

Other Types of IPR and their Impact on JISC Projects

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Context

Intellectual Property Rights (IPR) provide legal protection for the fruits of human imagination, skill, invention and endeavour and therefore, IPR issues are prevalent within the use, creation, repurposing, alteration, transaction and dissemination of content. This means that it is highly likely that JISC funded projects will involve IPR either as inputs or in relation to their outputs. Indeed the range of IPR that exist and the breadth of coverage of their protection, together with the variety and quantity of material generated and used by JISC funded projects, means that there is potential for a whole raft of rights to exist. It is therefore essential that in order for appropriate rights clearance and management strategies and for risk to be suitably assessed, these rights need to be properly identified and their properties understood. In response to this, the IPR Consultancy was invited to produce a short report examining the various types of IPR, their relationship to JISC funded projects and a brief analysis of the types of material likely to be protected by these rights. We were also asked to provide:

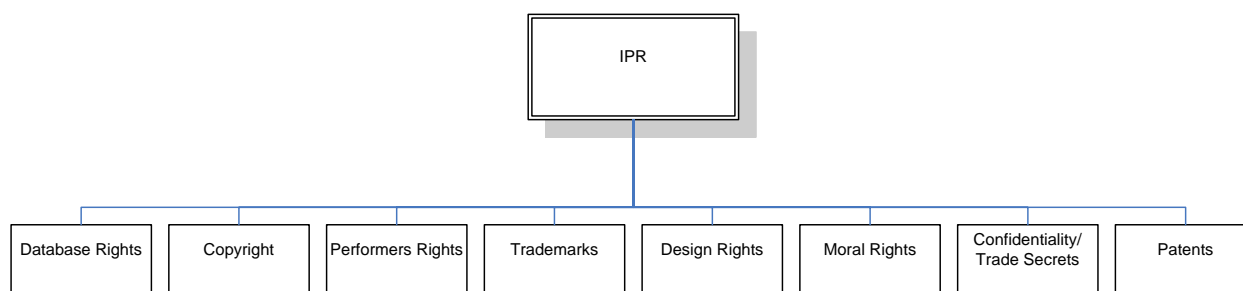
- A short analysis of the relationship between copyright, Data Protection, Freedom of Information and other legal issues and the impact upon JISC's work.
- An analysis of the international issues regarding IPR.

This report therefore provides a broad overview of these issues, as well as a series of recommendations for potential follow up work. This report is not a comprehensive over-view, but rather a snap shot of the type of issues and rights that may be encountered. Whilst it includes a short section explaining the international context, the main discussion is based on **UK** law.

1. GENERAL ISSUES

1.1. Overview of IPR

UK and European law give a variety of Intellectual Property Rights which regulate and protect the creation, use and exploitation of intellectual or creative activity. IPR are robustly protected by the law, which means that unauthorised use may result in civil, and sometimes even criminal remedies. Whilst some IPR are proprietary (i.e. can be asserted against all 3rd parties and transferred to others), such as the ownership of trademarks, patents and copyright, others are personal or relational (i.e. they bind only persons in a specific and normally direct relationship).



For example:

- The obligation of confidentiality applies essentially to recipients of confidential information who are in a direct relationship, and not indirect recipients acting in good faith. This would apply to data or information supplied explicitly on confidential terms; or if the method of supply implies confidentiality, e.g. if it is encrypted; or if access to commercially-sensitive material is obtained due to an employment relationship; or if data such as genetic information from samples are obtained without the permission of their owner.
- A performer's right to authorise the recording of a live performance and to control the distribution of illicit recordings is personal and non-transferable except on death. An example might include the ability of a freelance lecturer to control how their lecture is disseminated, as such dissemination requires their permission

Moral rights are personal to authors (see further below). They include, for example, the right of authors of scholarly publications to ensure that they are suitably credited.

The various kinds of rights are generally cumulative so that the same activity or product may be protected by more than one right and potentially all the rights will require clearance.

