

Intellectual Property Rights (IPR) in Networked e-Learning

A Beginners Guide for Content Developers

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Important Note: This paper should be read in the context of raising legal issues for content developers and indicating certain practices, rather than giving current information about the law. For information on the update position with regard to changes to intellectual property law, please refer to the JISC Legal website - <http://www.jisclegal.ac.uk/>

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Preface

This guide aims to provide a user-friendly introduction to intellectual property rights (IPR) issues for e-learning content developers and managers. 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. It 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 guide has been written by an e-learning content developer who has had to deal with these issues in practice. The style of the guide is practical and approachable with many useful tips and observations but it also provides a sketch of the wider issues.

The guide is based on my experience while 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 website is at: <http://www.stir.ac.uk/departments/daice/l2l/>

Because the project chose to create mostly 'real' learning objects (i.e. collections of actual files etc.) rather than metadata for 'virtual' web links I had to deal with the issue of IPR in content development.

John Casey, July 2004 – [Updated April 2006]

1. Introduction

1.1 Background

Intellectual property rights 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. In addition they are in turn influenced by regulation of areas such as e-commerce. They must also be considered in conjunction with data protection legislation and privacy considerations, relevant considerations about unsolicited electronic communications and possibly freedom of information.

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).

The technology that enables new types of digital publishing races ahead and the law often appears to lag behind. However, there have been significant legal advances that should warn against a cavalier approach to handling the rights which exist in materials. 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 coming of age and joining the rest of the media industry.

1.2 Aims

The aims of the guide include 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;

1.3 Who is this guide for?

This guide is intended for those who are thinking of using third party materials to create new learning resources and who 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 considering making their e-learning content available to others for use in shared digital repositories and libraries. They need to find out about the legal rights they may have when so doing and also any responsibilities which they may have.

1.4 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 3 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 considering 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 short set of guides to IPR and the use of images are relevant to the e-learning development community. The TASI resource complements this more general guide and would make a good next step for the reader before some more 'heavier' reading. After this the reader may 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 9.

1.5 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 many consider that there has been a lack of awareness about IPR issues in e-learning in UK educational institutions, especially regarding the use of third party materials. Closely connected to this problem has been a more general lack of knowledge and expertise about IPRs and how to manage them. There is also a need for training with regard to IPR issues in general and in e-learning in particular. Those which 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 9).

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 who want to share their content with others it is also important that they understand the legal environment that they are operating in.

1.6 IPR

Intellectual Property Rights (IPR) is a broad term that refers to the legal protection available in relation to certain property that is intangible which can be created by individuals. It is fair to say that the law is lagging behind the digital technology which is changing the way that the creation, publication and access to the products of intellectual activity now happens. New technology creates challenges that the law is responding to. But it would be a mistake to think that the use and management of technology is unregulated or beyond the law.

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 Statute of Anne 1710) was enacted to protect publishers using the recently invented printing press from piracy. IPR law 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.

1.7 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 their short definition.

“We define ‘networked learning’ as:

learning in which information and communications technology (ICT) is used to promote connections: between one learner and other learners, between learners and tutors; between a learning community and its learning resources.”

Effective networked learning in higher education: notes and guidelines (2001)
Published by JISC-JCALT & CSALT, Lancaster University.

Available at: http://csalt.lancs.ac.uk/jisc/guidelines_final.doc

The guide to networked learning in higher education referenced above is intended to provide a thorough educationally sound guide for people who are new to e-learning. It is highly recommended.

2. Copyright and rights - getting the right ‘mind set’

Copyright and IPR 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’.

2.1 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.

2.2 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 include:

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

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.

