

# **Survey of International Legal Issues affecting Electronic Portfolio Developments**

## **A Brief Review of Five Countries**

A deliverable of the JISC Study to explore the legal and records management issues relating to the concept of the Lifelong Learner Record

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## 1. Introduction

The remit of the JISC Study to Explore Legal & Records Management Issues Relating to the Concept of the Lifelong Learner Record (hereinafter 'Legal Study'), has focused on the United Kingdom. Since March 2004, the Legal Study has identified the legal issues affecting Lifelong Learner Record (LLR) and electronic portfolio (e-portfolio) developments in the UK, examined the legal viability of a national LLR system and supported the work of the JISC LLR/e-portfolio projects, including producing FAQs on specific legal issues raised by such projects.<sup>1</sup>

This brief Survey looks beyond the UK. It scopes legal issues affecting electronic portfolio developments in five selected countries. The five countries fall into two wider categories, those of Continental European countries, where there is a civil law tradition, and English speaking common law countries. The Continental European countries selected for this survey are the Netherlands, France and Finland. The selected English speaking common law countries are the United States and Canada. The Survey is a preliminary review of some of the key legal issues affecting e-portfolio developments in these countries, and could be followed up by a more comprehensive survey if deemed necessary or useful.

The Survey was conducted in June 2006. E-portfolio experts in the five selected countries were contacted via e-mail to inquire whether they would be in a position to comment on the legal issues affecting e-portfolio development work and practice in their country, and if not, whether they could recommend someone to contact about the matter. The e-portfolio experts were sent a letter explaining the JISC Legal Study and the purpose of this particular Survey. They also received a short, six page document, produced by the Legal Study in May 2006, outlining the key legal issues that need to be considered in the UK, and in part in the wider EU, when developing and operating an e-portfolio system. The respondents were encouraged to refer to the document, note which of the outlined legal issues apply in their country, and add any legal issues and concerns relating to e-portfolios that they have come across in their respective countries but do not appear in the document. (See Appendix 1 for the letter regarding legal issues affecting e-portfolio developments and Appendix 2 for document titled 'Developing and Operating an ePortfolio System: Assessing the Legal Issues'.)

It should be noted that the term 'electronic portfolio' is used in different ways across, but also within, the five countries. Conceived in terms of the primary purpose of an e-portfolio system, such purposes include: recording formal learning outcomes; supplementing learning and/or tutoring processes; facilitating personal development and/or career planning; supporting continuous professional development; assessment; social networking. It is beyond the scope of this Survey to make reference to the legal issues specific to different types of e-portfolio application.<sup>2</sup>

The Legal Study would like to thank the following people for their contribution to this Survey: Wijnand Aalderink, Angela Baker, Kathryn Chang Barker, Ali Jafari, Victor Leginsky and Marij Veugelers.

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<sup>1</sup> See for details of the output of the JISC Legal Study:  
<[http://www.jisc.ac.uk/index.cfm?name=project\\_learner\\_records\\_legal\\_study](http://www.jisc.ac.uk/index.cfm?name=project_learner_records_legal_study)>

<sup>2</sup> See for a discussion of legally relevant characteristics of electronic portfolio systems and the key legal issues associated with each characteristic in the UK context: Charlesworth & Home (forthcoming/2006): 'Legally relevant characteristics of e-portfolio systems, associated legal issues and ways of addressing them' that will be available from the Legal Study website noted above.

## 2. Legal issues affecting e-portfolio developments in selected European countries

Three EU countries, The Netherlands, France and Finland, were selected for this Survey on the basis that multiple institutions have engaged in e-portfolio development work and implementation in them for several years. Continental European countries, including The Netherlands, France and Finland within the EU, share a similar style of legal system known as civil law.

*“Civil law is a codified system of law that sets out a comprehensive system of rules that are applied and interpreted by judges. It has its origins in Roman law. However, modern systems are descendants of the 19th century codification movement, during which the most important codes (most prominently the Napoleonic Code and the BGB [the civil code of Germany]) came into existence.”<sup>3</sup>*

While all three countries have differing national approaches to the legal issues that may affect the development and use of e-portfolios, there are some underlying similarities which have arisen from their historical antecedents, notably in intellectual property law; also, all three countries are members of the European Union (EU), and the EU has attempted to harmonize its Member States' laws in areas such as intellectual property and privacy.

This section outlines some topical legal issues and concerns relating to e-portfolio developments and the main laws affecting such developments in The Netherlands, France and Finland in turn.

### 2.1. The Netherlands

In Netherlands, e-portfolio developments in the education sector are supported by the SURF Foundation, which is the Dutch higher education and research partnership organisation for network services and ICT. It was thought by Dutch e-portfolio experts affiliated with SURF that most of the legal issues raised in the document 'Developing and Operating an ePortfolio System: Assessing the Legal Issues', which is attached to this report, apply in the Netherlands as well.<sup>4</sup> Two issues were mentioned as being particularly important, or topical, at the moment. They concern who owns the information stored in the e-portfolio (the student or the educational institution) and whether there are legal implications involved in the incorporation of pictures, audio and video, created either by students or produced by others, in the student e-portfolio. Both issues have to do in part with the question of intellectual property rights in the content of the e-portfolio system, primarily copyright issues.

Since the beginning of 2004, SURF has had Community of Practice called “Digitale Rechten Expertise Community” (DiREcT). DiREcT deals with legal questions having to do primarily with Netherlands copyright law (called *Auteursrecht*), including its implications for e-portfolio developments. Unfortunately, none of the information and guidance created by DiREcT so far is available in English.<sup>5</sup> Still, it is worth saying a few words about the Netherlands copyright law for the purpose of comparison with related laws in other countries.

