

July 2006/20

**Good practice**

## **Guidance for senior managers**

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This report is for information and guidance

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This guidance will allow institutions to protect their own and their students' rights against third parties. It draws on case studies of national and overseas projects and includes sample contracts which institutions can adapt for their own use.

July 2006/20

# Intellectual property rights in e-learning programmes

## Alternative formats

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The information contained in this report is intended to be used as general background information and is not to be relied on as definitive or comprehensive guidance in any particular circumstances. Higher education institutions are urged to seek their own legal and professional advice on any employment law or intellectual property law issues relevant to their own circumstances before acting on any guidance contained in this report. To the extent permitted by law, neither HEFCE nor any contributors to this report shall be liable to any person for any claims, costs, proceedings, losses, expenses, fees or damages whatsoever arising directly or indirectly from any error or omission (whether negligent or otherwise) contained in this report.

# Intellectual property rights in e-learning programmes

<b>To</b>	Heads of publicly-funded higher education institutions in the UK
<b>Of interest to those responsible for</b>	Intellectual property rights, Employment contracts
<b>Reference</b>	HEFCE 2006/20
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## Executive summary

### Purpose

1. This is a good practice guide for higher education institutions on the management of intellectual property rights (IPR) in e-learning programmes.

### Key points

2. This guidance expands on HEFCE 2003/08 following further case studies carried out on intellectual property rights in e-learning programmes, particularly overseas projects. Intrallect Ltd was commissioned to manage the case studies, which can be accessed on the Intrallect web-site ([www.intrallect.com/HEFCE-IPR/index.htm](http://www.intrallect.com/HEFCE-IPR/index.htm)).

3. A higher education institution's (HEI's) IPR management strategy will depend on the business model it uses in its e-learning programme and its particular mission for the dissemination of knowledge. This guidance attempts to structure rights within such a framework. Following advice on IPR issues will allow institutions to protect their rights and those of their staff and students against third parties.

4. Every HEI needs to establish a clear, preferably plain English, IPR policy and disseminate it widely across the organisation, including IT guidelines and codes of practice for staff and students.

5. Every programme maker needs to follow a basic legal framework involving clear and straightforward contracts covering all its relevant relationships, from staff and end users to collaborators and overseas agents.

6. HEIs should own the IPR in the e-learning materials created by their staff, and contracts of employment should make this explicit. This also applies to freelance and, where agreed by them, to student creators.

7. Where HEIs collaborate, a consortium agreement is necessary and should be agreed before any work commences.

8. Institutions also need to be mindful that while creating IPR they need to manage it in terms of respecting the IPR of third parties whose material they may utilise. Rights clearance can put a significant burden on an HEI's resources, so a risk assessment should be carried out before adopting a specific rights policy.

9. Licensing agreements should be used to protect the IPR in e-learning material from abuse by end users and third-party suppliers such as local learning partners.

10. In an international context, an HEI should ensure that any contract specifies an agreed legal jurisdiction, preferably a UK one. In this way any dispute can at least be dealt with under familiar legislation.

11. The annexes include sample contracts and clauses to cover these legal relationships.

12. The detection and tackling of IPR infringement are a heavy burden on resources. We recommend the use of technological measures to protect IPR in UK and international programmes. Higher education institutions need to implement a risk register and use digital rights management to protect valuable IPR, and their reputations, from infringement.

13. This guide only touches on the area of commercial exploitation. There are few commercially successful examples of e-learning programmes, and those HEIs that have had some success are unlikely to offer to share the secrets of their success. It may be desirable for an external body to provide aid in negotiating commercial deals on behalf of individual HEIs.

14. Higher education institutions need to make IPR management central to the planning and implementation of any e-learning programme and staff training should be a priority in this regard. There is currently insufficient training for staff in handling IPR issues. There should be across the board training for all staff, as well as more specialised training for those working in rights clearance and those managing the creation of e-learning programmes.

15. Institutions should be as keen to educate their authors about IPR as they are to claim ownership over the work their authors have created.

16. There is also a need for effective IPR tracking software to support staff clearing rights, and the process should be made as automated as possible. A clear audit trail needs to be kept.

17. Since the production of e-learning materials is in its infancy it is appropriate that HEIs set up a reward system for staff involved in their production. This should act as an incentive to contribute to an activity which is not yet seen as an integral part of 'normal' duties.

18. If e-learning material is produced as a result of special funding from public monies, then free licences to the community in the UK for use of that material are normal practice.

19. For ease of reference, key guidance statements in this report are shown as boxed text.

#### **Action required**

20. No action is required from institutions; this report is for information.

# Introduction

## Background

21. Managing intellectual property rights (IPR) is one of the challenges facing academic managers today. E-learning has increased that challenge, and when e-learning programmes become international the complexity expands. This report addresses the issues of managing IPR in domestic and international e-learning programmes.

22. In 2003 a working group established by HEFCE and Universities UK produced a report to advise institutions on best practice in managing IPR in e-learning programmes (HEFCE 2003/08). In 2004 HEFCE contracted Intrallect Ltd to manage five case studies in international e-learning. These case studies, undertaken from August 2004 to March 2005, covered a broad spectrum of established international e-learning programmes, and can be accessed on the Intrallect web-site ([www.intrallect.com/HEFCE-IPR/index.htm](http://www.intrallect.com/HEFCE-IPR/index.htm)). Additional studies were commissioned to clarify issues raised by the case studies and to produce sample agreements between the different stakeholders in international e-learning. This good practice guide brings together all of this work, to help institutions plan their IPR management more effectively.

23. This report focuses on the creation of IPR in e-learning, how to protect the IPR once created, and how to sort out ownership issues. Nonetheless, it is crucial that those developing e-learning materials are aware of the risks involved in using third-party materials or systems, and take the necessary precautions to avoid an infringement action.

### JISC's role

24. The Joint Information Systems Committee (JISC) funds the JISC Legal Information Service, also known as JISC Legal. Further information can be found at [www.jisclegal.ac.uk](http://www.jisclegal.ac.uk). The focus of this advisory service is to offer high quality legal information to further and higher education institutions relating to the use of IT, to ensure that legal compliance and legal issues are not, and do not become, obstacles to the use of IT in this sector. However, JISC Legal cannot give professional legal advice. There may therefore be opportunities in the future to build on the services provided by JISC Legal in areas that it does not currently cover.

## Defining e-learning material and IPR

25. There is no set definition for e-learning material and therefore individual institutions should define it for themselves – as it applies to them – for use in contracts and any arbitration situation in a dispute over IPR.

26. The creation of e-learning materials invariably involves the creation of new IPR. Much of this will be copyright (in particular, copyright in any new computer programs or learning platform systems created, and in new text, images, moving images and sound recorded materials incorporated into the e-learning material), but there are other forms of IPR that may well be created.

27. Copyright management is an important component in the strategic management of intellectual property (IP) in an institution. It needs to be taken seriously – increasingly so given the changing nature of learning. In an institution with significant aspirations in e-learning, copyright management will need to be placed at the centre of the institution's governance.

28. The topic of patenting of computer-controlled processes is a controversial one, with the UK holding a harder line than the US (in that it is more difficult to obtain such patents in the UK than it is in the US). It is therefore possible that in some cases systems developed in the UK delivering e-learning material may be patentable in the US, or indeed, that if sold in the US, might infringe a pre-existing patent there.

29. In some circumstances, such as where e-learning materials include video footage of a lecturer teaching, or of (say) a theatrical or ballet performance for illustration purposes, performers' rights are involved.

30. For ease of reference, key guidance statements in this report are shown as boxed text.

## What can be protected

31. The basic IPR management strategy for any higher education institution (HEI) is to seek to protect what it perceives to be valuable.

32. An institution may use various legal frameworks to protect its IPR through employment contracts with its staff, collaboration agreements and end-user licences. It can also prevent theft and/or misuse of its IPR through technological protection and, as a last resort, through the courts.

33. In the management of IPR risk an HEI will need to be mindful of cost constraints and the burden on staff and resources that its policy may bring to bear. For example, few institutions can afford to employ staff to monitor potential IPR infringements on a global scale. Equally, it cannot be practical to pursue a student through the courts where IPR has been infringed on an individual basis with no loss of income or reputation to the HEI.

34. This document examines the ways HEIs can protect their IPR in a practical way, through clear, straightforward contracts, technological barriers, and staff awareness and training.

35. Anyone creating e-learning materials needs to be aware of both sides of the issue – that they are creating IPR materials, and that they are potentially infringing IPR by making or using materials or systems that are already subject to IPR owned by a third party.

36. The elements of an e-learning programme for which rights management is important are:

- initial conception and production of an outline
- content (literary, artistic, dramatic and musical works authored for the modules in the programme)
- amendments/updating of materials
- third-party materials
- software development (such as a virtual learning environment)
- development of ‘extra’ creative elements (such as templates and designs)
- investment in obtaining, verification and presentation of the contents of the e-learning programmes.

The last item is covered by database rights. Copyright applies to all the others, and moral rights (which are in many cases legally enforceable) may

apply to many of these elements. Other rights such as performers’ rights, design rights and registered trademarks may also be involved.

## Dissemination of knowledge

37. HEIs need to be able to pursue their core mission of creating and disseminating knowledge. Individual academics, other staff and students similarly need to be able, and encouraged, to use and develop their intellectual outputs throughout their careers. Staff also need to protect their reputations, enshrined in the moral rights of authors. And HEIs need to ensure that the learning programmes they devise maintain their intellectual integrity, even when they are customised or developed for overseas or proprietary markets.

38. It is important that IPR management should not inhibit the dissemination of knowledge. There is a risk that an over-prescriptive approach will prevent academics experimenting with novel methods of dissemination or collaboration. None of our recommendations are intended to interfere with the dissemination of knowledge.

39. Some institutions believe an open access policy should be adopted, similar to that currently used by the Massachusetts Institute of Technology (MIT) in the US. The movement for ‘open courseware’, led by institutions such as MIT, aims to make 2,000 courses (modules) openly accessible by 2008. It strongly argues that little value lies in the courseware and that most of it resides in the experience of undertaking a course and gaining the qualification.

40. On the other hand, others think that individuals should be able to use materials and should be able to retain moral rights of authorship and integrity. Sections 79 and 82 of the UK Copyright, Designs and Patents Act 1988 (Part 1, Chapter IV) can be interpreted to mean that if an institution as employer owns copyright in the material of which an individual is author, it also technically removes their moral right to be identified as the author of the work and removes their right to object to derogatory treatment of the work, if they were never so identified.



41. Funding conditions may also determine whether work is freely disseminated or designed for commercial exploitation. For example, the University of Bolton was funded for a particular project by the European Union (EU) under the condition that the outcomes be widely disseminated.<sup>1</sup> It therefore decided that the outcomes would all be made public. This in turn led to the withdrawal of one of the ‘commercial’ partners from the project since making the project freely available obviously undermined the commercial opportunities for exploitation.

42. The methods used to protect IPR can also be an issue to some institutions. For example, ‘gating’ is a ‘condition of use’ in the Glasgow Caledonian University project,<sup>2</sup> where broadcasters’ archive material is made available on condition that it is password protected. This has caused tensions in a consortium where the US partners are opposed to gating and make their material freely and openly available.

## Business models

43. The motivation for entering into an e-learning programme might include: revenue generation; quality enhancement; increasing overseas student numbers; reducing costs by sharing effort or reusing existing material; and expanding the continuous professional development market.

44. The purpose behind the venture will determine the business model to be used, and that should determine the strategy for managing intellectual property rights. Before embarking on e-learning programmes, the motivation and objectives should be defined and they should be used to steer decision-making on IP issues and to select a suitable business model. E-learning programme implementers will need to determine who will develop and provide the various layers of value (such as courseware, learning activities and degrees) and how the IP in each layer will be managed and protected. One option may be that no protection is offered for some courseware.

45. If an institution develops a programme alone, to attract more students, it should adopt a strategy to own all of the relevant IP through employment and sub-contractor contracts. The HEI then retains all of the IP and licenses it for use to appropriate partner organisations.

46. When several institutions of approximately equal standing collaborate, they each should agree to retain ownership of their own IP, but license it to enable their collaborators to use the IP extensively. This is best handled by means of a consortium agreement, agreed and entered into before work commences.

47. Differentiation between the two IP-handling strategies in paragraphs 45 and 46 is usually evident through termination clauses. In student-attracting ventures the HEI needs to be able to terminate its agreements with other stakeholders without penalties such as losing control over its IP. This contrasts with collaborative ventures, where it is necessary to allow any partner to withdraw while allowing the remaining partners to continue to use the IP.

48. Both examples in paragraphs 45 and 46 imply that the use of third-party IP needs to be monitored and managed as well.

49. Several funding bodies (such as the European Commission and the UK Research Councils) require all participants in any of their projects to have an equal opportunity to exploit the fruits of their funding. Others (such as JISC and Scottish Enterprise) require that the outcomes of the funding should be made available to the entire community supported by the funder.

50. These requirements can result in agreements between participants for joint ownership of IP.

51. All e-learning programmes, whether developed within a single jurisdiction purely for dissemination within that jurisdiction, or developed by a group of institutions within different jurisdictions for exploitation in multiple territories, share these common features in relation to their intellectual property strategy.

<sup>1</sup> International IPR in e-learning group: Case Study 5: University of Bolton: Microelectronics (page 4, paragraph 2.2).

<sup>2</sup> International IPR in e-learning group: Case Study 2: Glasgow Caledonian University: Spoken Word.

## Scope of this guidance

52. The intellectual property rights considered in this report are copyright, moral rights, database rights and performers' rights, and these apply to many of the layers in an e-learning programme.

53. Our fundamental assertion is measures taken by HEIs to protect copyright and related rights in other areas should now be taken in regard to e-learning materials, including software, systems and content.

54. This guidance offers advice on contractual issues for protecting copyright and clarifying IP ownership across the spectrum of relationships, from HEIs and their staff to HEIs working in an international context with partners across the globe.

55. It focuses on prevention of infringement rather than aiding HEIs to seek redress when an infringement is detected. Institutions are not generally looking to produce mass market products, and do not usually take a particularly vigorous approach to infringement given that:

- the permitted uses are explicit
- HEIs are not primarily commercial enterprises
- commercial sales support HEIs but are not a major source of funding
- the cost of most forms of enforcement would be disproportionate.

56. However, when an infringement has a derogatory effect on the reputation of the university some action obviously has to be taken. In tackling such cases, in the first instance it is practical to stop the infringement rather than to pursue damages.

57. This guide also offers advice on technical protection and staff training issues.

# Intellectual property rights: authorship and ownership

58. It is essential to identify **what** is being authored and **who** owns the result. In the academic sector questions over ownership of copyright are acute. In any e-learning programme, a number of stages are clearly identifiable, each of which has IP implications as to authorship and ownership:

- a. Initial conception of an e-learning programme and the production of an outline.
- b. Literary, artistic, dramatic and musical works authored for the modules in the programme.
- c. Amendments/updating of materials.
- d. Third-party materials.

Moral rights may be relevant to each of the above categories a-d.

- e. Development of the virtual learning environment (software program).
- f. Development of 'extra' creative elements within the software program used to deliver the modules.
- g. Investment in obtaining, verification and presentation of the contents of the distance learning programmes (database rights).

## HEI ownership

59. There are three issues to consider in terms of authorship and ownership:

- the basic rules for materials created in the course of employment while the member of staff who creates them is in employment
- what happens when they leave to take up employment elsewhere
- the fact that, while traditional teaching materials are typically created by a single academic, e-learning materials are increasingly created by a team.

60. The HEI should determine its own policy in terms of ownership of the e-learning materials created by staff.

61. Individuals are unable to enforce ownership and defend against litigation because of the expense and complexity involved.

62. The starting point for considering ownership of copyright for those employed within an academic institution in the UK is the Copyright, Designs and Patents Act (CDPA) 1988<sup>3</sup> (Part 1, section 11 [2]). This states that the author of a work is the first owner of any copyright in it, subject to the following provisions:

*'Where a literary, dramatic, musical or artistic work, or a film is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.'*

63. Lecture notes, as distinct from formal course/module handouts and learning materials, are generally regarded as the property of the lecturer, often as a matter of custom and practice.

64. A critical dimension to the distinction between e-learning materials and other scholarly research output is that a journal article (or other research output) is usually created by the will of an individual or group of individuals who wish to communicate their area of expertise, while e-learning materials, in contrast, are usually created at the prompting of, or in agreement with, the institution.

65. An important distinction has to be made between joint authorship and joint ownership. Common across many jurisdictions is that for joint authorship to exist then three conditions must be satisfied:

- each of the authors must have contributed to the making of the work although the contribution does not have to be in equal proportions
- the work must have been produced through a process of collaboration between the authors which can take place over long distances (such as via the internet)
- the respective contributions must not be distinct or separate from each other but must

<sup>3</sup> [www.hmso.gov.uk/acts/acts1988/Ukpga\\_19880048\\_en\\_1.htm](http://www.hmso.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm)

merge into an integrated whole – no author should be able to point to one bit and say ‘that is mine’.

