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1. Introduction

This article provides a basic introduction to certain areas of law relevant to the establishment, development and administration of online repositories in further and higher education. It is intended to provide introductory discussion material, and as an aid to exploring the legal issues in more depth. At the outset, it should be stated that there are a number of secondary legal issues (such as freedom of information requests in relation to repository holdings) which are not covered by this paper.

The term “e-repository” is used to describe various methods for capturing and preserving the intellectual output of the educational community. The structure of an e-repository is based on the information stored in it and the specific informational service offered by it. The contents of an e-repository can comprise a wide range of materials, such as audio and visual objects, e-learning objects and other courseware, presentations, administrative and personal data of individuals, research outputs which can include theses, journal articles, and linked metadata (1).

The informational service offered by the e-repository can be categorised into four:

- (1) a file sharing device: It enables the uploading, publishing, storing, preserving and downloading of content.
- (2) a search and access device: It allows the tracking and retrieval of information.

- (3) It serves the role of an on-line cataloguing or reference service and as
- (4) a marketing tool: It facilitates the visibility, dissemination and re-distribution of the preserved digital content to public (within and outside institutions) through its functional characteristic of 'interoperability'.

In short, an e-repository is a "one size fits all" digital collection that

- (1) may provide an alternative to traditional journals,
- (2) can streamline access to single or multi-institution intellectual output (2) through the 'click of a mouse' or a 'key' and that
- (3) can serve as an alternate and attractive platform for publishing the academic output.

The ability to deliver easy access to digital materials via an e-repository requires a consideration of a number of legal issues. The predominant legal issues are copyright law, database law, liability issues, accessibility law and data protection law.

2. Copyright and e-Repositories

One of the key legal issues that will impact on the development and use of an e-repository is copyright. Copyright protects the expression of ideas in the form of various types of work, (including literary, dramatic, musical or other works). Copyright allows the right holder to control copying of their works. This affects how the e-repository contents or e-contents are used and distributed.

The next sections will analyse the scope of copyright protection for an e-repository based on two factors:

- (1) protection for the individual e-contents (e.g. theses, research works, learning materials etc) and for the contents as constituting a 'compilation' (e.g. a collection of dissertations) in the e-repository and
- (2) protection for the entire e-repository as a work.

The Copyright Designs and Patents Act (CDPA) 1988 does not define the term 'compilation' but classifies a compilation as a literary work under Section 3 (1). Also, dramatic and musical works are excluded from the meaning of 'literary work' under Section 3(1). It follows from this that copyright for dramatic or musical works in an e-repository would extend only to the individual dramatic or musical work. Dramatic and musical compilations (e.g. choreography, film scripts) in an e-repository would thus be out with the realm of copyright. In short, copyright for dramatic or musical compilations in an e-repository is very thin.

Copyright owners acquire exclusive rights in respect of their work (3). The right to copy a work is one of the principle rights allowing a copyright owner to restrict particular uses of the work. The technology used for storing e-content in e-repositories is prone to rapid changes in technology which could make the e-contents inaccessible. Likewise, rapid and sudden changes through deterioration of the medium of storage can affect the preservation of e-content (4). There is thus a demand for the preservation of e-contents through the process of archival. Archiving e-repository content can involve making a copy of the digital resource or web site.

Under s.17, CDPA 'copying' in relation to literary, dramatic and musical works includes 'reproducing the work in any material form' and s.7 (2) states that 'material form' includes storing the work in any medium by electronic means (5). So, archiving an e-collection will essentially constitute reproduction in a material form and could amount to copyright infringement (unless the act of archiving falls under one of the permitted acts relating to libraries and archives as provided under s. 37– 44 of the CDPA).

Another exclusive right of the copyright owner is the right to make an adaptation of the work. Consequently, it is a restricted act to make an adaptation of the contents of an e-repository. Maintenance and re-use of an e-repository can involve its adaptation into other file formats (6). This might be performed through the addition or exclusion of contents from the e-repository. However, such modifications (whilst technically important for the-repository) may not be legally permissible under the existing legal framework of the CDPA.

The contributing participants to an e-repository may include 'content creators' (e.g. faculty, staff and students), the individual curator, and the hosting institution responsible for the collection, publication and maintenance of the contents in the e-repository. This raises questions about how ownership rights will be regulated between them. The first owner of copyright in a work is the person who created the work (7). A work may have joint owners when more than one author is involved in creating it. Accordingly, a piece of courseware posted in an e-repository can have single or multiple copyright owners. Nevertheless, joint ownership can raise complex issues when jointly created courseware is archived in an e-repository and one of the staff members who contributed to its development moves from the institution and wishes to include/use the current work in the e-repository of his new institution (8).

It is possible that the outgoing member of staff wish to claim a right to authorship and ownership in the content submitted towards development of the courseware. Here, the submitted content might incorporate material that is inseparable and is created by the co-member of staff. In such a scenario, the attribution of rights and ownership to a single person in the contributed material could be considered inequitable when compared to the other member of the team.

The demarcating line of ownership rights is murkier when research projects (e.g. a doctoral research of a student) are funded by third parties (9). Here, the research that leads to the publication of the student thesis might also contain material contributed by any third-parties who have funded the doctoral research. Given their contribution (financially or otherwise), they may wish to lay claim to any intellectual property arising from the doctoral research. At the same time, the institution where the student is enrolled for his doctoral studies might wish to claim ownership of any intellectual property. Absent express contractual agreements, it will become difficult to draw the copyright balance between the diverging interests of the institution favouring open access and wanting to deposit a thesis in the institutional e-repository, and the industrial sponsor wishing to commercially exploit the research results of the doctoral student.

Academic publishing has witnessed a paradigm shift with many publishers demanding only an 'exclusive licence to publish' articles rather than adopting the

traditional approach of acquiring copyright ownership in the article by assignment (10). It is possible that copyright owners might consider such arrangements as a leeway allowing them to post a published copy of the article in an e-repository. However, the scope of such a blanket freedom is ambiguous. It can happen that the terms of the publication licence arrangement include prohibitive arrangements that indirectly prevent submission or publication of the article in the e-repository.