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<sup>3</sup> Wikipedia: Civil Law  
<[http://en.wikipedia.org/wiki/Civil\\_law\\_%28legal\\_system%29](http://en.wikipedia.org/wiki/Civil_law_%28legal_system%29)>

<sup>4</sup> See Appendix 2.

<sup>5</sup> See for information on DiREcT in Dutch:  
<<http://www.surf.nl/auteursrecht/direct.php>>

Netherlands' copyright law (*Auteursrecht*) is based on their Copyright Act of 1912. In s.1 it is stated that "copyright is the exclusive right of the author of a literary, scientific or artistic work or his successors in title to communicate that work to the public and to reproduce it, subject to the limitations laid down by law".<sup>6</sup> Today, artistic works are taken to include films, recorded music and visual art, some or all of which could be stored in or presented through an e-portfolio system. Generally speaking, a copyright owner can do with his or her copyrighted work what he or she wants, including making copies or selling it to others.

It should be noted that, as in UK copyright law, rights in works created by employees in the course of their employment belong to their employer under Dutch law (s.7, CA 1912), but rights in works created by freelance contractors and other non-employees belong to them in the absence of an agreement to the contrary.<sup>7</sup> However, it appears that there is some uncertainty as to the status of certain types of work carried out by employees. In the context of Dutch Higher Education and academic works, Mossink notes that "Not all rights in works made in the course of employment are vested in the employer. s.7 provides that it must concern certain literary, scientific or artistic works. In establishing this, the employee's job description is decisive."<sup>8</sup> This suggests that there may be circumstances where works that would automatically belong to the employer under UK law, may not belong to the employer under Dutch law. Other legal differences between Dutch and UK copyright law include the stronger set of moral rights available under Dutch law.<sup>9</sup> Both issues may have implications either for who owns the intellectual property rights in an e-portfolio system, if it is created by an employee of an educational institution; or for what can be done with the work without infringing moral rights (s.25, CA 1912).

## 2.2. France

In France protection of authors' rights in their works has traditionally been based in the concept of '*droit d'auteur*', rather than in copyright in the sense used in the UK. In principle, the two concepts can be crudely distinguished by stating that copyright is concerned more with the economic rights of the author, and the *droit d'auteur* with the right of the author to control what use is made of their work. In practice, contemporary supranational legal developments, such as the Berne Convention, the WIPO Treaties and EU harmonization of intellectual property laws have resulted in the two systems converging. The relevant law is embodied in the *French Intellectual Property Code*, which states that protected works must be Works must be a work of the mind, whatever kind, form of expression, merit, or purpose, (Arts. L. 111-1, 112-1) and that only natural persons who create works may be deemed to be authors. (Art. L. 121-1) Probably because of the latter rule, the doctrine that rights in works created by employees in the course of their employment belong to their employer does not appear to have been

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<sup>6</sup> See for the Copyright Act 1912 in English: <<http://www.ivir.nl/legislation/nl/copyrightact.html>>

<sup>7</sup> Mossink (1999) 'Copyright Policy for universities', Annex D at 23-26.  
<<http://www.surf.nl/en/download/iwi%20auteursrechten%20UK%20def.pdf>>

Crews, K. & Ramos J. (2004) 'Comparative Analysis of International Copyright Law Applicable to University Scholarship' at p.19-20.  
<[http://www.surf.nl/copyright/International\\_Comparative\\_Chart\\_ZwolleIII\\_1104.pdf](http://www.surf.nl/copyright/International_Comparative_Chart_ZwolleIII_1104.pdf)>

<sup>8</sup> Mossink (1999) at 24. See also the Report of the Dutch Group 'Employers' rights to intellectual property' to the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPA) World Congress in Geneva, Switzerland 2004  
<[http://www.aippi.org/reports/q183/q183\\_netherlands.pdf](http://www.aippi.org/reports/q183/q183_netherlands.pdf)>

<sup>9</sup> Dietz, A. (1995) 'The Moral Right of the Author: Moral Rights and the Civil Law Countries', *Columbia-VLA Journal of Law & the Arts* 19(3/4): 199-227.

formalized in legislation in French law, but rather to have developed out of court rulings.<sup>10</sup> Equally, the moral rights granted to authors are significantly stronger than those granted under UK law, as with Dutch law, and again both issues may have implications either for who owns the intellectual property rights in an e-portfolio system, if it is created by an employee of an educational institution; or for what can be done with the work without infringing moral rights

A particular legal area in France that has important implications for e-portfolio implementation is that of data protection. The key piece of legislation here is Law no. 78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties, which was last updated on 6th August 2004. France, and its data protection regulator, the Commission nationale de l'informatique et des libertés (CNIL)<sup>11</sup> (roughly the equivalent of the UK Information Commissioner) have a particular reputation for strict enforcement of data protection law, and the CNIL is very pro-active in ensuring that the impact of new technologies is assessed at an early stage.

The Law on Data Processing, Data Files and Individual Liberties has implications for the use of, and access to, personal data stored in e-portfolio systems. It forbids anyone from using or reusing personal data without the explicit permission of the person concerned. As a consequence, institutions providing an e-portfolio cannot simply make specific data subjects' personal data stored in their e-portfolios available to 3rd parties. Unless explicit consent is granted by the person concerned, third party access to an e-portfolio containing personal data is forbidden and any breaches will be illegal.<sup>12</sup>

In France, the Ministry of Education has introduced a new policy on 'Espace Numérique de Travail' (ENT) that can be seen as a basic e-portfolio for all students involving a "digital workspace". The CNIL has advised the Ministry of Education to implement conformity agreements with it on three related issues: how the data collected in ENT will be used; how to ensure that the ENT "e-portfolio" is secure; and how to make sure that the ENT conforms to the Law on Data Processing, Data Files and Individual Liberties.<sup>13</sup>

The CNIL recommendation places requirements on educational institutions providing the ENT system to their learners. Institutions will have to prove that their ENT systems are secured against unauthorized access by 3rd parties. Furthermore, the authenticity of teacher's marks and comments will need to be validated. Finally, ENT users, including students and teachers, will have to be informed clearly as how to comply with the Law on Data Processing, Data Files and Individual Liberties and given advice on issues like password security.