66. In some jurisdictions, though not in the UK, mutual intent is another requirement for joint authorship.

67. Materials created by a team pose IPR problems over and above the already difficult issues regarding copyright ownership in materials created by an individual. Ownership issues become more acute when the materials have been developed jointly by a number of people in more than one HEI. So, it is vital that a consortium agreement is finalised before work starts.

68. Further, it may be that ownership will vest in one or more joint authors on the one hand, and an employing institution on the other. This may arise where works are authored across national borders, and the law of the state of one or more of the joint authors does not allow for ownership to be vested in the employer.

69. In the UK, and some other jurisdictions, joint owners have equal shares in ownership, in the absence of any other agreement, and require the permission of all owners for exploitation. However, one joint owner can bring an action against a copyright infringer independently of the other joint owners. Under some jurisdictions, such as the US, one joint owner can exploit a resource without permission from the other owners.

70. When e-learning materials are used outside the UK then the laws of those territories in which they are exploited will determine the extent of ‘free’ uses that may be made, for instance under fair dealing in the UK, and fair use in the US. Some jurisdictions are more permissive than others in terms of the use that may be made of protected works for the purposes of education. In the US Technology Education and Copyright Harmonization (TEACH) Act 2002, for example, those who teach in a classroom may display and perform any work in the classroom regardless of the medium. This has recently been expanded to include digital education albeit with a number of exceptions.

## Authors’ moral rights

71. Authors have moral rights of attribution and integrity. In the UK and some other jurisdictions they can waive this right but in other jurisdictions, for example France, this right cannot be waived.

72. We recommend that institutions assert ownership of copyright in e-learning materials created by their staff on the basis that they are employee-created works, thereby preventing the acquisition of some moral rights by authors that they would otherwise have.

73. Where an author of a work has been identified, the moral right of integrity permits him or her to object to derogatory treatment of that work, which may include modification.

## Database rights

74. Database rights arise as a result of a European directive (the 1996 Database Directive) and only apply within the European Economic Area (EEA). The directive defines a database as ‘a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means’.<sup>4</sup> This definition can include many forms of e-learning.

75. In the UK, the database right is owned by the maker of the database. The maker is ‘the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation...’.<sup>5</sup>

76. The HEI, as employer, should take the approach that it owns the database rights.

<sup>4</sup> 1996 EU Database Directive Article 1 (2)

<sup>5</sup> Copyright and Related Rights in Database Regulations 1997 (SI 1997/3032) Reg. 14 (1)

77. Database rights give the owner(s) the right to prevent the extraction and re-utilisation of the whole or a substantial part of the contents of the database. There can be joint database makers and owners of the database rights where relevant substantial investment in the collection of data is shared or where there is joint original creative effort in the database structure.

# Legal frameworks

## UK HEI senior management and staff

78. This section sets out practical methods for HEIs to cover IPR in e-learning materials created wholly or in part by their staff, students and freelancers. These methods involve:

- the creation of a clear, open and straightforward IPR policy by each HEI
- employment contract clauses which set out the HEI's terms in plain English as far as possible
- clear conditions of work, including whether the work is seen as part of normal duties or additional, how it will be rewarded and whether the staff member is responsible for clearing third-party rights
- each HEI to set up an arbitration procedure to fairly address any dispute.

### IPR policy statement

79. A clear IPR policy statement should be published, agreed and disseminated by each HEI to promote transparency and avoid possible litigation. The document should cover the following:

- a. The rationale for HEIs acquiring ownership of IP.
- b. Details of any revenue sharing arrangements in commercial exploitation that are open to staff.
- c. Clarification of ownership when an academic has developed materials and used these in teaching while working at one institution and subsequently left that institution.
- d. Sharing of material if a course is to be taught by another member of staff using the author's original materials.
- e. Encouraging staff to ensure that all contracts or licences which they sign, for publication of their own work, include provision for them and their institution to re-use work for a range of purposes including e-learning.

## Staff contracts

### HEI ownership

80. HEIs should be free to exploit (whether for financial gain or not) e-learning materials created by their own staff in any lawful manner that the HEI sees fit, including direct exploitation, licensing or assigning the IPR in the materials to third parties, or merging the e-learning materials with other materials created within that HEI or elsewhere (while taking into account authors' rights of paternity and integrity). The contract of employment should make this clear.

81. Where the materials fall into the category of 'personal' – as identified, for example, in Clause 16.4 of the post-1992 HEIs' contract of employment<sup>6</sup> – the IPR remains with the individual, although the individual must abide by the HEI's requirements with respect to placing materials on its intranet or the internet.

82. Where there is disagreement or uncertainty as to the status of the materials, the matter should be subject to the HEI's arbitration procedures.

83. As already noted, under UK law employees do not enjoy full moral rights to any materials created by them as part of their duties in the course of their employment. However, they do retain the legal right to object to their name being associated with something they did not create. All authors therefore have the right to require that their name be removed and a disclaimer placed on versions of their work of which they disapprove.

### Staff licensing

84. To avoid any suggestion of restraint of trade, HEIs should in their contracts of employment provide a royalty-free non-exclusive licence to any member of staff who created the e-learning materials (or, in the case of jointly developed e-learning materials, to all those staff involved). This licence shall be to exploit such materials for their own bona fide teaching or research purposes only (in other words, not for commercial exploitation) for as long as such members of staff remain employed by the HEI.

<sup>6</sup> [www.natfhe.org.uk/hied/nalecon2.html](http://www.natfhe.org.uk/hied/nalecon2.html)

## Credit

85. At present, there is no statutory right to be credited on e-learning materials created while in employment. However, we recommend that HEIs name key individuals on e-learning materials.

86. These might be significant contributors and/or high-profile lead academics. It will be necessary for HEIs to put in place compulsory arbitration to deal with disputes over naming and over sharing of rewards.

87. Even where the HEI claims copyright ownership, any member of staff who has made a significant contribution may wish to be credited as the creator, and, if so credited, should generally not be asked to waive rights under Chapter IV of Part I of the CDPA (but see paragraph 72 above).

88. However, it is for the HEI to make the decision whether to give credit or not. It would be in the career interest of those involved to be named, and the HEI should be sensitive to this.

89. Any member of staff who is named should have the right to request that if the e-learning materials are now in their reasonable opinion so out of date, or so changed that continued distribution damages their reputation, then their name should be removed. If the individual does have their name removed, then they should have no further entitlement to any share of the profits that had previously been agreed.

90. If authorship of any work is attributed to one of more individuals, it is of course important that it is attributed to the right ones, and indeed that all joint authors are credited except in any case where they all waive the moral right to object to false attribution. We recommend that an arbitration process be available to resolve any disputes on credit.

91. We recommend that the broad principles that apply to the naming of inventors on patent applications should be extended to credit on e-learning materials.

## Reversion of rights

92. HEIs should allow for the possibility of reversion of rights if, should the HEI choose not to exploit the materials commercially, the individual or team that developed the materials wishes to take on the exploitation of the materials.

93. (We note that it is difficult to define ‘commercial exploitation’, and recommend that institutions avoid such a formal definition but have appropriate arbitration procedures in place in case of disagreement.)

94. Negotiations should be entered into in good faith and should be based on the premise that the HEI should not unreasonably refuse the individual or the team the IPR if the HEI has no interest in exploiting the materials; however, we do not recommend specifying the time after which staff have a right to acquire IPR.

95. Each case should be treated on its own merits, with appropriate arbitration procedures in place in case of disagreement. In return for the acquisition of the IPR, the member of staff should always grant the HEI and its authorised users a royalty-free licence to use the materials for administrative, educational, teaching or research purposes.

96. Any agreement regarding reversion of rights should include a clause that forbids the individual to offer the material in any way that the HEI in its reasonable opinion deems to be competitive to its own activities. However, there is no reason, for example, why there should not be open access e-learning materials if the HEI deems it to be in its best interests.

97. The contract for all members of staff should state that: if, after an agreed period of time following the completion of the creation of the e-learning materials, the employing HEI has failed to exploit the materials and does not intend to do so in the foreseeable future, the HEI and the member(s) of staff should enter into good faith negotiations with a view to transferring the IPR in the materials to the staff while still licensing the HEI to copy materials for its bona fide purposes. (Note that exploitation takes many forms – see Annex A, Definitions – and could cover the use of



materials in teaching. The HEI should retain this right even if commercial exploitation rights revert to staff. Any reversion of rights to staff should be limited so as not to conflict with use by the institution.)

#### **Amendment of e-learning materials**

98. The HEI may wish to amend the materials to suit its own particular requirements or to update them. Ideally, it would co-operate with any staff named on the materials if the changes are significant. But if this is not feasible then it would be at liberty to make the changes anyway, provided that the amended material included indications that named staff were not responsible for the amendments.

99. In view of the potential impracticability of contacting everyone named, the contract of employment should make it clear that the HEI always has the right to make the final decision regarding amendments, and that it need not consult staff over minor amendments. This is a difficult and controversial area, and a balance has to be struck between the ability of the HEI to make minor necessary changes easily and speedily, and the need to ensure the interests of staff are respected.

100. It should also be noted that it is not an infringement of either the right of attribution or integrity where the author consents to a particular act, such as a work being treated in a particular manner that might otherwise be considered derogatory (CDPA Part 1, Chapter IV, s87[1]).

#### **What happens when staff move post?**

101. Should staff be allowed to take physical ownership of materials they created if they move to another post? The problems involved become acute if several members of staff were involved in the creation of the e-learning materials.

102. We recommend the Open University approach: staff are given certain rights to use extracts from course materials, and the contract of employment governs such rights, but each case is negotiated between the member of staff and the Open University on its merits. A reasonableness test applies. We also strongly recommend that the contract of employment make explicit the arbitration procedures that should be followed in the case of disagreements over this issue.

103. Whatever the negotiated settlement, one thing should always be explicit in the contract of employment: the ex-member of staff is not entitled to use any materials subsequently that have been significantly updated by their previous employer. Equally, the previous employer will not be permitted to exploit any e-learning materials that the person creates in their new employment.

104. The contract of employment should also state that if the member of staff leaves the employment of the HEI, procedures will be implemented for negotiation of the continuation of the licence. It should specify that such a licence would not be unreasonably withheld, and identify arbitration procedures that would be available.

#### **Performers' rights**

105. Contracts of employment with staff should make clear that they own the performers' rights in any video or other recording of their own lectures or presentations. Exploitation of such materials should only be undertaken by the HEI following negotiation of a licence from the member of staff. However, if lecturers are employed with the presentation of e-learning packages as part of their duties, then it would be good practice for the HEI to acquire the performing and all other necessary rights under the contract of employment.

#### **Translations**

106. A translation is an adaptation of a work, and thus would need consent of the owner of the copyright of the original work. The translation itself would result in a new copyright in the translated



material, but could not be exploited without the permission of the original owner. Where copyright has been assigned to the institution, then there should be no difficulty with translation. For example, the Middlesex University contract with authors not only assigns the copyright, but also permits translations into other languages.<sup>7</sup>

107. Edinburgh University has dealt with translations and has no special provision concerning these.<sup>8</sup> Therefore, the translating partners retain copyright in translated texts with the originating author of the English text.

108. Where works are to be translated for different markets, permission from the copyright owner is required for the translation in addition to permission from the translator to exploit the translated work.

109. Where translators are subject specialists, their expertise may be used to improve and modify the original text. This may contribute IPR to the process, for example where a translator's modifications are transferred back to the original text. Such translators should also be included in IPR agreements.

### Database rights

110. Ownership of database rights differs from copyright. Database rights are intended to protect investment. Thus, 'the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation' is to be regarded as the maker and the owner of the sui generis database rights (Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) Regulation 14[1]). Where a database is made by an employee in the course of employment, ownership rests with the employer. The protection only applies where the maker (or if made jointly one or more of the makers) was within the EEA.

111. Recent rulings by the European Court of Justice on database rights have, to an extent, clarified both the existence and the extent of database rights and thus will make it easier to apply to IPR strategies in e-learning programmes in the future.

112. However, where database rights belong to one organisation, and the copyright to another, exploitation of the whole package might be hampered in the event of disputes arising.

### Students

113. Students (undergraduate and/or postgraduate) involved in the creation of e-learning materials should be treated as far as is legally possible in the same way as staff, and should be offered the same training and protection that staff have, including contractual rights and revenue sharing.

114. The contract should, however, be voluntary. The student should not be obliged to sign it in order to undertake their studies.

115. The HEI should stress to students the benefits of signing such a contract: the fact that commercial exploitation will be undertaken by those more experienced in such things than the student, and that the student will get a fair share of any net income generated. We do not believe that a compulsory clause imposed on all students would be upheld by the courts.

### Freelancers

116. Freelance individuals or organisations may be involved in the development of e-learning materials. In all cases, they should be required to assign copyright to the HEI that commissions the work.

117. Suggested contractual terms for staff, students and freelancers are provided in Annex B.

<sup>7</sup> International IPR in e-learning group: Case Study 1: Middlesex University: Global Campus (page 13, section 5A).

<sup>8</sup> International IPR in e-learning group: Case Study 3: University of Edinburgh Veterinary School (page 6).

## UK HEIs and third-party rights holders

118. Whatever the business model used it is likely that third-party material will be included in some of the e-learning material, often in the form of extracts from other works. Since teaching students, in the UK or overseas, does not constitute an exception to copyright law, permission should be obtained to include such material, where the material reproduced is a substantial part of the work.

119. Several risks are associated with clearance of third-party rights. The process can be time-consuming, fees may be requested, or permission may be refused. Failure to obtain permission may result in action against the HEI for infringement of copyright. In order to manage such risks, good records management practice is essential.

120. Third-party rights holders have concerns about their resources being misused, and institutions are anxious about the embarrassment and damage that could be done by a court case over use of third-party materials.

121. Institutions/programmes need to carry out a risk assessment on their use of third-party materials and adopt a policy that matches the level of risk. This may be:

- not using third-party materials
- differentiating between heavyweight (for example, works which include performance rights) and lightweight copyright clearance, and using only third-party material with lightweight clearance
- using only low risk third-party materials and operating a ‘notice and take down’ policy rather than clearing copyright.

Once an HEI has assessed its risk policy, it can implement its third-party rights management. Whatever risk level it decides to opt for however, each HEI needs to have procedures and record keeping in place to administer permissions and licences.

## Avoiding use of third-party materials

122. Some HEIs actively discourage the use of third-party materials (such as Heriot-Watt and Middlesex Universities) citing the difficulties and expense of obtaining permission. The University of Bolton and Middlesex University strongly encourage authors to produce their own materials.

## Heavyweight vs lightweight

123. Some HEIs depend heavily on the use of third-party materials (such as Glasgow Caledonian University and Edinburgh University) and have procedures in place to acquire and keep details of licences and permissions. In these cases works are licensed for specific uses and no copyright transfers to the institution.

## Notice and take down

124. A ‘notice and take down’ policy should be sufficient to cover low-risk third-party rights material. In this instance, when an HEI is informed of an infringement it immediately acts to remove the material from circulation. This policy is only advisable for low risk/low value IPR issues where seeking permission is too time-consuming and a burdensome drain on resources.

## Third-party learning environments

125. Where learning environments and other software used for delivering learning programmes comes from a third party it is desirable that the institution should own it, although this may not be possible for commercial reasons and it may have to be used under licence.

126. Where developed in-house, the issue of ownership of the copyright in the computer program can be covered by the employment contract.

127. Similarly, where external ‘consultants’ are used to author material, the HEI should ensure that copyright is assigned to the institution via the contract for provision of services, for example:

*‘...you, by way of assignment of the present and future copyright, hereby assign with full title guarantee to MU the entire copyright and all other*

*rights of whatsoever nature in and to the e-learning package... throughout the world for the full period of copyright and all renewals and extensions thereof. MU shall have the exclusive right during such period to publish and to license for publication the e-learning package in whole or in part in all editions, formats and media in the English language and in any translations without limitation.*<sup>9</sup>

128. Annexes C and D provide two sample letters to request and give permission to use third-party material. To facilitate transnational exploitation it is advisable to obtain permission to exploit materials throughout the world.

## UK HEIs and external users

129. Most external or end users of material are likely to be students registered to take courses. Their relationship may be directly with a UK institution or may be with an intermediary such as a local learning partner or a local teacher using material from an international e-learning programme.

130. The main risk of breaching IPR is that through the legitimate access of students, IP might leak to other students or institutions. While copying of materials by students may be an acceptable part of the study process for an e-learning course, further dissemination may not.

131. Where the end user has access to the learning materials, a variety of mechanisms can be used to monitor and, in some circumstances, control use. We recommend that a combination of the following be used:

- an established copyright good practice as part of student regulations with IT guidelines and codes of practice for staff and students
- a copyright statement as part of the terms and conditions of use
- protection through licence agreements
- protection via technical measures.

132. The management of end-user access will depend on the business model employed for the e-learning programme by the institution. For example, the University of Bolton has a relaxed attitude to its courseware ‘leaking’ in this way and, as an effective marketing tool, encourages anyone to access its courseware.

133. However, in this situation great care must be taken to ensure that third-party material, for example software used under licence, is not taken and redistributed.