For example:

- Computer programs may be protected by copyright (as literary works) and may also in some circumstances be patentable, particularly in the US.
- Films or audio recordings of learning events - various rights may be owned by different persons: thus, if a film or audio recording is made of a learning event such as students performing a scene from a play, the right to the film or recording would belong to the person who made the arrangements for it (the producer), the play has separate protection as a dramatic work, and the performers must authorise the recording or filming of the performance.
- A database may have full copyright protection and/or may be protected under the specific database right. Individual pieces of data or content included within the database might each be protected by copyright and the software in which the database is built might be protected by patents. There may also be trademarks in the name of the database or its software.

However, the extent of copyright protection for some types of works is restricted. Thus, a design may be protected by copyright, e.g. as an artistic work; but, an exception introduced in Copyright Designs and Patent Act 1988 (CDPA 1988) Section 51(1) specifies that it is not an infringement of a work recording or embodying a design to make, or copy an article made to, the design, so that protection of designs is primarily via the specific design right.

Most IPR require no formalities, notably copyright is automatic, but some require registration, in particular patents. Designs need not be registered, but registered designs obtain specific and stronger protection. It is worth noting that the recent Gowers Review of IP¹, has recommended the establishment of a voluntary system for registration of copyright, to facilitate the clearance of rights.

1.2. The Scope of Rights and Exceptions

The extent of protection offered by IPR depends on both the scope of the right itself and of recognised exceptions. So, copyright protects against both literal and non-literal copying and so it

¹ http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

follows that a work which is significantly derivative of another may be regarded as a copy. However, if it could be shown that the work was created entirely independently despite substantial similarities, it would not be considered a copy. On the other hand, a granted patent gives protection against even unintentional infringement, so technical innovators have an obligation to search patent databases before manufacturing, selling or importing an invention.

IPR generally grant exclusive rights, so that unauthorised uses may be infringements regardless of whether economic damage can be shown. However, the protection they give is subject to a number of exceptions and limitations. These are often broadly interpreted to safeguard the public interest in dissemination and attempt to create a more balanced approach between affording creators of works and owners of rights protection against unauthorised use of their IPR, and allowing users certain limited uses of works which are deemed to be fair to rights holders. The applicability of these exceptions and limitations can be challenged by rights holders if they consider that the specific use is not fair.

1.3. Moral Rights of Authors of Copyright Works

Moral rights were introduced in the UK in the CDPA 1988). Moral rights only apply to works protected by copyright, and they are quite separate from the economic rights associated with copyright protected works. The Moral right protections given under UK law are much less extensive than in other countries, and they are sometimes regarded as alien to the common law, if they may restrict dissemination or exploitation of a work. In the UK they are as follows:

(a) The right of attribution, i.e. to be identified as the author or director of a work, which depends on the author having formally asserted it. Such an assertion must be done either (i) by a written instrument signed by the author (which would only bind anyone who has notice of it), or (ii) a statement asserting the right included in any assignment of the copyright (which binds any future owner). It does not apply to a computer program, works that appear in a periodical (it is not clear if that includes scholarly articles in journals), computer-generated work, the design of a typeface, or a work made for the purpose of reporting current events. In the case of works created by employees in the course of their employment, it does not apply to any acts done with the authority of the copyright owner, i.e. the employer or anyone to whom copyright has been transferred. It only applies to works in Crown or Parliamentary copyright if the author has previously been identified as such on published copies. There are a number of other exceptions, notably permitted use of a work in relation to examinations.

(b) The right to object to a false attribution, i.e. not to have a work falsely attributed to you as author or director. It also applies to a false attribution of an adaptation or copy of a work. This right lasts for only 20 years after the death of the person falsely attributed as author. It is infringed by various kinds of acts of issuing copies, exhibiting, performing or showing a work to the public, or dealing with it in the course of business, either knowing or having reason to believe the attribution is false.

(c) The right of integrity, i.e. to object to derogatory treatment. In the UK this is limited to a distortion or mutilation of a work, which the courts have considered to require prejudice to the honour or reputation of the author. UK courts are not as willing as those in other countries to accept the artist's view of what is a distortion, but apply an objective test based on how the public would perceive it. In the case of a work created by an employee in the course of employment, when copyright vests in the employer, it does not apply to acts done with the authority of the copyright owner, except that if the employee has been identified as the author, there must also be a clear and prominent indication that the author has not consented to the treatment. It does not apply to a computer program or computer-generated

work, or a work made for the purpose of reporting current events. There are also some other specific exceptions.