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<sup>10</sup> Crews & Ramos (2004) at 14-16. See also the Report of the French Group 'Employers' rights to intellectual property' to the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPA) World Congress in Geneva, Switzerland 2004 (English summary) <[http://www.aippi.org/reports/q183/q183\\_france.pdf](http://www.aippi.org/reports/q183/q183_france.pdf)>

<sup>11</sup> Commission nationale de l'informatique et des libertés (French with some English material) <<http://www.cnil.fr/>>

<sup>12</sup> See for the official French version of the law: <<http://www.legifrance.gouv.fr/texteconsolide/PPEAU.htm>>;  
and for an approximate English translation of it: <<http://annuaire.in2p3.fr/legal/a78-17-text-local.html>>

<sup>13</sup> See for CNIL decision relating to the implementation of ENT (in French): <<http://www.cnil.fr/index.php?id=2027>>

### 2.3. Finland

In Finland, those involved in e-portfolio development work and implementation have identified intellectual property rights in the content of the e-portfolio system; data protection, including privacy of personal data stored in the e-portfolio; and access to the e-portfolio content by third parties as key legal issues to be addressed in the near future. The national regulators within whose remit these issues fall are the Data Protection Ombudsman and The Finnish Communications Regulatory Authority.

Finnish copyright law is based around the Finnish Copyright Act (No. 404/1961, as amended).<sup>14</sup> As in France, the law is based on a *droit d'auteur* model, and a legal person (e.g. a corporation as an employer, or a university in relation to its students) cannot as a rule be the initial owner of an intellectual property right. The general rule is that such rights must be transferred by an agreement. An employer does have the right to use works created in the context of employment contract, within the field of its normal business activities. However, when it comes to computer programs or databases, the rights are in many circumstances automatically transferred by law to the employer - except where created by an author independently engaged in teaching or research work in an institution of higher education.<sup>15</sup> As with the French and Dutch systems moral rights have strong protection.

Regarding data protection, the Constitution of Finland, the latest version of which dates from 11 June 1999, guarantees every citizen's right to privacy (s.10).<sup>16</sup> More specific legislation in this area consists of the Personal Data Act. The protection of privacy is also controlled by the Act on the Protection of Privacy and Data Security in Telecommunications.

The current Personal Data Act, which replaced the Personal Data File Act, came into force on 1 June 1999. The Personal Data Act accommodates the Finnish constitutional reform and the EU Data Protection Directive, i.e. 'Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data'.<sup>17</sup> One of the objectives of the Personal Data Act is to improve the opportunity of individuals to control the use of their personal data. The Act grants individuals the right to know why and how their personal data is being processed and to decide about the processing, unless otherwise stipulated by the law.

The Office of the Data Protection Ombudsman provides guidance and advice on all issues relating to the processing of personal data and control the observance of the law. In the Ombudsman's view: "As the use of information technology is on the increase and the sphere of communication is rapidly expanding, the protection of

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<sup>14</sup> See for an unofficial English translation of the Finish Copyright Act  
<[http://portal.unesco.org/culture/admin/file\\_download.php/fi\\_copyright\\_and+annexes\\_1998\\_en.pdf?URL\\_ID=30300&filename=11419907443fi\\_copyright\\_and\\_annexes\\_1998\\_en.pdf&filetype=application%2Fpdf&filesize=413709&name=fi\\_copyright\\_and+annexes\\_1998\\_en.pdf&location=user-S/](http://portal.unesco.org/culture/admin/file_download.php/fi_copyright_and+annexes_1998_en.pdf?URL_ID=30300&filename=11419907443fi_copyright_and_annexes_1998_en.pdf&filetype=application%2Fpdf&filesize=413709&name=fi_copyright_and+annexes_1998_en.pdf&location=user-S/)>

<sup>15</sup> See the Report of the Finnish Group 'Employers' rights to intellectual property' to the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPA) World Congress in Geneva, Switzerland 2004  
<[http://www.aippi.org/reports/q183/q183\\_finland.pdf](http://www.aippi.org/reports/q183/q183_finland.pdf)>

<sup>16</sup> See for an unofficial English translation of the Constitution of Finland:  
<[http://www.om.fi/uploads/54begu60narbnv\\_1.pdf](http://www.om.fi/uploads/54begu60narbnv_1.pdf)>

<sup>17</sup> See: <http://www.tietosuoja.fi/27305.htm>. See also:  
<[http://www.cdt.org/privacy/eudirective/EU\\_Directive\\_.html](http://www.cdt.org/privacy/eudirective/EU_Directive_.html)>

privacy is becoming even more topical. Everyone should control the processing and circulation of his or her personal data.”<sup>18</sup>

The Finnish Communications Regulatory Authority (FICORA) is an administrative authority for issues concerning electronic communications and information society services. Its mission is to promote development of the information society in Finland. The Authority is an agency in the same administrative sector as the Ministry of Transport and Communications.<sup>19</sup> FICORA has duties concerning protection of privacy and data security in electronic communications. It seeks to advance the information security and protection of privacy of the communications networks and services in collaboration with various stakeholders. FICORA supervises compliance with the laws enacted on the basis of the relevant EU directives, and FICORA's regulations issued under those laws maintains a review of the level of information security and provides general guidelines regarding information security.<sup>20</sup>

### 3. Legal issues affecting e-portfolio developments in selected English speaking common law countries

There are three major English speaking countries in which e-portfolio development work and implementation have been taking place for a number of years now. These countries are the United States, Canada and Australia. The common law constitutes the basis of the legal systems of the states of the United States with the exception of the state of Louisiana, and Canada, except Quebec, and Australia. In Louisiana and Quebec, the legal tradition is based on civil law as in Continental Europe.

