and refer the person making the request to the repository. This also has the benefit of populating the repository with learning materials.

6.4.2 Developing a licence on behalf of third parties to allow you to use their materials

You may ask “why should I draw up a licence agreement for someone else to allow me to use their materials?” There are a number of good reasons:

- The owner of the copyright might not have the necessary expertise or be able to afford it
- You are often going to be in a weak negotiating position as you might not be able to pay cash for the rights
- By offering to handle the time consuming and potentially expensive process of creating a user licence you are saving the rights holder time, hassle and money. This is likely to improve your chances of a successful negotiation
- It gives you the opportunity to set the IPR parameters of the licence – this is very important, especially if you intend depositing the material in a repository (either local or national).

You can consider using an existing licence such as the JORUM licence as a template. There are two good reasons for this:

1. It will make it easier to deposit your work in the national repository
2. Using one licence document in this way simplifies your IPR procedures and reduces the mental load involved.

7 IPR in the e-learning product lifecycle

Most of this guide has been about the IPR issues associated with using third party materials in your e-learning content development work. This section focuses on the practical issues involved in the two major areas of employment and administration.

7.1 Employment issues

The details of job descriptions and titles are important, as the copyright of work created outside an employee's normal role is likely to be retained by them. An extreme example will serve to illustrate the general principle: if a university cleaner writes a research paper, the copyright will stay with them and not the employer. Making job descriptions very wide is no solution either.

Here are some basic checkpoints to consider:

- If you hire freelancers, make sure you have a written IPR agreement. Hiring their services does not automatically give you copyright of their materials
- Employees usually lose their copyright to the employer – but if people are working in their own time or outside their job description you may not own the copyright. Play safe and have a blanket copyright agreement for all the work done by all the employees on each project.
- Moral rights are permanent and cannot be transferred; in the context of reusable materials the right to have the integrity of their work respected is an important one. So getting the author's permission to adapt the work in the form of a moral rights waiver is also vital for reuse (that is covered in the JORUM depositors licence so you might be able to use that as the basis for licences and blanket agreements.) The HEFCE report also has model employment clauses to use, see section 10

- Keep detailed project records including those about the media components of your e-learning that also contain IPR information such as title, author, contractual relationship, and contributors and adaptations etc.
- As a rule always provide a ‘credits’ list that provides a comprehensive list of who worked on the project and what they did – this is good employment practice and satisfies the moral right of paternity
- Remember that the HEFCE report stresses that fairness should be exercised in IPR dealings with staff. From a common sense perspective an overly harsh or restrictive IPR policy might not be a] necessary or b] legally enforceable. Remember, there are other aspects of the law that an employee can have recourse to challenge unfair or unreasonable employment policies. It is far better to aim at agreements that give the different parties what they need, and licences are probably your best tool to do this.

7.2 Administration

This represents an unavoidable cost overhead (even with the information gathering activities devolved) and goes to show that e-learning content is not cheap to develop. But this administration process also adds value; having a complete IPR record for a resource means it can be used safely and also exploited further as an asset.

Accurate records help to minimise the risks associated with third party copyright by:

- Allowing the project managers to see what clearances have been granted for what materials and what the current rights status is of any resource
- Showing diligence in trying to comply with IPR requirements. This can greatly reduce the severity of any punishment
- Supplying information to use in negotiations and help resolve disputes.
- Helps prove your ownership

Keeping detailed records of IPR transactions and negotiations is absolutely essential to the proper management and exploitation of e-learning content. It is really an extension of good practice in media production projects, which is what an e-learning development project is. In this context it should not be thought unusual or burdensome to expect to be able to identify the authors, contributors, and rights status of the media components of any e-learning content. IPR management is best integrated into the basic record keeping functions and can often bring a fresh view and rigour to the management and administration of projects.

Some IPR information needs to be recorded in the metadata of learning objects as well. This is likely to assume greater importance as the information systems of institutions come to include digital rights management functions. Digital rights expression languages (DREs) are currently being developed to be used by such management systems in the educational sector and elsewhere. But it is important to remember that the IPR metadata itself has no legal power – it is merely an expression of agreements, contracts and licences etc. that are already embodied in the resources. Remember that the creation of metadata is itself subject to and covered by copyright, so if you are using freelancers to create your metadata make sure you actually own it!

E-learning content development projects can be confusing and complex environments to work within, with multiple partners, contributors, media formats and job titles and working relationships being involved. IPR management and administration in such an environment

can be a daunting prospect to a beginner, but it is worth noting that this is exactly the situation that faces those working in the TV and computer games sectors of the media industry, to name but two.

The solution is to approach the problem in a systematic way from the start and to have a simple but robust system of record keeping in place and appoint someone to oversee the IPR aspect of the project and to act as a gatekeeper for content going into the project. Trying to do this after a project is complete is an almost impossible task and can result in the complete scrapping of the project outputs. The project should have a formal IPR assessment process built into the management procedures to deal with problems and conflicts of interest – this is of special importance in the public sector where awareness of these issues is currently low. In the commercial sector company lawyers are liable to block a release of a project if they are unsatisfied with the IPR status of the content. In the public sector the project manager and the IPR gatekeeper will often have to make this decision in the face of considerable pressure (much of it ill-informed) to complete the project. Having a system in place from the start will help these decision makers demonstrate the reasons and grounds for their views and, if they are overruled, help to show assignment of responsibilities for the decisions taken.

7.3 IPR Administration tools and aids

7.3.1 Getting organised

McCracken and Gilbert (1995) in chapter 12 of their book provide a good description of the administration and information gathering processes that need to be completed. They suggest using the methods employed by the television and radio industries to keep track of third party material (in fact of all materials) by the use of ‘Programme as Complete’ (PasC) monitoring forms. These log every component of a finished programme, listing not only the material used but the contract terms under which it was used. The information stored on these forms regarding rights clearances enables an experienced person to quickly judge the likely implications for using the materials.