## Copyright statement

134. An example of a copyright statement is as follows:

*‘All rights of the producer and of the owner of the recorded work reserved. Unauthorised copying prohibited.’* (Edinburgh University)

## Licence agreements

135. End-user agreements are desirable, particularly where the project interacts directly with the end user. In the UK the permissions to end users granted for the use of third-party material (in particular broadcasters’ archives) stipulate that the material should be made available for educational use only, copyright cleared and password protected. Users are permitted, however, to download, annotate, amend and modify this content for educational purposes.

136. Glasgow Caledonian University’s user licence agreement is written in plain English. A sample clause:

*‘You can only use the material for educational purposes, so don’t go selling it on e-Bay. Beyond the fact that it is illegal, it is also not very nice. After all, we and many others worked hard to make this archive what it is. Sometimes, some material will be subject to extra restrictions and this will be indicated clearly. You must observe these extra restrictions. In particular BBC archive material cannot be used, added to or altered without the prior consent of the BBC unless that action is permitted by the BBC end user agreement.’*

137. It is important to include a clause warranting that the licensor will not knowingly infringe any third-party IPR. The use of ‘knowingly’ in this clause is crucial, as awareness is a required factor.

138. It is obviously important to ensure that the rights that an HEI licenses are owned by the HEI. The best

<sup>9</sup> International IPR in e-learning group: Case Study 1: Middlesex University: Global Campus (Contract clause 11, page 12).

way to do this is to obtain written affirmation from the author stating that the HEI owns the material.

139. With regard to foreign jurisdictions, it is difficult for individual HEIs to detect infringement. Given the burden on resources that checking for infringement would involve, together with the high cost of litigation and long timescales involved, we recommend that where courses are delivered via local learning partners, the licensing agreement with the partner covers infringement of IPR. It is also advisable that, if the local learning partner becomes aware of any infringement, it is obliged to inform the awarding body.

140. In the US Creative Commons<sup>10</sup> licences are often used. The philosophy behind Creative Commons is that it offers open, free access for non-profit educational use. Creative Commons licences allow rights holders to mix and match a range of terms and conditions. All Creative Commons licences are accompanied by easy to read symbols and a 'human readable licence' written in plain English.




#### Example of a Creative Commons human readable licence

Attribution-NonCommercial-ShareAlike 2.0  
United Kingdom

You are free:

- to copy, distribute, display, and perform the work
- to make derivative works

Under the following conditions:

-  Attribution. You must give the original author credit.
-  Non-Commercial. You may not use this work for commercial purposes.
-  Share Alike. If you alter, transform, or build upon this work, you may distribute the resulting work only under a licence identical to this one.

For any reuse or distribution, you must make clear to others the licence terms of this work.

Any of these conditions can be waived if you get permission from the copyright holder.

Your fair use and other rights are in no way affected by the above.

This is a human-readable summary of the Legal Code (the full licence).

141. We recommend the use of a Creative Commons type licence for end users as a first-line protection for areas of an e-learning package, but only where commercial considerations and third-party rights issues are not relevant. A Creative Commons licence is now available for law applicable in England and Wales, and is under development for Scotland (development has not yet begun for Northern Ireland).

#### Technical protection

142. Our later section, 'Technological protection', gives more in-depth advice on technical protection of IPR. In terms of avoiding breach of copyright by end users a mix of measures can be employed. For example, open access areas of the e-learning material may carry the copyright statement and/or a Creative Commons type licence. However, any parts of the package protected by digital rights management (DRM) cannot be associated with a Creative Commons licence.

143. There may be password protection for further access to course materials with more sophisticated computer barriers to protect commercially sensitive software or IPR.

144. See Annexes E and F for examples of a local learning partner agreement and Creative Commons licence.

#### Collaborations between HEIs

145. Collaborations between HEIs currently tend to fall into two categories:

- HEIs working together as part of a consortium to contribute towards producing the 'product' (which may be anything from a CD-ROM to a postgraduate degree course).
- HEIs working together to offer components in the 'value chain' (courseware produced by one group of institutions, tutorial support provided by another group, degree awards provided by different group).

<sup>10</sup> <http://creativecommons.org/>

146. It is vital that the formal written agreement of consortium members to the assignment of copyright and ownership of materials is obtained at the start of any joint project. The division of benefits and liabilities arising from this and other activities of the consortium need to be clearly defined.

147. We have provided a model for such an agreement at Annex G. The details will vary according to project goals and objectives, and the nature of existing arrangements between the partners.

148. In all cases, it is strongly recommended that the partners take specialist legal advice on the agreement. Whatever the precise wording, the following issues need to be covered in the agreement:

- the goals and objectives of the consortium
- how the consortium's funding will be allocated and accounted for
- what happens if a consortium partner leaves the consortium (or is asked to leave)
- who owns the copyright in the software, content of the materials produced, and the database rights.

149. The question of ownership between institutions where more than one is involved in the project should be dealt with in the consortium agreement, although sometimes reaching agreement can be problematic.

150. Where IPR rests within the institution in which it is generated, a system of licences for use can be developed, or permissions to use the IPR of the collaborating institution, both during the currency of the agreement and thereafter.

151. For example, the Edinburgh University consortium agreement<sup>11</sup> business model is governed by a 'collaboration and exploitation agreement' between the six UK universities with veterinary schools. The IPR provisions are summarised in the following extracts:

*'...all Background shall remain the property of the Party, or third party, in which it is vested at the date of delivery hereunder. Such delivery shall constitute a non-exclusive, royalty-free right to use the same for the CLIVE project. The Party delivering the same shall have received appropriate third-party permission for such use.'* (Case study page 3, article 4.1. 'Party' means one of the universities party to the agreement)

*'Any CLIVE products created or arising during the course of the CLIVE project shall belong to the Party responsible for creating the same...'* (Case study page 4, article 4.2)

*'...Edinburgh will be deemed to have an exclusive licence to all CLIVE products for the duration of this Agreement for the purposes of concluding, and entering into, sub-licences with third parties for the manufacture, sale and distribution thereof.'* (Case study page 4, article 5.3)

152. An example of joint ownership of IPR is between the University of Bolton and its partners:

*'The partners agree that each institution has joint ownership [of] the intellectual property rights associated with the course materials developed for the joint programme. It is also agreed that permission is granted in perpetuity, by each institution to the other, for use of all such course materials as are developed during the contract period. In all cases, the names of the two institutions and the names of the author or authors shall be retained on all such materials.'*<sup>12</sup>

153. Another approach to ensure that it is possible for each partner to exploit the materials over the

<sup>11</sup> International IPR in e-learning group: Case Study 3: University of Edinburgh Veterinary School (page 3-4. The CLIVE project is Computer-aided Learning In Veterinary Education).

<sup>12</sup> International IPR in e-learning group: Case Study 5: University of Bolton: Microelectronics (Part 1 page 3, contract memorandum for the AMI contract, that is the Advanced Microelectronics for Industrialists contract).



longer term is to leave the IP with the contributing institution, but to grant irrevocable licences in favour of the collaborating institutions:

*'(i) Each of the parties to this agreement acknowledges that nothing herein shall alter the ownership or control of any Intellectual Property.*

*Each institution hereby confirms that it will grant a non-exclusive, royalty-free non-transferable license to the other members of the consortium to use the intellectual property they own and contribute in connection with the Programme, for the duration of the programme and any successor thereto.'*<sup>13</sup>

154. External funding can determine the IP ownership between collaborating institutions. For instance, when Bolton obtained funding from the Engineering and Physical Sciences Research Council (EPSRC), the management committee made it a requirement that the IP rights arising from the development of the course materials be jointly owned. We examine the role of external organisations in more detail in the next section.

## **UK HEIs and external organisations**

### **Implications of external funding**

155. Many e-learning projects are funded by Government via organisations such as JISC, HEFCE, EPSRC and the EU and industrial trade organisations, and they may require that resources are made available (sometimes exclusively) to certain audiences.

156. For example, JISC may require that resources are open to the whole of the UK higher education and further education sector, and the EU may require that resources are made openly available. Similarly trade organisations may want information to be pooled.

157. However, some institutions may want to protect their IP and be resistant to this. Such funding conditions may be in conflict with the aims of the e-learning programme. Before entering any collaboration with an external organisation it is vital that the HEI assess the impact of such conditions on the programme.

158. Institutions may be prepared to assign copyright in 'foreground' materials, that is new content created under the contract, but will not wish to transfer ownership of 'background' materials, that is content previously created and owned by the institution. If copyright is assigned to the funding body, the institution should obtain a reverse licence permitting the institution to make use of the content in its own courses (and any commercial exploitation of those courses).

159. Funding conditions can affect the exploitation policy. For example, when Bolton was funded by the EU for a particular project under the condition that the outcomes should be widely disseminated, it decided that the outcomes would all be made publicly available so the other partners could link to them. This led to the withdrawal of one 'commercial' partner from the project.

### **Government trade legislation**

160. Governments can also affect e-learning projects through legislation as they may control exports and distribution within the countries. For example, some governments have anticompetitive and protectionist policies, and may only allow exploitation of materials by local, rather than foreign organisations. Also, US software licences can include the condition that the material is not accessed by students from certain countries, such as Iran, Libya and Serbia.

### **Private companies**

161. Private companies such as developers and publishers may also be involved in the production and distribution of e-learning materials. Their concerns will often be profit-based, so they may wish to guard or reuse the IP they produce during projects.

162. For example, external consultants involved in projects may wish to obtain more revenue or sell their work to competing HEIs. We recommend that HEIs get consultants to assign intellectual property to them, but we recognise that this may not always be possible.

<sup>13</sup> As footnote 12, page 4 CEESI collaborative agreement between 10 universities (CEESI, Continuing Education in Electronics System Integration)

## UK HEIs and international organisations

163. International e-learning programmes differ from e-learning programmes within the UK through the number and nature of relationships with other stakeholders, both in the UK and overseas. With each it must be clear whether IP existed before the relationship, if IP is to be assigned or licensed for use by other parties, under what conditions the IP may be used, how the relationship may be terminated and what rights remain after termination of the relationship.

164. An HEI offering degree courses internationally needs a high degree of control over what is offered in the courses and how they can be maintained. Risks are reduced by ensuring that the HEI owns all of the IP over which it needs to exert control. Additional risks arise when using local learning partners, as they must have the right to use IP but will not normally gain any other rights.

165. There may be several relationships: between an HEI and a local learning partner in another country, or between an HEI and intermediate organisation (agent), or between that agent and a local learning partner. In all of these cases the agreement will need to cover a common set of items: commencement and duration, intellectual property ownership and rights of use, warranties and liabilities, minimum standards, payments, termination, jurisdiction and dispute resolution. In addition, it may be desirable to include confidentiality and sub-licensing conditions. Annex E shows a sample local learning partner agreement. We recommend that the local learning partner agreement include the obligation on the part of the partner to inform the HEI if it becomes aware of any IP infringements.

166. However, we have to make it clear that international law is by no means fully developed or consistent and therefore institutions should ensure that IP protection goes beyond any contract and is backed up by technical measures.

167. We also recommend that each institution gain an understanding of digital rights management, both in technological terms and as a business system. Each HEI should also develop an IP risk register detailing specific issues relating to e-learning when foreign countries are involved, such as state regulations, trade issues, target markets, and how e-learning is perceived in these markets. Annex H shows an example of a risk register.

## Jurisdiction and choice of law

168. Where a number of institutions are involved across borders and a consortium agreement has been negotiated, a choice of jurisdiction and law clause is needed to clarify which courts have jurisdiction and which law will apply in the event of a dispute over the terms of the contract.

169. Where jurisdiction and choice of law clauses are inserted in consortium agreements, or in agreements with local learning partners, it is advisable to seek assertion of the jurisdiction of the English or Scottish courts (as appropriate) and English or Scottish law to be applicable to the substance of any dispute to avoid the additional expense of specialist international lawyers and achieve the simplicity of a universal procedure within the HEI.

170. If these clauses are not agreed, a range of laws may be applicable, and the rules are not fully settled. For an infringement of copyright, the law of the place in which infringement occurs will be applied to determine the extent of the infringement. For matters of jurisdiction, within the EU this is governed by the Brussels Regulation.<sup>14</sup> For matters beyond the EU, it will be the international private laws of the country in which jurisdiction is sought that will determine whether the courts have competence to hear a particular dispute.

<sup>14</sup> Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which came into force on 1 March 2002. The Regulation is applicable throughout the EU except for Denmark.

171. Countries that have signed the Berne Convention of 1971 award the same protection to foreign materials as they do to home-grown content.

172. Any nation that wishes to become a member of the World Trade Organisation (WTO) must ensure that its national laws uphold the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which expands on the protections afforded by the Berne and Paris (1883) Conventions (and their revisions).

### Authorship

173. Where there is collaboration across borders between authors, works of joint authorship may arise. Careful analysis will be required as to authorship and ownership of those materials by the exploiting institution to ensure that all relevant permissions have been obtained from the correct author and/or institution to ensure that any exploitation strategy can be successfully pursued.

174. Sensitivity will also be required in dealing with authors in jurisdictions in which those laws state that copyright may not be assigned, but merely licensed.

### Moral rights

175. In some countries (for instance France) it is not possible to waive or contract out of moral rights. Therefore, if these rights are infringed in that country, a right of action could arise. Although the risk of infringement seems small, once again sensitivity might be required in respect of those authors coming from jurisdictions with strong moral rights provisions, particularly where materials are to be updated.

176. Moral rights are acknowledged by the Berne Convention, with the US being the exception as the only major country that does not recognise such rights.

### Copyright

177. The intellectual property rules in any one country may be a strong driver in selecting the materials to be used within an e-learning programme. Where materials are considered to be 'in the public domain' in any one jurisdiction then exploitation of those materials within an e-learning programme within that jurisdiction is greatly simplified.

178. Where works protected by copyright are exploited in different territories, the laws of those territories in which they are exploited will determine the extent of 'free' uses that may be made, for instance under fair dealing in the UK, and fair use in the US.

179. In addition some jurisdictions are more permissive than others in terms of the use that may be made of protected works for the purposes of education; the TEACH Act in the US is one example. However, those rules would only apply where the work is exploited within the US, and would not apply to exploitation in other territories. Therefore, where materials used without permission in accordance with the laws in one country, are to be exploited in another, the laws of the country in which the work is to be exploited should be examined to ensure that exploitation without permission of the author would be permissible. The risk is that the owner of the materials may object to exploitation without permission in the less permissive country.

180. Beyond the US TEACH Act, the laws of countries differ in terms of the extent to which materials may be used for the purposes of fair dealing. Whereas use under these provisions does not require permission or payment, risk might be minimised by ensuring that each author/owner who contributes materials for an e-learning programme is aware of the use to which their works may be put.

181. Third parties may use works incorporated within e-learning programmes for the purposes of fair dealing within their territories. Such use would not need permission from the author/owner of the works, although any underlying licence with the author should clarify that the institution responsible



for delivering the e-learning programme would not be liable in the event that such a use was made of the work: an example might be the materials supplied by Glasgow Caledonian under licence from broadcasters' archives.

182. The possibilities for infringement of copyright in other jurisdictions where copyright belongs to third parties is of concern. However, rather than relying on the law for enforcement, technical means can be deployed to limit or terminate access.

183. Where the programme is commercial in nature and the rights belong to one institution or collaborating institutions, there is concern over infringement and accessible means of monitoring and enforcing infringements. However, here the fear seems to be that the materials might be used by a competitor – rather than isolated acts of infringement by individuals. Enforcement against an entity exploiting works for a commercial purpose is easier than pursuing individuals.

184. Where the works are made available over the internet and in a jurisdiction operating a 'notice and take down' policy, the internet service provider (ISP) can be requested to remove infringing materials. The problem of detection remains.

# Technological protection

185. On the use of technological protection measures, laws have been introduced in many countries outlawing circumvention. Violation can attract both civil and criminal sanctions. In the EU, the provisions are in the Information Society Directive, which has now been implemented into the national laws of most member states. In the US, the provisions are to be found in the Digital Millennium Copyright Act 1998. Although the laws are territorial and thus only effective within the territory in which they are enacted, authorities in the US in particular have not been hesitant in enforcing the provisions to be found in the Digital Millennium Copyright Act in relation to an act of circumvention that would appear to have occurred abroad, but where jurisdiction over the individual could be exercised as a result of personal entry into the US.<sup>15</sup>

186. Although the use of a technological protection measure might prevent access to a work, the right to demand access to a work for the purpose of exercising fair dealing or other exceptions to copyright is difficult and convoluted to apply in the UK.

187. Sorting out ownership and rights to exploit is only half the battle. Another issue is who is responsible for policing the web to ensure that copyright in e-learning materials is not being infringed. The HEI, together with any commercial partner, should be responsible for this, although individual authors will also be active in ensuring the fruits of their labour are not being abused. This has to be considered at the start of creating any e-learning programme.

188. Technological protection may be the most cost effective way of protecting IPR, compared to the expense of seeking legal recourse. Again, the level of sophistication should depend on the business model being employed in the e-learning programme. Where an institution is operating an open courseware policy, very little protection will be required.