(d) There is also a right to privacy of photographs or films commissioned for private and domestic purposes, to prevent copies being issued to the public or the work being shown in public or communicated to the public, which is regarded as a moral right.

JISC Projects need to be aware of the importance of respecting the moral rights of third parties, above all to ensure that they suitably credit the author of a piece of content. It may also be necessary to obtain permission or a waiver from the author in editing or manipulating content created by a third party, if it might be regarded as a derogatory treatment.

1.4. Relationship of IPR to other Legal Rights and Obligations.

IPR are generally independent of other rights or obligations granted or imposed by law. Thus, an item obtained under the Freedom of Information Act is likely to be protected by copyright, so its re-use would also be governed by the relevant copyright rules. Guidance on the re-use of items made available or supplied under the Freedom of Information Act has been given by the Office for Public Sector Information². Works produced by employees of the Crown in the course of their duties are Crown Copyright, which is administered also by the Office for Public Sector Information. A number of categories of such works can be reproduced without formal licence, including government press notices, legislation, ministerial speeches, consultation documents, national curriculum and related material, documents featured on official websites (except where expressly indicated otherwise), headline statistics and unpublished public records³. Other material may also be freely used under a Core Licence obtainable by an online application. This does not apply to categories of information regarded as 'value-added', for which permission must be requested and payment may be required⁴.

Similarly, actions done to ensure compliance with copyright must comply with other legal obligations: e.g. a person creating and maintaining a database of rights-owners must comply with the Data Protection Act. This means that unless they have authorisation from the rights holder, they may have to refrain from further disseminating the rights holder's contact address, in accordance with the provisions of the Data Protection Act. So, for example consortium partners involved in JISC funded projects must ensure that they obtain consent from rights holders, before sharing the information amongst the various project partners. JISC funded projects need to be aware of their obligations under the Data Protection Act with regards to sharing and making available rights holders data. However, the Data Protection Act only applies to personal (i.e., individuals') data and therefore can be ignored if records are only kept of organisations.

The interaction of IPR and contract law is more complex. Generally, IPR may be waived or overridden by contract, and in UK law this includes the possibility of waiving moral rights. However, some rights, especially those which are personal or inalienable, may not be waived, e.g. the Artist's Resale Royalty Right, which is a rights afforded to artists whose works are sold on the secondary art market and above a certain threshold. Contracts may also be more restrictive than IPR, for example by prohibiting uses of IP-protected material which are otherwise legally permitted, e.g. by exceptions such as fair dealing. There may therefore be a breach of contract even if IPR on the face of it have been respected. It is therefore important that licences clarify these relationships, e.g. by specifying that the licence or contract does not constitute a waiver of statutory rights - else there is a

² www.hmso.gov.uk/copyright/guidance/gn_19.htm

³ <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/index.htm>

⁴ <http://www.opsi.gov.uk/click-use/value-added-licence-information/examples-of-value-added-material.htm>

possibility that contractual terms might restrict the ability of JISC funded projects to carry out acts which would otherwise be permitted

1.5 International Aspects.

National and European IP laws govern the acts of legal persons, although governments must ensure such laws comply with international treaties. The issue of what law applies to the various acts of production and use of intellectual output raises complex questions, particularly within the framework of the use of the Internet. In practical terms, greatly simplifying the legal complexities, it can be said that, in general, the applicable law will be that of the place where the relevant acts take place. Thus, if the activity consists of the creation of a collection of learning objects, the relevant acts would be:

(a) Production and making available of the collection

(b) Access to the collection by users. In the case of an international collaboration, therefore, in principle the IP laws of several countries may govern both production and use.

This complexity may be reduced by explicit provisions of a contractual nature. In particular, the owner of IPR may authorise their use either unilaterally or by agreement. Such an authorisation may be valid under the laws of other countries, and hence operate internationally. Thus, material may be made available under an open licence such as Creative Commons. This operates as a unilateral authorisation, which gives permission for the defined uses under the terms and conditions it specifies. The Creative Commons licence, or similar open licence may also impose reciprocal obligations (e.g. under the share-alike licence, to issue derivative creations under the same terms), because the user will normally be deemed to have agreed to the licence terms.

