

Legal Planning for JISC Projects

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The Legal & Records Management Study project was based at the Centre for IT & Law (CITL), University of Bristol and directed by Andrew Charlesworth - A.J.Charlesworth@bristol.ac.uk.

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Assessing Potential Legal Risks

Probably the main legally-related mistake that projects make is to fail to adequately identify, discuss, and request advice on, the potential legal issues that might affect their work, at a sufficiently early stage. A key element in avoiding legal problems on your project is thus to start thinking about them at the same time as you are planning your project bid. Important early issues include:

- **Identification of the roles and capabilities of your prospective project partners** - what are you going to expect your partners to do, is their planned role feasible given their resources, and what will happen to the project if they don't perform.
- **Developing a clear understanding between partners about the direction of the project, project outcomes, project ownership** - it is surprising how often project partners assume they know what the other institutions' needs, aims, and objectives are, based solely on their own institutional understandings, and without detailed consultation.
- **Understanding how legal issues may affect operational and strategic planning** - project planners often fail to consider who is responsible for project outcomes; what the implications may be of failing to develop an appropriate agreement for long term use of intellectual property used by and created in a project; or what the legal status of the partners will be if the project is a success and it is desirable to continue the work after the initial funding has finished.
- **Developing an understanding about the relevant legal issues that might be relevant** - for example, a digital repositories project will need, at a minimum, to know about or have access to an informed source on intellectual property law, especially copyright; a learner records based project will be in the same position as regards data protection law.
- **Seeking out reliable sources of information** - institutions often have existing staff who are expert in relevant areas, including data protection officers, contract negotiation staff, research and enterprise centres. These contacts should be used in conjunction with external sources, such as JISC legal, consultants, and lawyers - they can advise, for example, on when seeking external professional guidance would be appropriate or advised.
- **Identifying where legal compliance mechanisms may be needed** - for example, a project seeking to use personal data will need to think about the administrative framework for handling that data; how that project framework fits with both partner institutional DP frameworks; and the institutions' requirement to notify personal data processing to the Information Commissioner.
- **Deciding how legal issues relating to a project should be communicated to those impacted by it** - some forms of information are mandated by law, for example, data protection notices. Other communication, however, may be vital to ensuring third party co-operation or involvement, for example providing information to students about

the value of the re-use of student-created works in VLEs, or providing information to publishers about the processes involved in the incorporation of academic-created materials in institutional repositories.

Most legal issues are best addressed before projects actually begin. The key word at the planning stage is thus **Consultation**. Everyone in the project proposal process should be involved in discussing what legal issues the project might raise. Consultation within partner institutions should be used as the starting point for informed consultation between partner institutions.

An effective consultation process will provide the basis for developing the legal components of the three core elements of a multi-partner project: the project bid, the consortium agreement and the project management process.

Planning and Bidding

An important part of any JISC project bid is the requirement to undertake a risk assessment for the project. Projects are often able to provide adequate information about risks such as staffing and resource allocation. However, the need within a risk assessment to identify legal risks, assess their likely impact, and to outline the types of processes and guidance that the project partners envisage developing to address them is often overlooked, or handled perfunctorily. Many projects, however, contain legal risks which can, unless addressed at an early stage, delay or derail the projects themselves, or make their outcomes and deliverables harder to exploit. JISC is increasingly concerned to ensure that project proposals contain a comprehensive legal risk assessment to ensure value for money and reusability of funded developments.

Use of a coherent consultation process, as noted above, will provide the background to the legal risk assessment, identifying those legal issues relevant to the project's development. The project proposal team will then need to consider:

- **How the legal issues will be most effectively addressed** - for example, a multi-partner project that identifies data protection as a legal risk may, as part of the project, decide that the partner institution DP officers will meet at an early stage with appropriate team members to advise on compliance with DP law and partner institution policies, and that an audit will be undertaken during the project to make sure project policies and practices are being properly followed. A project that involves use of third party intellectual property, such as copyrighted materials, may plan for the provision of a 'copyright register' in which details of the materials used, and the licence conditions attached to those uses are collated.
- **How the processes identified to address the legal risks will be resourced** - projects often fail to provide adequate resourcing for dealing with legal risks, whether in terms of ensuring that appropriate financial costs (e.g. for consultancy or training) are included in the bid, or in terms of allocating sufficient project person hours (e.g. for developing administrative mechanisms or auditing). This may result in vital work to prevent legal problems being left too late, or being effectively overlooked.
- **The place of legal planning and processes in the project timetable** - the fact that JISC funds cutting-edge development work means that the temptation for projects is to concentrate solely on the developmental work at the expense of matters that are seen as more mundane. It will be helpful, both for the project team and for JISC programme management, to have a clear roadmap and timescale for addressing the legal issues raised by a project. It also means that it is harder for work required to address legal risks to 'fall off the agenda.'
- **A risk/benefit analysis** - undertaking a legal risk assessment is not just beneficial for project proposal reviewers, for the project team and for JISC programme management

- it is also useful for partner institutions to assess the extent to which they are exposed to risk, either by individual project commitments, or across their research and development activities. Clear risk assessments provide a basis on which decisions can be made about, for example, the need for liability cover/insurance.