Furthermore, the contents of an e-repository may comprise audio-visual resources that have separate copyrights and performance rights (11). Of note here is that while a music performer may have waived his performance rights in posting a musical work in an e-repository, the composer of the music may not have done so. So, anyone building and maintaining an audio visual e-repository where ownership rights are not properly cleared will still be unintentionally infringing copyright.

Fair dealing with e-repository contents will be allowed for the purposes of non-commercial research, private study, criticism or review or for reporting current events. The remit of the research and private study exception which is available under s.29 CDPA is restricted to literary, dramatic, musical and artistic works and to the typographical arrangements of published editions (12). Consequently, the provision will prohibit a researcher from copying a sound recording or film from an e-repository for the purpose of private study but at the same time will permit copying of the underlying musical work or film script (13). The CDPA also carves out certain exceptions for libraries, the 'library exceptions' under sections 37 - 44. However, these exceptions apply only to works like literary, dramatic, musical and the typographical arrangement of published editions (14). The CDPA will thus impede preservation of sound or film collections made available in an e-repository.

3. The Database Right and e-Repositories

The database right, also known as the *sui generis* right, can be referred to as a substitute protection (15). It is a property right independent of copyright and protects the contents of a database or the database itself. The database right in the UK is governed by the Copyright and Rights in Database Regulations 1997.

The first issue to be addressed here is whether an e-repository conforms to the definition of a 'database' as set forth in the Copyright and Rights in Database Regulations 1997.

A database is defined as a collection of independent works, data or materials arranged in a systematic or methodical way and is individually accessible by electronic or other means (16). The definition of a database is thus broad and so the contents of a database can comprise just about anything.

The 'independence' of repository contents is to be construed in terms of them being complete information (17). And to constitute independent data, the contents of an e-repository should be capable of being, or intended to be useful when analysed in isolation. An e-repository can comprise content that by itself is complete information. The positioning of the contents (for example, a collection of articles) in an e-repository could be such that the removal of a single content (an article) from the repository is unlikely to affect the performance or functioning of the repository.

Hence, e-repositories fulfil the requirement of being a collection of ‘independent work’ as provided under the definition of a database.

The next requirement, systematic and methodical arrangement, denotes an arrangement that enables easier tracking of individual independent parts without searching all the contents. In the broadest sense, digital repositories have been defined as a “collection of resources that are accessible via a network without prior knowledge of the structure of the collection” (18). This definition is enough to denote that an e-repository would fulfil the systematic and methodical arrangement requirement of the database definition.

The purpose of the last criteria ‘accessing by electronic means’ is to enable location of particular or individual content through electronic means (19). E-repositories provide access to the resources made available in them via electronic means (20). The electronic access facilitates easier tracking of single or multiple contents and its associated metadata. e-Repositories thus connote a digital collection for which an electronic access is a must. e-Repositories thus will usually satisfy the threshold definition of a database.

There are two conditions for a database right to subsist in a database. The first condition requires that the maker or makers of a database be a national or resident of one of the States in the European Economic Area (EEA), at the time the database is made (21). An institution might wish to outsource the building of its repository to a consortia or a company for several reasons. The building and hosting of repositories could be major operational challenge to institutions especially in situations where the institution lacks the requisite infrastructure or suffers from technical incapacity. Institutions might consider outsourcing in order to minimise the effort and investment in manpower, cost or even to aid in rapid deployment of the-repository. At this point, it may be noted that the building of an institutional repository could also be outsourced to a company or consortia in a foreign country for the same reasons. In such cases, absent express sub-contracting agreements or where the company or consortia is based in a country where there is no similar legislative framework offering a *sui-generis* right of protection, the-repository in the EU can lose out on gaining database protection for the-repository. So, institutions that still wish to outsource building of the-repository to an outside country will need to consider having joint collaborative owners in the EU or building the-repository in the EU itself.

Another qualifying condition for *sui-generis* right requires database owners to demonstrate substantial investment in the obtaining, verifying or presenting of the contents in a database. The term ‘substantial investment’ is however not defined in the regulations. The only guidance given is that ‘substantial investment’ may be measured quantitatively or qualitatively and can be an investment in the form of financial, human or technical resources (22). So, what is substantial investment in an e-repository based on this guidance? The advancing of capital to fund the making or updating of an e-repository can be a quantitative financial investment (23). Contributing technical know how through computing facilities can be a qualitative investment of technical resources (24). Likewise, employing staff or contractors or curators to work on the e-repository can be a qualitative and quantitative investment of human resources (25). What these actions possibly create is a substantial investment in obtaining, verifying and presenting contents for the e-repository.

Investments in an e-repository are thus an ongoing process, right from the time of obtaining contents to create the e-repository database to its continued verification and presentation. The crucial question here will be whether the meaning of the term 'obtaining' includes investments directed towards the collection and gathering of data for the e-repository or whether it is restricted to investments directed at the creation of the e-repository database subsequent to the collection (26).

Answering a similar question for a horse racing database, the ECJ in the *British Horse Racing Board Ltd v William Hill Organisation Ltd* (27) held that investments at the time of creation of a database is to be excluded from the meaning of the term 'obtaining' (28). From this view point, investments directed towards the creation of materials for the e-repository will not constitute an investment. It will only be the investment in collection and gathering of contents that will be within the ambit of the term 'obtaining'. As a result, e-repository makers will have to draw a line of distinction between investments that were directed at the time of creation of the e-repository and that at the time of collection and gathering of data for the e-repository (29). In other words, e-repository makers may face a tricky task in assessing what are protectable and non-protectable investments to gain database right protection for the e-repository.

The effect of the substantial investment criteria is that it can result in the creation of fragmented ownership rights in an e-repository. The maker (30) of a database is the person who takes the initiative and assumes the risk of investing in the obtaining, verifying and presenting of the contents of a database (31). Thus legally speaking, ownership of the e-repository database will rest with the funding body or institution that provides the requisite infrastructure or funds the database. Sub-contractors and hired service enterprises are explicitly excluded from claiming database ownership in such cases (32). However, ownership will be a problem when externally-funded university research teams who might not consider themselves subcontractors wish to claim a database right on the content submitted by them. Also, in the case of central e-repositories (e-repositories that are developed through a co-operation network between institutes) groups who place data in the common repository might wish to claim ownership in the submitted content (33). Even though a joint ownership is a possible answer in such scenarios, it leaves open the question on what exactly can the ownership right be claimed – the whole e-repository as a database, its format of arrangement or its contents (34). Unfortunately, the database law framework is unsupportive in answering this question.