Different versions of Creative Commons licences have been developed to comply with the laws of many countries, and the author of a work will be required to select the appropriate version. However, it should be clearly understood that this does not restrict the permissions given. Any CC licence should in principle be effective globally. Provided the permission is validly given by the person who is the rights-owner under the law of the country where the work was created, it should have effect under the laws of other countries. The author should therefore normally choose the CC licence of the country where the work was created, or where the main work of creation was done. In the case of a collaborative work with authors in different countries, it may be appropriate to choose the version of the country with the strongest connection with the activity producing the work. If a work is produced under a contract, e.g. with a funding body or an employer, which specifies the law applicable to IPR generated by it, then the licence should be the version written under that law.

It is obviously important that such authorisation is granted by person who under the applicable law is the actual owner of the rights. In particular, there are significant differences among national laws as to when an employer may own IPR created by an employee. Thus, a user cannot rely on an authorisation given by an author or creator if under the relevant law the rights are owned by that person's employer. This is the case under UK legislation for work produced in the scope of the employment, although this may either be waived by custom and practice, or explicitly overridden by the employment contract (as in the case of some HEIs). There is also room for debate as to the applicable law for determining ownership, but the relevant law is probably that of the country of origin of the work, which for copyright works is the country of first publication. A licence needs as far as possible to be worded in such a way as to provide all necessary authorisations under the laws of all relevant countries and to be valid under all those laws. Many IPR concepts are defined by international treaties, so have similar meanings in different national laws, hence a licence may have broadly the same effect in most countries, although interpretations may vary. Where there are significant differences, e.g. in the scope of moral rights, it may be important to ensure that the

authorisations are as broad as may be necessary and possible under the laws of all relevant countries.

2. IPR OTHER THAN COPYRIGHT

2.1. Performers and Performances.

As already mentioned (section 1.1) performers have a personal right to authorise the recording of their live performances, unless the recording is made for private and domestic purposes. A performance includes not only dramatic, dance, mime and musical performances but also 'the reading or recitation of a literary work' (CDPA 180). Thus, a person giving a lecture, talk or presentation within an HEI and FEI environment must consent to the recording or filming of it, which includes podcasting and webcasting; and if the text or a substantial part of it is by a different author, the author must also consent. Participants in an interactive learning session, such as a seminar, could be said to be performing literary works, so that their consent may be required to recording the session.

Performers also have proprietary rights in their performances, provided these have taken place in the UK, the EU or EEA, or another country providing equivalent protection. Their rights are infringed if a recording made without their consent is issued or shown to the public in any manner. They also have a right to 'equitable remuneration' from the owner of the copyright in the recording if it is played or issued to the public.

Use of such recordings for the internal educational purposes of the institution or organisation does not constitute an infringement of the rights in the performance (CDPA 1988 Schedule 2). However, if such material is incorporated in learning packages which are distributed to the public, especially commercially, the performers' rights may be infringed unless they have consented and been equitably remunerated.

Thus, although rights in a recording or film of an activity such as a learning event will normally belong to the producer (organiser) of the recording, and the producer and principal director of a film, participants may also have rights if they are performers.

2.2 Databases.

The CDPA s.3A (in force since 1998, implementing EU law) defines a database as:

- 'a collection of independent works, data or other materials which –
- (a) are arranged in a systematic or methodical way, and
- (b) are individually accessible by electronic or other means.'

Since this covers all types of works, a multi-media work as a whole may be protected as a database, if the component parts can be individually accessible. However, it does not include a computer program used in making or operating databases.

Such a collection is treated as original and therefore given full copyright protection (in the UK as a literary work, even if it includes other types of works)

- 'if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation' (CDPA s.3A(2)).

It follows that, for example, a collection of learning objects would be unlikely to be given such protection if the items are contributed independently by various persons using software or other arrangements provided by an institution. On the other hand, a collection which is developed by an

individual or group who design its structure and/or select the contents, even if the software is provided by the institution, would be likely to receive full copyright protection. The collection must be made available in such a way that the components are individually accessible.