*“The common law forms a major part of the law of many nations, especially those with a history as British territories or colonies. It is notable for its inclusion of extensive non-statutory law reflecting precedent derived from centuries of judgments by judges hearing real cases.”<sup>21</sup>*

This section outlines some topical legal issues and concerns relating to e-portfolio developments and the main laws affecting such developments in the United States and Canada, as such information regarding Australia was unfortunately not available at this stage.

#### 3.1. The United States

It appears meaningful to outline only some of the Federal laws most relevant to e-portfolio and wider learning management system developments in the United States, not any laws of individual states of the United States, in a short survey like this one.

US Copyright law will regulate copyright in the content of an individual's e-portfolio and affects what can be stored in, and presented to others using, an e-portfolio system. In the United States, copyright law is part of Federal law authorized by the US Constitution. Article I, Section 8, Clause 8, also known as the Copyright Clause, forms

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<sup>18</sup> See for information on the Ombudsman and data protection in Finland in English:  
<<http://www.tietosuoja.fi/1560.htm>>

<sup>19</sup> See for information on FICORA in English:  
<<http://www.ficora.fi/englanti/esittely/n2483.htm>>

<sup>20</sup> <<http://www.ficora.fi/englanti/tietoturva/index.htm>>

<sup>21</sup> Wikipedia: Common Law  
<[http://en.wikipedia.org/wiki/Common\\_law](http://en.wikipedia.org/wiki/Common_law)>

the basis of US Copyright law (and Patent law) and gives the US Congress the power to enact Copyright law:

*The Congress shall have Power [ . . . ] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*<sup>22</sup>

The US Copyright law protects the intellectual property rights of any individual in the original works created by them. This applies to any such content stored in the e-portfolio.

The key element of the Copyright law in relation to what can be stored in, and presented to others using, the e-portfolio is the “fair use doctrine”.

*“Fair use is a doctrine in United States copyright law that allows limited use of copyrighted material without requiring permission from the rights holders, such as use for scholarship or review. It provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test. It is based on free speech rights provided by the First Amendment to the United States Constitution. The term "fair use" is unique to the United States; a similar principle, fair dealing, exists in some other common law jurisdictions.*<sup>23</sup>

It has been pointed out that well-established uses of copyrighted material, especially in the context of education and scholarship, do not tend to cause problems. For example, it is possible for students to quote from copyrighted work to comment upon it or to criticise it in their coursework, which they may or may not wish to store in their e-portfolio.<sup>24</sup>

As for data protection and other rules relating to personal data stored in e-portfolio, in the United States privacy law tends to serve the same purpose as data protection law in Europe. In the education sector, where e-portfolios are increasingly provided, a key privacy law is the Family Educational Rights and Privacy Act (FERPA). FERPA (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all educational institutions, from school to universities, which receive funds from the U.S. Department of Education.<sup>25</sup>

In a nutshell, FERPA gives certain rights to parents regarding their children's education records until the child is 18 or attends an education institution beyond high school level (“eligible students”). Parents and eligible students have a right to inspect and review the student's education records maintained by the school and request that a school correct records which they believe to be inaccurate or misleading. Also, schools must have written permission from the parent or eligible student in order to release any information from a student's education record.

Regarding allowing third party access to student personal data stored in their e-portfolio, it should be noted that FERPA allows educational institutions to disclose student records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

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<sup>22</sup> Wikipedia: US Copyright law  
<[http://en.wikipedia.org/wiki/United\\_States\\_copyright\\_law](http://en.wikipedia.org/wiki/United_States_copyright_law)>

<sup>23</sup> Wikipedia: Fair use  
<[http://en.wikipedia.org/wiki/Fair\\_use](http://en.wikipedia.org/wiki/Fair_use)>

<sup>24</sup> *Ibid.*

<sup>25</sup> See U.S. Department of Education information on FERPA:  
<<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>>

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

Educational institutions may disclose "directory information" such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance without consent. In practice this means that educational institutions could generate a webpage or an e-portfolio welcome page of all their students containing such personal data. However, under FERPA, educational institutions are obliged to tell parents and eligible students about such directory information and give them a reasonable amount of time to request that the institution does not disclose information about them.<sup>26</sup>

There is one contentious issue relating to e-portfolio use, which has recently come up in the United States, but does not appear to be regulated by any law at the moment. This is the question of whether third parties, acting as evaluators of University courses, are allowed to view student course work stored in their e-portfolio without the explicit consent of the student. The issue appears to be one of privacy and confidentiality relating to privately owned or generated data, not only personal data regulated by FERPA.

The way in which some educational institutions providing e-portfolios to their students are planning to go about addressing this issue is to form "e-portfolio policy committees" made up of high level University administrators, including the Provost. The policy committee would deliberate on the issue and create an own, well-justified institutional policy on the matter. It is hoped that such approach, especially if the institution decides to grant access to student work in the e-portfolio, will protect the institution from any legal challenges and/or force the Supreme Court to rule in this area.

### 3.2. Canada

This survey of Canadian law relevant to e-portfolio developments is a direct commentary on legal issues raised in the document "Developing and Operating an ePortfolio System: Assessing the Legal Issues" written by Andrew Charlesworth and Anna Home and attached to this report. It discusses four out of the five legal issue areas covered in the document in turn.<sup>27</sup>

It was found that Canadian law relevant to e-portfolio developments is very similar to that of the European community. In particular, much of personal information, privacy protection and human rights law derive from European work. As a consequence, the theses and recommendations made in the document in Appendix 2 of this report are valid in Canada as well.