2.3 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 is amended by relevant E.U. Directives, so you will need to refer to the latest version if you are going to look at it in detail. The recent Directive 2001/29/EC (the Copyright Directive) seeks to harmonise certain aspects of copyright and related rights for the 'information society'. Its main objective was to deal with the digital challenge and to implement changes introduced by the World Intellectual Property Organisation (WIPO) in two 1996 Treaties. The Directive has been implemented through the Copyright and Related Rights Regulations 2003 in the UK. Insofar as someone immersed in the e-environment must know about relevant legislation, this is important. Reading the Directive helps contextualise the specific Regulations which implement it in the UK. The Regulations alter the Copyright Designs and Patents Act 1988 yet again. Some textbooks therefore may not be up to date. The Regulations can be downloaded from the UK government website at:
<http://www.opsi.gov.uk/si/si2003/20032498.htm>.

The Regulations were significant in a number of respects. In recent years there has been a call from Intellectual Property producers for greater legal and technological protection. A movement developed to deter the proliferation of devices capable of circumventing copy-protection technology. With the evolution of electronic rights management information it became clear that their removal was likely to be the first step taken to copy someone else's work. The Regulations create a criminal offence in relation to the manufacture or dealing with devices designed to circumvent copy

protection technology. They also protect electronic rights management information by allowing civil action to be taken by a range of people against those who remove it.

The consequences of the latter trend is to suggest that copyright producers will spend more time on inserting and using electronic rights management information to facilitate tracking and to deter breaches knowing that the law is beginning to use this approach as an extra weapon in its armoury. The lesson for e-content developers is to factor in electronic or (simply) rights management information. This is standard practice anyway. In addition the Regulations remove the separate compartment of cable programmes, by assimilating them into broadcasts.

Communication to the public right

In addition there is an extension of the copyright owner's right by adding a right of communication to the public in electronic contexts, subject to some minor exceptions. This has clarified the law in the UK emphasising the law's protection for copyright in the digital context.

Copyright owners now have the right to authorise or prohibit broadcasting the work or other communication to the public by electronic transmission. This includes putting copyright material on an intranet or using it in an on demand service where members of the public choose the time that the work is sent to them.

In addition the UK Regulations implementing the EU E-Commerce Directive are relevant to the operation of information society service providers and should be considered along with distance selling obligations in certain contexts. If the e-content provider is a spin-off company it should take additional care to remember that it may be treated differently from other educational contexts as a result of the separate legal personality that follows.

2.4 Characteristics of Copyright

2.4.1 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.

2.4.2 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 the person, whom the law identifies as the 'author' and first owner, can enjoy and claim the protection of copyright law immediately. The author can of course sell their rights as copyright is a bundle of property rights. 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.

2.4.3 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 2.4.1 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 author as defined in the Act is the first owner. Generally the author is easy to identify and reflects the common understanding of that term. However copyright also applies to collaborative works that do not easily allow identification of a single author. Where two or more people have created a single work protected by copyright, those people are generally joint authors and joint first owners. Where individual contributions are distinct or separate, however, each person would be the author of the part they created. However, this might not apply where, for example, these people are employees. (see below para 2.4.5)

The property rights can be owned and bought 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 may not like.

2.4.4 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 Patent law. Software patents may be obtainable and worthwhile investigating in certain rare cases. Ensuring that the patent rights of others are not infringed is also a consideration.

2.4.5 Employment, Copyright and Confidential Information

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. Under the Act, the author is the first owner of any copyright, subject to the classic exception for employees. Thus, if the work is created during the course of employment, the employer owns the copyright. This is the starting point. Universities would seem to own much of the work created by their employees, subject to any agreement to the contrary (or perhaps implied custom). This of course requires that there is an employment relationship. If not, the author is the first owner. The student is not an employee. It may be appropriate in certain circumstances to get students to transfer copyright in writing in relation to their work.

In all cases employees should ensure that they are acting within the scope of their authority and that people they are dealing with are doing so also.

In the higher educational sector it has been the custom and practice that copyright in articles and monographs etc (publications) belong to the author. Copyright in teaching materials has not really been an issue until recently with the advent of the digital storage of learning materials. Many institutions may 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: <http://www.obhe.ac.uk/> this very useful 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 licence 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 9).

