

## Developing and Operating an ePortfolio System - Assessing the Legal Issues

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## Developing and Operating an ePortfolio System - Assessing the Legal Issues

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## Introduction

Regardless of the legal system or systems within which an ePortfolio system is used, a similar set of legal issues is likely to need to be considered. These are:

- intellectual property rights in the ePortfolio system;
- intellectual property rights in the contents of the ePortfolio system;
- data protection, privacy and confidentiality rules relating to personal data;
- confidentiality rules relating to privately owned or generated data;
- liability arising from misuse of the system;
- liabilities arising from systems failure, data losses and security breaches;
- user accessibility, disabilities discrimination, and other social inclusion policies.

The legal issues which may affect the development and use of particular ePortfolio systems will vary widely depending upon a range of operational variables, including:

- the developmental process that produced the system;
- the nature of the data that will be stored in that system;
- the range of people who will have access to the data;
- the means by which learners may make the data in their ePortfolio available to others.

In any ePortfolio project these issues ought to be considered at an early stage in the planning process. This permits those running the system to identify potential legal risks, assess their implications, and decide what measures, if any, will be required to reduce or remove those risks. An effective review of legal issues will have adequate time and financial costs allocated to it, and will be included in the project timetable/milestones. The risk analysis process should be fully documented, providing a clear rationale for decisions made, for the benefit of future system administrators and staff. A successful ePortfolio system may be used for many years, it is thus essential to make provision for long term use and support. The process should also identify areas where there may be a need to seek further advice, including professional legal advice - seeking such advice proactively is likely to be more cost effective than seeking it retrospectively. Failure to carry out a timely review of legal risks may expose the project to legal liability, result in greater costs remedying problems at a later date, or result in learners not being able to use the ePortfolio system to its full potential.

It is also important to be aware of changes in the law that may impact upon the system. Both copyright and data protection law have undergone significant changes in recent years, and the EU has made social inclusion a key element of its Information Society programme. It is likely that further changes in national laws, driven by technological innovations, will occur in the short to medium term. Those running long term ePortfolio projects will need to have processes in place to ensure that relevant changes in the law are identified, and their implications assessed and addressed, as an ongoing part of operating the system. A periodic audit of legal risks, project documentation, and actual administration and learner practices can be a useful way both to evaluate the changing legal landscape and ensure appropriate legal compliance.

## Recommendations

- Plan early, plan effectively.
- Document your processes clearly
- Audit your practices periodically
- Don't be afraid to seek advice

## Developing an ePortfolio System

The process of developing an ePortfolio system may take a number of routes. An ePortfolio provider may:

- develop its own ePortfolio system 'in-house' - this may be created entirely by employees of the institution or institutions involved, or with the aid of outside contractors;
- purchase an 'off the shelf' ePortfolio system - i.e. a commercial system which is usually generic in nature, and for which no adaptation to specific types of end-users is offered.
- purchase a customisable ePortfolio system - i.e. a commercial system which is broadly generic, but which can be altered to suit specific types of end-users.
- purchase a bespoke ePortfolio system - i.e. a commercial system which is specifically designed to requirements of the institution or institutions involved
- use an open source ePortfolio system - i.e. a system which has been developed under an open source licence where institutions are free to modify and customise the source code of the system according to their needs.

Each has certain legal implications that will need to be considered. If a system is licensed from a proprietary supplier, ePortfolio providers will need to consider, for example, how to assess:

- the suitability of the software for the project, and its end-users - has the supplier provided adequate and reasonable information?
- the ePortfolio software's fitness for the purpose for which it has been purchased - does the software contain substantial faults that affect its usability?
- the acceptability of the terms of the licence of the ePortfolio software, in particular whether the supplier's warranties, indemnities, and limitation of liability are appropriate in the circumstances?
- provisions for circumstances where the supplier goes bankrupt, is taken over, or stops supporting the software, in particular whether the institution can have access to the source code under an escrow agreement for the purpose of error correction, and code improvements - do they have the rights to continue to maintain/develop the software?

If the ePortfolio system is designed in-house, or by a contractor on behalf of the institution, or by a consortium of which they are a part, ePortfolio providers will need to consider, for example, how to assess:

- the appropriate ownership of the intellectual property in the system. While copyright has been partially harmonised in the EU, there remain differences between Member State intellectual property regimes, and ePortfolio providers will need an understanding of the relevant law in order to ensure that they own the intellectual property in, or have a suitable licence to use, the system software that is created
- who has responsibility for developing, maintaining and updating the system, and who is liable, and for what, if the system does not work properly, or it infringes on someone else's intellectual property rights - this is particularly important in consortia.

If the ePortfolio system is an open source development, ePortfolio providers will have to consider, for example, how to assess:

- the implications of the open source licence terms and conditions, in particular whether these impact upon what the project wishes to do with the system.

## Recommendations

- Document your system requirements
- Check your licences and agreements
- Know your local intellectual property law

## Data Protection, Privacy and Confidentiality

All EU Member States have data protection laws based primarily upon the EU Data Protection Directive 1995. While similar in framework, these laws vary in content and national regulators tend to take different approaches to their enforcement. Data protection law in the EU aims to ensure that people who make decisions about how other people's personal data is processed have to abide by a set of rules. There are essential 3 key concepts underpinning the law, purpose, fairness and transparency.