The scope of the *sui-generis* right prohibits unauthorised acts of extraction or re-utilisation of the contents of a database. Extraction refers to the permanent or temporary transfer of the contents of a database to another medium by any means or in any form (35). In effect, what this covers is not just the transfer of the contents from one database to another but also the temporary holding of the contents of database so as to search it for any of its contents (36).

In any case, to constitute an infringement of the database right through extraction or re-utilisation, accessing or reading should be of substantial data or repeated or systematic reading of insubstantial data. So, what is substantial extraction or re-utilisation in an e-repository evaluated quantitatively or qualitatively. Quantitative

extraction was held by the ECJ in the British Horse Racing Board Decision to be decided on a comparison of the volume of data extracted or re-utilised as related to the total volume of the contents of a database. Hence, extraction of a large volume of e-repository content when compared with what is available in the database will be an infringement. Qualitative investment refers to the scale of investment in the obtaining, verifying or presenting of the particular data being extracted or re-utilised, notwithstanding the question whether that actually represents a quantitatively substantial part of the contents of a database. The ECJ having rejected the intrinsic value of materials as a relevant criterion for determining qualitative extraction (37), the issue here will be whether the human, technical and financial efforts put in by the makers of the e-repository in obtaining, verifying and presenting the extracted or re-utilised data constitutes a substantial investment. Thus, if the particular material (e.g. a journal article) extracted or re-utilised from an e-repository required the e-repository builder to put an investment independent of that required for its creation (e.g. in drafting/preparing the article), it will be considered as an infringement through the extraction of a substantial part in the qualitative sense (38).

Regulation 16(2) of the Copyright and Rights in Databases Regulations 1997 provides that repeated and systematic extraction or re-utilisation of insubstantial data will amount to extraction of substantial content, and is therefore an infringement. What is needed to show systematic extraction is a systematic and repeated access (39). For e-repositories this is provided by the internet search engines actively supported by the interfaces for searching, browsing and collecting data through the various software platforms and the metadata that allows a resource to be discovered using multiple search techniques (40). Therefore, acts of repeated or systematic extraction and re-utilisation that amount to an infringement in an e-repository are acts that have either made use of the data available in the e-repository or arguably have taken unfair advantage of the way in which its maker had rendered the contents individually accessible (through metadata, software etc) (41). It can thus be inferred that if a user utilises these search mechanisms to extract even insubstantial data (e.g. parts of an article) from an e-repository repeatedly at regular intervals of time to create a new e-repository or another compilation of articles for an e-repository it will constitute substantial data and will be an infringement. This exposes the strict nature of the database right, to the right holder's benefit.

The *sui-generis* right also provides a catalogue of exceptions. One of these exceptions allows lawful users to extract/re-utilise insubstantial parts of the contents of a database made available to the public (42). This freedom however extends only to the part of the database that a lawful user is authorised to extract/re-utilise (43). Lawful users will thus face a challenging task of defining access permitted and access denied parts of an e-repository. A lawful user is defined as a person who has the right to 'use' a database. With no definition of the term 'use' in the regulations, it can create potential uncertainties in understanding the activities considered permissible with an e-repository (44). The fair dealing provisions also suffer from a lack of clarity as they are limited to non-commercial purposes. This creates practical difficulties when public funded e-repositories develop commercial implications (45). Also, with no exceptions for reproduction from non-electronic databases, the legal position regarding the extraction and digitising of printed content to build e-collections is not clear.

Databases are protected by the *sui-generis* right for a period of 15 years. The protection can run for another 15 years when substantial changes are made to the database resulting in the database being considered a substantial investment (46). Substantial changes to an e-repository can be through the addition, deletion or edition of content. These actions add new value to the e-collection. Under these circumstances, protection pursuant to the *sui-generis* right may exist in perpetuity in e-repositories. Such a protracted and perpetual term of protection based on unlimited renewal rights in a database whenever updates are added to it (47), calls for reliance on the laws of anti-trust, competition and laws on compulsory licensing to make the data in an e-repository available for research (48).

4. Liability and e-Repositories

This section will outline and analyse the potential liability risks of an e-repository for publishing content that is defamatory or obscene (49). This will be exemplified by looking at liability issues from the perspective of a curator (who assumes the role and risk of hosting and thus publishing content) and that of the university (that funds the hosting of an e-repository).

Defamation: The law on defamation, the Defamation Act 1996 applies to print media and in the same way to publication over the internet. Published content is defamatory and untrue if it “tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person” (50). Libel is a cause of action for defamation and refers to publication of defamatory content in permanent form and so includes online publication in e-repositories.

In the current context, the medium for publication is the e-repository represented by its curator, editor and the hosting institution (herein collectively referred as ‘content managers’). The liability of an e-repository for defamation is dependent on two questions –

- 1) are content managers ‘publishers’?
- 2) if so, can content managers avail of any defence under the Defamation Act?(51)

Under s.1(2) Defamation Act, a publisher means a commercial publisher, that is a person whose business is issuing material to the public, or a section of the public, and who issues material containing the defamatory statement in the course of that business. The definition of ‘commercial’ in this context is not certain under the law, but providing more than basic services (such as the inclusion of custom metadata creation (52)) could be enough to bring them under the umbrella of being considered a ‘publisher’.

UK’s first internet defamation case, *Godfrey v Demon Internet Ltd* (53) is one of the leading authorities dealing with the liability of an internet intermediary and internet service providers (ISPs) for publication of content. The case laid the foundation stone for the proposition that internet intermediaries who actually knew that defamatory material was hosted or cached on their computer systems, but failed to take steps to remove or disable access to that material were ‘publishers’ for the

purpose of civil defamation law (54). These cases thus held a prospect of liability for e-repository hosting institutions in their capacity as Internet Service Providers (ISPs) for alleged defamatory content posted on their sites. This elicits the question - are institutions hosting e-repositories ISPs under the law? Here, useful reference may be had to the Electronic Commerce Directive (55) under which Information Society service means “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”. Though the phrase “normally provided for remuneration” suggests that this includes only commercial ISPs as a norm, of note is that the language of the provision in no way excludes organisations not operating along commercial lines (e.g. libraries, institutions) (56). However, in the recent landmark decision *Bunt v Tilley* (57), the Queen’s Bench Division of the UK courts narrowed down the liability of internet intermediaries for passively posting defamatory content. The court ruled that ISPs are not liable simply by playing the passive role of a facilitator to publishing content on the Internet. ISPs can thus argue that they are no more considered as publishers in their role for hosting content under the UK law (58).