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<sup>26</sup> *Ibid.* See also U.S. Electronic Privacy Information Centre's information on student privacy: <<http://www.epic.org/privacy/student/>>

<sup>27</sup> The review of relevant Canadian law has been written by Victor Leginsky (Leginsky Consulting Counsel). The author of this report has made only minor editorial changes to the original review.

### Data protection, privacy and confidentiality

In Canada, personal information held electronically is protected by the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). This protection is modeled on European standards, and, in 2002, the European Parliament and the European Commission determined that PIPEDA meets the rigorous standards for the protection of personal data as outlined in the European Union's Data Protection Directive. Therefore, PIPEDA can be viewed in the same light as European personal data protection laws.

### Ownership and use of information in e-portfolios

In Canada, “computer programs” (i.e. software) are considered “literary works” and thus fall within the subject matter of copyright protection. A typical distinction with regard to the ownership of copyright is between “employees” and “independent contractors”. By virtue of section 13 of the *Copyright Act*, employers own the copyright of works created by their employees so long as they were created in the course of employment. Otherwise, the employer must have an assignment of the contract to own it.

In education, there are issues that arise in copyright law in Canada. The Commonwealth of Learning has set out one issue as follows:

*“Current Canadian copyright law often makes the spontaneous use of the Internet by teachers and students illegal. For example, using the information that is found on web sites without obtaining prior written permission is often an infringement of copyright. There are many types of activities that are sound educational practices but are made illegal by current copyright law. A Grade 3 student who copies a picture from a web site, adds it to a report, e-mails the report to her teacher and makes a print copy to show her family has broken copyright law. A university student in a media awareness class that cuts and pastes from different web sites to comment on the composition of the sites is also in violation. A professor who helps his students by posting news clippings on his class web site as a resource for his class is also in violation of copyright law.”<sup>28</sup>*

Therefore, while a student that creates her own e-portfolio would own the copyright in it, it is very difficult to ascertain whether she could assert rights to all of the pictures, quotes and segments used in her e-portfolio, even for educational, criticism or commentary purposes. Each e-portfolio would have to be carefully produced, with appropriate guidance and advice along the way.

### Misuse of e-portfolio systems by learners

Canada has extensive legal protection from many potential areas of misuse of Internet-based communication systems. Internet crimes are regulated by the *Criminal Code* of Canada for which enforcement responsibility normally rests with the police agency of local jurisdiction. Internet crimes – including distribution of child pornography, hate propaganda, pyramid schemes, and so on – are traditional crimes committed using an electronic medium and can be referred to the local police service for investigation in Canada.

### User accessibility, disabilities discrimination, and other social inclusion policies

Canada has extensive protection in the area of social inclusion of its challenged citizens. The federal government and each province and territory has human rights legislation that guarantees that each citizen may not suffer discrimination based on

<sup>28</sup> <<http://www.col.org/news/connections/html/0212.htm#COPY>>; C.O.L Connections and EdTech News, Dec. 2002.

grounds such as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. This list has been broadened by Canadian courts to “similar or analogous” grounds such as sexual orientation. Therefore, no learner or employee could be deprived of educational or work opportunities because of their challenge.

## 4. Conclusions

The responses of the 5 international e-portfolio experts to this survey suggest that those developing and providing e-portfolio systems in other countries face many of the same problems facing developers and providers in the UK. These problems may be somewhat different in nature and scope, and exacerbated or relieved by particular national laws or administrative practices, but intellectual property rights (whether classified as copyright or *droit d’auteur*), and data privacy/confidentiality issues are clearly to the forefront. It seems fair to say that developers and providers in the UK who hope to link to, or to provide services to, other institutions in the EU, or elsewhere will have to consider the implications of potential mismatches between conformity with UK law and conformity with other national laws.

In some respects the survey, while brief, also suggests that responses to legal issues arising from the use of e-portfolios in other countries, either by individual institutions, or umbrella organisations, remain relatively uncoordinated and unfocused, except where there is pressure from a national regulator to ensure compliance, as with the CNIL in France. This would accord to some degree with the anecdotal experiences of the Legal Study team when discussing legal issues with colleagues from outside the UK. In many cases, those implementing e-portfolio technologies are unaware of, or inadequately briefed on, the potential legal issues and risks; where they are aware of those issues and risks, they are sometimes loath to address those issues directly, because of concerns about the impact upon projects and delivery dates.

This suggests that UK e-portfolio developers and providers, in conjunction with JISC, can, if they are able to develop concrete policies and promote good practices with regard to identifying and addressing the legal issues in the UK, also play an important role in raising and addressing those issues at an international level.

## **Appendix 1 - Survey Letter**

**Recipient**

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5 June 2006

Re: Legal issues affecting e-portfolio developments

Dear...

I am a researcher undertaking a Study to explore the legal issues relating to electronic portfolio developments, funded by the UK's Joint Information Systems Committee (JISC). The Study has recently completed a short report titled 'Developing and Operating an ePortfolio System: Assessing the Legal Issues' that may be of interest to you. Please, find a copy of the report attached to my e-mail message.

As the report is based on findings regarding e-portfolio practice primarily in the UK, it may not reflect accurately the situation in your country. I have been given the task by JISC to undertake a survey of legal issues affecting e-portfolio developments in the U.S., Canada, Australia and three EU countries in order to gain a more complete picture of the situation. It is hoped that this survey will benefit the entire international e-portfolio community.

I am turning to you, a leading e-portfolio expert in country X, to ask for your assistance in this survey regarding your own country. I would be grateful if you could let me know of any legal issues or concerns relating to, or affecting, e-portfolio development work and/or e-portfolio use in X. Some legal issues may have arisen due to the specific nature of the legal system in your country. In addition, various stakeholders, such as educational institutions, professional associations, employers or private citizens may have voiced their own legal concerns.