189. Since technological protection can involve significant investment of resources, the HEI needs to focus on giving the most valuable elements the highest degree of protection. So different levels of protection will be employed for different elements of the programme, with some elements not requiring any protection at all.

190. The levels of technical protection also have to be balanced so that there is enough open access for marketing purposes and the student's learning experience is not hampered in any way.

191. The HEI (or its agent) must have confidence that the user is who they say they are. Authenticating the user's identity and right of access is the first step.

192. The HEI also needs to be confident that information travelling via the web is not intercepted or copied en route. An encrypted virtual private network connection gives a commercial level of security in this respect.

193. Digital rights management systems should be used to protect copyright and should be considered in the adoption or purchase of any repository software. A DRM system is any hardware or software that prevents access to digital materials to anyone other than authorised users; it includes authentication systems such as Athens as well as systems for accepting credit card payments for access to materials. Other examples of technological protections are machine2machine, exposure of rights metadata, watermarking, encryption, and specialist digital rights expression languages.

194. Although Athens offers UK protection in terms of authentication, there is no international option at the moment. The Shibboleth<sup>16</sup> system is in development and may offer such a solution in the next couple of years.

195. Creative Commons has developed an application, ccTAG, which allows content creators to tag MP3s (motion picture experts group, audio layer 3) easily with a machine readable licence. This substantially reduces the chances of accidental or deliberate mislabelling and distribution of files.

<sup>15</sup> USA v Elcom Ltd and Sklyarov – see [www.eff.org/IP/DMCA/US\\_v\\_Elcomsoft/#filesSklyarov](http://www.eff.org/IP/DMCA/US_v_Elcomsoft/#filesSklyarov)

<sup>16</sup> Shibboleth is an authentication system being developed by an initiative between Internet2, companies such as IBM and Sun, and 'middleware architects' from US universities. It is currently in alpha testing.

196. 'Gating' is a basic protection measure – providing a gateway which requires a username and password. For most academic purposes this usually provides sufficient security. It also requires users to identify themselves and allows their activities to be tracked.

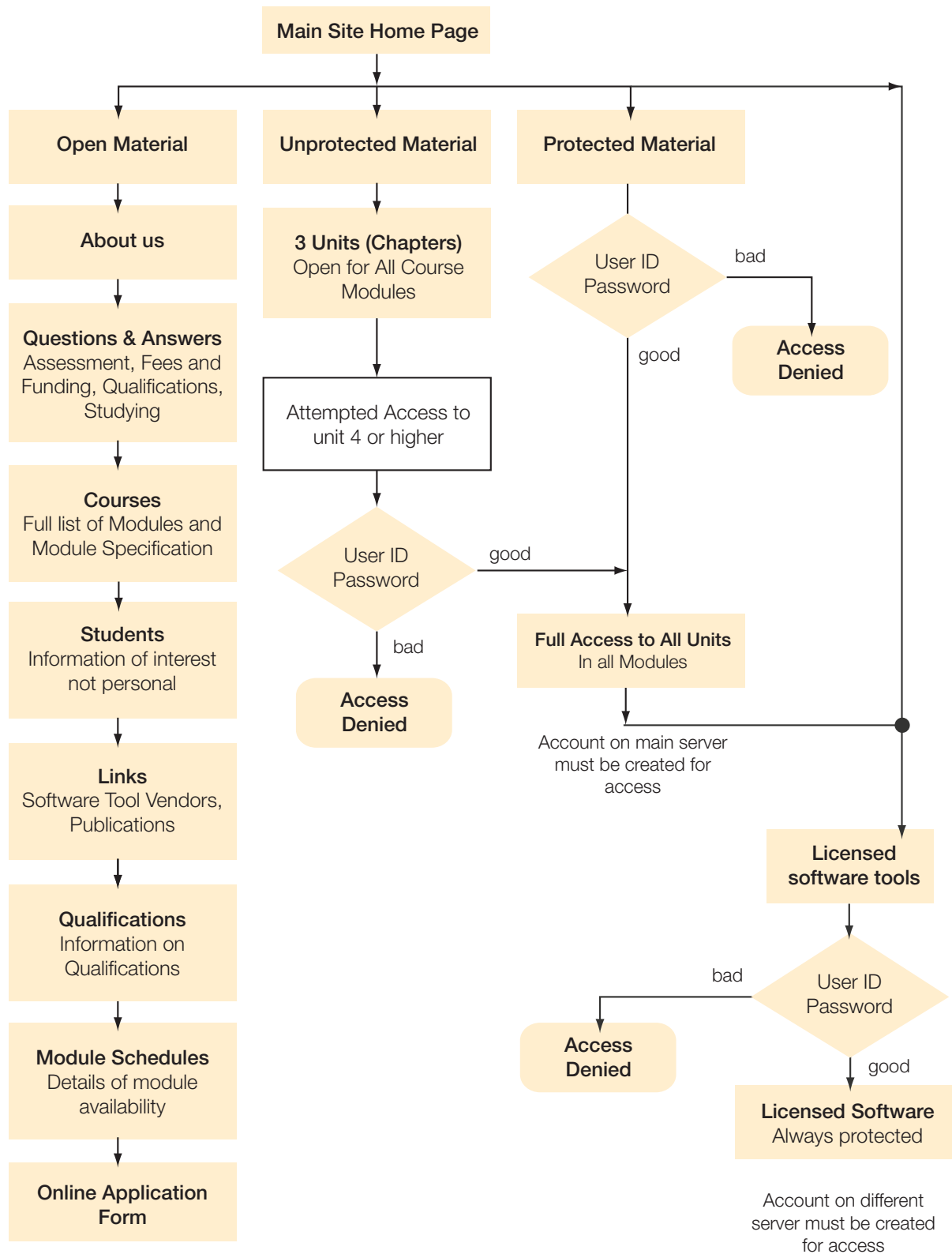
197. A slightly higher level of protection can be introduced for high value components of a course through a 'thin client' approach. In a thin client/server arrangement most of the application processing is done in the server (rather than the workstation). For example, a thin client may supply only the graphical interface. The University of Bolton offers a course which provides student access to high-value commercial software systems. All the high-value material is kept on a server which offers a gateway capable of controlling and logging all actions to a fine level of detail.

198. Additional levels of technological protection can be provided when high-value, high-risk third-party material, such as an expensive software system, is made available. This can be managed by providing access only through an institution's own servers rather than allowing users to download material from external servers.

199. As mentioned in the earlier end-user section, paragraph 131, a clear statement of copyright ownership, and an explanation of what may or may not be done with the material, should appear on every piece of e-learning material.

200. In the UK, it is now an offence to bypass or deactivate either DRM, or a statement of copyright ownership, with the intention to infringe or conceal infringement (Copyright and Related Rights Regulations 2003). UK law reflects the EU directive and similar laws have also come into force in the US. Such recent legislation may provide some deterrent to those aiming to infringe copyright in such a cynical way.

## Example of a practical approach to protecting IP



Source: International IPR in e-learning group: Case Study 5b: University of Bolton: Intellectual Property Protection (section 4.1, page 9).

Note that although many different servers are used, the user authentication and serving of application licences is centralised.

# Commercial exploitation

201. Larger enterprises, such as the Middlesex Global Campus and Heriot-Watt's Interactive University are quite strongly influenced by increasing income for the university. They therefore pay a lot of attention to minimising costs while producing and supporting high quality courses as efficiently as possible.

202. Not everyone is motivated by commercial interests. While the Glasgow Caledonian project recognises the eventual need to cover its costs, its American partners are resolutely opposed to charging and are ideologically uncomfortable with moves to make projects commercially self-sufficient.

## HEI viewpoint

203. From our case studies we note the importance of clarity in the wording of contracts to avoid disputes between HEIs and more commercially oriented organisations. The involvement of commercial partners in the exploitation of any e-learning materials has obvious implications for the business model.

204. There are few successful examples to which we can refer in terms of offering a guide to best practice. Organisations which produce commercially successful e-learning programmes would be unlikely to want to share their expertise with the sector in general.

205. E-learning programmes targeted internationally have more potential pitfalls given the larger number of variables involved such as unfamiliar legislation and lesser knowledge of market conditions. We have identified certain barriers to success which need to be addressed by any HEI with commercial ambitions for its e-learning programmes:

- socio-cultural factors inhibiting take-up of e-learning (e-learning degrees are not seen to be as credible as conventional degrees – a problem faced by the UK Open University in its early days)
- regulatory barriers to pure e-learning or even to blended e-learning
- price sensitivity
- competition from both local and overseas suppliers

- competition from blended or e-learning suppliers from other English-speaking countries (especially Australia, Canada and the US)
- competition from blended or e-learning suppliers from the few countries with e-universities operating in other languages (primarily Spanish)
- in a few countries (Malaysia, Finland, the Netherlands, Germany, Korea) competition from indigenous e-universities.

206. Most universities that are interested in delivering distance learning overseas from the UK end up targeting the same few countries, thereby increasing the competition.

207. Again in international programmes the involvement of an overseas partner is laden with risk:

- the best partners often prove too demanding financially
- there may be a lack of overseas partner support due to the wholly online nature of initial courses
- key overseas influencers (local government, universities, the press) may not support the delivery model (an issue for some projects in China)
- there is exposure to exchange rate fluctuations
- the overseas agent may default or pay slowly
- there may be a lack of control over overseas operations (agents and employees)
- there will be overseas taxation: withholding and income taxes
- overseas law may be breached (especially within marketing).

## Staff and authors

208. If a third party is involved in commercial exploitation of materials, it should deal directly with the HEI as the owner of the IPR rather than individual members of HEI staff. HEI staff need to understand that because of the contract of employment, they need to think carefully about any licence or assignment deals with third parties.

209. It is particularly important that academic authors think carefully about e-learning possibilities before assigning to publishers, or exclusively licensing to them, rights in textbooks, journal articles and the like where it is anticipated that these might be converted into e-learning materials.

210. This requires a mixture of education and persuasion.

211. Providing advice to HEIs on how to exploit their e-learning materials commercially is outside the remit of this guidance. However, we acknowledge that not all HEIs have suitable experience in negotiating deals with third parties, and that it may be desirable for an external body to provide guidance or act on behalf of individual HEIs in the future.

# Staff education and training in IPR

## Staff rewards and credits

212. Although in a legal sense the development of e-learning materials may be seen as part of 'normal' duties in terms of the employment contract, since these activities are in their infancy in most institutions we recommend that HEIs develop schemes for providing special rewards for staff creating e-learning materials. These might run along the lines of existing schemes for, for example, patented inventions. A rewards system would help promote the creation and generation of e-learning materials.

213. It is up to the HEI to decide the appropriate levels and the mechanism for such payments, which might form part of the regular salary review system of the HEI. There should also be distinctions made between those staff creating IP and those who, although contributing to the creation of the e-learning materials, are clearly doing so as part of their everyday working role, for example providing technical support or updating web-site content; in the latter case no financial reward need be offered.

214. We recommend a flexible rewards system. While for most purposes a standard contract outlining the rewards is appropriate, if significant profits are expected there should be leeway to negotiate different terms. In general, if an HEI plans to exploit materials commercially, it should follow its own particular practice for the sharing of net income (that is, after deduction of all costs), and this should be made explicit in the contract of employment.

215. It should be up to the employing HEI whether or not it credits those who make a significant contribution in the course of their employment to the e-learning materials. If it chooses to do so, it should credit individuals in a fair and equitable manner, and should provide for arbitration in the case of dispute.

## Staff training

216. It is clear that at present there is insufficient staff training on IPR issues. We recommend that all staff, not just new staff on induction courses, receive training on the importance of protecting their own IPR, the importance of IPR to their HEI, and respecting third parties' IPR.

217. This is not just a case of educating staff about IPR in general, but also about how to deal with approaches from publishers and similar third parties. In particular, staff may sign over copyright with little awareness of the implications for the future use of materials by the institution.

218. Institutions must be as keen to educate their authors about IPR as they are to claim ownership over the work their authors have created.

219. Staff with responsibility for IPR issues need to be trained to a sufficient level of expertise to be able to advise authors on the use of third-party materials, which will help reduce misunderstandings. Programme managers must have a clear, practical understanding of the legal principles of intellectual property law. Agreements must have certainty and clarity so that disputes and legal issues are avoided, going forward. The specialist involved in the negotiation of agreements must communicate this to the programme managers effectively.

220. Staff responsible for rights clearance need to know what to do when infringements arise. Each HEI should have straightforward policies and procedures to tackle infringement (albeit detection is more challenging), whether it is the HEI itself that is doing the infringing or whether its own IPR have been infringed.

221. There is also a need for effective IPR tracking to support staff with responsibilities for rights clearance. Rights clearance needs to be as streamlined and automated as possible to reduce the burden on staff and costs. A clear audit trail also needs to be kept of those who create e-learning materials and their transfer of ownership to the HEI.





# Annex A

## Definitions

The following definitions apply throughout the report.

**‘Arbitration’** is a process for negotiation to settle any disputes and which allows for differences to be reconciled. This is not necessarily a formal process through the courts. A robust and transparent internal process that is seen to be fair to all interests is the ideal; this means that it does not have to be an expensive or elaborate system.

**‘Assignment’** is, in this context, the transfer of IPR in action by one person (the assignor) to another (the assignee). Having assigned the IPR, the assignor has no further legal title in the IPR.

**‘Commercial exploitation’** is exploitation for financial reward, or an equivalent consideration. We have noted elsewhere that there is considerable ambiguity in this term and that it is not possible to give a precise definition; for example, is material placed on a free-of-charge university web-site for ‘commercial exploitation’ as it may directly or indirectly lead to increased income for the HEI? We recommend that arbitration procedures be put in place to settle any disputes that might arise.

**‘E-learning materials’** are any materials created within an HEI that are **primarily intended** (whether by the HEI or by some third party) **to be used in digital form** by learners at any level (including staff as learners in the case of staff training and development materials), for the purposes of any course of study those learners are following. We recommend that this working definition of e-learning materials be adopted by HEIs. We particularly draw attention to the fact that our definition excludes materials such as textbooks that might happen to be converted into digital form at a later date. However, we also recognise that the boundary between e-learning materials and other output produced by staff, including textbooks, is becoming blurred, and recommend our definition be kept under review by HEIs.

**‘Exploit/exploitation’** is offering the materials to students for use in courses, and/or selling or licensing the IPR in said materials, in return for payment or some other consideration. ‘Exploitable materials’ are any e-learning materials capable of such exploitation.

**‘Institution’** refers to a Further or Higher Education institution as construed under the Further and Higher Education Act 1992.

**‘IPR’** includes patents, trademarks (whether registered or not), design rights, database rights, copyright and confidential information/trade secrets. Patents, registered trademarks and registered designs are obtained only through a formal application process. Copyright, database rights and confidential information/trade secrets are created automatically without any formal process.

A **‘licence’** is a formal authority to do something that would otherwise be unlawful. In this context, it refers to a licence by the owner of IPR to copy, adapt, etc e-learning materials even though copyright law prohibits such copying without authorisation. Unlike assignment, the owner of the IPR remains its owner and, depending on the terms of the licence, may be able to continue to do whatever they like with the IPR.

**‘Materials’** can include printed material, material on floppy disk, web-sites, online databases and CD-ROM, and can comprise any combination of text, still images, moving images, sound, music on any medium, and might include hypertext links to other materials. In other words, the medium is irrelevant.

**'Staff'** includes academic staff, research associates, technicians, or any other members of staff of the HEI who are employed under a contract of employment (whether fixed term or permanent). It does **not** include freelancers since they do not have contracts of employment with the HEI, undergraduate students, or postgraduate students (whether taught or research based), unless the student has a contract with the HEI to undertake teaching duties.

# Annex B

## Model contract clauses for staff, students and freelancers

In all the contracts that follow, there should be cross-references to the HEI's existing contractual clauses that refer to reward systems or arbitration regarding IPR. (The wording of the clauses in this annex is based on Appendix 3 of 'Intellectual property rights in e-learning programmes' HEFCE 2003/08.)

### Model contractual clauses of employment for members of staff

(We recommend that these clauses are incorporated into standard contracts of employment.)

#### Definitions

1. 'E-Learning Materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.
2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.
3. 'Member of staff' means academic staff, research associates, technicians, or any other members of staff of the Institution who are employed under a contract of employment (whether fixed term or permanent).

#### Primary obligation

4. The parties foresee that the member of staff may make or discover or create intellectual property in the course of his or her duties under this agreement and agree that in this respect the member of staff has a special duty to further the interests of the Institution.

