

## SFC e-Learning Transformation Programme Meeting 11 May 2006

### Practical Guidance on IPR, Copyright and Legal Issues

#### Question/Answer Session

*When I took over as director of our project in January, nobody gave me information about the legal aspects affecting our project. Maybe more time needs to be spent on these issues at the outset, but there is a danger of putting people off with how complex and difficult the legal situation is.*

People rarely give enough thought about how to adequately document processes in project development work, for example, so that new project members can be quickly apprised of both the legal matters that need to be addressed in the project generally, and in specific relation to their role within it. But in general, projects are getting better at addressing legal issues at an early stage.

Legal issues have to be taken into account when programmes are being developed so that adequate information about possible risks can be given to projects at an early stage. Equally projects should be assessing the legal risks that might arise to provide information to funders that will enable resource planning to address both general programme-wide risks and specific project risks.

Conducting a legal risk assessment and producing a draft consortium agreement should be part of the bidding process. Funders need to make it clear to projects that these things are important. In the past it was not clear whose responsibility it was to inform projects about their legal responsibilities, and there has been a learning process for both funders and project teams. Things are getting better but there is still scope for improvement and increased clarity.

JISC Legal Information Services (<http://www.jisclegal.ac.uk>) attended the Programme Start-up meeting in April 2005 and raised many of these issues for consideration. The JISC project management documentation has information about risk assessment, including legal risks. But projects tend to look inwardly rather than outwardly when conducting their initial risk assessment. The legal aspects are sometimes complex and difficult, which is why consideration must be given to the time and resources that will be needed to investigate and handle them. They are often less complex to overcome if addressed at an earlier rather than later stage. Even with the long run-in period for the Transformation Programme, projects were not really able to articulate their potential legal risks at the outset. It is only once they are underway with development activities that they start to appreciate the legal issues and risks. Programme support addressing legal issues therefore needs to be an ongoing process as well.

*Our project is exploring different communication tools, and practitioners are using blogs and contributing to online communities of practice. Where can we find help in identifying any legal aspects affecting our work with online communities of practice?*

Blogs have legal implications, both in terms of what is recorded, and what is included from other people. Projects can draw upon existing institutional knowledge and processes for handling web pages and similar technologies, such as Usenet newsgroups. It might also be helpful to look at the terms and conditions of use for blogs in the private sector. JISC Legal may also be able to offer advice. If they get enough questions from the sector in a particular area, they may be able to produce a specific briefing or advice paper.

*Does JISC have a toolkit for producing a rights register for IPR management?*

JISC does not have a tool kit for producing a rights register at present. It is worth remembering that your rights register does not have to be a large dusty tome. It can be a structured A4 folder with plastic inserts containing letters, licence agreements etc, or an electronic database holding the same information. The key thing is that the more you know and document about the provenance of, and conditions placed upon the use of, the works that you are planning to use on your project, the easier your task will be when it comes to working out strategies for dissemination, exploitation, reuse, repurposing and so on.

*Are electronic signatures valid? The context for use is to make sure we are collecting agreements that are valid.*

There is a difficulty in that people do not know what an electronic signature actually is in terms of UK law. Depending upon the context, an 'electronic signature' can be as simple as an e-mail tag line. However, in the UK Electronic Communications Act 2000 (which applies in Scotland) the term 'electronic signature' is also used in a context where many people would use the term 'digital signature' implying the use of cryptographic techniques.<sup>1</sup> DTI Guidance on the ECA 2000 states that "the Act [does not] mandate the use of electronic signatures, or specify particular formats or methods. The legislation aims to be technology-neutral and covers all types of electronic signature, from those based on e-mail exchanges to those using public key cryptography or biometric techniques" The UK Electronic Signatures Regulations 2002 also (possibly unhelpfully) adds the concept of an "advanced electronic signature". Such advanced electronic signatures are uniquely linked to the signatory, capable of identifying the signatory, created using means that the signatory can maintain under his sole control, and linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