If it helps, you could refer to the attached report, note which of the outlined legal issues apply in X, and add any legal issues and concerns relating to e-portfolios that you have come across in X but do not appear in the report.

I would very much appreciate if you had the chance to e-mail me your reply by 20 June 2006, as the deadline for the survey report is end of June. You would of course be sent a copy of the survey report when it is completed.

For more information on, including the publications of, the JISC Legal Study please see: [http://www.jisc.ac.uk/index.cfm?name=project\\_learner\\_records\\_legal\\_study](http://www.jisc.ac.uk/index.cfm?name=project_learner_records_legal_study)

I would like to take the opportunity to thank you in advance for your assistance, and hope to hear from you soon.

Kind regards,

Anna Home

## **Appendix 2 - Developing and Operating an ePortfolio System: Assessing the Legal Issues**

# Developing and Operating an ePortfolio System: Assessing the Legal Issues

Andrew Charlesworth & Anna Home, Centre for IT & Law, University of Bristol

## Introduction

Regardless of the legal system or systems within which an ePortfolio system is used, a similar set of legal issues is likely to need to be considered. These are:

- intellectual property rights in the ePortfolio system;
- intellectual property rights in the contents of the ePortfolio system;
- data protection, privacy and confidentiality rules relating to personal data;
- confidentiality rules relating to privately owned or generated data;
- liability arising from misuse of the system;
- liabilities arising from systems failure, data losses and security breaches;
- user accessibility, disabilities discrimination, and other social inclusion policies.

The legal issues which may affect the development and use of particular ePortfolio systems will vary widely depending upon a range of operational variables, including:

- the developmental process that produced the system;
- the nature of the data that will be stored in that system;
- the range of people who will have access to the data;
- the means by which learners may make the data in their ePortfolio available to others.

In any ePortfolio project these issues ought to be considered at an early stage in the planning process. This permits those running the system to identify potential legal risks, assess their implications, and decide what measures, if any, will be required to reduce or remove those risks. An effective review of legal issues will have adequate time and financial costs allocated to it, and will be included in the project timetable/milestones. The risk analysis process should be fully documented, providing a clear rationale for decisions made, for the benefit of future system administrators and staff. A successful ePortfolio system may be used for many years, it is thus essential to make provision for long term use and support. The process should also identify areas where there may be a need to seek further advice, including professional legal advice - seeking such advice proactively is likely to be more cost effective than seeking it retrospectively. Failure to carry out a timely review of legal risks may expose the project to legal liability, result in greater costs remedying problems at a later date, or result in learners not being able to use the ePortfolio system to its full potential.

It is also important to be aware of changes in the law that may impact upon the system. Both copyright and data protection law have undergone significant changes in recent years, and the EU has made social inclusion a key element of its Information Society programme. It is likely that further changes in national laws, driven by technological innovations, will occur in the short to medium term. Those running long term ePortfolio projects will need to have processes in place to ensure that relevant changes in the law are identified, and their implications assessed and addressed, as an ongoing part of operating the system. A periodic audit of legal risks, project documentation, and actual administration and learner practices can be a useful way both to evaluate the changing legal landscape and ensure appropriate legal compliance.

## Recommendations

- Plan early, plan effectively.
- Document your processes clearly
- Audit your practices periodically
- Don't be afraid to seek advice

## **Developing an ePortfolio System**

The process of developing an ePortfolio system may take a number of routes. An ePortfolio provider may:

- develop its own ePortfolio system 'in-house' - this may be created entirely by employees of the institution or institutions involved, or with the aid of outside contractors;
- purchase an 'off the shelf' ePortfolio system - i.e. a commercial system which is usually generic in nature, and for which no adaptation to specific types of end-users is offered.
- purchase a customisable ePortfolio system - i.e. a commercial system which is broadly generic, but which can be altered to suit specific types of end-users.
- purchase a bespoke ePortfolio system - i.e. a commercial system which is specifically designed to requirements of the institution or institutions involved
- use an open source ePortfolio system - i.e. a system which has been developed under an open source licence where institutions are free to modify and customise the source code of the system according to their needs.

Each has certain legal implications that will need to be considered. If a system is licensed from a proprietary supplier, ePortfolio providers will need to consider, for example, how to assess:

- the suitability of the software for the project, and its end-users - has the supplier provided adequate and reasonable information?
- the ePortfolio software's fitness for the purpose for which it has been purchased - does the software contain substantial faults that affect its usability?
- the acceptability of the terms of the licence of the ePortfolio software, in particular whether the supplier's warranties, indemnities, and limitation of liability are appropriate in the circumstances?
- provisions for circumstances where the supplier goes bankrupt, is taken over, or stops supporting the software, in particular whether the institution can have access to the source code under an escrow agreement for the purpose of error correction, and code improvements - do they have the rights to continue to maintain/develop the software?

If the ePortfolio system is designed in-house, or by a contractor on behalf of the institution, or by a consortium of which they are a part, ePortfolio providers will need to consider, for example, how to assess:

- the appropriate ownership of the intellectual property in the system. While copyright has been partially harmonised in the EU, there remain differences between Member State intellectual property regimes, and ePortfolio providers will need an understanding of the relevant law in order to ensure that they own the intellectual property in, or have a suitable licence to use, the system software that is created
- who has responsibility for developing, maintaining and updating the system, and who is liable, and for what, if the system does not work properly, or it infringes on someone else's intellectual property rights - this is particularly important in consortia.

If the ePortfolio system is an open source development, ePortfolio providers will have to consider, for example, how to assess:

- the implications of the open source licence terms and conditions, in particular whether these impact upon what the project wishes to do with the system.