While this decision recognised the role of ISPs as facilitators and exempt ISPs from strict liability for any defamatory content that they may communicate, the court did not go so far as saying that ISPs will be relieved of liability under all circumstances (59). Therefore, content managers will only be liable for defamation to the extent that they are able to discover that items hosted in the-repository are defamatory and do not take steps to prevent the material from being published or continuing to be published in the-repository (60). It is thus strongly arguable that institutions hosting e-repositories and who know that they are hosting defamatory material are publishers under defamation law and will not be exempt from liability.

One of the defences available for an e-repository publisher will be that under Section 1 (3) (e) of the Defamation Act 1996 (61). Under Section 1(3) (e) of the Defamation Act, “a person is not a publisher of a statement if he is only involved as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control”. It is unlikely that content managers will be considered as mere ‘operators of services’ if they also perform the duty of checking content that is to be posted in the e-repository. It is pertinent to note here an observation regarding the creation of an e-repository to support a community. It is observed that “There are at least two scenarios regarding the creation of a learning repository to support a community. The first is that a community exists and has a requirement for repository functionality. It may be the core functionality such as storage and retrieval, or it may be the additional functionality found with (most) learning repository initiatives such as discussion forums, mailing lists and authoring tools” (62). So, though e-repositories hosting discussion forums can arguably claim a defence under section 1 (3) (e) for being a provider of access to a communication system, the very fact that discussion forums constitute only a secondary functionality of e-repositories raises doubts on whether they really can make complete use of this defence.

Liability for obscene content: The legal definition of ‘obscene’ is narrower than the dictionary meaning and is set out by the Obscene Publications Act 1959 and 1964 (OPA). The Act makes it an offence (punishable with up to 3 years imprisonment or an unlimited fine or both) to publish an obscene article or to have an obscene article

for publication for gain. A material is considered 'obscene' if it has the tendency to deprave or corrupt those likely to be exposed to it (63). The definition is thus very wide and will include other material rather than just sexual depictions (64) (e.g. audio representations of scenes of violence hosted in an e-repository). Thus, an offence of obscene publication will be committed simply by making obscene material available for electronic transfer or downloading by another party who is thus enabled to access and copy that material (65). This again calls for consideration of the definition of a 'publisher' under the obscenity laws. The OPA 1959 defines a publisher as "one who in relation to obscene material:

- (a) distributes, circulates, sells, lets on hire, gives or lends it, or who offers for sale or for letting on hire, or
- (b) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it, or, where the matter is data stored electronically, transmits that data".

The definition will, of course, include content managers of an e-repository. It covers the transfer of obscene material in various formats and will include electronic transmission via intranet or internet (66). However, under Section 1(2) of the Obscene Publications Act 1964 the possession of obscene material with the intention of 'publication for gain' is an offence (67). This offence may be committed simply by making an obscene material available for download by others thus enabling their access to the material and allowing them to copy the same (68). Thus, an e-repository which charges a subscription fee for its online access and that makes available any obscene data for transfer or download may be caught under the laws of liability.

5. Accessibility Law and e-Repositories

This part of the paper will analyse the key legal issues associated with the accessibility and use of e-repositories by disabled people. The primary legislation affecting accessibility of an e-repository by a disabled person is the Disability Discrimination Act of 1995 (DDA 1995). The DDA 1995 provides guidance to both service providers and disabled people (69). It prohibits discrimination against disabled people in a range of circumstances and includes employment, education and the provision of goods, facilities and services (70). Only those people who are defined as 'disabled' in accordance with section 1 of the Act are entitled to the protection that the Act provides.

According to the Act a disabled person is a person who has an impairment that is either physical or mental and the impairment has adverse effects that are substantial and long-term thereby affecting his/her normal day-to-day activities. The breadth of the definition will cover a majority of disabled people who have barriers on accessing or using an e-repository. The protection can also cover a person who has learning difficulties and struggles to read long and complicated passages of courseware text on an e-repository (71).

Of relevance to accessibility and an e-repository is Part III of the DDA. Part III of the DDA places duties on those providing goods, facilities or services to the public. The DDA (Part III) thus applies only to the provision of goods, facilities and services and

does not apply to the actual product which in an e-repository can be an article, course ware and which needs to be accessed by a disabled student (72). Hence, though access to an e-repository will need to be in a format that is accessible to a disabled person, there is no statutory requirement under Part III that the product or content that is available in the e-repository is accessible.

According to the Act, 'service providers' should not discriminate in the services that they provide to a disabled person. This leads to the question whether educational institutions administering e-repositories can be considered as 'service providers'.

A 'service provider' is not explicitly defined in the DDA or in Part III and educational institutions are exempt as service providers in respect of the educational services (section 19 (5) (a)) that they provide. But the Act under Section 19 (2) (b) states that a person is "a provider of services" if he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public. Further, under Section 19 (3) the Act provides some examples of what can be considered as 'services'. 'Services' include '*access to and use of communications*' (73) and '*access to and use of information services*' (74) and so Part III will therefore still be relevant to online services like e-repositories. Here, it is worth noting that e-repositories may function as data providers and/or service providers. "Most institution-based repositories using the protocol to expose metadata will be data providers, although they themselves will (in principle) also be service providers harvesting from multiple data providers within a single institution" (75). This leads to the conclusion that institutions operating e-repositories can be service providers under Part III of the DDA. But the fact that the Act exempts educational services from the purview of Part III, calls for its analysis also under Part IV of the DDA. The duties and obligations of institutional e-repositories will thus have to be analysed under the Special Educational Needs and Disability Act (SENDA) 2001 which amended the DDA and is treated as Part IV of the DDA.