For this approach to work it is essential to be able to look at the material being developed as a sum of its component parts in order to be able to clarify what material has been used and what rights need to be or have been cleared. The concept of the PasC form can be developed and tuned for a particular project. A simple set of ‘Rights Tracker Forms’ adapted for multimedia and e-learning IPR content management are provided in Appendix 2. Please note, that these forms are a starting template only and will need to be adapted to your particular needs. All letters and emails and telephone calls involving rights clearances as well as any licences, contracts and other documents need to be recorded and stored in a permanent project archive together with the other paper work and records associated with the project.

It might be a good idea not to resort to using licence agreements at too early a stage in your negotiations with rights holders. An e-learning content development project may involve dealing across different media sectors with different practices and traditions and they may not be that used to dealing with the educational sector. For this reason it might make sense to develop a plain prose proposal first between the parties to clarify their mutual understanding. Then a licence or contract may be developed more easily with less chance of misunderstanding.

7.3.2 Identifying the creators of copyright works in an e-learning project

For those new to e-learning content development or multimedia projects it can be difficult getting to grips with all the different types of work involved, not to mention the IPR implications. For those in management and administration positions this can prove very

difficult. So we have prepared a schematic diagram in Appendix 2 that can be used as an aid to identify and analyse the types of work and people that may be involved in a project. To do this we have taken an approach where we identify the functions in the project – the things that are being done - and allocate ‘actors’ who may be involved in that function. All these actors will be producing work that is protected by copyright - and you will need to identify it and record its rights status. A checklist of actors’ functions / job titles is provided – you should regard it as a starting point for your project.

8 Current developments in IPR

The future of IPR law is currently being hotly debated. The development of our economy to one based on information and knowledge is leading to a rapid extension of legislation especially in the USA, where the extension of IPR law and its aggressive application has moved furthest. A diverse range of interest groups from individuals to large corporations is opposing the scale and type of this expansion. One such organisation is called the Creative Commons. The name echoes the social protests by the Levellers and Diggers against the enclosure of the commonly owned lands by private interests in England during the 17th century.

The Creative Commons and others oppose the growing restrictions being placed on the legitimate rights in civil society to share information and knowledge. This organisation has developed a set of draft legal agreements (licences) that enable the producers and consumers of information and knowledge to exchange and share between themselves as they see fit. This is intended to establish ‘common spaces’ where knowledge and information is controlled by the community associated with that space. Although US-based (and using US law) and mainly used by artists and musicians. This approach has a great attraction to those working in the educational sector world-wide who greatly depend on each other to function and where the cost of administering IPR in a very restrictive manner could be crippling. More information about the Creative Commons can be found at their website <http://creativecommons.org>.

In the context of the world-wide educational sector it should be noted that there is a large effort underway to open up the world education market to trade liberalisation and globalisation under the auspices of the World Trade Organisation (WTO). It is only recently that the implications of this have started to be discussed in higher education and policy circles in the UK. In this context IPR is emerging as an issue of major importance in the debate – it is a factor that increasingly appears linked to change in our educational systems. For those interested in the globalisation of trade in education the Observatory on Borderless Higher Education has published two reports By Dr. Jane Knight entitled: *Trade in Higher Education Services: The Implications of GATS* and *GATS, Trade and Higher Education Perspective 2003 – Where are we?* These two reports provide a clear and accessible introduction to the issues involved and make a good starting point for further development they can be found at the OBHE website at www.obhe.ac.uk .

As learning materials in digital form especially those in learning object format become traded commodities or valuable institutional assets then the need to address and manage the fundamental issues of IPR in e-learning seem set increase in importance. Looking forward to the near future where digital learning objects become common Lorna Campbell observes:

“As learning object repositories proliferate and the reuse of learning objects across communities of practice and international boundaries become more common and widespread, the necessity to formally address digital rights management issues is likely to become more urgent and pressing”

(Campbell, L., 2003)

In the UK the JISC, which has had a long experience in developing common licences, is currently considering the feasibility of a similar approach to the Creative Commons (but using UK law). The working name of this project is the ‘Share Alike’ initiative, more information about that can be found at:

http://www.jisc.ac.uk/index.cfm?name=ie_sharealike.

Although the use of such standard licences can simplify the use and distribution of e-learning content and the costs of administration we still need to identify and manage the rights involved in our work – especially those of third parties.

9 Planning to work with IPR

9.1 Project Planning

The main organisational form of e-learning content production in the public sector has taken the form of projects. This is likely to remain the case for some time until this type of activity becomes integrated into the routine functional activity of institutions. Even then, the strongly project based nature of media development work will tend to dominate.

Here is a short set of checkpoints to consider for project work:

- Plan for IPR from the start in partnership agreements, employment contracts and purchase agreements etc
- Keep detailed IPR records
- Have an IPR ‘gatekeeper’ for the project – often best combined with a project archivist
- If the project involves collaboration or partnerships, make sure there is general written agreement and that it covers issues relating to IPR management and exploitation. There is useful draft consortium agreement in the JISC/DNER Guide
- Make arrangement for storage and archival of the project outputs (e-learning materials etc) and the project documentation including IPR clearances and documentation. Consider using an institutional library or a national repository. Remember to deposit the original editable versions of all files. Archiving in this manner ensures the viability of the resource for future exploitation and reuse.
- Ensure that the metadata records for the resources are complete and accurate

9.2 Personal Planning

Some general tips to consider (your position may be different legally according to employment contract):

- Read your contract of employment for IPR clauses
- Take advice if necessary
- Refer to any institutional policies for IPR
- Always assert authorship and moral rights in writing
- Seek to regain copyright and be reluctant to assign copyright - use licences instead
- Make sure all agreements are in writing.

With the increasingly project based nature of educational work individuals need to be aware of any IPR arrangements in a project that depart from their normal contractual relationships.

Section 6.2 of the JISC/DNER Guide has some useful advice and guidance for authors including a draft Author licence that an author may use in negotiations with a publisher or a project manager.

10 Further information and sources of guidance

10.1 Bibliography and recommended further readings and references

JISC/DNER Copyright and Licensing Guidelines (2001) by Professor Charles Oppenheim and Emanuella Giavarra. Available at http://www.jisc.ac.uk/index.cfm?name=projman_copyright (Provides a set of sample licences with a useful commentary for a subscriber/user licence (similar to that of the JORUM) that explains the main components of a licence.)