2.5 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 programs (it is spelt 'programs' in the Act) have been squeezed into the law where legislators think they fit best. The main categories are briefly summarised below.

2.5.1 Literary Works

The written word in the form of novels, poems, letters, reference works, song lyrics etc. The notion of a literary work is defined by its form rather than its content. Such form relates to the fact that it is recorded or manifests itself in some form of writing or notation. The law is not interested in literary merit. Rather it is an exercise in putting something into one of the categories. This obviously covers books, song lyrics, and poems and perhaps less obviously compilations and tables as defined in the Act. It has been held to cover timetables. It explicitly covers computer programs.

2.5.2 Dramatic Works

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

2.5.3 Databases

Databases may receive copyright protection for the selection and arrangement of the contents. This is separate from the protection given to the software that the database uses to operate – which is also protected. The information in the database itself need not be particularly original but the organisation and structure and classification of the information must be original and is the copyright of the database designer.

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 holder of a database right can prevent others from reusing substantial parts of the database without permission. This protection, which originated in an EU Directive, gives explicit protection that had not been in the 1988 Act. The UK introduced Regulations to comply with the Directive and they are to be found in the Copyright and Rights in Database Regulations 1997.

Database right is an automatic right and protects databases against the unauthorised extraction and re-utilisation of the contents of the database. Database right lasts for 15 years from making but, if published during this time then the term is 15 years from publication.

The law with regard to 'database right' has been closely examined in the *William Hill v British Horseracing Board* (BHB) - [2005] EWCA Civ 863. The case concerned the official list of riders and runners in races and whether William Hill had extracted or utilised a "substantial part" of the BHB database. The Court of Appeal held that William Hill did not seriously prejudice the investment made by BHB in the creation of that database, and was not prohibited by the Directive from using the database.

A database must fulfil three requirements.

- (1) There must be a collection of independent data or other material. This means that the data or materials must be capable of being separated without losing their informative content.
- (2) The collection must have been arranged systematically or methodically. This excludes mere random collections of information.
- (3) The data must be individually accessible by electronic or some other way which means that 'mere storage' does not amount to the creation of a 'database'. On this basis, maintaining lists of football fixtures could in effect create a database.

(The full text of the judgment can be accessed online on the BAILII website at - [http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2005/863.html&query=\[2005\]+EWCA+Civ+863&method=all](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2005/863.html&query=[2005]+EWCA+Civ+863&method=all))

It is important to remember that many databases are a collection of copyright works such as an online database of poetry from the last fifty years where each poem will be protected by copyright. So if you are compiling a database you need to make sure that you have permission from the copyright owners for use of their material. Also when using databases you need to be aware of the rights of copyright owners as well as the database rights of owners.

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

2.5.4 Musical Works

These are protected if they are recorded as musical notation and may also be protected as sound recordings (see below). When music is recorded, there will usually be more than one copyright owner having an interest in the recording. The music itself may be an original musical work, the lyrics may be an original literary work and the sound recording itself can be a separate copyright work regardless of whether or not it is a recording of copyright music. Performers' rights may also exist in the recorded music.

2.5.5 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 artistic 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.

2.5.6 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 its own copyright separate from the original. Film sound tracks are included under the film category.

2.5.7 Films

Films are classed as any recording of a moving image on any medium by which a moving image may be produced by any means. This is a wide and flexible definition; this includes the sound track if there is one and any single frames as stills.

2.5.8 Broadcasts

Copyright can subsist in either a terrestrial or satellite broadcast, which can be encrypted or not and whether delivered wirelessly or by cable and this copyright is in addition to any copyright in the content of broadcasts such as films, music and literary material.

2.5.09 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. The publisher usually holds this copyright.

2.6 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). Also as a result of the UK's membership of international conventions, a copyright work created in the UK is automatically protected in most parts of the world.

2.7 Moral Rights

These are rights the original author has automatically as the creator of the work. Moral rights are concerned with protecting the personality and reputation of authors. 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).

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.

Paternity Right is unique in having to be asserted. This could mean that an author could object to your treatment of their work as 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.

