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# **JISC/TLTP Copyright Guidelines**

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These guidelines were produced by the JISC/TLTP copyright working group on behalf of the Joint Information Systems Committee. The guidelines are developed from those originally created for the TLTP.

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### ***Disclaimer***

These guidelines should not be regarded as prescriptive. They should be used as pointers towards good practice in the development of computer-based materials for higher education. While every care has been taken in preparing these guidelines, the authors and publishers do not accept responsibility for any omissions or inaccuracies that may have occurred.

These guidelines only apply to UK. You should consult a copyright expert if you plan to create or use materials outside the UK.

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# 1 Introduction and background

## 1.1 Background to these guidelines

The four funding councils for UK higher education<sup>1</sup> have jointly created the Joint Information Systems Committee (JISC) to manage large-scale investments in networking infrastructure, electronic information, technology applications, etc. Much of the JISC's work is done through sub-committees; the recently revised sub-committee structure includes the Advisory Committee for Networking (ACN), the Committee for Awareness, Liaison and Training (CALT) the Committee for Electronic Information (CEI) and the Technology Applications Sub-Committee (TASC). Much of the work of these sub-committees is achieved through projects operating within defined programmes such as the JISC Technology Applications Programme (JTAP) and the Electronic Libraries Programme (eLib).

The Teaching and Learning Technology Programme (TLTP) is a quite separate programme of the four funding councils, which also operates through projects.

These guidelines are developed from those originally created for TLTP, and are aimed at workers involved in both TLTP and JISC projects. The guidelines only cover UK law. One of your most taxing concerns will be to understand copyright and intellectual property rights issues so you can legitimately use existing copyright works in new products, and safely make new copyright works available.

Copyright problems do not only affect the development of new media products in UK higher education. Commercial software developers and publishing houses are also finding that the costs of administration and negotiation of rights are frustrating the creation of new products. Publishers and rights owners are now developing new business contracts and processes for rights clearance to cope with the developments taking place in computer-based media and on-line, but these developments are at a very early stage.

This set of guidelines is an attempt to provide a source of information to assist staff involved in JISC and TLTP projects; JISC and TLTP programmes have specific aims.

- 1 To produce innovative information products that are freely available to institutions of higher education in the UK.
- 2 To encourage inter-institutional consortia arrangements for information product development.
- 3 To encourage, in many cases, the commercial distribution and exploitation of information products outside UK higher education.

All three of these aims are influenced by issues of copyright.

<sup>1</sup> Higher Education Funding Council for England (HEFCE); Higher Education Funding Council for Wales (HEFCW); Scottish Higher Education Funding Council (SHEFC); and the Department for Education in Northern Ireland (DENI).

**Aim 1** indicates that you need to negotiate clearance to use existing copyright materials (third party materials such as photographs, sound recordings, film or video, or text) in your information products.

**Aim 2** indicates that you and your partners should create appropriate letters of agreement or similar contractual instruments from the start to ensure that all partners understand the ultimate ownership of rights in the works you create.

**Aim 3** indicates that you must ensure that your project has the right to exploit the information products you create outside UK higher education and, if this is the case, that you are capable of protecting its position when negotiating with publishers and distributors.

## 1.2 Copyright requirements for JISC and TLTP projects

It is a condition of funding that all materials created under JISC programmes or TLTP must be made available to other higher education institutions (HEIs) within the UK. For this to be achieved, clear permission must be acquired *before* copyright material belonging to a third party is included in your products. This applies whether the material has been specially created by third parties or already exists. As a producer, you have two options.

- 1 To acquire explicit permission for every element to be included even where, under copyright law, permission is not required (for example, because the material is of an age where protection has lapsed). The advantage is that little copyright knowledge is required. The disadvantage is that fees may be paid which are not legally required.
- 2 To determine which material is protected and to seek permission (and perhaps pay fees) only for those items. The advantage is saving of money. The drawback is that a more detailed knowledge of copyright law is required and, more relevant, you need enough confidence to back your judgement.