#### Title to rights

5. Subject to the provisions of the Patents Act 1977, the Registered Designs Act 1949 and the Copyright, Designs and Patents Act 1988 all IPR in the e-learning materials originated by the member of staff and arising out of the performance of his/her duties under this agreement shall be the property of the Institution, and the member of staff undertakes to do all acts and things as may be thought by the Institution to be necessary to vest any such property in the Institution and to register title in such property in the Institution.
6. In the event that the member of staff fails (for whatever reason) within 30 days of a demand by the Institution to do all acts and things effectively to vest any such property in the Institution, the member of staff hereby authorises the Institution in his/her name and on his/her behalf to execute all such deeds or documents as may be necessary or desirable to transfer such property in the e-learning materials to the Institution and register title in the e-learning materials in the Institution.
7. If material from other copyright works is included in the e-learning materials the member of staff shall identify such material to the Institution and shall obtain all

necessary written permissions from the owners or from any rights organisation authorised by the owner to grant such permissions in respect of such material. Alternatively the member of staff shall, if the Institution so agrees, provide the Institution with sufficient information to enable the Institution to obtain such permissions, but the Institution shall not thereby be obliged to secure such permissions and may require that the member of staff omit any such material from the e-learning materials.

8. The Institution hereby agrees and acknowledges that all performers' rights in any video or other recording of the member of staff's own lectures or presentations or similar works are owned by the member of staff. The member of staff grants to the Institution and its authorised users an irrevocable royalty-free non-exclusive licence to use such material for administrative, educational, teaching and research purposes.

9. Nothing in this agreement shall constitute a waiver by the member of staff of any moral right under the Copyright, Designs and Patents Act 1988, and nothing therein shall constitute an exclusive recording contract within the meaning of Part II of that Act or consent by the member of staff to the exploitation of any qualifying performance for the purposes of that Part.

### **Exploitation and income**

10. The Institution is free to exploit (whether for financial gain or not) such e-learning materials as it sees fit, including licensing or assigning the IPR in the e-learning materials to third parties, or merging said e-learning materials with other materials created within the Institution or elsewhere.

11. In the event that the Institution fails to exploit the e-learning materials within a period of [to be inserted], the member of staff or his/her representative may give notice thereof to the Institution, and in such event the Institution shall declare within thirty (30) days in writing whether or not it intends to exploit the e-learning materials in the foreseeable future. The Institution agrees it will enter into good faith negotiations with the member of staff with a view to assigning its rights in the e-learning materials to the member of staff if no prospect of commercial exploitation of materials is to be expected. In return, the member of staff shall grant the Institution and its authorised users an irrevocable royalty-free licence to use such material for administrative, educational, teaching and research purposes.

12. Should the e-learning materials prove to be profitable, the Institution agrees that it shall, in accordance with its normal procedures, enter into good faith negotiations with the member of staff regarding possible rewards.

### **Credits**

13. The Institution agrees to credit the member of staff for any significant contribution to the e-learning materials. The Institution shall comply with any request by the member of staff in writing that his/her name be removed from the e-learning materials where such request is on grounds that the whole or parts of the e-learning materials are out of date or changed in a manner that might damage his/her reputation.

14. The Institution may update or in any other way amend the e-learning materials to suit its requirements. The Institution agrees to consult the member of staff over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

### **Permitted uses**

15. The Institution grants to the member of staff a royalty-free non-exclusive licence to use the e-learning materials created by the member of staff or jointly with others for non-commercial teaching or research purposes only for as long as the member of staff remains employed by the Institution. Such licence may continue after the termination of this agreement provided that the use of the e-learning materials does not damage the exploitation of the materials by [the Institution] or prejudice in any way the interests of the Institution.

16. Should the contract of employment of the member of staff terminate, the member of staff shall be entitled to enter into negotiations with the Institution with a view to permitting the member of staff to make and retain a copy of the e-learning materials for his/her use for non-commercial teaching and research purposes. In the case of disagreement over these negotiations, dispute settlement procedures in accordance with Clause 22 of this agreement shall be invoked. Neither the member of staff nor his/her new employer is permitted to commercially exploit the e-learning materials without the express permission of the Institution.

17. Nothing herein shall grant to the member of staff any right or licence to copy or use any versions of the e-learning materials updated or in any way amended by the Institution after termination of the employment whose terms and conditions are governed by this Agreement.

### **Prohibited uses**

18. The member of staff is not permitted to assign or enter into any licence for the exploitation of the e-learning materials. In the event that the member of staff becomes aware of any third party wishing to exploit the e-learning materials such third party shall be advised by the member of staff to contact the Institution as the owner of the IPR in the e-learning materials.

### **Rights in other material**

19. Save as provided hereafter, the Institution agrees and recognises that the IPR in texts shall be vested in the member of staff. Texts means textbooks and academic articles and works of a similar nature other than e-learning materials created through the intellectual effort of the member of staff in the course of employment. Texts are not confined to words, but could include images or other media. The member of staff grants to the Institution and its authorised users an irrevocable royalty-free non-exclusive licence to use the texts for administrative, educational, teaching and research purposes.

20. If texts are to be used in e-learning materials, IPR in texts shall not be assigned or licensed by the member of staff on an exclusive basis to any third party unless provision is made for the Institution to use such materials for teaching and research purposes without charge.

### **Termination**

21. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of the employment whose terms and conditions are governed by this agreement in respect of all IPR in the e-learning materials originated by the member of staff during the member of staff's employment under this agreement, and shall be binding on his/her representatives.

### **Dispute settlement**

22. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties, within thirty (30) days after a request for a reference is made by either party, [e.g.] nominated on the application of either party by the chairman for the time being of the Bar Council [but see also definition of 'arbitration' in Annex A of this report].

[There might be a reversion of rights clause also inserted. HEIs should allow for the possibility of reversion of rights if, should the HEI choose not to exploit the materials commercially, the individual or team that developed the materials wishes to take on the exploitation of the materials. Negotiations should be entered into in good faith and should be based on the premise that the HEI should not unreasonably refuse the individual or the team the IPR if the HEI has no interest in exploiting the materials. Appropriate arbitration procedures should be in place in case of disagreement. In return for the acquisition of the IPR, the member of staff should always grant his/her employer and its authorised users a royalty-free licence to use the materials for administrative, educational, teaching or research purposes. Any such clause should forbid the individual from exploiting the material in a way that the HEI in its reasonable opinion deems to be competitive to its own activities.]

## **Model contractual clauses for students**

(We recommend that this contract should *NOT* form part of the standard contract between the HEI and its students, but is instead offered for voluntary signature by the student on a case by case basis.)

### **Definitions**

1. 'E-Learning materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.
2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.
3. 'Student' means any person registered as an undergraduate or postgraduate student of the Institution or following any course as if such a student.

### **Title to rights**

4. The student hereby assigns all IPR in the e-learning materials originated by the student to the Institution. The student wherever requested to do so by the Institution, should (at the expense of the latter) execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

### **Exploitation and income**

5. The Institution is free to exploit (whether for financial gain or not) e-learning materials as it sees fit, including licensing or assigning the IPR in the e-learning materials to third parties, or merging said e-learning materials with other materials created within the Institution or elsewhere.
6. Should the e-learning materials prove to be profitable, the Institution agrees that it shall enter into good faith negotiations with the student regarding possible rewards.

### **Credits**

7. The Institution agrees to credit the student for any significant contribution to the e-learning materials. The Institution shall comply with any request by the student in writing that his/her name be removed from the e-learning materials where such request is on the grounds that the whole or parts of the e-learning materials are out of date or changed in a manner that might damage his/her reputation.
8. The Institution may update or in any other way amend the e-learning materials to suit its requirements. The Institution agrees to consult the student over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

### **Permitted uses**

9. The Institution grants to the student a royalty-free non-exclusive licence to use the e-learning materials created by the student or jointly with others for non-commercial teaching or research purposes only for the duration of the student's period of registration or course of study at the Institution, at the conclusion of which this

agreement shall be treated as having terminated. Such licence may continue after the termination of this agreement provided that the use of the e-learning materials does not damage the exploitation of the materials by [the institution] or prejudice in any way the interests of the Institution.

10. The student is allowed to make and retain a single copy of the e-learning materials for his/her use for non-commercial teaching or research purposes, for the purpose of supporting his/her c.v., or for any other job application purpose after the termination of this agreement.

11. Nothing herein shall grant to the student any right or licence to copy or use any versions of the e-learning materials updated or in any way amended by the Institution after termination of this agreement.

### **Prohibited uses**

12. The student is not permitted to assign or enter into any licence for the exploitation of the e-learning materials. In the event that the student becomes aware of any third party wishing to exploit the e-learning materials such third party shall be advised by the student to contact the Institution as the owner of the IPR in the e-learning materials.

### **Termination**

13. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of this agreement in respect of all IPR in the e-learning materials originated by the student during this agreement and shall be binding on his/her representatives.

### **Dispute settlement**

14. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, [e.g.] nominated on the application of either party by the chairman for the time being of the Bar Council [but see also definition of 'arbitration' in Annex A of this report].



## **Model contractual clauses for freelancers**

(We recommend these clauses be incorporated into any contract signed between the HEI and a contractor.)

### **Definitions**

1. 'E-Learning materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.
2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.
3. 'Freelancer' means an individual or organisation working for the Institution other than under a contract of employment.

### **Title to rights**

4. All IPR in the e-learning materials conceived or made by the freelancer in the course of providing the services are assigned to the Institution. Wherever requested to do so by the Institution, the freelancer will at the expense of the latter execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

### **Exploitation and income**

5. The Institution is free to exploit (whether for financial gain or not) the e-learning materials as it sees fit, including licensing or assigning the IPR in the e-learning materials to third parties, or merging said e-learning materials with other materials created within the Institution or elsewhere.

### **Credits**

6. The Institution agrees to credit the freelancer for any significant contribution to the e-learning materials. The Institution shall comply with any request by the freelancer in writing that his/her name be removed from the e-learning materials where such request is on the grounds that whole or parts of the e-learning materials are out of date or changed in a manner that might damage his/her reputation.
7. The Institution may update or in any other way amend the e-learning materials to suit its requirements. The Institution agrees to consult the freelancer over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

### **Prohibited uses**

8. The freelancer is not permitted to assign or enter into any licence for the exploitation of the e-learning materials. In the event that the freelancer becomes aware of any third party wishing to exploit the e-learning materials such third party shall be advised by the freelancer to contact the Institution as the owner of the IPR in the e-learning materials.

**Termination**

9. Save as provided herein, all rights and obligations under this agreement shall continue to be in force after the termination of this agreement in respect of all IPR in the e-learning materials originated by the freelancer during this agreement and shall be binding on his/her representatives.

**Dispute settlement**

10. Any dispute between the parties arising out of or in connection with this agreement, except as otherwise provided in this agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, [e.g.] nominated on the application of either party by the chairman for the time being of the Bar Council [but see also definition of ‘arbitration’ in Annex A of this report].

# Annex C

## Sample request letter for using third-party materials

This is taken from: International IPR in e-learning group: Case Study 4: Heriot-Watt University: BA Management.

The draft shown below is an example of the sort of letter that might be sent out. The wording should be amended in the light of the specific request details and should bear in mind what the ideal situation in terms of permissions granted for the requestor should be, but what the fall-back position of the requestor is.

[date]

[name and address of copyright holder]

Dear Sir,

### Request for Copyright Permission

We are currently preparing learning materials for the [ ] degree / programme / module. These course materials will be delivered to students in print and made available to them over a secure web environment. We wish to copy and use [paragraph / quote / image] which originally appeared in one of your publications for inclusion in the course materials. The details of the [paragraph / quote / image] and where it was published are contained in the schedule attached hereto.

We now seek your permission to make use of these for the educational purposes described above. Could you please confirm your consent in writing to this proposed use of your copyright works.

We look forward to hearing from you in due course.

Yours faithfully,

### Schedule

Author	Title	ISSN/ISBN	Page
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# Annex D

## Sample permission letter granting use of third-party materials

This is taken from: International IPR in e-learning group: Case Study 4: Heriot-Watt University: BA Management.

The draft shown below is an example of the sort of letter that might be sent out. The wording should be amended in the light of the specific request details and should bear in mind what the ideal situation in terms of permissions granted for the requestor should be, but what the fall-back position of the requestor is.

[date]

[name and address]

Dear Sir,

### **Grant of Permission to Use Copyright Work**

We write in response to your request dated [ ] for permission to make use of various copyright works in your [ ] degree / programme / module. We hereby grant permission for you to copy and publish the copyright works specified in your request in print format and to make them available to students over a secure web environment. The copyright works may not be amended or altered in any way. This permission is granted for this educational purpose only and will not extend to the use of the copyright works for non-educational or commercial purposes.

Yours faithfully,

[name of copyright holder]

# Annex E

## Local learning partner agreement\*

### Cover sheet

Local learning partner agreement

between

[the Agent]

and

[the local learning partner]

in relation to the appointment of local learning partners  
and the provision of learning support

\* Source: International IPR in e-learning group: Case Study 4: Heriot-Watt University: BA Management.

## Local learning partner agreement

Between

[Name and designation of the Agent] ('the Agent')

and

[Name and designation of the institution providing tutorial support] (the 'Local Learning Partner' or 'LLP').

## Recitals

- A. The Agent has been established to market and deliver distributed education Programmes outside the United Kingdom which have been developed by the Awarding Body (as defined below).
- B. The LLP has experience and expertise in relation to the provision of educational services in the Territory (as defined below).
- C. The Agent and LLP wish to enter into this Agreement in terms of which LLP will inter alia perform the LLP Obligations (as defined below) and pay the Wholesale Price (as defined below) and the Agent will perform the Agent Obligations all in connection with the marketing, distribution and provision of the Programme in the Territory.

## Terms Agreed

### 1 Definitions and interpretation

#### 1.1 Definitions

In this Agreement (together with the Schedules), where the context so admits, the following words and expressions shall have the following meanings:-

'Agreement'	this agreement, together with Schedules One and Two attached to this Agreement;
'Awarding Body'	the institution set out in Schedule One in relation to the Programme;
'Confidential Information'	in relation to either party, information (whether in oral, written or electronic form) belonging or relating to that party including (without prejudice to the foregoing generalities), financial information relating to the affairs or activities which is not in the public domain and which:- <ol style="list-style-type: none"><li>(i) either party has marked as confidential or proprietary,</li><li>(ii) either party, orally or in writing has advised the other party is of a confidential nature, or</li><li>(iii) due to its character or nature, a reasonable person in a like position and under like circumstances would treat as confidential;</li></ol>

<b>‘Course’</b>	an academic course that is a specific award within the Programme as set out and described in Schedule One;
<b>‘Data Protection Principles’</b>	the principles set out in Schedule Two;
<b>‘Effective Date’</b>	the last date of signature of this Agreement;
<b>‘Entrance Criteria’</b>	the entrance criteria for the Programme as set out in Schedule One;
<b>‘Force Majeure’</b>	with reference to either party, any delay or failure to perform an obligation set out in this Agreement which results from a cause beyond its reasonable control including (without prejudice to the generality of the foregoing) strikes, lock-outs, rebellion, act of government or supernational body, act of God, war, riot, civil commotion, fire, flood or storm;
<b>‘IPR’</b>	patents, trade marks, service marks, logos, get-up, trade names, internet domain names, rights in designs, copyright (including rights in computer software) and moral rights, database rights, semi-conductor topography rights, utility models, rights in know-how and in innovations and technology and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;
<b>‘Agent Obligations’</b>	the obligations to be performed by the Agent in relation to the Programme, in accordance with this Agreement, as set out in Schedule One;
<b>‘LLP Obligations’</b>	the obligations to be performed by LLP in relation to the Programme, in accordance with this Agreement, as set out in Schedule One;
<b>‘Marketing Plan’</b>	the marketing plan document issued by the Agent from time to time to be completed by LLP, to provide marketing data on all Courses (including but not limited to, a review of previous years student numbers, a review of student performance, growth plans over the following 3 years, pricing and competition);
<b>‘Minimum Student Requirement’</b>	the minimum number of Students which LLP must ensure register for each Course in each academic year as set out in Schedule One;
<b>‘Module’</b>	means a module of a Course;
<b>‘Non-Assessable Work’</b>	any assessment undertaken internally by students in the LLP which has been set by the LLP to gauge student progress. For example, but not limited to, multiple choice tests, group work, and essay practice;
<b>‘Programme’</b>	a programme of Courses set out and described in Schedule One;



<b>‘Student Registrations’</b>	is the point at which a Student has committed to study for a Module, Module Set or Course with an LLP;
<b>‘Student’</b>	any person who has registered for or is in the process of registering for any of the Courses in the Territory;
<b>‘Student Fee’</b>	means the fee that the LLP charges a Student to participate in a Module or Module Set or Course, from which the Wholesale Price will be remitted to the Agent;
<b>‘Territory’</b>	means the territory or territories indicated in Schedule One;
<b>‘VAT’</b>	means Value Added Tax pursuant to the United Kingdom Value Added Tax Act 1994 or such other tax supplementing or replacing the same and any tax outside the United Kingdom which is similar to such Value Added Tax or is a sales or similar tax or such other tax supplementing or replacing same; and
<b>‘Wholesale Price’</b>	the fee that is payable by LLP to the Agent for a Student to undertake a Module or Module Set or Course, as set out in Schedule One or as otherwise agreed between the Parties from time to time.

1.2 Any reference to a Clause, sub-clause, or Schedule shall be to, respectively, a Clause, sub-clause, or Schedule to this Agreement.

1.3 Clause headings are for ease of reference only and shall not affect the construction or interpretation of any clause.

1.4 Words importing the singular shall include the plural and vice versa and words denoting any gender shall include all genders.