Employees 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.

Both the right to be identified and the right to object to derogatory treatment can be waived by the author.

There are also situations where moral rights have limited or no application including:

- in computer programs
- where ownership of a work originally vested in an author's employer
- where material is used in newspapers or magazines
- reference works such as encyclopaedias or dictionaries

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. A simple, clear, fair and reasonable employment policy and practice are probably the best approach 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 6.

2.8 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 you may be (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 Gilbart (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 remain relevant.

2.9 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 include:

- Copying the work
- Issuing copies to the public
- Renting or lending copies to the public
- Performing, showing or playing the work to the public
- Communicating the work to the public
- Adapting, or amending the work.

There are two main forms of infringement:

1. Direct – where you carry out the act that is restricted by copyright.

2. Secondary infringement - dealing with or facilitating of direct infringement – where you authorise or encourage others to break the copyright laws and extends to providing premises or apparatus for infringing performances and providing the means for making infringing copies.

It is possible to envisage a hypothetical situation where a senior office holders in an institution could be prosecuted in this way – e.g. a Principal, Secretary, Registrar, or Vice Chancellor. The likelihood of such a prosecution is low and would probably require that the office holder had knowledge of serious copyright infringement within the institution and deliberately disregarded the activity over a period of time.

Infringement of Copyright law may involve both civil and criminal law. For educational institutions and individuals infringement could lead to a civil action and financial penalties would be 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 invite criminal enforcement. These outcomes may not be as harmful as the reputational damage that an institution could suffer as a result of the bad publicity.

In a civil case the copyright owner can sue for damages and can also apply for an injunction (or an interdict in Scotland) 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, at the time of writing, over 260 lawsuits against individuals have been filed, one high profile example 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)

2.10 Copyright in practice

2.10.1 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.

Jurisdictional coverage

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.

3. 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.

3.1.1 What can be used for free?

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

3.1.2 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 the copyright has expired 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
Film	70 years
Typographical arrangements	25 years
Performances	50 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.

3.1.3 Fair Dealing under the 1988 Copyright Act

In all cases below the dealing must come within the terms of the statute as amended and interpreted in the light of the Directive and it must be fair in all cases.

Criticism and review

The act allowed 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 deals specifically with that work or genre. This right is usually used, for instance, by film or literary critics to illustrate their work and back up their conclusions. Acknowledgement of the source must be made.

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 non-commercial research and study

Works may be copied for individual 'private non-commercial 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 use, neither can they direct the students to make copies of specific works for these courses (that would be secondary infringement). Although a student may copy under their own initiative for their own non-commercial research as part of taking a publicly taught course.

3.1.4 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 rights owners may have very different views as to what might constitute an 'insubstantial' part. Even a short extract from a poem, song or film might not be viewed as insubstantial.

3.1.5 Employees

As long as it is all original work the work of your employees is 'free' in IPR terms (but not that of sub-contractors and freelancers – see section 6). 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 6.

For a recent article on some of the changes taking place see the article "Cambridge approves IP reform plans" on the Guardian website at <http://education.guardian.co.uk/businessofresearch/story/0,,1666230,00.html>

3.1.6 Competition law

In addition to IP, developers may have in certain cases to consider competition law, particularly if operating in an economic or commercial context. For example there are significant EU Regulations that may need to be considered if there is a patent licence, a software licensing agreement or a know how licence involved. National competition regulations are also relevant. Whatever the ignorance of IP, ignorance of competition law is usually deeper. If Microsoft can fall foul of competition law, it is unsurprising that other commercial entities may similarly find themselves struggling with competition rules. Further details can be accessed in 'Competition Law – the basics' a guide on the OUT-LAW website at - <http://www.out-law.com/page-5811>

3.2 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 some of these collections can be found in section 9, for an up to date list you should consult the JISC Collections website at <http://www.jisc.ac.uk/index.cfm?name=coll> .