Buying and Clearing Rights, print, broadcast and multimedia (1995) by Richard McCracken and Madeline Gilbert, published by Blueprint, an imprint of Chapman & Hall, London. (Provides a useful set of example letters and contracts to use and develop in rights negotiations and record keeping in the educational sector.)

A Guide to Copyright for Museums and Galleries (2000), by Peter Wienand, Anna Booy & Robin Fry, published by Routledge, London. (Provides a good clear introduction and a set of sample documents for dealings in copyright with an emphasis on the museums sector)

Intellectual Property Rights in E-Learning Programmes, report of the working group. A good practice guide for senior managers (2003). Published by HEFCE and available at http://www.hefce.ac.uk/pubs/hefce/2003/03_08.htm

Your Guide to Intellectual Property Rights (1999), published by the Association of University Teachers, London. (Has a useful checklist for individuals)

Copyright, Data Protection and other IPR (2003) Technical Advisory Service for Images available at:

<http://www.tasi.ac.uk/advice/managing/copyrights.html>

(Good, clear and short overview)

Advice Paper: Copyright (2002) Technical Advisory Service for Images. (Good, clear description of copyright regarding the use of images but widely applicable elsewhere.). This and more information can be found at:

<http://www.tasi.ac.uk/advice/managing/copyright.html>

Coping with Copyright (2003) Technical Advisory Service for Images available at: <http://www.tasi.ac.uk/advice/managing/copyright2.html>
(Good, clear description of procedures to consider when managing and administering IPR in a project, biased towards images but widely applicable elsewhere.)

Quick Reference Copyright Guide (2003) Technical Advisory Service for Images available at: <http://www.tasi.ac.uk/advice/managing/copyright3.html>
(Quick reference source on types of copyright materials and duration of protection)

E.U. Directive (2001/29/EC) on IPR is available at: <http://www.legislation.hmso.gov.uk/si/si2003/20032498.htm>

The Future of Ideas (2002), by Lawrence Lessig, published by Vintage Books, New York, USA. (The author is chairman of The Creative Commons, and a prominent law professor in the USA. He thoroughly describes the case for less legislation and restriction and identifies the vested interests in the debate.)

The Norwegian JITOL experience and NITOL as a national extension by Ask, B. & Haugen, H. (1995) In R. Lewis (Ed.) *Journal of Computer Assisted Learning*, 11 (4). Oxford: Blackwell Science, pp203-209.

Digital libraries and repositories by Charles Duncan & Cuna Ekmekcioglu, in *Reusing Online Resources: a sustainable approach to e-learning* edited by Allison Littlejohn (2003). London & New York: Kogan Page, 2003.

Engaging with the learning object economy, in *Reusing Online Resources: a sustainable approach to e-learning* edited by Allison Littlejohn (2003). London & New York: Kogan Page.

Intellectual Property, The Internet & Higher Education by Dr. Dennis Farrington (2002), Observatory on Borderless Higher Education, London. www.obhe.ac.uk

Trade in Higher Education Services: The Implications of GATS by Dr. Jane Knight (2002) Observatory on Borderless Higher Education, London. www.obhe.ac.uk

GATS, Trade and Higher Education: Perspective 2003 – where are we? by Dr. Jane Knight (2003). Observatory on Borderless Higher Education, London. www.obhe.ac.uk

Licensing Digital Resources: How to avoid the legal pitfalls 2nd edition 2001 by Emanuella Giavarra, published by ECUP, CELIP & EBLIDA www.eblida.org (A useful and clearly written guide to the issues around licensing and common mistakes to avoid. A web version is available at <http://www.eblida.org/ecup/docs/licensing.htm>)

A User's Guide to Copyright by Michael F. Flint & Clive D. Thorne, published by Butterworths (1997) London. (A good book to read for those who want to go further after reading this Guide. Has a good explanatory style yet offers a fair amount of detail.)

Copyright Made Easier by Raymond Wall (1998) published by ASLIB, London. (A good source for dipping into for reference as well as further reading and development. It presents a more detailed technical approach but is well. The *Copyright Administration* chapter has lots of useful information about trade and professional organisations.)

10.2 Useful websites

J-LIS – JISC Legal Information Service www.jisc.ac.uk/legal

This operates an advice service. Good source of material and useful links section. Workshops are held from time to time.

Creative Commons – “Creative Commons is devoted to expanding the range of creative work available for others to build upon and share”- from their website. Pioneers of creating a system of easy to use licences (under US law). The site is also a very good educational resource.

<http://creativecommons.org/>

Metadata and Technical Standards

The guide does not cover metadata or the other important technical standards involved in the creation and use of e-learning resources. The best source of information for these issues is the UK organisation CETIS (Centre for Educational Technical Interoperability and Standards); the web address is www.cetis.ac.uk.

The MASIE centre. A useful explanation of learning objects in SCORM format and other technical standards can be found at:

<http://www.masie.com/masie/default.cfm?page=standards>

10.3 Training

Training in this area is not currently widespread but the following organisations offer occasional training sessions and workshops:

BUFVC - The British Universities Film and Video Council (a membership organisation) operate occasional training sessions. For more information see <http://www.bufvc.ac.uk>

AHDS – Arts and Humanities Data Services operate occasional training sessions. For more information see:

<http://ahds.ac.uk/>

TASI - Technical Advisory Service operate occasional training sessions. For more information see:

<http://www.tasi.ac.uk/>

JISC-RSC – These are the regional support centres operated by JISC and may offer information about training:

<http://www.jisc.ac.uk/index.cfm?name=rsc>

10.4 Licensing Organisations

Text

The Copyright Licensing Agency (CLA) <http://www.cla.co.uk>

HERON <http://www.heron.ingenta.com/>

Music

Mechanical-Copyright Protection Society (MCPS) <http://www.mcps.co.uk/>

Broadcast Radio and TV Programmes

Educational Recording Agency (ERA) <http://www.era.org.uk>

The Open University <http://www.ouw.co.uk/info/record.shtm>

The British Universities Film and Video Council <http://www.bufvc.ac.uk>

Newspapers

The Newspaper Licensing Agency (NLA) <http://www.nla.co.uk/>

Appendix 1 JORUM Depositor's Licence & Commentary

The JORUM Depositor Licence Agreement – A Commentary

Introduction

The purpose of this commentary is to provide a plain-english explanation of the JORUM licence, working through it section by section. The aim is to give the reader an easy to use reference to help them understand the licence. It should also help them decide, in conjunction with qualified legal advice, on any alterations that may be needed to suit particular circumstances.