1.5 References to legislation are to that legislation as amended or re-enacted from time to time.

1.6 Except where otherwise provided, words and expressions used in this Agreement shall have the meanings ascribed to them by the Companies Act 1985.

1.7 References to parties include references to their respective successors in title, permitted assignees and novatees.

## **2 LLP obligations & agent obligations**

2.1 The LLP shall perform the LLP Obligations and shall otherwise perform and/or procure the proper performance of all such acts as are required for the proper exploitation of the Programme in the Territory in accordance with this Agreement and shall comply with all directions of the Agent and/or the Awarding Body in relation to LLP Obligations and/or the operation of this Agreement.

2.2 The Agent shall where applicable, ensure that the Awarding Body performs the Agent Obligations.

2.3 The LLP shall use its best endeavours to enrol/register the Minimum Student Requirement in each academic year.

2.4 The LLP will invoice Students and receive payment from the Student of the Student Fee once the Student has been accepted and prior to the Student commencing any studies.

2.5 The LLP shall provide the Agent with a complete list of names for new and existing Students for all Modules or Courses after all Student Registrations and within 10 days of the commencement of study to enable the Agent to invoice the LLP for the Wholesale Price.

2.6 The Agent will issue the LLP with a Marketing Plan template to complete from time to time. The LLP shall complete and provide the Marketing Plan annually, or otherwise whenever requested to do so by the Agent. The LLP must return the completed Marketing Plan to the Agent for discussion and agreement within 30 days of the Agent's initial request.

2.7 In the event of early termination of this Agreement, both parties will honour existing arrangements for students who have already embarked on the Programme leading to an award provided through this Agreement.

2.8 The LLP shall not use any advertising or promotional materials in relation to its promotion of the Programme except those supplied by the Agent or as are otherwise approved by the Agent in writing.

2.9 The LLP shall not make or give any promises, warranties, guarantees or representations concerning the Programme other than those as are consistent with this Agreement or are approved by the Agent in writing.

2.10 The LLP may only represent that it promotes the Programme defined in this Agreement. The LLP will not represent that it promotes any other programmes under or in connection with this Agreement. For the avoidance of doubt, the LLP is free to enter into other contractual relationships with other providers or awarding bodies to promote other programmes.

### **3 The term**

3.1 This Agreement shall without prejudice to the date or dates of signature commence on the Effective Date and shall, subject to Clause 9, remain in full force for a period of five years.

### **4 Nature of relationship**

4.1 The LLP shall at all times act on the basis and represent that they are representatives of the Awarding Body and the Agent for the Territory and hold out that the Programme is the sole property of the Awarding Body and, without prejudice to that generality, shall not suggest or infer in any way that their role is other than that of a representative and learning service provider.

4.2 For the avoidance of doubt, nothing in this Agreement shall be construed so as to constitute a legal partnership or joint venture between the parties.

4.3 The LLP shall not provide or make available any of the Courses or any other material provided by the Agent to any person except as is expressly permitted by this Agreement.

## **5 Review**

5.1 The Agent shall have a right of access (for itself and/or its advisors) to all data and information (including without prejudice to the foregoing generality all certificates, invoices, vouchers, receipts, statements, books, records and accounts, management and audited) held by or on behalf of the LLP whatsoever from time to time in relation to the Programme, the Agent, the Awarding Body and/or the LLP Obligations.

5.2 Such right of access shall be exercised upon not less than two Working Days prior written notice. The LLP will provide all reasonable assistance to the Agent and/or its advisors in relation to such a review.

5.3 The LLP shall have no liability to the Agent in respect of any breach of this Agreement which results from disruption to the LLP Obligations caused by the exercise unreasonably or without due care and attention of any of Clause 5.1 or 5.2.

5.4 The LLP will immediately notify the Agent in writing if at any time during the period of this Agreement anything (including without prejudice to the foregoing generality any change in its business, assets or financial position) is likely to adversely affect its ability to perform its obligations under this Agreement.

## **6 Financial provisions**

6.1 The LLP will be responsible for collecting the Student Fee and will remit the Wholesale Price to the Agent in accordance with this Clause.

6.2 The LLP shall pay the Wholesale Price to the Agent exclusive of any charges or taxes whatsoever, including withholding, sales or any other form of tax. Without prejudice to the foregoing sentence, in the event that any charges or taxes are levied or imposed on the payment of the fee from LLP to the Agent, or there is any form of deduction so that the amount of the Wholesale Price received by the Agent is less than the amount set out in Schedule 1, the Wholesale Price shall be increased by such amount as is necessary to enable the Agent to receive, after all deductions having been made, the amount of the Wholesale Prices set out in Schedule 1.

6.3 The LLP will set the Student Fee at a reasonable level, (taking into account market conditions and other factors in the Territory), after first discussing matters with the Agent.

6.4 The Wholesale Price shall be payable to the Agent under this Agreement and be remitted by electronic funds transfer by sending a SWIFT payment to: -

[Provide Bank Account name and number, bank address and Sort Code]

6.5 For the avoidance of doubt, no Student will be eligible to sit any examinations with the Awarding Body until all Wholesale Prices relating to that Student have been paid to the Agent. The Agent reserves the right to suspend or terminate a Student's participation in the Programme if the Wholesale Prices relating to that Student are not paid timeously in accordance with this Clause 6.

6.6 The level of Wholesale Prices will be subject to review on or before each anniversary of the Effective Date. The parties will discuss and agree the level of Wholesale Prices prior to each anniversary of the Effective Date and as a minimum will apply an inflationary increase to each new student intake.

6.7 The Wholesale Prices shall be:-

6.7.1 deemed to be exclusive of VAT (and such VAT shall be payable upon delivery of a valid VAT invoice to the party making the payment); and

6.7.2 payable within 30 days of presentation of an invoice (unless otherwise expressly stated in this Agreement).

6.8 In the event that the LLP fails to make payment in accordance with Clause 6, the Agent shall be entitled to charge the LLP interest from the date specified for payment upon the unpaid amount of the principal sum at the rate of 2 per cent per annum above the Bank of England base rate in force at the time this Clause becomes applicable until such payment is made in full.

6.9 For the avoidance of doubt, any breach of this Clause 6 shall constitute material breach of this Agreement in accordance with Clause 9.1.1.

## **7 IPR**

7.1 The IPR in the Programme and all related documentation belong to the Awarding Body. Nothing in this Agreement purports to transfer any right, title or interest in or to the Programme or the related documentation other than specifically provided for in this Agreement.

7.2 The LLP agrees to waive any claim, demand, action, costs or expenses it may have against the Agent or the Awarding Body by reason of any infringement or alleged infringement that the Programme and the related documentation provided by the Agent infringe the IPR of any third parties.

7.3 The LLP hereby agrees to grant to the Agent a perpetual, irrevocable, royalty free licence to use and otherwise exploit any IPR that may be created by or on behalf of LLP as a result of performing the LLP Obligations.

7.4 The LLP will notify the Agent if it or its employees become aware that a third party is infringing any IPR of the Agent or the Awarding Body or if any claim, demand or action is threatened or commenced against the LLP in relation to any alleged infringement of a third party's IPR. The LLP will give the Agent all such reasonable assistance in relation to any possible infringement action.

7.5 For the avoidance of doubt, any breach of this Clause 7 shall constitute a material breach of this Agreement in accordance with Clause 9.1.1.

## **8 Insurance**

8.1 The LLP shall:-

8.1.1 to the extent that it has not already done so, forthwith effect and during the period of this Agreement maintain in force professional indemnity and all other appropriate insurance with a reputable insurance company to cover its liability arising under this Agreement and in an amount appropriate to cover all such liabilities and potential liabilities;

8.1.2 immediately notify the Agent in writing if such insurance ceases to be available at commercially reasonable rates; and

8.1.3 upon request, provide the Agent with documentary evidence that such insurance is in force.

## **9 Termination**

9.1 Either party may terminate this Agreement at any time immediately upon notice to the other if the other party:-

9.1.1 commits a material breach of this Agreement (which, for the avoidance of doubt, includes the breaches specified in Clauses 6.9, 7.5 and 10.3);

9.1.2 commits any other breach that it fails to remedy within 20 Working Days of receiving notice requiring it to do so;

9.1.3 ceases to carry on its activities, becomes unable to pay its debts when they fall due, becomes or is deemed insolvent, has a receiver, manager, administrator, administrative receiver or similar officer appointed in respect of the whole or any part of its assets or business, makes any composition or arrangement with its creditors, takes or suffers any similar action in consequence of debt, an order or resolution is made for its dissolution or liquidation (other than for the purpose of solvent amalgamation or reconstruction) or enters into liquidation whether compulsorily or voluntarily.

9.2 The Agent has the discretion to terminate this Agreement if the LLP fails to enrol/register the Minimum Student Requirement in any academic year.

9.3 Termination shall be without prejudice to the rights of either party under this Agreement which have accrued prior to termination.

9.4 This contract is subject to the LLP attaining and maintaining Approved Support Centre status of the Awarding Body.

9.5 Upon the termination or expiry of this Agreement:-

9.5.1 except where it is expressly provided to the contrary in this Agreement, all rights granted to the LLP under this Agreement shall cease;

9.5.2 LLP shall cease to carry on all activities authorised by this Agreement;

9.5.3 both parties shall immediately pay to the other any sums due to the other under this Agreement as at the date of termination;

9.5.4 within 20 Working Days of such termination or expiry, LLP shall destroy or return to the Agent (at the Agent's option) all content, material, goods and papers associated with the Programmes then in its possession, custody or control and, in the case of destruction, certify to the Agent that it has done so; and

9.5.5 both parties shall discuss, in good faith, how arrangements may best be made to allow Students who have signed up to the Courses to continue the Courses.

## **10 Warranties/indemnity**

10.1 The LLP warrants to the Agent that:-

10.1.1 it has full capacity and authority to enter into this Agreement and to perform its obligations under this Agreement and that it has taken all necessary action to authorise the execution, delivery and performance by it of this Agreement;

10.1.2 it is not aware of any reason which may affect its ability to properly perform its obligations under this Agreement;

10.1.3 it is, and its staff are, competent to fulfil its obligations under this Agreement (including having relevant experience, training and qualifications); and

10.1.4 it shall use such due care, skill and diligence as would reasonably be expected of a competent provider of services of the nature of the LLP Obligations whilst discharging its obligations under this Agreement, perform all of its obligations under this Agreement in a timely and professional manner and shall hold any licence, permit and/or certificate required by law for the performance of this Agreement.

10.2 The LLP shall indemnify and keep the Agent and the Awarding Body fully and effectively indemnified from and against any cost, claim, expense or other liability as a result of any act or omission of LLP not in accordance with this Agreement.

10.3 For the avoidance of doubt, any breach of Clause 10.1 or Clause 10.2 shall constitute material breach of this Agreement in accordance with Clause 9.1.1.

10.4 The Agent shall not be liable, and LLP waives any and all claims it may have against the Agent which arise as a result of LLP breaching the terms of this Agreement, or otherwise, as a result of or in connection with any act or omission of the Awarding Body or any other third party.

## **11 Assignment and sublicensing**

11.1 The LLP shall not assign, sub-license, sub-contract, mortgage or otherwise transfer or dispose of this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the Agent.

## **12 Confidentiality**

12.1 Each party shall maintain the confidentiality of the other party's Confidential Information and shall not, without the prior written consent of the other, use, disclose, copy or modify the other party's Confidential Information (or permit others to do so) other than as necessary for the performance of its rights and obligations under this Agreement.

12.2 Each party undertakes to disclose the other party's Confidential Information only to those of its officers, employees, agents and contractors to whom, and to the extent to which, such disclosure is necessary for the purposes of this Agreement and to procure that such persons are made aware of and agree in writing to observe the provisions in this Clause 12.

12.3 Each party shall give notice to the other of any unauthorised misuse, disclosure, theft or other loss of the other party's Confidential Information immediately upon becoming aware of the same.

12.4 This Clause 12 shall not apply to information which:-

12.4.1 is or comes into the public domain through no fault of the recipient, its officers, employees, agents or contractors; or

12.4.2 is required by law, or by court or governmental order, to be disclosed.

12.5 This Clause 12 shall survive the variation, expiry or termination of this Agreement.

### **13 Notices**

13.1 Any notice or other document to be served or given pursuant to this Agreement shall be sent by international courier, facsimile transmission or e-mail as follows:-

13.1.1 in the case of notices or other documents to be given to or served on the Agent to:-

[appropriate contact details of Agent]

13.1.2 in the case of notices or other documents to be given to or served on LLP to:-

[appropriate contact details of LLP]

(or, in either case, to such other address and/or facsimile number as shall be notified to the other party in accordance with Clause 13.2)

13.2 Any such notice or document shall be deemed to have been served when delivered by the courier or if sent by e-mail or facsimile transmission at the expiration of twelve hours after receipt of the same has been automatically acknowledged to the sender thereof and in proving such service it shall be sufficient to prove that the envelope containing such notice or document was properly addressed and delivered to the intended recipient or that the e-mail or facsimile transmission was properly addressed and acknowledged as the case may be, provided that a copy of such e-mail or facsimile transmission is delivered or sent by courier post in accordance with this Clause 13 within twenty four hours of such e-mail or facsimile being automatically acknowledged.

### **14 Compliance with the law**

14.1 The LLP shall comply with the law for the time being in force in the Territory, and insofar as it carries out its activities in other jurisdictions, with the law of those jurisdictions.

14.2 The LLP will be responsible for ensuring that it notifies the Agent, as soon as is reasonably practicable, of any local laws or changes to local laws in the Territory (and insofar as it carries out its activities in other jurisdictions, with the law of those jurisdictions) which may have an adverse effect on the delivery of the Programme or the terms of this Agreement.

### **15 Data protection**

15.1 In the European Economic Area (EEA), all parties that process 'personal data' (that is, data which identifies a living individual) must comply with the provisions of the Directive of the European Parliament and of the Council 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the 'Directive'). The Data Protection Act 1998 (the 'Act') implements the Directive in the United Kingdom.

15.2 Terms defined in the Act will have the same meanings when used in this Clause 15.

15.3 The LLP warrants undertakes and represents that:-

15.3.1 it will at all times comply with all relevant data protection laws and legislation including (i) the Act and any subordinate legislation enacted pursuant thereto; and (ii) all relevant data protection legislation applicable in the Territory, in connection with the performance of the LLP Obligations; and

15.3.2 it will only undertake such processing of personal data pursuant to this Agreement as is reasonably required in connection with the performance of the LLP Obligations;



15.3.3 it will comply with the Data Protection Principles;

15.3.4 it has and will have in place suitable technical and organisation security measures to prevent unauthorised disclosure or access, accidental or unauthorised loss or alteration to personal data;

15.3.5 it shall not transfer any personal data processed pursuant to this Agreement to any country or territory outside the European Economic Area;

15.3.6 it will not disclose personal data processed pursuant to this Agreement to any other third parties other than:-

- (i) to the Agent;
- (ii) to the Awarding Body;
- (iii) to its employees to whom such a disclosure is reasonably necessary in order for the LLP Obligations to be provided; or
- (iv) to the extent required under a court order.

## **16 Force majeure**

16.1 Neither party shall be deemed to be in breach of this Agreement, or otherwise be liable to the other, by reason of any delay in performance, or non-performance, of any of its obligations hereunder to the extent that such delay or non-performance is due to any Force Majeure of which it has notified the other party; and the time for performance of that obligation shall be extended accordingly.

16.2 If the Force Majeure in question prevails for a continuous period in excess of six months, the parties shall enter into bona fide discussions with a view to alleviating its effects, or to agreeing upon such alternative arrangements as may be fair and reasonable.

## **17 Waiver**

17.1 The failure of either party to enforce or to exercise any term of this Agreement does not constitute a waiver of such term and shall in no way affect that party's right later to enforce or to exercise it.

## **18 Severability**

18.1 The invalidity or unenforceability of any term of, or any right arising pursuant to, this Agreement shall not affect the validity or enforceability of the remaining terms or rights.

## **19 Entire agreement**

19.1 This Agreement contains all the terms agreed between the parties regarding its subject matter and supersedes any prior agreement, understanding or arrangement between the parties whether oral or in writing.

19.2 Neither party shall have any remedy in respect of any untrue statement made to it upon which it relied in entering into this Agreement (unless such untrue statement was made knowing that it was untrue) other than any remedy it may have for breach of the express terms of this Agreement.

## **20 Survival**

20.1 Terms of this Agreement which are either expressed so as to survive expiry, variation or termination of this Agreement, or from their nature or context it is contemplated that they are to survive expiry, variation or termination, shall remain in full force and effect notwithstanding expiry, variation or termination.

## **21 Variation**

21.1 No variation of, or amendment to, this Agreement shall bind either party unless made in writing and signed by authorised representatives of both parties.

## **22 Independent contractors**

22.1 The relationship of the parties is that of independent contractors dealing at arm's length and except as expressly provided in this Agreement nothing in this Agreement shall be construed so as to constitute the parties as partners, joint venturers or co-owners or empower either party to act for, bind or otherwise create or assume any obligation on behalf of the other and neither party shall hold itself out as entitled to do the same.