Copyright protects the database as such independently of its contents, the rights to which are not affected by their inclusion. As with any copyright work, what is protected is its reproduction in any material form, distribution to the public of copies, communication display or performance to the public, or making an adaptation, arrangement, altered version or translation. Reproduction covers copying the whole or a substantial part. Thus, reproduction of one or more of the components of a database may infringe rights in those components, but would only infringe copyright in the database itself if it entails reproduction of the whole or a substantial part of it as a collection. It should be noted that the terms on which the database is supplied may restrict what use may be made of its components, regardless of any other IPR which may apply to them. However, it is not an infringement of rights in the database for a lawful user to do anything necessary to access and use its contents, regardless of the terms of any agreement.

In addition, or in the alternative, there is also a special (or *sui generis*) Database Right. This applies where there has been 'substantial investment in obtaining, verifying or presenting of the contents of the database'. It applies separately and in addition to the full copyright protection which may exist if the database is sufficiently original by reason of selection or arrangement of the contents. The investment must be made in 'obtaining, verifying or presenting' the contents, and not in their creation.⁵ Investment includes financial, human or technical resources. The maker becomes the first owner, and is defined as the person who takes the initiative in obtaining, verifying or presenting the contents of the database and assumes the risk of investing in those activities. A database made by an employee in the course of an employment belongs to the employer, in the absence of an agreement to the contrary. The maker must be a national, habitual resident, or legal person formed under the law of, an EEA member state, or a state which provides equivalent protection.

This right is much shorter than full copyright: it extends for only 15 years from the end of the calendar year the database is completed, or made available if that is later. However, if there has been substantial change to its contents or their arrangement, which entails a substantial new investment, it would become a new database and qualify for a new term of 15 years. Thus a dynamic database may enjoy a 'rolling *sui generis* right', provided the changes to it entail substantial new investment.

This specific database right prohibits the unauthorised extraction or re-utilisation of the whole or a substantial part of its contents. Repeated and systematic extraction of insubstantial parts may amount to a substantial part. No other guidance has been given yet as to what amounts to a substantial part of a database.

JISC funded projects need to be aware of the protection that is offered to Databases, and ensure that any use that is made of third party databases is done either with permission from the rights holder, or within the parameters of what is legally permissible.

2.3 Design Right.

Broadly, a design is the plan or scheme for the appearance of an industrial article or a part of such an article. Design right protects the appearance and not the function of an article, which is the concern of patent law. The design may be recorded in a drawing, a photograph, or a written description, or it may be embodied in an actual article. 'Industrial' here means that the article is intended to fulfil a specific function, usually to be mass produced. An industrial design is therefore

⁵ *The British Horseracing Board Limited v William Hill Organisation Limited*, decision of the ECJ, Case C-203/02, November 9, 2004

different from a work of fine art such as a painting which may be enjoyed in itself. Semiconductor topographies have been given specific protection as unregistered designs (see the Design Right (Semiconductor) Regulations 1989).

There are a number of exceptions from design right, notably surface decoration, methods or principles of construction, and features enabling an article to fit or match with another (e.g. spare parts particularly for automobiles). The design must also be original rather than commonplace. Unregistered designs are protected for fifteen years from their creation or ten years from their first legitimate marketing, but may be subject to licences as of right in the last five years.

Different requirements must be met in order to register a design, some of which are additional. However, due to the amendments introduced to comply with the European Directive, the definition of registrable designs has in some respects been expanded, e.g. some spare parts may be registered if they are 'complex products', provided they are visible in use (e.g. hub caps, car doors). Registered design right subsists for five years from the date of application (which is deemed to be the date of registration if registration is granted), and may be extended for up to five periods of five years.

There may be a number of types of outputs which are generated by JISC funded projects, as well as designs by third parties which are used or incorporated into JISC funded projects. These rights need to be identified and measures employed to ensure that they are managed appropriately.

2.4 Patents

Patents are granted for new and useful inventions. To obtain a patent, the applicant must apply to a local patent-issuing authority (in the UK, the UK Intellectual Property Office) with a detailed description of the invention together with claims which describe the monopoly being requested. Patents go through a rigorous checking procedure, including checks for novelty (has the invention been described in the public domain prior to the earliest application date for the patent?), obviousness (does the invention involve an inventive step that would not be obvious to a notional expert in the field?) and to check that the invention is not one of a series of things that may never be patented (this includes software, but see 2.5 below). In addition, the invention must be capable of practical use, but in practice this latter requirement is rarely a problem for the applicant. Fees are payable at various stages of the patenting process, and once the patent has been obtained, renewal fees have to be paid to keep it in force.