It is also recommended that you refer to the JISC/DNER guide section 6.3.

Overview of the Licence

The document is a legal agreement that the holder of the rights in a work uses to grant permission to the organisation operating the JORUM repository (Edinburgh University) to store the work in electronic format and make it available to authorised users for downloading, copying and adapting, according to the conditions of the licence.

The agreement is between the rights holder (Depositor/Licensors) and the organisation operating the JORUM (Edinburgh University). It specifies the conditions under which the work is being made available by the rights holder including the types of use that may be made of the work. It also describes the responsibilities that the JORUM and its authorised users bear towards the rights holders when they use the work. For instance the authorised users of the JORUM may not sell a work from the repository for commercial use.

The depositor, who will normally be the rights holder in the form of a representative of an institution, also has responsibilities under the terms of the licence towards the JORUM repository. For instance, the depositor agrees in that licence that they actually do hold all the rights in the work and will compensate the JORUM if their work contains materials that infringe the rights of a third party.

Commentary

Subject to Contract

At the start of the licence this phrase appears and indicates that the whole licence is subject to the law of contract.

Date

An obvious thing but the document needs to be dated to be valid and to indicate when it was signed and agreed and gives a reference point in time.

Organisations / Parties: to the agreement

This indicates who is making the agreement – an obvious and necessary piece of information that needs to be recorded.

Recitals

This section provides a brief description of what is to be achieved by the agreement and some basic background information. Its role is to provide a reference point that describes the original intentions of the parties to the agreement – this is intended to be used if the agreement needs to be discussed or re-negotiated at some time in the future.

1. Definitions

A place in the document where the common terms used in the document are defined and agreed to have a certain meaning within the context of the agreement. This is important for ensuring a common understanding of the meanings to be attached to the terms used in the document, it is also potentially useful in helping resolve disputes at a later date.

2. Agreement

A short summary stating that Depositor (the holder of the rights in the work) will provide the work to the Licensee (Edinburgh University) and that the JORUM will make the work available to authorised users. This is all to be done in accordance with the terms and conditions of the agreement.

3. Licence Grant

This section describes the type of licence that is being granted to the JORUM by the rights holder – you will notice that it is a non-exclusive one, that it is cost free and lasts forever. It also gives the JORUM the right to grant sub-licences to authorised users to access and use the work in accordance with the terms and conditions of the agreement.

4. Permitted Uses

This section sets out what the JORUM may do with the work. You will notice the last part of this section (4.2) asserts the rights that the JORUM may have under any legislation that is in force. This makes sure that the agreement cannot be interpreted as the JORUM giving up any of the rights it may have under law to use the work. This is a kind of safety mechanism.

5. Restrictions

This section states what the JORUM and the authorised users are not allowed to do with the work. You will notice the last part of this section (5.2) states that this part of the agreement shall continue even after the end of the agreement. This gives reassurance to the rights holder that this restriction (and legal protection) will continue to apply to any copies of the work that are in existence amongst the authorised users of the JORUM even after the end of the agreement.

6. Responsibilities of the Depositor

This states that the rights holder will create the necessary metadata.

7. Responsibilities of the Licensee

This states that the JORUM will clearly state who the author of the work is and the year of first publication and that the JORUM will publicise the availability of the work to the authorised users. You will notice that the last part of this section (7.1.3) states that the JORUM will not be obliged to make the work available or be liable for any compensation to the rights holder if the work is withdrawn. As well as being a legal safety net this allows the JORUM to manage its digital collection without having to constantly get permission from rights holders to withdraw items from the collection.

8. Termination

This section states that if either party persistently breaks the agreement then the other may end the agreement by giving notice in writing and identifying the nature of the breach – subject to conditions.

You will notice that the final part of this section (8.3) states that existing copies and adaptations of the work may be retained by the JORUM and authorised users and continue to be used under the terms of sections 4 & 5. The rights described in these sections shall continue to apply to the use of the work after the ending of the agreement. This helps to

ensure the continued access to and use of the work by the JORUM and its authorised users despite the ending of the original agreement – this recognises the impracticality of removing the work and adaptations of it from the JORUM and its authorised users systems.

9. Acknowledgement and Protection of Intellectual Property Rights

This section states that the JORUM agrees that all the IPR in the work is the property of the rights holders and that the agreement does not transfer any ownership to the JORUM. This gives assurance to the rights holder. This section also states that any work created by an authorised user and added to the work referred to in this agreement will remain the property of that authorised user. The final part of the section also makes clear that the JORUM will own any database rights for the whole repository.

10. Representation, Warranties and Indemnification

This section states that the parties to the agreement have the authority and own or control the rights to make this agreement.

This section also states that if the rights holder does not in fact own the IPR to the work they will compensate Edinburgh University (who operate the JORUM) if a third party makes a claim against the JORUM for infringement of their IPR. For its part the JORUM agrees to help the rights holder in the defence and settlement of third party claims – subject to certain conditions.

This section also states that the rights holder assures the JORUM that the work does not break any English laws and if it does the rights holder agrees to compensate the JORUM – subject to certain conditions.

The section states if the authorised users infringe third party IPR or English Law by their adaptation of the work then the rights holder will not be liable. This helps to protect the rights holder from any misuse that may be made of their work after it has been deposited in the JORUM.

In this section the JORUM agrees to promptly notify the rights holder of any claim by a third party in connection with the work and that the JORUM may remove the work from the collection in such a situation.