If the first choice is selected, the information in this booklet will suffice. For the second, you may need further advice over and above the basic information of these guidelines. A number of helpful publications are identified in Appendix III.

The JISC does not seek to retain or acquire any formal intellectual property rights in the end products or services funded under its programmes. *It is the responsibility of institutions to ensure that products and services they create do not infringe copyright or other intellectual property rights of any third party.*

JISC funding is made available on the condition that, except for a handling charge, and any usage charge that must be authorised in writing by the JISC Secretariat, institutions make available free of charge, the products to other UK HEIs. However, if you plan a self-sustaining service to HEIs after the initial JISC funding ceases, a business plan that recommends appropriate charging levels to be levied in order to sustain the service must be developed and agreed with JISC.

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You can see that, as a manager of JISC projects, you have a double responsibility: to ensure you respect the copyright of others, and to ensure you properly manage your project's copyright. These guidelines have been created to help you with both these tasks.

## 2 Introduction to copyright

### 2.1 What is copyright?

Copyright is a set of property rights vested in the owner of a protected work. There is copyright protection for specific classes of works (see Section 2.2), but not for ideas. Each type of work has a different status in law. Each may require different strategies and considerations to obtain clearance for use, and the term of copyright (duration of protection) in each category can vary. To qualify for copyright protection, the work must be original, that is, not copied.

Until the Duration of Copyright and Rights in Performances Regulations 1995, UK copyright legislation was not retrospective. In other words, a reading of the Copyright Designs and Patents Act 1988 (CDPA – the current Act in the UK) only provided information on copyright applied to works created since 1989 when the Act was implemented. Works created before 1989 were covered by the terms of earlier Acts. This meant that anyone wishing to clear the rights to copy third party works had to have knowledge of both current and older legislation. Unfortunately, although the Duration of Copyright and Rights in Performances Regulations 1995 harmonises the situation regarding the length of copyright and associated rights, it does not address other issues such as ownership. Consequently, for works created before 1989, you need to check the older Acts *on all questions other than lifetime*.

Copyright is automatic. Once an original work is created, copyright in it exists without the need to register, pay fees or undergo any bureaucratic procedures. Furthermore, copyright is simultaneously created automatically in all the major countries of the world, irrespective of where creation of the work occurred (see Section 2.8).

### 2.2 Types of work protected by copyright

#### ***Literary work***

Literary works under the CDPA include not only novels, poetry and non-fiction books but also all other written works that are original. In this context, 'written' includes typescript and data in machine-readable form. Literary merit is not important, although length might be, as single words or short phrases may be denied copyright protection, particularly if they could be better protected by trademark, or the tort of 'passing off' (see Section 4.5).

In practice, letters, memoranda, directories, e-mail messages and World Wide Web (WWW) pages are usually protected. Computer programs and code are protected as literary works. Maps, charts and plans are not protected as literary works but as artistic works.

#### ***Dramatic work***

Apart from plays, dramatic works in this context include instructions for dance or mime. To distinguish a dramatic work from a literary work, there must be some spoken words or described actions to perform. The absence of dialogue does not prevent qualification as a dramatic work.

**Musical work**

Musical scores including annotations and directions are covered here. Lyrics are not regarded as musical works; they are protected as literary works.

**Artistic work**

Graphic works, photographs, sculptures and collages are protected regardless of artistic merit. However, works of architecture and of artistic craftsmanship are protected only if there is artistic quality in the work.

**Sound recording**

This covers every type of sound recording on any type of medium from which sound can be reproduced.

**Film**

The definition of 'film' in this context is any medium from which a moving image may be reproduced. The definition of film under the 1956 Act was similar, which thereby provided automatic protection for video recordings when video was developed.

**Broadcasts**

The definition of a 'broadcast' covers any transmission by wireless telegraphy that is capable of being lawfully received by members of the public. This includes satellite transmissions.