The patent-issuing authority normally publishes two documents during the process; the first, 18 months after the earliest application date, is a copy of the patent application. The second, some time later, is of the final granted patent. The documents are normally similar, but not identical, as the claims and the text may have been changed during the process of patent examination. Many applications never reach granted status; in such cases, only the application gets published.

Once granted, the owner gets a monopoly right to prevent third parties from making, using, selling or importing the invention during the patent's lifetime. In most countries, including the UK, the maximum lifetime is 20 years from the earliest application date. After that, the patent expires and anyone can make, use, sell or import the invention without fear of being sued for infringement. In addition, the owner can, and often does, license rights under the patent to third parties for a fee. Patents are geographically limited, so to get protection in multiple countries, multiple patent applications have to be made. There are complex international agreements governing how this should be done; details of these are beyond the scope of this report.

Patents are in some respects stronger than copyright because whilst to prove copyright infringement, one must demonstrate that the third party actually copied the copyright work, to

demonstrate patent infringement one simply has to demonstrate that the infringer was making, using, etc. the invention, even if that invention had quite independently been developed by the infringer, who did not deliberately copy. There is therefore an obligation on an innovator to check existing patents before making, using, selling or importing an invention. This is much easier today as there are numerous patent databases, many of them free of charge, available for searching online. Although a patent is stronger, and because damages and costs in patent infringement cases can run to millions of pounds, the lifetime of patents is much shorter than that of copyright.

There are defences against an infringement action, such as the patent is invalid and should never have been granted in the first place, because, e.g., the invention was known before the application date or the patent owner did not disclose all he knew about the invention at the time the patent was applied for, or the making and using is for small-scale research purposes, or the making or using is with the permission of the patentee, or the invention was stolen from the person accused of infringement.

Few JISC projects are likely to involve the development of patentable inventions or the infringement of third party patents (although see below with respect to software patents).

2.5 Patents for software

As noted in 2.4 above, certain items can never be patented; these include surgical procedures, immoral inventions, mathematical theorems, discoveries from nature, etc. Importantly from the point of view of this discussion, computer programs “as such” cannot be patented. The “as such” is important. A piece of software cannot be patented, but if that software is incorporated into some industrial application (that term being interpreted very broadly), then it can be patented. So software controlling, say, a machine tool, may be patentable. In the USA, where different rules apply, the patent office has been very generous in granting patents for software. It has thereby allowed many patents through which failed the normal tests, e.g., regarding novelty. In the UK and Europe, a much harder line has been taken, both on the “as such” issue and regarding preventing non-novel software from being patented. Despite pressure from software companies, there is no sign of the UK or its EU partners softening their line on this.

Nonetheless, much software is now covered by patents, and anyone making, using or selling software should be aware that there are risks of infringement, especially if that making, using or selling takes place in the USA.

JISC projects may well encounter software patents in two regards. Firstly, consideration should be given to patenting (especially in the USA) very successful software, particularly if it is tied to some process; and secondly, there is a risk of infringing a third party’s patent in the making, using, licensing nor selling of software, or services with software embedded in it, if said software is the subject of a patent (again, especially in the USA). JISC is currently examining this issue and will be making recommendations to the community in due course.

2.6 Registered Trade Marks

Trade marks are symbols, shapes, etc., associated with particular goods and services and which are used in the course of business or trade. Whilst there is some protection for unregistered trade marks (often called trade names) under UK common law, the strongest protection for such marks is obtained by applying for and obtaining a Registered Trade Mark. As with patents, this involves making a formal application and paying fees at various stages. Unlike patents, it is necessary to demonstrate that the trade marks are well known to the public, or a section of the public, before they can be registered. They must be distinctive and not confusingly similar to any other existing trade

mark or trade name. Certain types of symbols, e.g., Red Cross, Olympics, and certain names, e.g., Royal, cannot be registered.