### **Recommendations**

- Document your system requirements
- Check your licences and agreements
- Know your local intellectual property law

## **Data Protection, Privacy and Confidentiality**

All EU Member States have data protection laws based primarily upon the EU Data Protection Directive 1995. While similar in framework, these laws vary in content and national regulators tend to take different approaches to their enforcement. Data protection law in the EU aims to ensure that people who make decisions about how other people's personal data is processed have to abide by a set of rules. There are essential 3 key concepts underpinning the law, purpose, fairness and transparency.

- Purpose requires that data controllers may process personal data only where they have a clear purpose for doing so, and then only as necessitated by that purpose.
- Fairness requires that data controllers who have identified a particular purpose for processing of personal data must also consider whether to do so would be fair to the data subject. This determination may be guided by legislation, regulators, sectoral practice, or rules laid down by the courts.
- Transparency requires that data controllers to provide data subjects with a basic minimum amount of information about the collection, use, and distribution of their personal data, including the purpose of the processing, and the measures that the data controller has taken to ensure that the processing is fair.

It is clear that for some types of ePortfolio, an ePortfolio provider will only host the ePortfolio and not make decisions about the processing of personal data contained in it. In these circumstances the ePortfolio provider is probably not a data controller and thus data protection legislation will not apply to it. Where an ePortfolio provider does exercise some control over the data in the ePortfolio, it may be considered a data controller, and it will have to ensure that it complies with the appropriate national data protection rules. End-users of ePortfolio systems may also be data controllers in certain circumstances, for example where their ePortfolio contains personal data concerning third parties.

Ensuring compliance with data protection law should always be built into the ePortfolio planning/design process. ePortfolio providers should determine whether, under their national legislation, their ePortfolio system's functions are likely to lead to them, or their end users, being considered data controllers. If they are data controllers, they should ensure that proposed uses of personal data, as well as potential 3<sup>rd</sup> parties from whom personal data may be received or to whom data may be transferred from the system, should be identified and their respective data protection risks identified, and the provider's responses to those risks documented.

When a system is operational, ePortfolio providers should ensure that they can demonstrate continued compliance with the requirements of national legislation, including formalities such as notification. Data subjects, end users, institutional employees and 3<sup>rd</sup> parties permitted to access the personal data should all be regularly reminded of their rights and obligations as regards the system. All proposed future changes to the system, both technical and administrative, should be reviewed for their data protection implications prior to their implementation, and where necessary, advice on their impact should be sought from ePortfolio provider or institutional data protection officers, or from the national regulator.

Apart from data protection law, some EU member states may also have particular privacy or confidentiality laws that impact upon ePortfolio systems. Compliance with data protection law may not be sufficient to meet the requirements of those laws. Certain activities may have higher expectations of confidentiality in terms of the use of personal information, for example, ePortfolio providers using ePortfolios in support of health-related learning or work may find restrictions placed on the data that end users can legitimately incorporate into their ePortfolios, or that stricter security requirements are imposed upon their systems.

### **Recommendations**

- Assess your data protection risks
- Consider purpose, fairness, transparency
- Pay attention to sectoral privacy risks

## **Ownership and use of information in ePortfolios**

The ownership of information that is placed in an ePortfolio can sometimes be controversial. As noted above, the term 'ePortfolio' may cover a range of learner support systems, and the ownership questions raised will inevitably vary according to the nature and derivation of the information used, and how it is used. Some examples include:

- An ePortfolio relating to a course of study at school where all the information is created by a learner for their personal use and stored on their home computer - while copyright regimes across the EU vary, it is likely that all would agree that the user owns the information they have created.
- An ePortfolio relating to a course of study at University which incorporates information from University systems about the learner such as grades, examiner's comments and tutor assessments - here it is likely that some of the information is 'owned' by the University and some by the learner. However, the learner can exercise some rights over the University's retention and use of that data under data protection law. Some educational institutions make particular ownership claims to information created by students in the course of their studies - it is unclear how effective such claims are.
- An ePortfolio relating to a course of study at University created by a doctoral research student sponsored by a pharmaceutical company, containing information created by the student and tutorial assessments - here, the student, the University and the sponsor may all have rights in some of the information in the ePortfolio - the student as creator, the University as rightsholder to the work of its employees, and the pharmaceutical company by virtue of its sponsorship agreement with the student.
- An ePortfolio relating to a work experience placement created by a learner on a program designed to help the long-term unemployed - again, the learner and possibly the employer will have rights in the data, for example, if the learner has incorporated material into the ePortfolio which the employer considers to be part of their intellectual property - copyrighted material, trademarks, material received in confidence etc.

Thus learners, when they create digital/digitised works that they may then choose to place in an ePortfolio, are very likely creating works in which they have intellectual property rights. But other parties may also have rights in information relating to the learner and the placing of work, or the reporting of research, and particularly the ability to display that data to third parties, in an ePortfolio may thus be constrained by the dictates of third parties. In effect, it may be very difficult to separate out the commingled 'ownership' of the content of an ePortfolio system.

Misuse of some types of third party information may open an ePortfolio provider and/or learners to legal liability for breach of intellectual property rights or breaches of confidentiality. Even where legal action is unlikely, misuse may damage relations between the learner, or the ePortfolio provider, and third parties. As a result, it is important to understand the ownership issues in information stored in ePortfolios, and to be able to identify and address potentially problematic areas. ePortfolio providers need to assess the risks attaching to types of information that are likely to be contained in ePortfolios in their system, and to advise staff and learners on the proper use of information which third parties own, or in which they have an interest. Equally, it is advisable, in circumstances like sponsored education, work placements, and employment to ensure that relevant third parties are aware of the type of information that may be collected, and what it may be used for, so that they too can provide input into discussions about acceptable uses.