3.3 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 etc. . 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.
- an allegation of 'passing off' someone else's content as your own

3.4 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 9 for a list of some of these organisations.

3.4.1 Text

The Copyright Licensing Agency (CLA) <http://www.cla.co.uk> is a joint venture between the Publishers Licensing Society Ltd. and the Authors Lending and Copyright Society Ltd. CLA licences for educational institutions allow 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 have also negotiated a number of digital licensing agreements that allow the digitisation of printed materials. Further details of how these licences operate can be found on the CLA website at - <http://www.cla.co.uk>

HERON is a 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/>

3.4.2 Music

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

3.4.3 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. 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 of the licence which has been updated 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 and does not extend to programmes which are streamed via the internet.

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>

3.4.4 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/>

3.5 IPR management and risk evaluation

3.5.1 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 6 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 6). 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 often 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 and politicians.

As educational institutions student numbers continue to expand with very limited resources 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 a 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.

3.5.2 Risk evaluation and management

It may be stating the obvious, but, as we have pointed out in section 3.5.1 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.

When approaching a content creation context therefore adopt a proactive approach. Consider whether there is use of copyright material at all. Follow the logical sequence of the 1988 Act. But bear in mind that although the approach suggested by the Act remains the same, extensive amendments have been applied. That having been said, in every case the following questions should be asked.

- Does copyright subsist? This requires that we come within one of the compartments in the Act as amended i.e. if it is a literary work, then copyright subsists.
- Who is the author? It is generally the person who creates it, i.e. the person who wrote the book.
- Who is the first owner?
- How long will the copyright last? Check the relevant duration and when the clock starts.
- What are the rights of the owner? What are the acts restricted to owner?
- What can someone else do with it? What are the permitted acts? For example criticism and review.

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. You should also, for example, consider alternative licensed or copyright cleared resources.

3.6 Clearing & buying rights

There will be times when you will have to deal directly 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 with regard to obtaining and granting rights.

4. 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

If you are not able to employ these means 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.

4.1 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'.

4.2 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 licence at the start of your negotiations. As a rule you should buy the copyright completely (called an assignment [assignment in Scotland] - 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 ask for an 'escrow' agreement to be included in the deal. This allows for the editable software programme code to be deposited with a third party such as a lawyer in case the firm goes bust in which case the software code 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 6.

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

4.3 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, for example, that developed by the JORUM project - <http://www.jorum.ac.uk/>. This can minimise the administrative costs you might face.

JORUM is a free online repository service for teaching and support staff in UK Further and Higher Education Institutions, helping to build a community for the sharing, reuse and repurposing of learning and teaching materials.

5. 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 (or assignations in Scotland) – 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 may be used. This section will deal with licences.

Licences fall into a number of categories including: exclusive and non-exclusive.

5.1 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 TV network in the UK can transmit the same film.

5.2 Non-Exclusive Licences

A 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 good reasons for this:

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

5.3 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.

First, some background information on the JORUM licence and project - http://www.jisc.ac.uk/index.cfm?name=jorum_user .

The JORUM licence referred to in Appendix 1 was 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 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 grant this kind of permission to use a resource.

The JORUM licence continues to evolve and the commentary here is on a draft version. For details of the most up to date licence you should contact JORUM via their website at - <http://www.jorum.ac.uk/>.

A useful exercise is to use the commentary in Appendix 1 as a guide to help understand and analyse the draft JORUM depositor licence that is contained in Appendix 1. The draft 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 UK 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 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 licensing guide has been compiled in order to help a user understand the meaning and consequences of common clauses contained in a licence.

It provides an explanation of what licences are and lists useful tips on negotiating the content of licences. It is suggested that you read this work before signing or arranging any licences.

5.4 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 licence 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 plain English explanation of what you want to do.

5.4.1 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.

5.4.2 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 intent 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.

Further information can be found on the JORUM website at - <http://www.jorum.ac.uk/index.html>.

6. 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.