One can register trade marks for services, such as search services, as well as goods. Registered trade Marks have to be kept in use and renewal fees have to be paid for them to continue, but as long as these conditions are fulfilled, a Registered trade mark can last for ever. The owner can sue any third party who uses the mark "in the course of trade" and without permission. Whilst patents are limited by geography, Registered trade marks are limited by both geography and by class of goods/services. Thus to get extensive protection, the owner has to make separate applications in many countries, and for many classes of goods and services.

The issue of registered trade marks often crops up with regard to domain names, which are, of course, used world-wide. A domain name may well infringe a trade mark in one or more countries, and conflicts often arise between the users of the marks. There are arbitration procedures available for such conflicts, but frequently these cases go to Court. It is worth stressing, however, that one can only be sued if one is using the mark "in the course of trade", so if the domain name is not being used to compete for business with the owner of the trade mark, the chances of losing an infringement case are low.

Many JISC projects will encounter trade mark issues; for example, service names may well conflict with existing trade marks, or successful projects and services may well wish to protect the name of that project or service. Since trademark infringement can be inadvertent (i.e. without due knowledge of an existing trademark), advice should be sought from a reputable trade mark agent in both cases.

3. RECOMMENDATIONS

JISC projects will frequently entail the creation of collections of items of content which are likely to be protected by IPR. It is therefore important to ensure that all necessary rights have been obtained in respect of third party material for the uses envisaged of the project, including e.g. any waivers of moral rights. If the uses envisaged of these third party works are exempt from IPR protection (e.g. if they fall within an exception), it is nevertheless important to check the terms of any contracts under which such items are obtained, as pointed out in section 1.4 above.

Such collections of content are also likely to be protected in their own right as databases. As explained above (Section 2.2), they would have full copyright protection if there is sufficient originality in the selection or arrangement of the contents. This may not be the case, e.g. if items are obtained or submitted automatically into a standard database. The collection could nevertheless be protected under the specific database right if there has been substantial investment in obtaining, verifying or presenting of the contents. Although this is limited to 15 years, it is renewed every time there is a substantial change to the contents or their arrangement which entails a substantial new investment. Project need to be aware that database right can arise within collections of data that they create, as well as within of collections of data produced by third parties.

Items obtained from a database may be freely reused if they are not themselves IP-protected (e.g. raw data), and if they do not constitute a substantial part of the database. However, there are not yet any clear criteria for what constitutes a substantial part.

JISC projects seem unlikely to encounter infringements of industrial property, such as designs or patents, since they are unlikely to entail the production or importation for commercial purposes of infringing articles. It would, however, be helpful to identify any projects where this might take place. The exception to this is clearly software patents.

JISC projects may entail the creation of protectable designs. In such cases consideration should be given to (a) ownership of such rights, (b) whether applications for registration should be made, and (c) the terms on which the outputs of the project which include such rights should be made available to other users and ensuring that these conform to JISC's standard terms of funding.

JISC projects are most likely to involve the incorporation or use of works protected by copyright and/or related rights, such as performers' rights and rights in performances (as discussed above). Clearly, it is important to use great care to ensure that all necessary rights have been obtained, or in the cases where rights holders may be hard to find or are unknown (so called "orphan works") risks are evaluated appropriately and strategies employed to minimise risks. It is important to be borne in mind, as explained above, (a) that different rights may exist and be owned by different persons in respect of the same items (e.g. a recording of a performance of a work); and (b) uses may be restricted not only by IP protection but also by the terms of the contracts under which access to such works has been obtained.

4. CONCLUDING REMARKS

The range and complexity of IPR issues encountered by JISC funded projects are compounded by a constantly developing technology; the increased engagement with users and user generated content; other Web2.0 technologies; changes in the legislation and increased penalties and redress for infringement of rights.

In terms of ways forward, the JISC IPR Consultancy is continuing to assess the impact of IPR upon JISC funded projects and the wider implications for the HE and FE communities. The IPR Consultancy has responded to and is monitoring the implementation of the Gowers Review of IP, as well as recently represented at a Think Tank organized by JISC to discuss issues relating to software patents. The Consultancy will continue to maintain a watching brief on these and other developments relating to IPR and to ensure that JISC Programme Managers and JISC Projects understand the nature and issues associated with IPR. It will also roll out the IPR Policy and its implementation measures created for the Development Group, to across JISC so that there is a consistent approach to the handling of IPR issues.