

Legal Aspects of ePortfolio Systems: A Short FAQ

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Legal issues? What kind of legal issues?

A: The legal issues that are likely to affect your institutional ePortfolio system will vary depending a range of variables, for example, the developmental process that produced your system, the nature of the data it is envisaged will be stored in that system, the range of people who it is envisaged will have access to the data, and the means by which learners may make the data in their ePortfolio available to others.

Our ePortfolio system was developed by our staff – the system belongs to us, surely?

A: This is primarily an intellectual property question. If your ePortfolio system was developed by employees of your institution, in the course of their employment, it will probably belong to your institution as their employer. However, if parts of the ePortfolio system (software code, interface design, logos, icons, etc.) were developed by employees of your institution outside the course of their employment (i.e. if the work could not be said to be part of their employment contract), they may own the copyright in those parts. Many institutions have explicit conditions in their employment contracts about ownership of intellectual property rights in works created by their employees.

Equally, if parts of the system were designed by contractors, rather than employees, then unless the contractors' contracts with your institution specifically assigned copyright in the work produced to the institution, then the contractors will likely own the copyright in that work. In the absence of a written copyright agreement, the institution may have only a non-exclusive licence to use the work in specific ways.

If in the course of developing the system, your institution's employees or contractors have incorporated software code that is covered by an 'open source' software licence, this may also affect the nature of the intellectual property rights that your institution can enforce over the system, for example by requiring your institution to make its system source code 'open source' as well. If the institution wishes to avoid the complications that may be introduced by the incorporation of open source software code, the fact that it should not be incorporated should be made clear to employees, and should be included as a condition in agreements with contractors.

When developing an ePortfolio system, care should be taken to ensure that all the relevant intellectual property rights in the system are identified and that, where necessary, suitable written assignments or licences of those rights are acquired by your institution. These should

be collected/documented in an IPR register maintained by the ePortfolio system project which can be referred to in event of any future dispute.

Data protection is often talked about, but if the only personal data about learners we are adding to the ePortfolio system is personal data that we already hold in institutional systems, then are we automatically in compliance with the law?

A: Under the Data Protection Act 1998, an institution that determines the purposes for which and the manner in which any personal data are, or are to be, processed is a 'data controller'. Data controllers have a number of obligations under the Act with regard to 'data subjects' whose data is processed. An institution will usually have notified the Information Commission of the purposes for which it intends to process personal data - it is important to ensure that this institutional notification does in fact cover the intended operational uses of the ePortfolio system. It should not simply be assumed that the notification is adequate for that purpose, or that the institutional data protection officer is automatically going to be aware of the likely uses of the ePortfolio system. This is particularly important if there is any intention to permit the transfer of personal data from the ePortfolio system to 3rd parties.

Data controllers are required by the Act to process personal data only where they have a clear purpose for doing so, and then only as necessitated by that purpose. A data controller's purpose for any personal data processing operation should thus be clearly set out in advance of the processing, and should be readily demonstrable to data subjects. To that end, the Act requires data controllers to provide data subjects with a basic minimum amount of information about the collection, use, and distribution of their personal data. Most institutions provide this information to data subjects by means of collection notices at the point when the personal data is collected. However, if existing collections of personal data are to be imported into an ePortfolio system and in particular where this permits different uses, and allows access to the data by different third parties, than those already identified to the data subjects, then information about those uses by, and transfers to and from, the new system should be provided to data subjects.

Data held in the ePortfolio system must be held in accordance with the Data Protection Principles <<http://www.hmso.gov.uk/acts/acts1998/80029--l.htm#sch1>>. All new institutional administrative systems utilising personal data should be audited for compliance with the principles before 'live data' is used, and regular checks should be carried out to ensure continuing compliance of both the system and associated administrative procedures. Provision for initial and continuing compliance audits should be made when considering long term budgeting for such a system.

When developing an ePortfolio system, ensuring compliance with data protection law should be part of the planning process. Proposed uses of personal data as well as potential 3rd parties from whom transfers of personal data may be received into the system, or to whom data may be transferred from the system, should be identified and their respective data protection risks identified and the institutional responses documented. Institutional data protection officers should always be involved in this process. When the system is operational the institution must take such steps as are necessary to ensure that it is able to demonstrate continued compliance with its obligations under the Data Protection Act 1998.

Our Principal/Vice-Chancellor/Registrar (delete as applicable) says that data in our ePortfolio system is owned by the institution, our ePortfolio team/a guest speaker/a consultant (delete as applicable) says that an ePortfolio is owned by the learner. Who is right?