### ***Recommendations***

- Examine likely ownership conflicts
- Discuss policy with information owners
- Provide clear guidance to all parties

## **Misuse of ePortfolio Systems by Learners**

ePortfolio systems may permit learners to extract information from them for presentation to third parties, or permit third parties access to parts of the ePortfolio selected by the user. Some systems permit users to publish material from their ePortfolio onto webpages hosted by the ePortfolio provider. Such facilities create legal risks, in that learners may make available material that is inappropriate for such publication. As a result ePortfolio providers considering providing such a service will need to engage in risk analysis and cost/benefit calculations.

Allowing learners to publish ePortfolios on webpages through an institution may, depending upon the material made available, and the potential audience, leave the learner and potentially the ePortfolio provider open to liability for such content issues as defamation, breach of copyright, contempt of court, obscenity and indecency etc. In such circumstances, it is clear that an ePortfolio provider planning to operate such a system will need to think carefully about the guidance it provides to its learners, the rules (and sanctions) it adopts for inappropriate publication by learners, its administrative procedures for dealing with third party complaints about defamatory statements and breaches of intellectual property, and the administrative procedures for dealing with other agencies in the event of the publication of material in contempt, or which is deemed potentially obscene or indecent. These may involve significant financial and resource implications for the effective long-term operation of such a system.

### ***Recommendations***

- Conduct a risk assessment
- Provide clear guidance to learners
- Ensure adequate administrative support
- Consider the need for insurance

## **Systems Failure, Data Losses and Security Breaches**

It is clear that ePortfolio systems have the potential to play a highly important role in demonstrating a learner's ability to collect, organise, interpret and reflect on documents and sources of information: the student portfolio is quickly becoming recognised as an important means of documenting and evaluating achievements and improvements in student learning. However, as ePortfolios become more important, so the consequences of failure of ePortfolio systems become more acute. The failure of a free, open source, unsupported, unwarranted ePortfolio system is unlikely to result significant liability on the part of the ePortfolio provider; the same cannot be said for failures in areas such as the increasingly important use of ePortfolios in documenting proficiencies in applications for graduate school and for certain kinds of professional employment. As ePortfolio systems become more 'mission-critical' there will be an increasing expectation that they are permanently accessible and supported, effectively backed-up, and securely stored. Failure to meet such expectations will both damage the public acceptance of ePortfolios and potentially raise the issue of legal liability.

ePortfolio providers will need to consider carefully how they deal with such issues. Liability can be reduced by means of exemption and limitation of liability clauses in end-user agreements, but this has to be balanced against the reasonable expectations of end-users about the appropriate level of service provision. Laws such as data protection and sale of services legislation may also determine the standard of service that ePortfolio providers are expected to supply, and the preventive measures that they are expected to take, in order to ensure that data in an end-user ePortfolio is not lost, or misused.

### ***Recommendations***

- Conduct a risk assessment
- Take note of relevant legislation
- Decide the appropriate level of security
- Consider the need for insurance

## **User Accessibility, Disabilities Discrimination, and other Social Inclusion Policies**

It is important to remember that while ePortfolios potentially offer important advantages to learners, learners are not a homogenous group, and it is possible that certain groups may, initially at least, find some ePortfolio technologies to be socially exclusive as opposed to socially inclusive. Some potentially disadvantaged groups of learners are immediately obvious; disabled learners for whom technology often provides new opportunities, but also new interfaces to negotiate, may find the challenges considerable. Other groups potentially disadvantaged include:

- learners with poor literacy skills;
- learners with poor concentration or memory skills;
- learners with limited access to the necessary levels of technology
- learners forced to change between ePortfolio systems on a regular or irregular basis, such as Travellers and children of military personnel

Specific educationally related disability anti-discrimination laws, such as the UK's Special Educational Needs and Disability Act 2001 (SENDA) seem to be relatively new, and definitions of disability vary widely across the EU Member States. However, it is clear that Member States are increasingly moving to ensure that disabled learners are not unreasonably disadvantaged in their access to educational provision. Additionally, the EU has made social inclusion a key plank in its strategy for the wider European Information Society, and it is likely that this will, in the absence of action on the part of member States, result in EU legislation to bolster the position of those seen as marginalised by developments in information technology, including e-learning and ePortfolios.

As such, when developing an ePortfolio system, ePortfolio providers should consider those groups of learners who may be disadvantaged by the adoption of such a system, and ensure that wherever possible appropriate measures are taken to ensure that alternative solutions to reduce or remove those disadvantages are provided. It would be appropriate to document this process, as well as to provide, as fully as possible, the rationales for why particular measures were adopted for particular groups of learners. This will permit ePortfolio providers to demonstrate first, that they have taken appropriate account of the disadvantages that might be faced by those learners, and second, that measures adopted by them to address those disadvantages are proportionate and reasonable.

### **Recommendations**

- ePortfolios providers should actively provide for disadvantaged learners
- Consultation with disadvantaged learners and their representatives is advised
- Take note of relevant legislation
- Document your processes for ensuring learners are not, as far as possible, disadvantaged.

### **Conclusion**

Addressing the legal issues arising from ePortfolio development and use can take considerable time and effort. However, an early investment in those issues can save considerably more effort later on, by highlighting key issues and allowing ePortfolio providers to plan to avoid them or ameliorate their effects. Many matters can be addressed, at least in part, by ensuring that ePortfolio provider staff and learners are provided with adequate information and guidance. Maintaining adequate documentation of processes and decisions also helps to provide continuity in approach to legal issues over time. There will be occasions when recourse to professional legal advice may be necessary, and an effectively planned legal strategy will not just help to indicate when this is likely, but will also help in formulating the questions that will need to be asked.