The final part of this section (10.6) states that the JORUM will not be liable for the actions of the authorised users – subject to certain conditions.

11. Force Majeure

This section (sometimes referred to as ‘Acts of God’) releases the parties from the agreement if they are prevented from complying with it by forces outside their control e.g. war.

12. Assignment

This section states that, except for the permitted provisions of the agreement, the rights to the work and the agreement temporarily itself may not be given over to others by either party without written agreement of both parties. If this happens the terms of the existing agreement will be binding on any successors. The section also makes clear that both parties agree for the JORUM to be able to assign the work to HEFCE or any body appointed by HEFCE. This enables the Edinburgh University (who operate the JORUM) to transfer ownership of the collection and the rights to the works within it to another organisation appointed by HEFCE.

13. Governing Law and Dispute Resolution

This section explains that the agreement will be controlled under the terms of English law and that the parties will try to resolve disputes in an amicable manner.

14. Notices

This section describes how the parties will formally communicate with each other and their contact details for the purposes of this agreement.

15. General

This section tidies up matters by stating that this agreement and its Schedules are the only communications that will be considered in discussions between the parties relating to the use of the work.

As a legal safety net this section states that if any part of this agreement is found to be defective then that shall not invalidate the rest of the agreement.

The last part of the section (15.4) states the rights of the parties under this agreement cannot be waived or altered except in writing and that any such waiver or alteration of the chosen rights will not affect other rights. It also states that failure by a party to exercise or enforce any rights under this agreement will not be taken as meaning that those right have fallen into misuse and are considered to be waived.

Schedules

This is the part of the agreement that describes the work(s) that are the subject of the agreement

Signatories and Witnesses

This records the people who have signed the agreement and their position in the organisation that they occupy and the witnesses to the agreement.

End of Commentary

DATED

2003

DEPOSITOR X

-and-

UNIVERSITY OF EDINBURGH

JORUM DEPOSITOR LICENCE AGREEMENT

SUBJECT TO CONTRACT

individuals who study at these institutions, who are permitted to access the Secure Network and who have completed a sub-licence to access the JORUM Repository.

"Commercial Use"	means the use of the whole or parts of the Licensed Work for any reason which generates a profit.
"Educational Purposes"	means for the purpose of education, teaching, distance learning, private study and/or research.
"JORUM Repository"	means the electronic repository of learning and teaching material produced inter alia by participants in projects funded by the UK further and higher education funding councils or by any other natural or legal person.
"Licensed Work"	means the materials deposited by the Depositor in the JORUM Repository as listed in Schedule 1.
"Secure Network"	A network (whether a standalone network or a virtual network within the Internet) which is only accessible to Authorised Users whose identities are authenticated at the time of login.

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

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

1.4 Any reference to a clause, schedule or appendix shall be deemed to refer to that clause, schedule or appendix of this Agreement.

2. AGREEMENT

2.1 The Depositor agrees to provide the Licensee with the Licensed Work as specified in Schedule 1 and permit the Licensee to use the Licensed Work in accordance with this Agreement and the Licensee agrees to sub-licence with Authorised Users for access and use of the Licensed Work for Educational Purposes in accordance with the terms of this Agreement in consideration thereof.

3. LICENCE GRANT

3.1 The Depositor hereby grants to the Licensee a non-exclusive, royalty free perpetual licence to use the Licensed Work in accordance with this Agreement and the right to grant to any Authorised User a sub-licence to access and use the Licensed Work or otherwise deal with the Licensed Work in accordance with this Agreement.

4. PERMITTED USES

4.1 The Licensee may:-

- 4.1.1 mount the Licensed Work on a Secure Network;
- 4.1.2 incorporate the Licensed Work in the JORUM Repository however constituted;
- 4.1.3 communicate, make available and distribute the Licensed Work in any variety of formats and media;
- 4.1.4 make copies of the Licensed Work as are technically necessary to ensure efficient use by Authorised Users;
- 4.1.5 archive the Licensed Work;
- 4.1.6 set and charge fees for access and use of the Licensed Work by Authorised Users.
- 4.1.7 grant sub-licences to Authorised Users permitting the following uses of the Licensed Work for Educational Purposes only:-
 - 4.1.7.1 to access the Licensed Work in order to search, retrieve, display and download;
 - 4.1.7.2 to electronically save the whole or any part or parts of the Licensed Work;
 - 4.1.7.3 to print out single copies of the whole or any part or parts of the Licensed Work;
 - 4.1.7.4 to make Adaptations of any parts of the Licensed Work;
 - 4.1.7.5 to incorporate the whole or any part or parts of the Licensed Work in virtual learning environments, printed or electronic course and study packs, multi-media works or any other material used in the course of instruction. Each item shall carry appropriate acknowledgement of the source, title and copyright owner. Course and study packs in non-electronic non-print perceptible form, such as Braille, may also be compiled;
 - 4.1.7.6 to incorporate the whole or any part or parts of the Licensed Work and Adaptations in printed or electronic form in assignments, portfolios (including non-public display thereof) and in dissertations, including reproductions of the dissertation for personal use and library deposit. Each item shall carry appropriate acknowledgement;
 - 4.1.7.7 to display, download, print any part or parts of the Licensed Work for the purpose of promotion of the Licensed Work;
 - 4.1.7.8 to publicly perform as part of a professional presentation at a seminar, conference, or workshop, or other such similar professional activity
- 4.2 Nothing in this Agreement shall constitute a waiver of any statutory right available and held by the Licensee from time to time under the Copyright, Designs and Patents Act 1988 or any amending legislation.

5. RESTRICTIONS

5.1 Save as provided herein the Licensee and Authorised Users may not :-

5.1.1 sell or resell the Licensed Work ;

5.1.2 remove, obscure or modify copyright notices, text acknowledging or other means of identification or disclaimers as they may appear without prior written permission of the Depositor;

5.1.3 use all or any part of the Licensed Work for any Commercial Use or for any purpose other than Educational Purposes unless with the consent of the Depositor.