Part IV of the DDA places responsibilities on institutions operating e-repositories by extending the disability discrimination rights in relation to education to disabled students. It confers certain rights on students and so it is extremely likely that e-repositories will have to be provided in a format accessible to student with disabilities (76).

Under Part IV, institutions are under a duty not to discriminate on the grounds of disability and so duties are placed on institutions in relation to provision of education. The duties that are relevant to e-repositories are covered in Section 28 (R) (2), 28 (s) (a) and 28 (T) (b). One of the duties imposed on the institution is the duty not to discriminate in the 'student services' it provides or offers to provide (section 28 R (2)).

For an analysis of how this duty affects an institutional e-repository one needs to understand who is a 'student' under the legislation and what is meant by 'student services'. Section 31 (A) (3) of SENDA defines the term 'student' as meaning a person who is attending, or undertaking a course of study at, an educational institution (77). Thus the meaning of a 'student' is very wide and can include students learning through course ware put up in an institutional e-repository and who may or may not be disabled. It is important to note that this includes both existing students and also prospective students with disabilities.

The term ‘student services’ is not defined in the act but some typical examples of what might be included with relevance to an e-repository are:

“e-Learning, computer facilities, learning equipment, libraries” (78)

An institutional e-repository can include all or any of these student services. So, when any of these services are administered over an e-repository, it is very important that institutions are mindful of the accessibility to be provided by the service.

The next is the duty not to treat disabled students ‘less favourably’ without justification (section 28 (s) (a)). An example of this will be a situation where the design of an e-repository results in a less favourable treatment of a disabled student without justification. This can happen if a disabled student who wishes to complete his e-learning course is unable to access a subscription service administered through a database on the e-repository because of its design. In such a case the institution has another duty which is the duty to make ‘reasonable adjustments’ so that the disabled student is not at a ‘substantial disadvantage’ when compared to those who are not disabled in relation to student services (79). SENDA does not make clear as to what length regarding reasonable adjustments an institution must go in order to make an institutional e-repository accessible to disabled students. What is reasonable depends on the individual circumstances of the case. The duty is to make ‘reasonable adjustments’ generally and not just for the individual (80). So in the earlier example, a duty is imposed on the institution to make ‘reasonable adjustments’ to the database in the e-repository so that the disabled student is not placed at a ‘substantial disadvantage’. The extent to which an institution should go to make the adjustment will depend on how important it is that the student accesses the database in the e-repository and if such an adjustment is practical or possible. If not practical or possible, the institution should consider alternative methods of access or other adjustments to ensure that it does not discriminate against the student.

The Copyright and Visually Impaired Persons Act (CVIPA) 2002 amended the Copyright, Designs and Patents Act 1988 by creating exceptions for making copies in alternative formats for visually impaired people. The new law provides two situations where accessible copies of a copyright work can be made without permission from the copyright holder. These are:

- (1) a single copy can be made by or on behalf of a visually impaired person by an institution for their personal use (Section 31A)
- (2) multiple copies of a master copy can be made for and distributed to visually impaired persons without seeking the permission of the right holders (Section 31B)

These exceptions however are applicable only to literary, dramatic and musical works, and there are limits with regards to copying from a database also. So, if sound recordings or films are put in the e-repository in an accessible format for disabled persons without permission or licence, this may be an infringement of copyright (81).

Also, copyright law may prevent the institution from making changes to the online resource in the e-repository to make it accessible. The right to adaptation is a right exclusive to the copyright owner and so institutions wishing to adapt electronic or online course ware in an e-repository need to be mindful that adaptation is a right exclusive to the copyright owner and can pose copyright implications.

6. Data Protection and e-Repositories

E-repositories play an active role as a 'digital archive' by preserving electronic records which can contain administrative and personal data relating to individuals. And, every individual has certain rights regarding the information that organisations hold, process or use about them. These rights are enshrined in and protected through the Data Protection Act (DPA) 1998 regulating the obtaining, holding, using, processing and disclosing of the information relating to individuals.

The Act applies to personal data relating to any identifiable living individual which is in manual or electronic format. It is thus clear that an e-repository serving as an administrative archive will be covered by the DPA. Data protection law therefore demands that 'data controllers' (the institution hosting the repository or the e-repository record manager or archivist acting on behalf of the institution) responsible for managing and accessioning an administrative e-repository notify the Information Commissioner that they are processing personal data and keep the notification up-to-date.

At the core of the Act are eight Data Protection Principles which data controllers processing the personal information of individuals in e-repositories need to be comply with.

One of the principles provides that the data must be fairly and lawfully processed. This principle tells people what is happening with their personal information. The data subject will have to be informed that their data is being collected, who holds their information, what it is used for and as to who will have access to it. 'Processing' is further defined to include obtaining, recording, holding, organising, adapting, altering, retrieving, using, disclosing or erasing. The definition of processing is thus wide enough to cover anything that is done with the personal data (82) of individuals available in e-repositories. This also means that the processing of personal data of individuals made available in repositories must be done in a fair and lawful manner.

e-Repositories as an administrative archive can contain the email address of individuals. And, Section 1 of the Act defines 'personal data' as "data which relates to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual". But an email address such as erep123@yahoo.com as opposed to other email addresses like glenmcgrath@ntl.com does not constitute enough information from which a living individual can be identified (83). Can such email addresses constitute personal data under DPA when made available in e-repositories? At this juncture, the legal

guidance issued by the Information Commissioners Office (ICO) comes in handy. It is noted in one of the guidance notes titled “Internet: Protection of Privacy – Data Subjects” that “email addresses are personal data. If you find yourself on a directory or user list you can request to be omitted from it” (84). In addition, guidance asserts that “the Commissioner recognises that an individual may be ‘identified’ without necessarily knowing the name and address of that particular individual. In the context of the Internet, many email addresses are personal data where the email address clearly identifies a particular individual”(85) Though these assertions explain the data protection status of email addresses like glenmcgrath@ntl.com available in e-repositories that identify a person, it is not forthcoming enough to explain the application of DPA as regards the other email addresses of individuals in e-repositories.