- Purpose requires that data controllers may process personal data only where they have a clear purpose for doing so, and then only as necessitated by that purpose.
- Fairness requires that data controllers who have identified a particular purpose for processing of personal data must also consider whether to do so would be fair to the data subject. This determination may be guided by legislation, regulators, sectoral practice, or rules laid down by the courts.
- Transparency requires that data controllers to provide data subjects with a basic minimum amount of information about the collection, use, and distribution of their personal data, including the purpose of the processing, and the measures that the data controller has taken to ensure that the processing is fair.

It is clear that for some types of ePortfolio, an ePortfolio provider will only host the ePortfolio and not make decisions about the processing of personal data contained in it. In these circumstances the ePortfolio provider is probably not a data controller and thus data protection legislation will not apply to it. Where an ePortfolio provider does exercise some control over the data in the ePortfolio, it may be considered a data controller, and it will have to ensure that it complies with the appropriate national data protection rules. End-users of ePortfolio systems may also be data controllers in certain circumstances, for example where their ePortfolio contains personal data concerning third parties.

Ensuring compliance with data protection law should always be built into the ePortfolio planning/design process. ePortfolio providers should determine whether, under their national legislation, their ePortfolio system's functions are likely to lead to them, or their end users, being considered data controllers. If they are data controllers, they should ensure that proposed uses of personal data, as well as potential 3<sup>rd</sup> parties from whom personal data may be received or to whom data may be transferred from the system, should be identified and their respective data protection risks identified, and the provider's responses to those risks documented.

When a system is operational, ePortfolio providers should ensure that they can demonstrate continued compliance with the requirements of national legislation, including formalities such as notification. Data subjects, end users, institutional employees and 3<sup>rd</sup> parties permitted to access the personal data should all be regularly reminded of their rights and obligations as regards the system. All proposed future changes to the system, both technical and administrative, should be reviewed for their data protection implications prior to their implementation, and where necessary, advice on their impact should be sought from ePortfolio provider or institutional data protection officers, or from the national regulator.

Apart from data protection law, some EU member states may also have particular privacy or confidentiality laws that impact upon ePortfolio systems. Compliance with data protection law may not be sufficient to meet the requirements of those laws. Certain activities may have higher expectations of confidentiality in terms of the use of personal information, for example, ePortfolio providers using ePortfolios in support of health-related learning or work may find restrictions placed on the data that end users can legitimately incorporate into their ePortfolios, or that stricter security requirements are imposed upon their systems.

## Recommendations

- Assess your data protection risks
- Consider purpose, fairness, transparency
- Pay attention to sectoral privacy risks

## Ownership and use of information in ePortfolios

The ownership of information that is placed in an ePortfolio can sometimes be controversial. As noted above, the term 'ePortfolio' may cover a range of learner support systems, and the ownership questions raised will inevitably vary according to the nature and derivation of the information used, and how it is used. Some examples include:

- An ePortfolio relating to a course of study at school where all the information is created by a learner for their personal use and stored on their home computer - while copyright regimes across the EU vary, it is likely that all would agree that the user owns the information they have created.
- An ePortfolio relating to a course of study at University which incorporates information from University systems about the learner such as grades, examiner's comments and tutor assessments - here it is likely that some of the information is 'owned' by the University and some by the learner. However, the learner can exercise some rights over the University's retention and use of that data under data protection law. Some educational institutions make particular ownership claims to information created by students in the course of their studies - it is unclear how effective such claims are.
- An ePortfolio relating to a course of study at University created by a doctoral research student sponsored by a pharmaceutical company, containing information created by the student and tutorial assessments - here, the student, the University and the sponsor may all have rights in some of the information in the ePortfolio - the student as creator, the University as rightsholder to the work of its employees, and the pharmaceutical company by virtue of its sponsorship agreement with the student.
- An ePortfolio relating to a work experience placement created by a learner on a program designed to help the long-term unemployed - again, the learner and possibly the employer will have rights in the data, for example, if the learner has incorporated material into the ePortfolio which the employer considers to be part of their intellectual property - copyrighted material, trademarks, material received in confidence etc.

Thus learners, when they create digital/digitised works that they may then choose to place in an ePortfolio, are very likely creating works in which they have intellectual property rights. But other parties may also have rights in information relating to the learner, and the placing of work or the reporting of research, and particularly the ability to display that data to third parties in an ePortfolio, may thus be constrained by the dictates of third parties. In effect, it may be very difficult to separate out the commingled 'ownership' of the content of an ePortfolio system.