5.2 This Clause shall survive termination of this Agreement for any reason.

6. RESPONSIBILITIES OF THE DEPOSITOR

6.1 The Depositor agrees to create metadata in such a form and content as may be determined from time to time by the Licensee;

7. RESPONSIBILITIES OF THE LICENSEE

7.1 The Licensee will:-

7.1.1 clearly acknowledge the authorship in the Licensed Work and the year of first publication in all copies of the Licensed Work placed in such a manner and location as to give reasonable notice of claim of authorship;

7.1.2 promote and publicise the availability of the Licensed Work to Authorised Users;

7.1.3 not be under any obligation to archive or make the Licensed Work available or to continue to make it available and shall not be obliged to compensate the Depositor for loss of opportunity or otherwise.

8. TERMINATION

8.1 Any party may terminate this Agreement at any time on the material or persistent breach by the other of any obligation on its part under this Agreement by serving a written notice on the other identifying the nature of the breach. The termination will become effective thirty days after receipt of the written notice unless during the relevant period of thirty (30) days the defaulting party remedies the breach.

8.2 Upon termination of this Agreement, all rights under this Agreement and any sub-licence will be automatically terminated, except for such rights of action as will have accrued prior to such termination and any obligation which expressly or impliedly continue in force after such termination.

8.3 Upon termination of this Agreement, copies of the whole or parts of the Licensed Work and Adaptations made by the Licensee and Authorised Users may be retained and used subject to the terms of Clause 4 and 5 of this Agreement, which terms shall survive any termination of this Agreement.

9. ACKNOWLEDGEMENT AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

- 9.1 The Licensee acknowledges that all copyrights, patent rights, trademarks, database rights, trade secrets and other intellectual property rights relating to the Licensed Work, are the property of the Depositor or duly licensed to the Depositor and that this Agreement does not assign or transfer to the Licensee any right, title or interest therein except for the right to use the Licensed Work in accordance with the terms and conditions of this Agreement.
- 9.2 The Licensor acknowledges that the intellectual property rights in copyrightable works created by an Authorised User exercising the permitted uses set out in clauses 4.1.6.5 and 4.1.6.6 shall belong to that Authorised User.
- 9.3 Save as provided herein, any database rights in the JORUM Repository mounted on the Licensee's server or any other designated server shall be the property of the Licensee.

10. REPRESENTATION, WARRANTIES AND INDEMNIFICATION

- 10.1 Each party represents and warrants that it has sufficient authority and rights to enter into and perform its obligation under this Agreement.
- 10.2 The Depositor warrants to the Licensee that the Licensed Work and all intellectual property rights therein are owned by or licensed to the Depositor and that the Licensed Work used as contemplated in this Agreement does not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person. The Depositor agrees that the Licensee shall have no liability and the Depositor will indemnify, defend and hold the Licensee harmless against any and all damages, liabilities, claims, causes of action, legal fees and costs incurred by the Licensee or Authorised Users in defending against any third party claim of intellectual property rights infringements or threats of claims thereof with respect of the Licensee's and Authorised Users' use of the Licensed Work, provided that: (1) the use of the Licensed Work has been in full compliance with the terms and conditions of this Agreement; (2) the Licensee and Authorised User(s) provide the Depositor with prompt notice of any such claim or threat of claim; (3) the Licensee co-operates fully with the Depositor in the defence or settlement of such claim; and (4) the Depositor has sole and complete control over the defence or settlement of such claim.
- 10.3 The Depositor further warrants to the Licensee that the publication of the Licensed Work will not contravene any British laws, including but not limited to the laws of defamation and contempt of court (or concepts approximating thereto). The Depositor shall indemnify and hold the Licensee harmless from and against any loss, damage, cost, liability or expense arising out of any illegality or alleged illegality save where this is a direct result of any amendment of the material done by the Licensee without the agreement of the Depositor.
- 10.4 The foregoing in clause 10.2 and 10.3 do not apply to Adaptations by Authorised Users of the Licensed Work.
- 10.5 The Licensee agrees to notify the Depositor promptly and provide full particulars in the event that it becomes aware of any actual or threatened claims by any third party in connection with any works contained in the Licensed Work. It is expressly agreed that upon such notification, or if the Depositor becomes aware of such a claim from

other sources, the Depositor may remove such work(s) from the Licensed Work. Failure to report knowledge of any actual or threatened claim by any third party shall be deemed a material breach of this Agreement.

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

11. FORCE MAJEURE

- 11.1 Either party's failure to perform any term or condition of this Agreement as result of circumstances beyond the control of the relevant party (including without limitation, war, strikes, flood, governmental restrictions, and power, telecommunications or Internet failures or damages to or destruction of any network facilities) ["Force Majeure"] shall not be deemed to be, or to give rise to, a breach of this Agreement.
- 11.2 If either party to this Agreement is prevented or delayed in the performance of any of its obligations under this Agreement by Force Majeure and if such party gives written notice thereof to the other party specifying the matters constituting Force Majeure together with such evidence as it reasonably can give and specifying the period for which it is estimated that such prevention or delay will continue, then the party in question shall be excused the performance or the punctual performance as the case may be as from the date of such notice for so long as such cause of prevention or delay shall continue.

12. ASSIGNMENT

12.1 Save as permitted for under this Agreement, neither this Agreement nor any of the rights under it may be assigned by either party without obtaining the prior written consent of the other party. All the terms of this Agreement will be binding upon any permitted successor to any party. The parties hereby record their written consent to any assignment by the Licensee to the Higher Education Funding Council for England (HEFCE) or any third party appointed by HEFCE.

13. GOVERNING LAW AND DISPUTE RESOLUTION

- 13.1 This Agreement shall be governed by and construed in accordance with English law and the parties irrevocably agree that any dispute arising out of or in connection with this Agreement will be subject to and within the jurisdiction of the English courts.
- 13.2 The parties agree to use best efforts to resolve disputes in an informal manner, by decision of the Joint Information Systems Committee's project manager of the JORUM Repository. Where the parties agree that a dispute arising out or in connection with this Agreement would best be resolved by the decision of an expert, they will agree upon the nature of the expert required and together appoint a suitable expert by agreement.
- 13.3 Any person to whom a reference is made under Clause 13.2 shall act as expert and not as an arbitrator and his decision (which shall be given by him in writing and shall state the reasons for his decision) shall be final and binding on the parties except in the case of manifest error or fraud.