From an evidence point of view English law (and as far as I can tell Scots law) has always been fairly pragmatic. 'X his mark' and initials have been deemed to be legal signatures by the courts. Validity may depend on context and purpose. s.90 (3) and 92(1) of the CDPA 1988 state that an assignment or exclusive licence of copyright must be in writing signed by or on behalf of the assignor. Under current interpretations it seems that, "in writing" would appear to be satisfied by on screen display, and "signed by" could be satisfied by typing one's own name or initials and even clicking on a web site button. However, it also depends on how much legal risk you are prepared to accept. If you email someone a request to use their picture or some element of their work and they email their consent by return, you may decide that you are willing to accept the risk of relying on the consent to use their work contained in that email rather than requiring a paper document with a handwritten signature. The more controversial the material or its proposed use, or the more expensive the potential cost of disagreements, the more likely you may be to want to secure a paper document with a physical handwritten signature. It is worth remembering that for many online transactions today, often for quite expensive items, we readily just click that we accept the terms and conditions of the deal.<sup>2</sup>

*Are the laws in England and Scotland significantly different on these issues? I have responsibility for data protection and Freedom of Information in my college. We may need to think about what we have to disclose in the project under FOI law. There may be implications for the way we hold data for which we are not the primary source.*

JISC Legal are best placed to advise on this. Data protection law is a UK-wide regime overseen by the UK Information Commissioner. For freedom of information, there is an Act for England and Wales and a separate Act for Scotland. Broadly speaking, the UK Information Commissioner oversees FOI in England, Wales and Northern Ireland, the Scottish Information Commissioner oversees FOI in Scotland. The basic FOI model is similar for Scotland and England, but in Scotland there are less exemptions from disclosure, and for some exemptions, the Scottish Act is stricter than the UK Act in requiring that Public Authorities demonstrate that disclosure of particular information would, or would be likely to, cause 'substantial prejudice' as opposed to the UK standard of 'prejudice'. Scottish public authorities may thus find themselves

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<sup>1</sup> See the Scottish Middleware project Resource on Digital Signatures at <http://www.gla.ac.uk/projects/scotmid/publications/digisig.shtml>

<sup>2</sup> See the Law Commission's discussion of the terms 'in writing' and 'signatures' in its Report on Electronic Commerce. <http://www.lawcom.gov.uk/docs/e-commerce.pdf>

This concluded that what was determinative of the validity of a signature was its function rather than any particular form. Accordingly, it concluded that digital signatures, scanned manuscript signatures, typing one's own name or initials and even clicking on a web site button could constitute methods of satisfying a signature requirement, on the basis that the "signing" party, in so doing, intended to be bound.

required to reach a higher standard than authorities in England, Wales and Northern Ireland before availing themselves of an exemption.<sup>3</sup>

FE and HE institutions often hold material for which they are not the primary source, for example the University of Bristol Theatre collection contains items such as the personal correspondence/archives of actors, playwrights, designers etc. Here an institution may find itself receiving FOI requests which require it to consider whether it is in a position to disclose the information requested, either because it is not officially holding the information, or because the information is actually or potentially exempt; and the conditions, such as third party copyright statements that must be made known to the requestor in the event of disclosure. It is sensible in such circumstances to have clear institutional or project guidance as to the process that will apply in such circumstances.

*For existing resources that we want to incorporate in our materials, we have logged our access procedures and best endeavours to secure clearance to use. Where we have been unable to locate the source, is it a question of risk whether we use the material or not?*

There are a number of ways to deal with copyrighted works where you can't identify the author. Try the collecting licensing agencies to see if they can identify the copyright holder; put an advert or letter into a trade journal or a national newspaper, asking for the information. Keep a clear record of your attempts to find the copyright holder (diligence record). Any letters sent to potential rights holders should be sent by registered or recorded delivery, or by special delivery. If these efforts fail, you could still use the work, but it would be a good idea to flag it with a notice stating how you made best endeavours to clear copyright. If the copyright holder appears, and you are infringing their rights, the diligence record will provide evidence of your bona fide efforts to trace them; this is likely to reduce your liability if they sue. At this point you should formally request permission to use the material (and if possible it should be removed from any public accessibility until such permission is forthcoming).