6.1 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 draft 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 9.
- 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 offer a 'credits' list that provides a comprehensive list of who worked on the project and what they did.
- 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 (such regimes have been successfully overturned using other parts of the law). 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.

6.2 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 such 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) and Digital Rights Management Systems (DRMs) are currently being developed to be used by such management systems in the educational sector and elsewhere. It is important to remember that the IPR metadata itself 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.

6.3 IPR Administration tools and aids

6.3.1 Getting organised

McCracken and Gilbart (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.

6.3.2 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. To help with this 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 the rights status. A checklist of actors' functions / job titles is provided – you should regard it as a starting point for your project.

7. 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 and needs in a 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 originally US-based (and using US law) and mostly 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 Creative Commons can be found at their website - <http://www.creativecommons.org.uk/> .

At the same time, academics are conscious that they are producing valuable property, often for their employer. While the debates will rage about IP, it is clear that it has first to be treated as property by relevant individuals. Therefore individuals in organisations should not readily assume that they can purport to give it away easily, unless they are a charitable organisation or the objectives of the body so allow. Academics generally do not work for charities and cannot have their cake and eat it by refusing to exploit IP and then protesting at lack of resources after they give them away.

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 to 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”

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

(Campbell, L., 2003)

In the UK the JISC, which has had 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.

Looking to the future of IPR in e-learning and education generally we can make these provisional observations and suggestions for development in a positive and sustainable direction.

- We need to actively engage with IPR issues both professionally at work and politically as citizens to develop the legal environment within which we want our education system to prosper.
- It would be very useful if funding organisations such as the Funding Councils, Research Councils and JISC take the lead in setting the right policy environment. They can do this very effectively by encouraging and defining the values and attitudes towards the use of IPR in the resources created with their funds. For instance making it a contractual requirement to deposit project output materials in a national repository for teaching and learning materials would be a major step forwards. Making the best use of publicly funded resources in this way to support publicly funded teaching should be a politically attractive proposition. The JISC 'Share Alike' initiative is a useful step in this direction and is to be welcomed.
- We need to understand more about the different ways that digital materials and resources are being created and used and adapted for educational purposes and the lifecycle of such resources as they change and develop over time.
- With the development of virtual learning environments and digital repositories as well as the increasing amount of digital publishing we are starting to see the traditionally separate functions of libraries, archives, teaching, publishing, and preservation coming to occupy the same space. How these functions can work together will be important for the future. A useful development in this respect is the recent establishment of the Digital Curation Centre (<http://www.dcc.ac.uk/>) one of whose aims is to examine these kinds of issues.

8. Planning to work with IPR

8.1 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

8.2 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 general 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.

9. Further information and sources of guidance

9.1 Bibliography and recommended further readings and references

JISC/DNER Copyright and Licensing Guidelines (2001) by Professor Charles Oppenheim and Emanuella Giavarra. Available online 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

Effective networked learning in higher education: notes and guidelines (2001) Published by JISC-JCALT & CSALT, Lancaster University. Available at: http://csalt.lancs.ac.uk/jisc/guidelines_final.doc

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 Lorna Campbell, 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. The Copyright Administration chapter has lots of useful information about trade and professional organisations.)

9.2 Useful websites

JISC Legal - <http://www.jisclegal.ac.uk/> operates an information service. Good source of material and useful links section. Workshops on Copyright and e-Learning are held in association with the JISC Regional Support Centres. JISC Legal has published a series of short legal guides for e-learning authors and developers. These include

- Copyright Law for e-Learning Authors
- Copyright Licensing for e-Learning Authors
- e-Commerce Law for Web Administrators
- Data Protection Law for e-Learning Administrators
- Accessibility Law for e-Learning Authors

and are available online at -

<http://www.jisclegal.ac.uk/publications/elearningseries.htm>

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. One valuable source of information on 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>

9.3 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-Regional Support Centres (RSCs) – These RSCs are operated by JISC and may offer information about copyright and e-learning training events in your region -
 - <http://www.jisc.ac.uk/index.cfm?name=rsc>

9.4 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/>

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