Additional interpretative guidance on this aspect can be obtained from the *Durant v Financial Services Authority* (86) case decided by the UK Court of Appeals. The court while examining the meaning of personal data held that ‘personal data’ did not necessarily mean any and every document which has the data subjects name on it but the overriding test is whether the information in question affects a persons privacy, whether in his personal or family life, business or professional capacity (87). Guidance was also given by the court in determining whether the information "is information that affects [an individual's] privacy" and, thus, "relates to" an individual (88). This depends on 1) “is the information in itself significantly biographical? and 2) does it have the data subject as its focus, as opposed to just being a bystander?”(89) Going by this, if an individuals email address appears in an e-repository it will not be personal data but is likely to be ‘personal data’ only if it is supported with other information like address, telephone numbers etc. For data controllers of e-repositories this might mean obtaining consent of individuals before any of their personal data is made public which can include publishing the email addresses with other personal information in an e-repository.

Also of note at this point is the issue with the harvesting of web pages by e-repositories. Large web archives are created by harvesting web pages from the public web. As noted by a commentator, “web archiving initiatives deal with the ephemeral nature of the Web by harvesting domains or sites, thereby creating surrogates that can be used for current and future access” (90). It is possible that some of the harvested web pages in such cases contain personal data which can include data placed on the web by third parties without permission and comprises ‘ordinary’ and ‘sensitive’ personal data (91). It is thus possible that harvesting a web page for archival on an e-repository will place the e-repository curators at a significant risk of breaching the DPA.

The fourth principle on data protection requires that the data be accurate and up to date. This principle ensures that the data kept is suitably accurate and up-to-date, as holding data which is inaccurate will not serve any purpose. The purpose for which the data are used will be relevant in deciding whether updating of the data is necessary. This principle creates an issue for e-repository archives as records in the e-repository need to be preserved over a longer period and can over the time result in hosting inaccurate data(92) thereby contravening this principle of the DPA (93).

The fifth principle on data protection obligates the data controller to keep the data only for the time for which the information is necessary to perform the operation for which it was collected. For e-repository curators and record managers it means to avoid duplication of data on storage mediums or university servers through copying (94). However, s.33 DPA creates certain exemptions for e-repositories hosting research, history and statistics data. It provides that processing of personal data only for research purposes in compliance with the relevant conditions will be deemed compatible with the purposes for which the data were collected. It thus allows personal data to be stored indefinitely in archives for research purposes so long as these conditions are met “1) that the data are NOT processed to support decisions about individuals being made on the basis of the processing and 2) that substantial damage or distress is not likely to be caused to any data subject by the processing of the data” (95).

The DPA lists certain conditions for the processing of personal data and sensitive personal data. Additional conditions for compliance with data protection principles in respect of personal data are provided under schedule 2 of the DPA. Whilst it may be possible to apply alternative conditions [e.g. processing is necessary for the purposes of legitimate interests pursued by the data controller or. - schedule 2 6 (1)] it is suggested that for certainty the consent of the individual should be sought under schedule 2.1.

On this premise, consent should be obtained from all individuals before any personal data is processed. If an individual does not give his consent, the data should not be processed. If the individual agrees but changes his mind later, any data published must be removed immediately. Care should therefore be taken by institutions before publishing without consent the email addresses or home addresses of students in an e-repository. Even if the motive is well meaning, it may be considered unfair processing of the individuals data (the first principle) and legal action can be taken against the institution. With regard to sensitive personal data explicit, positive consent to process should usually be sought.

The rights granted by the Act to data subjects are applicable to anyone, anywhere in the world if the data controller holds their personal data. The individuals have seven rights in respect of the personal data held by them (96). One of the rights which is ‘the right to subject access’ allows a data subject to be informed of the nature of the information held about them and to discover to whom it has been disclosed. The request for access must be made by a data subject in writing (including fax and email) and an institution must respond to the request within a period of 40 calendar days. If however such information is readily available (for example, accessible by visiting the-repository archive), the institution is then under no obligation to release such information.

7. Concluding Summary

This article has examined some of the key legal issues arising in e-repositories with focus on e-repositories that support articles, theses, administrative records etc. It is to be noted that e-repositories host a number of other content which includes health

and medical sciences data and those that are built for hosting geographical or astronomical data. Undoubtedly, these repositories will raise a myriad of other legal issues (for example, issues relating to privacy and confidentiality in the case of medical e-repositories) and call for another study.

A summary of findings from this study are as given below:

- (1) Information created in an e-repository has to be preserved for future use and thus demands its preservation through reproduction and copying. With broad rights for copyright owners and narrow fair dealing exceptions copyright law however creates a number of bottlenecks for copying from e-repositories.
- (2) As regards the database right of protection, the unclear nature of database right and the substantial investment concept can pose problems for the management of ownership rights in e-repositories as databases.
- (3) An institution hosting an e-repository or the e-repository content managers acting on behalf of their institution could be held liable for defamatory or obscene content published in the-repository. They will therefore need to ensure that content posted in an e-repository is not defamatory or obscene.
- (4) E-repositories are also service providers for the purpose of disability discrimination law. However, the legal duty of designing a product in an e-repository to aid disabled people extends only to those operated by educational institutions for their students. For any commercial e-repository as a service provider, there is no statutory requirement that the product in the e-repository is accessible.
- (5) Finally, harvesting of web pages and archiving of data in e-repositories is central to keeping an e-repository alive and this can involve the processing of personal and sensitive data of individuals. So, the inclusion of personal data in materials is a path which data controllers of e-repositories need to tread with care.

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1 See JISC Briefing Paper – Higher Education Sector “*Digital Repositories: Helping Universities and Colleges*” August 2005 available at