**Cable programmes**

These are transmissions carried as services by way of cable. This includes some on-line services such as certain on-line databases. This is significant for education because under Section 35 of the CDPA, data available on-line may be recorded for use in educational establishments under the special provision for educational off-air recording.

**Published editions**

There is copyright in the typography and layout of literary, dramatic and musical works.

**Performers' rights**

While not strictly speaking copyright, performers' rights provide protection to performers and persons who hold recording rights in a performance. Previously covered by legislation in the Performers Protection Acts of 1958, these rights are now included in the CDPA.

Copyright exists for a limited period only. This is called the 'term of copyright'. All works will eventually emerge from copyright protection, with the exception of some very minor instances where copyright can exist in perpetuity. However, different types of works have different terms of copyright protection. Also, despite the role played by

## 2.3 Term of copyright

international agreements such as the Berne Convention (see Section 2.8), different countries apply different lengths of copyright protection to works. The CDPA made changes to the term of protection for various works in the UK but, as the Act did not apply retrospectively, you needed to be aware of the relevant provisions in the 1956 Act and the 1911 Act. In addition, there are various variations and exceptions, one being the term of Crown Copyright, which can be considerably longer than normal copyright term.

The provisions of the European Union Directive on Term of Protection of Copyright were designed to harmonise this aspect of Member States' copyright laws. It fixed the term in all Member States at author's life plus 70 years. This has been implemented in the UK by the Duration of Copyright and Rights in Performances Regulations 1995 (Statutory Instrument (SI) 1995 No. 3297) and the Copyright and Related Rights Regulations 1996 (SI 1996 No. 2967). The provisions of the directive have retrospective effect, which means that some material that had fallen out of copyright in the UK has been, as it were, re-copyrighted. S23, 24 and 25 of the Regulations address the issue of how this may affect those who acted in reliance on the material being out of copyright, and who now find it is back in copyright. The problem arises in materials created by authors who died between 1927 and 1946.

Even though copyright only exists in a work for a limited time, there are ways in which some copyright terms extend almost indefinitely. For example, Walt Disney's film *Snow White and the Seven Dwarfs* was completed and first distributed in 1937. There will be some term left to run in the screenplay (compiled by eight contributors), although the original story is a folk tale and therefore not in copyright. However, Walt Disney has been careful to ensure that each 're-release' of its older productions is a marginally modified version of the original work (all previous copies having been withdrawn) so creating, in effect, a new film with a renewed term.

Ownership of copyright is discussed in Section 4.

The following notes on various types of works and their term may be used for quick reference, but you are advised to use a professional advisor or a textbook to check whether or not any material you are interested in is a special case.

***Literary, dramatic and musical work***

The author's life plus 70 years after his or her death (amended by SI 1995 No. 3297). Anonymous works or those created by a corporation last for 70 years from the end of the year of publication.

***Work of joint authorship***

70 years from death of last author to die (amended by SI 1995 No. 3297).

***Computer-generated work***

50 years from first creation (unchanged – as per the CDPA).

**Artistic work**

The author's life plus 70 years after his or her death (amended by SI 1995 No. 3297).

**Anonymous work**

70 years from first publication (amended by SI 1995 No. 3297).

**Photographs**

The photographer's life plus 70 years after his or her death (amended by SI 1995 No. 3297).

**Sound recording**

50 years from first publication, or 50 years from fixation if unpublished during that time (amended by SI 1995 No. 3297).

**Film**

70 years from the death of the last to survive of: the principal director; the author of the screenplay; the author of the dialogue; or the composer of the music specially created for the film (amended by SI 1995 No. 3297).

**Broadcasts and cable programme services**

50 years from when the broadcast was first made or the programme included in a cable service (unchanged – as per the CDPA).

**Published editions**

25 years from first publication of that edition (unchanged – as per the CDPA).

**Previously unpublished work in which copyright has expired**

Publication or communication to the public of a previously unpublished literary, dramatic or musical or artistic work or film in which copyright has expired is protected for 25 years from the date of publication (amended by SI 1996 No. 2967).