Misuse of some types of third party information may open an ePortfolio provider and/or learners to legal liability for breach of intellectual property rights or breaches of confidentiality. Even where legal action is unlikely, misuse may damage relations between the learner, or the ePortfolio provider, and third parties. As a result, it is important to understand the ownership issues in information stored in ePortfolios, and to be able to identify and address potentially problematic areas. ePortfolio providers need to assess the risks attaching to types of information that are likely to be contained in ePortfolios in their system, and to advise staff and learners on the proper use of information which third parties own, or in which they have an interest. Equally, it is advisable, in circumstances like sponsored education, work placements, and employment to ensure that relevant third parties are aware of the type of information that may be collected, and what it may be used for, so that they too can provide input into discussions about acceptable uses.

## Recommendations

- Examine likely ownership conflicts
- Discuss policy with information owners
- Provide clear guidance to all parties

## Misuse of ePortfolio Systems by Learners

ePortfolio systems may permit learners to extract information from them for presentation to third parties, or permit third parties access to parts of the ePortfolio selected by the user. Some systems permit users to publish material from their ePortfolio onto webpages hosted by the ePortfolio provider. Such facilities create legal risks, in that learners may make available material that is inappropriate for such publication. As a result ePortfolio providers considering providing such a service will need 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 ePortfolio provider 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 ePortfolio provider planning to operate such a 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.

### Recommendations

- Conduct a risk assessment
- Provide clear guidance to learners
- Ensure adequate administrative support
- Consider the need for insurance

## Systems Failure, Data Losses and Security Breaches

It is clear that ePortfolio systems have the potential to play a highly important role in demonstrating a learner's ability to collect, organise, interpret and reflect on documents and sources of information: the student portfolio is quickly becoming recognised as an important means of documenting and evaluating achievements and improvements in student learning. However, as ePortfolios become more important, so the consequences of failure of ePortfolio systems become more acute. The failure of a free, open source, unsupported, unwarranted ePortfolio system is unlikely to result significant liability on the part of the ePortfolio provider; the same cannot be said for failures in areas such as the increasingly important use of ePortfolios in documenting proficiencies in applications for graduate school and for certain kinds of professional employment. As ePortfolio systems become more 'mission-critical' there will be an increasing expectation that they are permanently accessible and supported, effectively backed-up, and securely stored. Failure to meet such expectations will both damage the public acceptance of ePortfolios and potentially raise the issue of legal liability.

ePortfolio providers will need to consider carefully how they deal with such issues. Liability can be reduced by means of exemption and limitation of liability clauses in end-user agreements, but this has to be balanced against the reasonable expectations of end-users about the appropriate level of service provision. Laws such as data protection and sale of services legislation may also determine the standard of service that ePortfolio providers are expected to supply, and the preventive measures that they are expected to take, in order to ensure that data in an end-user ePortfolio is not lost, or misused.

### Recommendations

- Conduct a risk assessment
- Take note of relevant legislation
- Decide the appropriate level of security
- Consider the need for insurance

## **User Accessibility, Disabilities Discrimination, and other Social Inclusion Policies**

It is important to remember that while ePortfolios potentially offer important advantages to learners, learners are not a homogenous group, and it is possible that certain groups may, initially at least, find some ePortfolio technologies to be socially exclusive as opposed to socially inclusive. Some potentially disadvantaged groups of learners are immediately obvious; disabled learners for whom technology often provides new opportunities, but also new interfaces to negotiate, may find the challenges considerable. Other groups potentially disadvantaged include:

- learners with poor literacy skills;
- learners with poor concentration or memory skills;
- learners with limited access to the necessary levels of technology
- learners forced to change between ePortfolio systems on a regular or irregular basis, such as Travellers and children of military personnel

Specific educationally related disability anti-discrimination laws, such as the UK's Special Educational Needs and Disability Act 2001 (SENDA) seem to be relatively new, and definitions of disability vary widely across the EU Member States. However, it is clear that Member States are increasingly moving to ensure that disabled learners are not unreasonably disadvantaged in their access to educational provision. Additionally, the EU has made social inclusion a key plank in its strategy for the wider European Information Society, and it is likely that this will, in the absence of action on the part of member States, result in EU legislation to bolster the position of those seen as marginalised by developments in information technology, including e-learning and ePortfolios.

As such, when developing an ePortfolio system, ePortfolio providers 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 learners. This will permit ePortfolio providers to demonstrate first, that they have taken appropriate account of the disadvantages that might be faced by those learners, and second, that measures adopted by them to address those disadvantages are proportionate and reasonable.

### **Recommendations**

- ePortfolios providers should actively provide for disadvantaged learners
- Consultation with disadvantaged learners and their representatives is advised
- Take note of relevant legislation
- Document your processes for ensuring learners are not, as far as possible, disadvantaged.

## Conclusion

Addressing the legal issues arising from ePortfolio development and use can take considerable time and effort. However, an early investment in those issues can save considerably more effort later on, by highlighting key issues and allowing ePortfolio providers to plan to avoid them or ameliorate their effects. Many matters can be addressed, at least in part, by ensuring that ePortfolio provider staff and learners are provided with adequate information and guidance. Maintaining adequate documentation of processes and decisions also helps to provide continuity in approach to legal issues over time. There will be occasions when recourse to professional legal advice may be necessary, and an effectively planned legal strategy will not just help to indicate when this is likely, but will also help in formulating the questions that will need to be asked.

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