- 13.4 Each party shall provide the expert with such information and documentation as he may reasonably require for the purposes of his decision.
- 13.5 The costs of the expert shall be borne by the parties in such proportions as they shall agree in advance.

14. NOTICES

- 14.1 All notices required to be given under this Agreement shall be given in writing in English and sent by electronic mail, fax or first class registered or recorded delivery to the relevant addressee at its address set out below, or to such other address as may be notified by either party to the other from time to time under this Agreement, and all such notices shall be deemed to have been received (a) 24 hours after successful transmission in the case of electronic mail or fax; (b) seven (7) days after the date of posting in the case of first class registered or recorded delivery:

if to the Depositor:

[insert contact details]

if to the Licensee:

[insert contact details]

15. GENERAL

- 15.1 This Agreement and its Schedules constitute the entire agreement between the parties relating to the Licensed Work and supersede all prior communications, understandings and agreements (whether written or oral) relating to its subject matter and may not be amended or modified except by agreement of both parties in writing.
- 15.2 The Schedules shall have the same force and effect as if expressly set in the body of this Agreement and any reference to this Agreement shall include the Schedules.
- 15.3 The invalidity or unenforceability of any provision of this Agreement shall not affect the continuation in force of the remainder of this Agreement.
- 15.4 The rights of the parties arising under this Agreement shall not be waived or varied except in writing. Any waiver of any of a party's rights under this Agreement or of any breach of this Agreement by the other party shall not be construed as a waiver of any other rights or of any other or further breach. Failure by either party to exercise or enforce any rights conferred upon it by this Agreement shall not be deemed to be a waiver of any such rights or operate so as to bar the exercise or enforcement thereof at any subsequent time or times.

SCHEDULE 1: LICENSED WORK

Title	Format at Delivery	Date of Delivery
-------	--------------------	------------------

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

SIGNED by: _____

Position: (Signature)

for and on behalf of
[insert name of Depositor in Caps]

WITNESSED by: _____

Position: (Signature)

Address:

SIGNED by: _____

Position: (Signature)

for and on behalf of
UNIVERSITY OF EDINBURGH

WITNESSED by: _____

Position (Signature)

Address:

Appendix 2 Administration Tools

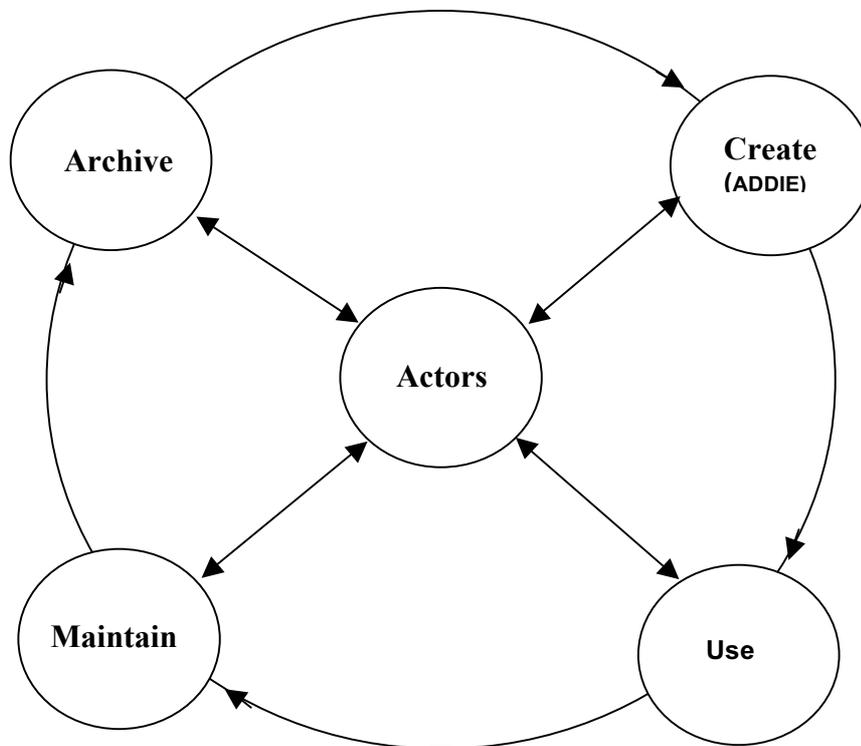


Fig. 1 Lifecycle Functions

1. **Creation** – where the materials are produced. The ADDIE (Analyze, Design, Develop, Implement, and Evaluate) model from the Instructional Systems Design tradition is used for simplicity, but there are many others that can be adopted.
2. **Use** – where the materials are deployed and used with real teachers and students.
3. **Maintain** – where the materials are altered to keep them up to date, to reflect changes in the curriculum and evaluation comments.
4. **Archive** – where the materials are stored in a digital repository to await retrieval and reuse.

In these functions the actors and roles might break down into the following actors' functions / job titles:

- Instructional Designers / Learning Designers
- Subject Experts
- Teachers /Lecturers
- Students
- Media Designers & Editors
 - Audio
 - Video
 - Graphics
 - Photographers
 - Web Designers
 - Animators
 - Desktop Publishing & Typography
- Programmers

- Cataloguers / Metadata Editors
- Performers
- Scriptwriters
- Examiners
- Usability Experts
- Accessibility Experts
- Instructional / Technical Authors
- Evaluation Experts
- Database Designers
- Project Managers
- Project Administrators

Rights Tracker Forms

Media / Rights Tracker Form	
Production Title	Name of the Course or Project etc.
Title / Description of the media item	e.g. top bar navigation icons
Location / Place in Production	e.g. on all the content pages
Purpose in Production	e.g. Navigate through the instructional content part of the site
File Format	e.g. GIF & JPEG
Name and Location of Master File(s) Note: 'path' to the folder may do	e.g. in the course_archive/icons/top bar/tb1.gif, tb2.gif, tb3.jpg
Created by (and employment status)	e.g. John Doe - freelance
Adapted by (and employment status)	e.g. Peter Perfect - staff
Content IPR (brief description and status)	e.g. Coca Cola bottle images from company web site and coke logo (copyright and trademark) – cleared, project permissions file ref. DMPP12

People / Rights Tracker Form

Name	John Doe
Employment Status	e.g. Freelance
Role / Job Title	Graphic Designer
IPR Status	e.g. Copyright – Assigned e.g. Moral Rights - Waived
Contract ref.	e.g. standard terms of freelance contract and job spec – contract ref. No.