## **23 Arbitration**

23.1 If after discussion between the parties, a particular matter is still in dispute, either party may refer the matter in dispute to an expert agreed by the parties or, failing agreement within 14 days of commencing discussions on the identity of such expert, appointed by the president for the time being of the Law Society of Scotland. Such expert shall act as an expert, not as an arbiter. He or she shall reach his or her decision within 30 days of receiving all relevant information from both parties in accordance with the specific remit given (if any) and the parties shall promptly and efficiently provide all necessary assistance and information to such expert to resolve the matter in question. The expert's decision shall be final and binding on the parties. Such expert's costs shall be borne equally by the parties unless the expert determines otherwise based on the conduct of the parties.

**24 Governing law**

24.1 All matters relative to this Agreement shall be governed and construed in all respects by [English/Scots] law and the parties irrevocably submit to the non-exclusive jurisdiction of the [English/Scottish] courts. **IN WITNESS WHEREOF** this Agreement consisting of this and the preceding 13 pages and the Schedules are signed as follows:-

Signed on behalf of [the Agent]

\_\_\_\_\_ Authorised Signatory

\_\_\_\_\_ Full Name

at \_\_\_\_\_

on \_\_\_\_\_

in the presence of

\_\_\_\_\_ Witness

\_\_\_\_\_ Full Name

\_\_\_\_\_ Address

\_\_\_\_\_

Signed on behalf of  
[The LLP]

\_\_\_\_\_ Authorised Signatory

\_\_\_\_\_ Full Name

at \_\_\_\_\_

on \_\_\_\_\_

in the presence of

\_\_\_\_\_ Witness

\_\_\_\_\_ Full Name

\_\_\_\_\_ Address

\_\_\_\_\_

## Schedule one: the programme

### 1 Awarding body

[Name and address of University awarding the credits]

### 2 The programme

[Name of the Programme and the Courses and Modules within it]

### 3 Fees

The LLP has informed the Agent, for reference purposes only, of its proposed Student Fee level and agrees to inform the Agent in advance of any proposed changes to the Student Fee level. [This can be set out in tabular form, see example below]

Course	Student Fee (£ )	Wholesale Price (£ )
Module	Student Fee (£ )	Wholesale Price (£ )

### 4 Territory and minimum student requirements and schedule

The Territory is [Name of Territory]

The Minimum Student Requirement is [give a minimum number of students required for each course]

### 5 Entrance criteria and exemptions

5.1 Applicants to the Programme will be expected normally to have the equivalent of at least [ n ] A Levels or have a pass in a suitable foundation or access course.

5.2 Applicants will be required to demonstrate a level of competence in English Language. Students will normally require to be of a standard of IELTS [as applicable] for admission to a certificate/diploma/degree/masters programme or equivalent.

5.3 The Awarding Body also welcomes applicants over the age of 21 with work experience and/or industrial training or professional qualifications in lieu of the normal requirements defined in Paragraphs 5.1 and 5.2.

5.4 Applicants with additional qualifications will be admitted to the appropriate stage of the Programme with exemptions for relevant subjects, subject to the approval by the Awarding Body.

5.5 The Entrance Criteria are subject to change by the Awarding Body at any time without notice.

5.6 Students may be given exemptions for various modules in the Programme for prior certificated learning equivalent to the course content required for those modules. Exemptions are at the discretion of the Awarding Body.

### 6 Notes for programme

6.1 Students may apply to the Awarding Body who have satisfactorily completed part of the Programme to undertake subsequent parts of the Programme 'on campus' in the UK. The Awarding Body has sole discretion in accepting the applicant to study on-campus.

6.2 The flexible nature of the Programme allows students to assess their strengths and confirm their area of specialist interest as they progress through their preferred pathway.

This flexible approach means that a student may choose the most appropriate subjects for the next stage of their learning. Students may progress through the Programme at their own pace, ranging from full-time to part-time study.

6.3 The Programme is fully modular and credit bearing providing a range of core and optional Modules. Each stage consists of 12 Modules. A Certificate of Higher Education is awarded after satisfactory completion of the equivalent of one full stage of study. A Diploma of Higher Education is awarded after satisfactory completion of the equivalent of two full stages of study. The relevant named Degree is awarded after satisfactory completion of three full stages of study.

6.4 All academic matters related to the Programme will be in accordance with the Awarding Body's Ordinances and Regulations.

6.5 The Programme and Modules available within the Programme, and their content, are subject to change by the Awarding Body.

6.6 The Awarding Body will maintain an Exemption Policy document relevant to the Territory, which will list the approved awards and entry requirements attained by potential applicants for the Programme.

6.7 All examinations and assessments will be set up, supervised and marked by the Awarding Body, who will be the sole determinant in awarding credits.

6.8 The Programme will be delivered and assessed in English.

6.9 The Awarding Body has absolute discretion as to whether to admit and matriculate Students to the Programme.

6.10 The Programme is subject to change by the Awarding Body.

## **7 LLP obligations**

The LLP shall:-

### **7.1 General**

7.1.1 Ensure that more Students than the Minimum Student Requirement register for the Programme.

7.1.2 Use its best endeavours to promote and market the Programme in the Territory so as to ensure that as many Students as possible sign up to the Programme and to seek orders for the Programme in the Territory, and generally to assist the Agent in the sale of the Programme in the Territory.

7.1.3 Conduct the promotion and marketing of the Programme in the Territory with all due care and diligence.

7.1.4 Cultivate and maintain good relations with Students, customers and potential customers in the Territory in accordance with sound commercial principles.

7.1.5 Obtain all licences, permits and approvals which are necessary or advisable for the sale of the Programme in the Territory and for the performance of its duties under this Agreement.

7.1.6 Promptly notify the Agent of:-

7.1.6.1 all enquiries concerning and orders for the Programme which it receives from customers and prospective customers both within and outside the Territory;

7.1.6.2 any complaint or after sales enquiry concerning the Programme which it receives; and

7.1.6.3 any matters likely to be relevant in relation to the sale, use or development of the Programme within or outside the Territory, or otherwise in connection with this Agreement.

## **7.2 Programme delivery**

7.2.1 Provide local tutorial support consisting of discussion and problem sessions in support of the course materials and case studies and assignments contextualising the Programme to the Territory.

7.2.2 Conduct tutorial support in English. Additional support may be provided in languages other than English provided that the option of full support in English is always available.

7.2.3 Ensure that all tutors of the course are suitably qualified to provide tutorial support. Qualifications of tutors will be validated and scrutinised on a regular basis as part of the Awarding Body's quality control procedures. For the avoidance of doubt, any breach of this paragraph 7.2 shall constitute material breach of this Agreement in accordance with Clause 9.1.1.

7.2.4 Provide all registered Students with printed course materials for each module in their chosen pathway of study, which may include case studies and sample examinations, as developed by the Awarding Body.

## **7.3 Examinations**

7.3.1 Ensure all registered students are adequately prepared to perform to a satisfactory level in their formal examination.

7.3.2 Where deemed appropriate, carry out and be responsible for Non-Assessable Work for their students as part of their teaching and learning strategies.

7.3.3 This may include, for example, internally marked informal examinations using past-examination papers of the Programme.

7.3.4 Any mark(s) or grade(s) awarded to students from Non-Assessable Work cannot be used by students to support an appeal where they have underperformed in the formal examinations set by the Awarding Body.

## **7.4 Student recruitment and admissions**

7.4.1 Ensure that more Students than the Minimum Student Requirement register for the Programme.

7.4.2 Ensure that all Students meet the Entrance Criteria and any other entry requirements as notified by the Awarding Body and/or the Agent including being proficient in English. For the avoidance of doubt, the Awarding Body's decision as to whether a particular Student complies with the Entrance Criteria is final.

7.4.3 Be responsible for the marketing of the Programme in the Territory, Student recruitment and/or the provision of information on the Programme.

7.4.4 Not publish any publicity and promotional information which refers to the Programme without the consent of the Agent.

## **7.5 Programme administration**

7.5.1 Ensure that all academic matters related to the Programme are conducted in accordance with the Awarding Body's Ordinances and Regulations.

7.5.2 Be responsible for co-ordinating and collecting information on Student registration and examination requests, and shall pass such information to the Agent in a timely manner.

7.5.3 Have all facilities, equipment and IT infrastructure which is reasonably necessary to allow proper performance of the LLP Obligations. For the avoidance of doubt, any breach of this paragraph 7.5 shall constitute a material breach of this Agreement in accordance with Clause 9.1.1.

## **7.6 Quality assurance**

7.6.1 Ensure that the quality of the services it provides to Students pursuant to this Agreement are no less rigorous than the arrangements operated by the Awarding Body.

7.6.2 Ensure that the Awarding Body's policies and procedures on distributed learning are applied to Students' use of the Programmes in the Territory.

7.6.3 Ensure that there is:-

7.6.3.1 adequate monitoring, including allowing visits by staff from the Agent and the Awarding Body to verify the accessibility and appropriateness of learning facilities such as library, computing and laboratory provision and other relevant support services and to ensure that agreed procedures are being carried out effectively;

7.6.3.2 clear and supported administrative systems to provide reliable and accurate information to the Agent and the Awarding Body on the operation and management of the Programmes, including quality control systems;

7.6.3.3 the availability of designated staff proficient in English for consultation, and effective systems of communication between the staff of the Agent and the Awarding Body and LLP; and

7.6.3.4 the availability to local Students of complaints procedures and provision for student appeals to the Awarding Body.

## **8 The agent obligations**

The Agent or, where applicable, the Awarding Body shall:-

8.1 Approve the tutors for the Programme.

8.2 Provide the course materials for each module by the following methods:-

8.2.1 in printed form (this will be charged separately);

8.2.2 in PDF form.

8.3 Set and mark all summative assessments.

8.4 Be responsible for the registration and admission of Students onto the Programme.

8.5 Be responsible for all academic matters related to the Programme.

8.6 Maintain Student records.

8.7 Be responsible for issuing results and transcripts of performance.



- 8.8 Provide the quality assurance guidelines, rules and regulations of the Programme to the LLP.
- 8.9 Confer Students with relevant awards and organise the graduation ceremony.
- 8.10 Maintain the Agent web-site as is required for the provision of the Programmes.
- 8.11 Provide the LLP and Students with a password and user ID to the Agent web-site and any relevant web-site owned and/or operated by the Awarding Body.
- 8.12 Ensure that the Awarding Body is responsible for maintaining Student records and the management of Student progress.
- 8.13 Ensure that the Awarding Body issues the appropriate certificates, results of examinations and transcripts.

## Schedule two: data protection principles

The LLP as a data controller will comply with the following principles:-

1. **Purpose limitation** – data must be processed and subsequently used or further communicated only for the specific purposes set out in this Agreement. Data must not be kept longer than necessary for the purposes for which they are transferred.
2. **Data quality and proportionality** – data must be accurate and, where necessary, kept up to date. The data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed.
3. **Transparency** – data subjects must be provided with information as to the purposes of the processing and the identity of the data controller, and other information insofar as this is necessary to ensure fair processing, unless such information has already been given by the data exporter.
4. **Security and confidentiality** – technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as unauthorised access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the controller.
5. **Rights of access, rectification, erasure and blocking of data** – as provided for in Article 12 of Directive 95/46/EC, the data subject must have a right of access to all data relating to him that are processed and, as appropriate, the right to the rectification, erasure or blocking of data the processing of which does not comply with the principles set out in this Schedule, in particular because the data are incomplete or inaccurate. He should also be able to object to the processing of the data relating to him on compelling legitimate grounds relating to his particular situation.
6. **Restrictions on onwards transfers** – further transfers of personal data from the data importer to another controller established in a third country not providing adequate protection or not covered by a decision adopted by the Commission pursuant to Article 25(6) of Directive 95/46/EC (onward transfer) may take place only if either:
  - (a) data subjects have, in the case of special categories of data, given their unambiguous consent to the onward transfer or, in other cases, have been given the opportunity to object.

The minimum information to be provided to data subjects must contain in a language understandable to them:

- the purposes of the onward transfer,
- the identification of the data exporter established in the Community,
- the categories of further recipients of the data and the countries of destination, and
- an explanation that, after the onward transfer, the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals.

or

- (b) the data exporter and the data importer agree to the adherence to the Agreement of another controller which thereby becomes a party to the Agreement and assumes the same obligations as the data importer.

7. **Special categories of data** – where data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union memberships and data concerning health or sex life and data relating to offences, criminal convictions or security measures are processed, additional safeguards should be in place within the meaning of Directive 95/46/EC, in particular, appropriate security measures such as strong encryption for transmission or such as keeping a record of access to sensitive data.

8. **Direct marketing** – where data are processed for the purposes of direct marketing, effective procedures should exist allowing the data subject at any time to ‘opt-out’ from having his data used for such purposes.

9. **Automated individual decisions** – data subjects are entitled not to be subject to a decision which is based solely on automated processing of data, unless other measures are taken to safeguard the individual’s legitimate interests as provided for in Article 15(2) of Directive 95/46/EC. Where the purpose of the transfer is the taking of an automated decision as referred to in Article 15 of Directive 95/46/EC, which produces legal effects concerning the individual or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc., the individual should have the right to know the reasoning for this decision.

# Annex F

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# Annex G

## Sample consortium agreement for multi-partner collaborative R&D projects

(The wording of the clauses in this annex is taken from Appendix 5 of 'Intellectual property rights in e-learning programmes', HEFCE 2003/08.)

THIS AGREEMENT is made the \_\_\_\_ day of \_\_\_\_\_ 200X BETWEEN

THE UNIVERSITY OF ENGLAND of ..... and

THE UNIVERSITY OF NORTHERN IRELAND of ..... and

THE UNIVERSITY OF SCOTLAND of ..... and

THE UNIVERSITY OF WALES of .....

(hereinafter referred to individually as a '**Party**', collectively or in groups as '**Parties**')

Introduction:-

A. The Parties to this Agreement wish to undertake a project entitled 'e-learning materials'.

B. The Parties intend to carry out a programme of work which is described in **Annex 1** [not attached] (hereinafter referred to as the 'Project').

C. The [ ] year Project will involve the development of [ ] and the production of [ ] (hereinafter referred to as 'Deliverables'). It is envisaged that the Deliverables may be further developed after the end of the Project and that such further development may lead to the production of additional materials (hereinafter referred to as 'Products').

This Agreement sets out the details of the relationship between the Parties.

It is hereby agreed as follows:-

### 1 Purpose of the Consortium

The purpose of the Consortium is to carry out the Project and to produce Deliverables as described.

### 2 Commencement and duration

The Consortium was formed and the Project commenced with an effective date of ..... and the Project has a duration of [ ] years, unless otherwise agreed in writing by the Parties.

### 3 Project resources

The total funding for the Project is as follows:-

Year 1 – £[ ] Year 2 – £[ ] Year 3 – £[ ] Total – £[ ]

and the budget shall be apportioned between the Parties in accordance with the schedule detailed in **Annex 2** [not attached].

### 4 Project management

#### 4.1 Identification

The Parties agree that the Project lead site is The University of England. The Parties agree that the Project will be managed by Professor [ ] of the University of England ('**Project Manager**'). The Project Manager will report to a group established by the Consortium and made up of [ ] ('**the Steering Group**'). The Chairman of the Steering Group is the Deputy Vice-Chancellor of the University of England ('**Chairman**'). The nominated individuals are listed in **Annex 3** [not attached].

#### **4.2 Responsibilities of the Project Manager**

The Project Manager will have responsibility for the day-to-day management of the Project, with the Steering Group being concerned with overall policy and direction. The Parties agree that the Project Manager will have the following responsibilities: [ ]

#### **4.3 Responsibilities and activities of the Steering Group**

The Steering Group will determine the overall nature of the Product and will maintain responsibility for determining the technical standards to be adopted in the Project. The Steering Group will determine the academic content of the Product. The Steering Group will meet at least [ ] times a year. Additional meetings may be called by two or more Parties or on the advice of the Project Manager. The Steering Group may choose to take advice from third parties, as is required. Meetings of the Steering Group will operate under the following rules:

- the Project Manager will notify Steering Group members of the dates of meetings and outline agenda with at least fourteen days notice
- each Steering Group member will have one vote, except the Chairman who has a casting vote. However, a member may not vote on matters concerning a dispute with the Consortium where the member is the subject of the dispute
- Steering Group members may nominate a representative to attend meetings and vote on their behalf
- decisions will be taken on the basis of a majority vote of those attending and eligible to vote
- the minimum number of voting members required for meetings is [ ].

#### **4.4 The responsibilities of the Chairman**

To act as chairman of the Steering Group.

#### **4.5 Responsibilities of the Parties**

Each Party undertakes to use all reasonable endeavours to:

- perform on time the tasks and work packages assigned to it under the schedules shown in **Annex 4** [not attached]
- participate actively with other Parties where necessary
- promptly notify the Project Manager of any delay in performance
- prepare and present reports as required.