http://www.jisc.ac.uk/uploaded_documents/HE_repositories_briefing_paper_2005.pdf

2 See IODE, “*What are e-repositories/ institutional repositories?*” available at

http://www.iode.org/iodeold/categories.php?category_no=133

3 See Tanya Aplin “*Copyright Law in the Digital Society*” (Hart Publishing) p. 98

4 See Cedars Guide to Intellectual Property Rights p. 10 available at

<http://www.leeds.ac.uk/cedars/guideto/ipr/>

5 See supra n. 3 p. 110

- 6 See Adrienne Muir “*Copyright and Licensing for Digital Preservation*” available at <http://www.cilip.org.uk/publications/updatemagazine/archive/archive2003/june/update0306c.htm>; Also See supra n. 3 p. 10
- 7 See Section 11 (1) CDPA
- 8 See Mark Bide, “*Open Archives and Intellectual Property: Incompatible World View?*” A report for the Open Archives Forum p. 23 available at <http://eprints.rclis.org/archive/00001139/>
- 9 For more on copyright ownership in e-theses see Dr. Theo Andrew, “*Intellectual Property and Electronic Theses*” p. 5 available at <http://www.jisclegal.ac.uk/publications/ethesesandrew.htm>
- 10 See Philip Hunter and Michael Day “*Institutional repositories, aggregator services and collection development*” p. 5 available at <http://www.rdn.ac.uk/projects/eprints-uk/docs/studies/coll-development/coll-development.pdf>
- 11 See Supra n. 8 p. 26
- 12 See section 29 (1), (1c), (2) CDPA
- 13 See Robert Burrell and Allison Coleman “*Copyright Exceptions: The Digital Impact*” (Cambridge University Press) p.117
- 14 Ibid., p. 152
- 15 See C.Rees and S.Chalton, “*Database Law*”, (Jordans), 1998 p.20, Copyright protection is inadequate for elements with no intellectual creativity. So the *sui-generis* right is a good measure of protection. Also See Laddie, Prescott and Vitoria (eds), “*The Modern Law of Copyright and Designs*”, (Butterworths), London (3rd edn.)2000, Vol.1 p. 1072; It is a property right independent of copyright for the contents or the database itself.
- 16 See Section 3 (a) (1) CDPA
- 17 See I. Stamatoudi, “*To What Extent are Multimedia Products Databases*” in I. Stamatoudi and P. Torremans (eds.), *Copyright in the New Digital Environment: The Need to Redesign Copyright*, Sweet & Maxwell, London, Perspectives on Intellectual Property Series, Vol. 8. 2000, p. 24
- 18 IMS Digital Repositories Interoperability - Core Functions Information Model , Version 1.0 Final Specification available at http://www.imsglobal.org/digitalrepositories/driv1p0/imsdri_infov1p0.html
- 19 See Supra n. 15 “*The Modern Law of Copyright and Designs* (Vol. 1) p. 1066
- 20 See Erik Duval, Simon Retalis, Bernd Simon “*CEN/ISS Work Item Proposal: Interoperability of Repositories for Learning*” available at <http://nm.wu-wien.ac.at/e-learning/interoperability/cen-iss-cwa-work-item.pdf>
- 21 See Reg. 18 (1) and 18 (2) Copyright and Rights in Database Regulations 1997
- 22 See Mark Davidson, “*The Legal Protection of Databases*”, (Cambridge University Press 2003)
- 23 Ibid., p.83, Also See P. Bernt Hugenholtz, “*The New Database Right: Early Case Law from Europe*”, available at <http://www.ivir.nl/publications/hughholtz/fordham2001.html>, Also Supra n. 15 Christopher Rees and Simon Chalton, “*Database Law*” (Jordans 1998) p. 60
- 24 Ibid., Supra n. 15 Christopher Rees and Simon Chalton, p. 60, Also n. 21 p. 83
- 25 Id., Christopher Rees and Simon Chalton, p. 60
- 26 See Supra n.22 p. 86
- 27 See Case C-203/02, for other related referrals See Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB*, Case -444/02 *Fixtures Marketing Ltd v Organismos prognostikon aganon podosfairou AE* and Case 46/02 *Fixtures Marketing Ltd v OY Veikkaus Ab*
- 28 See Matthias Leistner, “*ECJ: BHB v Hill with comments by Leistner*” 36 IIC 2005, 592-595. “The ECJ in the British Horse Racing decision had also while examining the meaning of what constitutes investments in the ‘verification’ and ‘presentation’ excluded investments which do not serve the purpose of monitoring the accuracy and reliability of existing database information”. This part of the consideration by ECJ on ‘verification’ and ‘presentation’ is not being considered in this article.
- 29 Ibid.,
- 30 See Reg.15 Copyright and Rights in Database Regulations 1997, “The maker of a database is the first owner of database right in it”.

- 31 See Reg. 14 (1) Copyright and Rights in Database Regulations 1997
- 32 The Copyright and Rights in Database Regulations 1997 are silent on this aspect and therefore guidance is sought from the Database Directive.
- 33 See Jasper A Bovenberg, “*EU Database Rights and DNA databases*”, The International Consortium on Agricultural Biotechnology Research (ICABR) conference abstract available at <http://www.economia.uniroma2.it/conferenze/icabr01/abstract/Bovenberg.htm>
- 34 See Teresa K. Attwood, “*Mobile , metamorphosing academic databases- capturing IP on the move*”
- 35 See Reg.12 (1) Copyright and Rights in Database Regulations 1997
- 36 See Supra n. 22 p. 87
- 37 See Supra n. 3 p. 143
- 38 Ibid., p. 143
- 39 See Matthias Leistner, “*Legal Protection for the Database Maker – Initial Experience from a German Point of View*”, 4 IIC 439 (2002)
- 40 See JORUM Project Document, “*E-learning Repository Systems Research Watch*” p.10 and See Learning About Digital Institutional Repositories “*Creating an Institutional Repository : LEADRIS Workbook*” p. 66
- 41 See Mahesh Madhavan, “*Copyright versus Database Right of Protection in the UK: The Bioinformatics Bone of Contention*” The Journal of World Intellectual Property (2006) Vol.9 no.1 p. 77
- 42 See Reg. 19 Copyright and Rights in Database Regulations 1997
- 43 See Supra n. 15 Christopher Rees and Simon Chalton p. 77
- 44 See Supra n. 41 p. 78
- 45 See The Royal Society, “*Keeping science open: the effects of intellectual property policy on the conduct of science*” p. 23 available at <http://www.royalsoc.ac.uk/document.asp?tip=0&id=1374>
- 46 See Reg. 17 (3) Copyright and Rights in Database Regulations 1997
- 47 See International Council for Science (ICSU), ‘*Responses to Analytic table of Questions raised at W.I.P.O Information Meeting on Intellectual Property in Databases*’, (Geneva 17-19 September, 1997) prepared by ICSU/CODATA Group on Data and Information p. 3
- 48 Supra n. 41., p.78
- 49 Contents published in an e-repository can also involve a number of other risks such as indecent material, those inciting racism, or even child pornography. The liability of an e-repository for such contents need to be examined under the relevant statute, for example racial incitement under the Race Relations Act 1975, contents inciting terrorist acts under the Terrorism Act 2006 and Child pornography under the Sexual Offences Act 2003 and the Criminal Justice Act 1988 (CJA) 1988. Although the term indecency appears in a number of statutes like the Protection of Children Act 1978, the Customs Consolidation Act 1876, the Customs and Excise Management Act 1979, the Indecent Displays (Control) Act 1891, Section 43 of the Telecommunications Act 1984, the term ‘indecency’ is not defined in any of these statutes. This article considers the liability of e-repositories only for publishing contents that are obscene or defamatory.
- 50 See *Sim v Stretch* (1936) 52 T.L.R 669
- 51 See Matthew Collins “*The Law of Defamation and the Internet*” (Oxford University Press) p. 187
- 52 See Supra n. 40 “*Creating an Institutional Repository : Leadris Workbook*” p.18
- 53 (2001) QB 201
- 54 See Supra n. 51 p. 189
- 55 See Directive 2000/31 on Electronic Commerce (2000) O.J L178/1
- 56 See Hasan A Deveci “*Usenet Defamation: FE/HE Liability*” (2005) C.T.L.R p. 141
- 57 (2006) EWHC 407 (QB)
- 58 See JISC Legal Newsletter Issue 14-March Round-up 2006 “*UK Court on ISP Liability*” (16/03/06) available at http://www.jisclegal.ac.uk/newsletter_06-03.html
- 59 See E.news @Gowlings available at http://www.gowlings.com/resources/enewsletters/enews/Htmfiles/V4N03_20060401.en.html
- 60 See Supra n. 51 p.202
- 61 The other defences which are not discussed here are Regs 17-19 of the Directive 2000/31 on Electronic Commerce (2000)
- 62 See Supra n. 40 JORUM p. 11