Rights Clearance Tracker Form	
Title	e.g. 12 Angry Men
Project Permissions File Identifier	e.g. DMPP14
Description / Synopsis and Use	e.g. Courtroom Drama. Useful for showing the importance of argument analysis and rhetorical skills
Media Type	e.g. video
Main Copyright Owner(s)	e.g. Broadcaster
Main Moral Rights Holder(s)	e.g. Broadcaster
Individual Content Rights Owner(s)	e.g. actors and performers, directors, producers (but not applicable under ERA)
Clearance Status	e.g. video free to use for educational purposes under the ERA licence scheme
Conditions / Restrictions	e.g. only for educational non-commercial use, with no time limit, only for and between institutions that are members of the ERA scheme.
Costs	e.g. institutional ERA license fees

Appendix 3 - Case Studies

Derek Rowntree, Professor of Educational Development at the OU, has produced a case study of his experiences in dealing with an academic journal publisher. It is available at: http://iet.open.ac.uk/pp/D.G.F.Rowntree/article_copyright.htm

In his case study, Derek Rowntree advises authors to use the support services of the organisations like: The Society of Authors, the Writers' Guild of Great Britain and the Authors Licensing & Collecting Society. He also recommends that authors read the *Declaration on Academic Writers and Academic Rights*, which was developed at a symposium convened in November 1997 by the Authors' Licensing and Collecting Society

Apart from being very good advice, this also shows the importance of support groups and communal organisations to the different players in the IPR debate, such as trade unions, professional associations and commercial associations.

The *Declaration on Academic Writers and Academic Rights* in some ways prefigures more recent concerns about restrictions on what may be legitimately shared in the public domain on the internet.

The right way to clear rights

Wednesday 6 March 2002 - Scottish Further Education Unit

Case studies

Use these to apply what you have learnt so far, what conclusions do you come to? What questions do you have? What aren't you sure about? Use these questions to guide your further study and research. (JC 7/11/03)

1. 'I've used material from XYZ book on my courses for a number of years now - all legitimately copied under the terms of my college's CLA licence. I'm putting a course together for our new VLE - I'll be OK to put the same material on this, won't I?'
2. 'Here's a list of a number of e-books I want to download from Amazon - I've got a new course starting in September and I want to be able to post all of the books, in their entirety, on the college intranet for the 50 or so students to refer to from their various outreach centres - that's not going to cause any problems, is it?'
3. 'As part of an online course for both the Intranet and Internet I want to include a table of data taken from the electoral register and the Glasgow Valuation Roll for the year 1900, showing the - names and occupations of all the residents of Sinclair Street - that's just round the corner.'
4. 'The college music department is planning a course on local music and lyrics and wants to compile a selection of tracks for inclusion on a CD-ROM that's going to accompany the course. I've a pretty good idea of what I want to include - it's mostly traditional - I think I've heard some of the tracks on a CD, but we'll be re-recording the music and lyrics - can you arrange for 100 CD-ROMs to be pressed? Oh - I thought we might include some nice local photographs and paintings -- here's a disc - I've scanned the ones I want - thanks.'
5. 'The funding on my project has allowed both the college and the students to be equipped with some really powerful hardware - you should see how well they handle video. The kit's ideal for the new course - that's why we bought it - we'll be putting a wide selection of edited extracts from a whole range of TV programmes, from both terrestrial and non-terrestrial broadcasters. Wait until you see the editing capabilities of some of the software - you want to see what we can do to the pictures and as for manipulating the soundtracks - we thought we might be able to re-record some of the music and re-publish it - what do you think?'
6. 'You know, instead of all that palaver cutting up the newspapers, discarding the pictures and adverts - yeah right, we do that all the time - I've found that most of the articles I want are on the newspapers' websites - it's great, you just download the stories, print off the pages - nicely convenient in A4 format and run off as many copies as you like for the handouts - wish I'd come across this earlier.'
7. 'I've found some cracking materials on the web for my new course - yes, I know, I know I can't make any print copies for my students, but I've just built all the links into their on-screen coursework - it took me ages, but I've got all the addresses that cut through all the rubbish and take them straight to the information they need - I don't know why everyone doesn't do it.'

8. 'I'm putting a study skills pack online to create an online version of a course we've only delivered on paper before. The pack's got all sorts of things in there - I used to teach with it. I'm not sure about the copyright for all the materials, but I know these are okay:
 - These are notes on how to Revise Effectively. These actually come from another study skills pack, produced centrally by College Open Learning Exchange Group (COLEG) for use by all colleges.
 - These are notes on Library Skills. They were produced by a part-time lecturer who worked in the department but has left now. I know that she added the materials to the pack and I remember her saying that she'd produced them herself at home.
 - This is an example of a personal timetable drawn up by one of the students. I took it from their assessment folder, and I'm using it as an example.'
9. 'I'm creating the front page for my study skills pack and I want it to look quite lively, so I'm using a number of graphics. I don't think there should be copyright problems with any of these:
 - The college logo - I'm putting that on the top of the page.
 - Pictures of students - I took them with a digital camera, in the classroom, so I don't even need to scan them in.
 - An image which I've taken from the Scottish Cultural Resources Access Network (SCRAN) resource bank - -our college has membership
 - A scan I've made of the college prospectus.'

AR/JH/JE
01.03.02