A: Effectively, they are both right and they are both wrong, in that they are probably correct for their own given value of 'owned',¹ but in legal terms they are effectively mixing concepts including 'possession', 'rights in', 'use of' etc. An educational institution may create, possess and eventually destroy data about its learners; however, learners will also have rights in the retention and use of that data (see, for example, data protection above). Equally, learners, when they create digital/digitised works that they may then choose to place in an ePortfolio, are, subject to a low-level test of originality, very likely creating works in which they have intellectual property rights.² Advanced learners, for example a Ph.D. student sponsored by a pharmaceutical company, may create original works in the course of their studies which by contractual assignment will belong to a sponsor or other third party. Their placing of that work, or their reporting on their research, and particularly their ability to display that data to third parties, in an ePortfolio may thus be constrained by the dictates of that third party. In effect, it may be very difficult to separate out the commingled 'ownership' of the content of an ePortfolio system.

In practice, particularly with regard to ePortfolios run within the formal taught education sector, i.e. schools, colleges, FE and HE undergraduate degrees etc. it is likely to be counterproductive to attempt to operate on the basis of 'ownership rights'. Indeed, when ePortfolio advocates talk of learners 'owning their ePortfolio', they rarely, if ever, mean to base that 'ownership' on the legal practicalities – it is rather a rhetorical tool (mis)used to emphasise the centrality of the learner's own experiences to the PDP/ePortfolio process - the learner more accurately has some control over the use of or access to, or has legally exercisable rights over or in, the data in the system. A more appropriate and effective way of looking at the position, in terms of the formal taught education sector, might be to regard the institution's relationship to the data in an ePortfolio as one of 'stewardship', where 'stewardship' is defined as 'the assumption of responsibility for the proper management of learner data'.

Our ePortfolio team have created this nifty way for our learners to publish parts of their ePortfolio to one of our websites for public or restricted access viewing. Are there any legal issues we ought to consider?

A: This appears to be the reappearance, in another guise, of a question frequently asked by educational institutions in the mid to late 1990s, which was 'We want to provide our staff and students with the opportunity to create personal webpages hosted at our institution. Are there

¹ See Pratchett, T. *et al.* (1999) *The Science of Discworld* at 312, "All religions are true, for a given value of 'truth'," also (2002), *The Globe*, Ebury Press at 5, "... this book is a true account of events in the life of William Shakespeare, but only for a given value of 'true'."

² Although some institutions appear to claim intellectual property rights in certain works created by any of their students. See University of Oxford, University Statutes, Statute XVI: Property, Contracts, and Trusts, Part B: Intellectual Property s.5(b) where the University claims ownership of all intellectual property specified in s.6 of the statute which is devised, made, or created by student members in the course of or incidentally to their studies. s.6 covers works generated by computer hardware or software owned or operated by the University; films, videos, multimedia works, typographical arrangements, field and laboratory notebooks, and other works created with the aid of university facilities; patentable and non-patentable inventions; registered and unregistered designs, plant varieties, and topographies; university-commissioned works not otherwise covered; databases, computer software, firmware, courseware, and related material not otherwise covered, but only if they may reasonably be considered to possess commercial potential; and know-how and information associated with the above. It is unclear how effective such a claim might be.

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

We are planning to roll out an ePortfolio system for our learners, but are concerned that some disabled learners may not be able to access the full functionality of the system. Does this potentially expose us to legal liability?

A: The Special Educational Needs and Disability Act 2001 (SENDA) establishes legal rights for disabled learners in pre- and post-16 education. It provides the right for disabled learners not to be discriminated against in education, training and any services provided wholly or mainly for learners, and for those enrolled on courses provided by 'responsible bodies', including all publicly-funded FE and HE institutions, schools with post-16 provision, and local authorities providing further, adult or continuing education or training. The Act defines learner services broadly, including educational and non-educational services, such as field trips, examinations and assessments, short courses, arrangements for work placements and libraries and learning resources. SENDA makes it unlawful for responsible bodies to treat a disabled person 'less favourably' than a non-disabled person for a reason that relates to the person's disability. If a disabled person is likely to be placed at a 'substantial disadvantage' by a particular institutional practice, responsible bodies must take reasonable steps to prevent that disadvantage. This might include changes to policies and practices, the delivery of courses in alternative ways, or the provision of material in other formats. SENDA also requires responsible bodies to anticipate the requirements of disabled learners and the adjustments they could make for them.

Thus, since 2002, institutions have been required to change policies and practices, e.g. checking all new electronic courseware to ensure it is accessible to disabled students. From 2003 institutions have also been obliged to provide auxiliary aids and services where these would help to prevent substantial disadvantage, e.g. introducing specialist software on computers for a visually impaired or dyslexic student. It is worth noting that, in addition to learner use of the LLR system, educational service providers may also have disabled employees, and they too will require access to the LLR system under non-discriminatory conditions under the Disability Discrimination Act 1995 (DDA).

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

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