- 63 See Section 1 (1) The Obscene Publications Act 1959 (OPA 1959)
- 64 See *R v Anderson & Others* (1971) 3 All ER 1152, Also See Gavin Sutter “ *FE/HE Institutions and Liability for Third Party Provided Content*” p.2 available at <http://www.jisclegal.ac.uk/publications/thirdpartycontent.htm>
- 65 *Ibid.*, p. 3
- 66 See Andrew Charlesworth “*Criminal law and liability*” in “*Staying Legal*” (edited by Chris Armstrong and Laurence W. Bebbington (Facet publishing 2004) p. 178
- 67 See *Supra* n. 64 Gavin Sutter p.2
- 68 See *R – Fellows & Arnold* (1997) 2 All ER 548, Also See *Supra* n. 64 Gavin Sutter p.3
- 69 See Martin Sloan “*Disability Discrimination Act 1995: Web Access and Disability*” p. 304
- 70 See Disability Discrimination Act Department of Work and Pensions; “*Consultation Document: Guidance on matters to be taken into account in determining question relating to the definition of disability*” p. 4
- 71 See *Supra* n. 69 p. 305
- 72 *Ibid.*, p. 307
- 73 Section 19 (3) (b) DDA
- 74 Section 19 (3) (c) DDA also see Pennington’s Solicitors “*A summary of the Disability Discrimination Act 1995 for Service Providers*” available at www.penningtons.co.uk/services/pdf/disabilitydisc.pdf
- 75 See *Supra* n. 10 Philip Hunter & Michael Day “*Institutional repositories, aggregator services and collection development*” p. 3
- 76 See Martin Sloan, “*The Advantages of E-Learning*” available at http://www.techdis.ac.uk/index.php?p=3_8_15
- 77 See Section 33 Interpretation on Section 31 (A) (3) available at www.opsi.gov.uk/ACTS/en2001/01en10-b.htm
- 78 Code of practice for post -16 provision of education – It deals with duties placed on those providing student services to the people.
- 79 Section 28 T(b)
- 80 See Roger Wilson and Gareth Bellaby, “*SENDA and University Homepages*” available at - <http://www.ics.heacademy.ac.uk/Events/conf2003/Roger%20Willison%20final.pdf>
- 81 See Section 31A CDPA
- 82 See Lawrence W. Bebbington, “*Data Protection: An Overview*” in “*Staying Legal*” *Supra* n. 66 p. 143
- 83 See Rosemary Jay and Angus Hamilton “*Data Protection: Law and Practice*” (Thomson Sweet & Maxwell) p. 646
- 84 *Ibid.*, p. 650
- 85 *Ibid.*, p. 650 -651
- 86 See (2003) EWCA Civ 1746, Court of Appeal (Civil Division) 2003 Court of Appeal
- 87 See *Data Protection Handbook* (The Law Society) Edited by Peter Carey p. 250
- 88 See Andrew Charlesworth “*Data Protection*” JISC Legal Briefing Paper available at <http://www.jisclegal.ac.uk/dataprotection/dataprotection.htm>
- 89 See *Supra* n.87 p. 251
- 90 See Michael Day “*The long-term preservation of Web Content*” available at <http://www.nationalarchives.gov.uk/documents/dpguide.pdf>
- 91 See Andrew Charlesworth “*Legal issues relating to the archiving of Internet resources in the UK, EU, USA and Australia*” A study undertaken for the JISC and Wellcome Trust p. 25
- 92 See “*Data Protection Act 1998: A Guide for Records Managers and Archivists*” p.11 available at <http://www.nationalarchives.gov.uk/policy/dp/pdf/dpguide.pdf>
- 93 This principle may however not be regarded as contravened if appropriate steps are taken in compliance with Schedule 1 part II Para 7 of the Data Protection Act. For details see Schedule 1 part II para7 available at <http://www.opsi.gov.uk/ACTS/acts1998/80029--m.htm#sch1ptII>
- 94 See Edinburgh University Library: Projects: Digital Preservation – Acts, “*Data Protection Act 1998*” available at <http://www.lib.ed.ac.uk/sites/digpres/acts.shtml>
- 95 See Section 33 (1) DPA 1998
- 96 Part II of the Data Protection Act 1998 under Sections 7- 14 and under Section 42 grants the seven rights to the data subjects. This paper discusses only the right that is granted by section 7 – 9 (right of access to personal data).