You could also take the risk and use the material with a 'Notice and Take Down' statement. This means that if the owner sees the material and objects to its use they should get in touch and the material will be removed. The Internet Archive in the US uses this 'Notice and Take Down' approach for the webpages that it archives.

It is worth noting that taking the material down on notice may not shield you from being sued. Copyright means that the author has the exclusive right to make copies of their work. If you make a copy, you are breaching copyright. But the implications of the breach have to be gauged in terms of the damages caused. Technically you are breaching copyright if you use material that has not been cleared, but a 'Notice and Take Down' may reduce your potential liability in the event that someone sues. The court will take into account whether you knew or had reason to believe your use of the work was infringing, the flagrancy of the infringement, and any benefits you have accrued from it. If you take it down as soon as the breach is brought to your attention, apologise, and make offer to recompense for any losses caused, then the copyright owner is unlikely to see any advantage in going to court.

*What if the material has been lodged in JORUM?*

The JORUM procedure is that you have to warrant that you have suitable copyright clearance for the materials you deposit. If you have included infringing material and JORUM get sued, they can come back to you.

*We have found images that are appropriate for our content on Wikipedia, including historical pictures. Some instances of use state the copyright source; others say the images are in the public domain. Where do we stand if we take these images from Wikipedia and use them?*

A lot depends on how risk averse you are. The site may state that the material is in the public domain, or purport to identify those who they claim own the copyright in the works, but this does not mean that this is in fact the case. Are the images available from other sources? There are a lot of legitimate image archives where you can buy images for your own use. You should be

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<sup>3</sup> See Universities Scotland's FOI website at:  
<http://www.universities-scotland.ac.uk/Fol/foi%20site/FolNewsGuidance.htm>

hesitant about taking material off the Internet when you are in any doubt about the legal provenance.

In copyright terms, 'public domain' usually means that materials are no longer covered by copyright, normally because the term of copyright has expired. It can also be used to mean that material has been made freely available for others to use by the copyright holder – essentially dedicated to the public domain. However in the second circumstance, you need to be sure that there is a shared understanding of the implications and meaning of public domain between yourself and the person who owns the copyright. What some people mean by 'public domain' may in fact turn out to be a free licence with some strings attached, for example that the work can only be used for non-commercial purposes.

There are both IP enforcement firms,<sup>4</sup> and individuals,<sup>5</sup> who spend their time trawling the Internet for trademarks, logos and copyrighted materials being used illegally. Ten years ago there was a limited risk in pulling things off the Internet and using them, because of the difficulty in tracing and preventing infringing usage. However, advances in technology, and changes in the law mean that the risks of doing so are far greater than they used to be. You would be advised not to pull images off a website unless the site specialises in cleared images.

*I want to use a photograph of a branded product, where the context of use is the significance of the type of product (a fizzy drink) not the trademark.*

You own the copyright of any photo that you take (unless in the course of your employment). Copyright in a copyrighted work is not infringed by incidental inclusion in a photograph, nor is there infringement where photographs are taken of buildings, sculptures, and works of artistic craftsmanship permanently located in a public place. Trademark is only infringed if the photograph is used in relation to the relevant goods or services for which it is registered. Mere showing of a trademark such as the CocaCola bottle as an example in education material would not seem to breach trademark. However, some trademarks are also artistic logos and therefore also copyrighted. A company may also object to your use if it could be construed that you are suggesting an affiliation between the purpose you are using the photograph for and the brand, especially if it appears you are bringing the brand name into disrepute. To be safe, you could write to them and explain that you want to use their product for educational purposes, and perhaps mention that it will be used in a VLE where it will be seen by lots of brand conscious students. But then you also need to be aware of any institutional product placement policies that may mitigate against your use of a branded product.

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<sup>4</sup> See, for example, Digimarc, <http://www.digimarc.com/>;  
Envisional, <http://www.envisional.com/antipiracy.php>;  
Eversheds, [http://www.eversheds.com/online\\_serv/brand.asp](http://www.eversheds.com/online_serv/brand.asp);

<sup>5</sup> See NetCopyrightLaw Net Consulting Services' s website  
<http://netcopyrightlaw.com/default.asp>