Consortium Agreements

This document will not discuss the scope and role of Consortium Agreements for projects in detail, as this is covered in depth in the JISC document:

Consortium Agreements: A Short FAQ (2005)

http://www.jisc.ac.uk/uploaded_documents/Consortium_Agreements.pdf

However, it is worth noting that an effectively drafted Consortium Agreement can, and should, fulfil multiple purposes within a project, including ensuring that the process of producing project deliverables, and the achievement of project outcomes, are made as efficient as possible. In a multi-partner project a Consortium Agreement provides both the institutions and the project team with a clear set of rules for managing the project, and for regulating issues relating to its operation amongst the project partners. If there is no Consortium Agreement, or the Consortium Agreement is unclear or inadequate, project partners and project staff may be unaware of the extent of institutional rights and obligations within the project, including ownership of existing and newly created intellectual property, and the project is likely to lack an effective management structure for its operational, technical and financial aspects.

Further, it is often the case that the project team which will carry out the work will only be fully assembled after the funding has been obtained. A clear Consortium Agreement between partner institutions will set out clearly, at the earliest possible stage, the management and regulatory framework within which the project team members are to work. It also provides clear guidance to newcomers to the project team on the roles, rights and responsibilities within the project, in the event of staff turnover during the project lifetime.

Because of the important management role, and the legal implications that will stem from what is a legal contract between the project partners, all project partners and project team members should be aware of their Consortium Agreement's content and its implications for their work.

Project Management

It is often tempting, when dealing with legal risks in a project, to assume that once a risk assessment has been carried out, the funding awarded, and a Consortium Agreement signed, that legal issues can be placed on the backburner. However, a not inconsiderable amount of project management involves dealing with continuing legal issues, and, as already noted, this work has to be both planned for and effectively executed. Ongoing processes may include:

- **Documentation of processes, decisions and outcomes** - projects often make decisions that have legal implications, and it is important to recognise when such occasions occur and to adequately document them. In the event of legal disputes, failure to document processes, decisions and outcomes may result in the lack of vital evidentiary material for a successful legal action.
- **Review of legal risks and project responses** - as projects mature, the legal issues which were apparent at the start of the project process, and were identified by the risk assessment, may change. New risks may appear, particularly if there are changes in project goals or methodology. Existing strategies for previously identified risks may also require evaluation as to their effectiveness in the light of continuing practice. Consultation with partner institutions and external information sources should be a continuing process
- **Monitoring of changes to the legal environment** - it is important to remember that laws affecting a project may change over time. It is helpful to try to keep up-to-date

with relevant legal developments. A periodic reassessment of the legal risks, an annual review of the accuracy of your written advice and good practice guidelines, and an occasional check on your projects processes and practices, are helpful ways to guard against legal risks.

- **Knowledge management and training** - in all organisations, it is important to 'know what the organisation knows'. This is particularly true of JISC projects. Staff turnover, the forming and reforming of consortia, and the extension of projects beyond their initial funding period all affect the extent to which a project has access to personnel with experience of relevant legal issues. It is a good idea for projects to produce and maintain written advice and good practice guidelines, as this will help ensure that knowledge is retained and accessible. However, guidelines, protocols and procedures are valuable only if both understood and used

Developing a clear understanding of the legal issues relating to the project, and implementing a strategy for managing them are key project management skills. An effectively managed project may still face legal risks, but will do so armed with adequate documentation, appropriate processes and an informed staff. It is important to identify a person/persons with responsibility for development, training and implementation of policy, at a suitable level of seniority to ensure that it is actioned.

New phases or winding down

At the end of a project, or when a project is moving onto a new phase of funding, it is an appropriate time to engage in a '**legal health check**' to ensure that all the legally-related matters that should have been attended to during the project have been successfully concluded. A legal health check may include:

- **An evaluation of the project management documentation** - to establish which data should be archived, why, by whom, and for how long; and which material should be securely disposed of. Use of a documented retention scheme for project management documentation will aid with this process
- **An evaluation of project good practice guidance documentation, and other advisory material** - as regards its effectiveness and uptake, and to assess whether it may be of use to future projects, or in a continuation project
- **Completion and audit of process documentation**, for example, in a project dealing with third party materials, the intellectual property rights management register. This will ensure that there is a right audit trail for appropriate reuse of project outcomes and deliverables
- **Ensuring that all project partners have been briefed on legal issues relating to exit strategy** - regardless of whether the project is ending, or entering a new phase of funding, it is important to ensure that project partners understand the implications of the ending, or amendment of, the project consortium agreement; for example, the effect this may have on their access to intellectual property made available to them for the duration of the project.
- **Where the project is continuing, an evaluation of the appropriateness of existing consortium agreements for future project development**, for example determining whether an agreement can and should automatically continue, or whether it will require revision.

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