#### **4.6 Changes in membership of the Consortium**

Institutions may be invited to join the Consortium only by the unanimous decision of the Steering Group and on the condition that the new institution becomes a Party to this Agreement. A Party may withdraw from the Consortium only in the event of irremediable breach of any Clause in this Agreement and with the unanimous agreement of the remaining Parties. In the event of withdrawal or expulsion, the remaining members of the Consortium will only be liable to meet the cost of any work undertaken up to the point at which an institution ceases to be a member of the Consortium. The balance of any payments made to the Party will be returned to the Project Manager within 30 days of withdrawal or expulsion. In all cases, the Consortium reserves the right to acquire (both in physical form and in the form of assignment to it of any relevant Intellectual Property Rights) any work produced as a result of the Project.

## 5 Data management

### 5.1 Data collection

In the course of the Project, each party is involved in the collection of data in the form of [ ]. The data are to be sent to the Project Manager and stored in an archive at [ ] (**the Project Archive**). Each Party agrees to ensure that all data submitted to the Project Manager are accompanied by documentation detailing the origin of the data, together with any necessary ethical consent. (Each data collection must be accompanied by a signed copy of the copyright form as shown in **Annex 5** [not attached]). The Project Manager undertakes to ensure that all data stored in the Project Archive are referenced to the associated copyright documentation stored as part of the Project Archive.

### 5.2 Data maintenance

The University of Wales hereby undertakes to maintain the Project Archive for the duration of the Project and for a period of at least [ ] years after the end of the Project. This period is subject to extension if the Steering Group so decides.

## 6 Confidentiality

Each Party hereby undertakes to the other Party that it shall procure that its employees, agents and students shall:

- a. keep confidential all information of a confidential nature (whether written or oral) concerning this agreement and the business affairs of any other Party that it shall have obtained or received as a result of the discussions leading up to or entering into or performance of this agreement (the 'Information');
- b. not without the prior written consent of the relevant other Party disclose the Information, either in whole or in part, to any other person save those of its employees, agents and students involved in the implementation or evaluation of the Research who have a need to know the same for the performance of their duties; and
- c. to use the Information solely in connection with the implementation of the Research and not otherwise for its own benefit or the benefit of any third party.

The provisions a, b and c above shall not apply to the whole or any part of the Information to the extent that it can be shown by the receiving Party to be:

- i. Known to the receiving Party prior to the date of this agreement and not obtained directly or indirectly from any other Party; or
- ii. Obtained from a third party who lawfully possesses such Information which has not been obtained in breach of a duty of confidence owed to any Party by any person; or
- iii. In the public domain in the form in which it is possessed by any other Party other than as a result of a breach of a duty of confidence owed to such other Party by any person; or
- iv. Required to be disclosed by legal process, law or regulatory authority.

Each Party hereby undertakes to the other Party to make all relevant employees, agents and students aware of the confidentiality of the Information and provisions of this Clause 6 and without prejudice to the generality of the foregoing to ensure compliance by such employees, agents and students with the provisions of this Clause 6.

## **7 Intellectual property**

### **7.1 Ownership**

With regard to the ownership of intellectual property, the Parties agree as follows:

- the Party generating the Material shall own all Materials not incorporated into a Deliverable
- all Deliverables, and the Materials contained therein, not incorporated into a Product shall be owned jointly by all the Parties
- any Product shall be owned by one Party and the Steering Group will decide which Party shall own a Product on a case-by-case basis.

Each Party shall obtain the necessary assignments of intellectual property rights (this term includes, but is not limited to, copyright, database right, patents and trademarks) from all staff, students or agents involved in the development and production of the Deliverables on its behalf. Each Party warrants to the other Parties that it is the owner of the copyright and/or database rights in the Deliverables or that it is duly licensed to use the Deliverables and that the content of the Deliverables used as contemplated in this Agreement does not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person.

Each Party shall indemnify and hold the other Parties harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any actual or alleged infringement of such rights.

This indemnity shall survive the termination of this Agreement for any reason.

### **7.2 Marking**

The Parties agree that all Deliverables and Products shall be clearly marked identifying that the copyright is owned by [ ]. The Parties agree that the Steering Group will produce a suitable form of words acknowledging the involvement of the Parties and the ownership of the copyright, which shall appear on all copies of the Deliverables and Products.

### **7.3 User rights**

Each Party hereby grants to the other Parties a non-exclusive indefinite free licence to use the Deliverables and Products for the purposes of carrying out the Project and for teaching and research purposes during the Project and after the end of the Project. The Parties hereby agree to grant to each other and to third parties such non-exclusive licences as are necessary to enable the exploitation of the Deliverables and the development and creation of Products in accordance with the provisions of this Agreement.

## **8 Commercial exploitation**

### **8.1 Procedures**

In addition to the free licences granted in Clause 7.3 above, the Parties agree that they shall endeavour to exploit commercially the Deliverables and Products world-wide. The parties agree that a special meeting of the Steering Group will be held at the end of the Project and also one year before the end of the Project in order to discuss the potential for the commercial exploitation of the Deliverables and Products. At these meetings, the Steering Group shall review the Deliverables and shall discuss the potential for exploitation and the potential for development of Products from the Deliverables. The Steering Group will agree upon a strategy for exploitation.

## 8.2 Exploitation income sharing

Income derived from exploitation of Deliverables shall be received by and allocated to an account within the finance office of the Party responsible for the generation of the income. Where more than one party is involved, the Parties shall agree among themselves on procedures for receipt of income.

After the deduction of all relevant expenditure and costs associated with exploitation, the remaining income derived from commercial exploitation shall be divided as follows:

x%, y%, z%

The Parties agree that the sharing of revenue applies to those Parties remaining at the end of the Project. If a Party resigns or is expelled prior to the completion of the Project their entitlement to a share in the income derived from commercial exploitation will be determined by the Steering Group and will take account of the proportion of the total Project undertaken by that Party.

## 9 Publication and press releases

Procedures for publications and press releases relating to the Project shall be agreed between the Parties through the Steering Group.

## 10 Liability

The work associated with the Project will be carried out by each Party in accordance with the highest academic standards, and reasonable endeavours will be made to achieve the degree of reliability and accuracy appropriate to work of this kind. However, no Party has control over the use to which other Parties may put the results of the work, and each Party will therefore be deemed to have satisfied itself in every respect as to the suitability and fitness of the work for any particular purpose or application. To the extent permitted by law, no Party, its servants or agents accept any liability, however caused, arising from any error or inaccuracy in any opinion, advice, report or deliverable arising from this work nor for any resulting damage, loss expenses or claim, except to the extent that such can be shown to be caused by the wilful negligence of the Party.

## 11 Miscellaneous

**Assignment:** No party will be entitled to assign this Agreement nor all or any of their rights and obligations hereunder without the prior written consent of the others.

**Disputes/arbitration:** All disputes or differences which will at any time hereafter arise between the Parties in respect of the construction or effect of this Agreement or the rights, duties and liabilities of the parties hereunder, or any matter or event connected with or arising out of the Project, will be referred in the first instance to the Steering Group. If the Steering Group is unable to resolve the dispute, the Chairman shall select an independent third party to act as arbitrator.

**Relationship:** Nothing in this Agreement will create or be deemed to create a partnership or the relationship of employer and employee between the Parties.

**Law and jurisdiction:** This Agreement will be governed by the laws of England. This Agreement is subject to the exclusive jurisdiction of the English courts to which the parties hereto submit. This clause does not prevent a party from seeking interim relief in any court of competent jurisdiction.

**Indemnity:** Each Party represents and warrants to the other Parties that publication or distribution of those parts of the Deliverables that it has contributed will not contravene any laws, including but not limited to the laws of defamation and contempt of court (or concepts approximating thereto). Each Party shall indemnify and hold the other Parties harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any illegality. Any Party shall promptly inform the others of any illegality or alleged illegality upon the

party becoming aware of the same. This indemnity shall survive the termination of this Agreement for any reason.

AGREED BY THE PARTIES through their authorised signatories

For and on behalf of THE UNIVERSITY OF ENGLAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF NORTHERN IRELAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF SCOTLAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF WALES:

..... Date .....

Name: .....

# Annex H

## Example of a risk register

This is taken from: International IPR in e-learning group: Case Study 4: Heriot-Watt University: BA Management.

This case study focuses on the BA Management Programme developed by Heriot-Watt University and delivered on campus. This Programme was subsequently licensed to the Interactive University (a company set up by Heriot-Watt University and Scottish Enterprise in 2002) for it to adapt, further develop and transform into an e-learning on-line programme to be marketed outside Scotland.

Abbreviations:

- HWU Heriot-Watt University
- IU Interactive University
- LLP Local Learning Partner

Hypothetical risk description	Status	Burden	Risk impact	Risk probability	Proximity	Evaluation	Response
Formation of new company with no track record to administer project	Strategic	HWU	Danger in using untried and untested method for development and exploitation of learning materials	Risk is low as there is no commonly accepted ideal way to work in this area, as this is universally a new field for exploitation	Prior to successful project implementation	No response therefore necessary	None
Use of exclusive licensee	Strategic	HWU	Inability to attempt other methods of exploitation; danger in concentrating on only one channel of exploitation	Reasonable, as there is no tried and tested method of exploitation in this field	Prior to successful project implementation	Some sort of response is necessary in order to spread risk	Courses licensed to IU on an individual basis enabling the exploitation of subsequent courses in other ways. Also, licensing to IU practically (although not contractually) territorial in nature – only outside Scotland – enabling other methods of exploitation to be implemented locally. This is seen as a sufficient balance.

Insolvency and bankruptcy of IU	Strategic	HWU	Loss of exploitation mechanism. Loss of 'developed' materials	Low, as IU is partially owned and funded by Scottish Enterprise	Anytime before or during project implementation	Response necessary – very important to retain ownership and use rights relating to learning materials, as they form the core assets of HMU. Survival prospects of IU would be increased by more HEIs joining	Assignment of IU interest in developed materials, if not separable from original materials. IU retains ownership of 'separable' elements of developed materials, but this is not thought to be a significant risk, as the content of such can only practically be items such as buttons and borders. IU formed as Company limited by guarantee. IU pushing other HEIs to become members.
Sale of IU	Operational	HWU	Detrimental change to project workings	Very low	During project implementation	Response necessary to ensure security	No assignment clauses inserted in contracts. IU a company limited by guarantee.
Author 'turnover'	Operational	HWU	Difficulties in updating content, particularly respect for the moral rights of paternity and integrity	Reasonable considering academic attitudes to copyright in their work	Prior to and during project implementation	Response necessary	Copyright in work assigned. Assignment includes no assertion of paternity, and also derogation from right of integrity. Authors advised of HWU's right to adapt, update and develop work.



Theft of created copyright materials by Local Learning Partners	Operational	HWU/IU	LLPs could take materials and provide the courses, cutting our income stream	Reasonable as they are being supplied with materials	During project implementation	Response necessary	No ownership or right to use alone passed under contract. Local publishers used to give local policing and enforcement of copyright rules.
Theft of created copyright material by students	Operational	HWU/IU/LLPs	Students could copy materials themselves	High, as students tend to do so in carrying out their work	During project implementation	No response necessary, as unclear what element of loss to IU or HWU is involved. Also students hold some rights to copy for studying, depending on copyright rules in local jurisdictions (eg fair use in US, private study rights in UK)	None.
Theft of copyright material by third parties	Operational	HWU/IU/LLPs	Third parties could access materials through, for example, employees attending courses. Risk that materials then used on an 'in-house' basis	Low, as it is considered that what users really pay for is a degree from HWU and tutorial support, neither of which will be available from third parties	During project implementation	Due to difficulties in discovering misuse, only a limited and low risk, only a low level response is necessary	Policing and enforcement of copyright by LLPs and local publishers.

'Failure to educate' liability and QAA issues	Operational	Firstly LLPs then IU	Students could sue education providers for low quality education	Low	During project implementation	Low risk because of confidence in quality of materials and due diligence regarding Local Learning Partners	Review of developed materials by HWU ensures they are 'fit for purpose'. HWU also protected through use of indemnity clause in arrangements with IU. Insurance also provides back up cover.
Copyright infringement by authors in creating original materials	Operational	HWU risk	Authors could plagiarise material	Low	Prior to project implementation but discovered during	Unlikely, as not a common problem with paper based teaching materials. Risks increase when using material externally due to the greater chance of discovery	Authors warranties, personal liability, and education of authors on intellectual property law, possible future use of JISC plagiarism detection service.
Rights infringement in creating platforms for content delivery	Operational	Chiefly IU, but also HWU to a degree	IU and HWU could infringe copyright in developing platforms	Low	Prior to project implementation	Likelihood of discovery very low, if any copyright is actually infringed	Authors warranties, personal liability, contractual cross-indemnities.
Not following Procedures established for risk management	Operational	All parties	Avoidable foreseen events could take place	Reasonable	Prior to and during project implementation	Unavoidable, but steps should be taken to minimise	Education of those working on project as to procedures in place, policing of procedure adherence. Risk management in place.

# References and useful sources of information

'Intellectual property rights international e-learning programmes' (HEFCE 2003/08) available at: [www.hefce.ac.uk/pubs/hefce/2003/03\\_08.htm](http://www.hefce.ac.uk/pubs/hefce/2003/03_08.htm)

International IPR in e-learning group: Case studies 1-5, available at: [www.intrallet.com/HEFCE-IPR/index.htm](http://www.intrallet.com/HEFCE-IPR/index.htm)

JISC's Intellectual Property Rights Overview: [www.jisclegal.ac.uk/ipr/IntellectualProperty.htm#overview](http://www.jisclegal.ac.uk/ipr/IntellectualProperty.htm#overview)

JISC's IPR publications: [www.jisclegal.ac.uk/ipr/IntellectualPropertyPub.htm](http://www.jisclegal.ac.uk/ipr/IntellectualPropertyPub.htm)

Copyright, Designs and Patents Act 1988, Copyright and Related Rights in Database Regulations 1997, Copyright and Related Rights Regulations 2003, available at: [www.patent.gov.uk/copy/legislation/](http://www.patent.gov.uk/copy/legislation/)

The US TEACH Act: [www.utsystem.edu/ogc/intellectualproperty/teachact.htm](http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm)

The EU Database Directive 1996: <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>

The World Intellectual Property Organisation, Copyright and Related Rights page: [www.wipo.int/copyright/en/](http://www.wipo.int/copyright/en/)

US Copyright Office: [www.copyright.gov](http://www.copyright.gov)

UK Intellectual Property on the Internet (UK Patent Office sponsored advice site): [www.intellectual-property.gov.uk](http://www.intellectual-property.gov.uk)

Advice on agreements for collaborative research projects: [www.innovation.gov.uk/lambertagreements](http://www.innovation.gov.uk/lambertagreements)

The British Library on patents: [www.bl.uk/patents](http://www.bl.uk/patents)

European Patent Office at: [www.european-patent-office.org](http://www.european-patent-office.org)

Intellectual property helpdesk (international) available at: [www.ipr-helpdesk.org](http://www.ipr-helpdesk.org)

Copyright Clearance FAQs for online use across the EU: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/241&format=HTML&aged=0&language=EN&guiLanguage=fr>

Basic definitions written in plain English, available at: <http://whatiscopyright.org/>

## Licensing

Creative Commons: <http://creativecommons.org/>

The Copyright Licensing Agency (CLA) (UK): [www.cla.co.uk](http://www.cla.co.uk)

Mechanical-Copyright Protection Society (MCPS) (UK) at: [www.mcps.co.uk](http://www.mcps.co.uk)

## DRM

Shibboleth: <http://shibboleth.internet2.edu/>

Digital rights management systems paper at: [www.ipr-helpdesk.org/documentos/docsPublicacion/html\\_xml/8\\_DigitalRightsManagementSystems\[0000006090\\_00\].html](http://www.ipr-helpdesk.org/documentos/docsPublicacion/html_xml/8_DigitalRightsManagementSystems[0000006090_00].html)

'Digital Rights Management – to avoid confusion', an article on the Publishers

Association web-site attempts to clarify some misunderstandings surrounding the use of DRM techniques:

[www.publishers.org.uk/paweb/paweb.nsf/0/3C183F17E6055C9080256C5B004ADA09?opendocument](http://www.publishers.org.uk/paweb/paweb.nsf/0/3C183F17E6055C9080256C5B004ADA09?opendocument)

## **Digitisation**

The Arts and Humanities Data Service (AHDS) brings together case studies, information papers and references relevant for those planning to digitise at:

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

Guidelines for Fair Dealing in an Electronic Environment (UK):

[www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html](http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html)

Technical Advisory Service for Images (TASI) (UK): [www.tasi.ac.uk](http://www.tasi.ac.uk)

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# List of abbreviations

<b>CDPA</b>	Copyright, Designs and Patents Act 1988
<b>DRM</b>	Digital rights management
<b>EEA</b>	European Economic Area
<b>EPSRC</b>	Engineering and Physical Sciences Research Council
<b>EU</b>	European Union
<b>HEFCE</b>	Higher Education Funding Council for England
<b>HEI</b>	Higher education institution
<b>IP</b>	Intellectual property
<b>IPR</b>	Intellectual property rights
<b>JISC</b>	Joint Information Systems Committee



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