## 2.4 Restricted acts

Copyright is a negative right. The owner of the copyright has the right to prevent third parties, without permission, from doing a number of acts with the copyright work. For this reason, these acts are known as 'restricted acts'. The main restricted acts are:

- copying the work;
- issuing copies of the work to the public;
- renting or lending the work to the public;
- performing, showing or playing the work to the public;
- broadcasting the work;
- including the work in a cable programme service;
- adapting or amending the work.

If someone carries out one or more these acts on the copyright work without the permission of owner, or authorises someone else to do so, then that person is infringing the copyright in that work, unless he or she can show that one of the exceptions or concessions apply (see Sections 2.6 and 3.8).

In most cases, the penalty for infringement is likely to be damages as a result of a civil court action. In rare cases of flagrant piracy or deliberate intent to harm the business of the copyright owner, infringement becomes a criminal matter. The copyright owner may, however, be content in obtaining an injunction to prevent any further infringement. If the owner sues for damages, he or she must demonstrate that he or she has suffered financial loss because of the infringement, or that the infringer has gained profits because of the infringement.

## 2.5 Bundle of rights

Copyright can be regarded as a bundle of rights. Each one of the restricted acts can be handled separately. Thus, for example, the owner may choose to sell his or her right to copy the work in one form (say, print) but retain the right to copy the work in another form (say, electronic). Experienced copyright owners are aware of the range of rights copyright provides and are careful when dealing with third parties not to give away too many of those rights. Someone involved with commercial negotiations for the first time may be tempted to assign (sell) all the rights in one go. This is not always the best course of action. Copyright is a collection of rights to restricted acts, each applying to every major country in the world. Once obtained, it should not be given away in total, all over the world, without careful consideration of the alternatives.

## 2.6 Exceptions to copyright (concessions to users)

The law provides a range of concessions for users of material. The idea is that it may be legal to undertake one of the restricted acts even when permission has not been acquired from the owner of the right to do it. The principle recognises that for certain purposes and within limits, it would be unreasonable for unauthorised use of material to be subject to successful legal action by the copyright owners. These exceptions are not 'users rights', a term sometimes used, since users have no rights under law (librarians gain some explicit rights if they follow the requirements of the CDPA, see Section 3.8). The exceptions do, however, provide defences that the courts are required to recognise.

Before looking at exceptions proper, you should be aware of a general principle in the CDPA which provides that an infringement (illegal use of material) occurs only when a 'substantial part' of the work is used. No definition is provided, but assume that the quantity taken is less important than the quality. For example, if part of a photograph of the Prime Minister outside 10 Downing Street is copied, that part is more likely to be substantial if it shows the PM's face than if it shows the No. 10 knocker, even though the respective areas of the two parts are

the same. It is rare that the 'substantial part' provision can be used to copy material, but it should certainly be considered as a first step in avoiding the need to seek permission.

Assuming you decide that a substantial part of a work is to be used, the possible concessions you should consider are as follows.

### **Fair dealing**

Copyright in literary, dramatic, musical and artistic works and published editions is not infringed by copying the work for the purposes of research or private study or for the purpose of reporting current events. However, this really means *current* events, namely things that have occurred in the last few hours. Definitions of 'research' and 'private study' are not provided in the Act, but 'private study' seems to mean a rather more restricted use than mere convenience. Copying may be done by the student (i.e. anyone doing research or private study) or on his or her behalf (library staff making copies on behalf of patrons get special concessions, see Section 3.8). As the term 'research' is not preceded by 'private', both universities and industry can benefit.

Another fair dealing provision permits all types of protected material to be used for the purpose of criticism and review, either of that work or another work. This is of more interest in this context as subsequent publication is permitted, although the author and source of the work copied must be acknowledged.

In all cases, the term 'fair' means 'not unduly prejudicial to the copyright owners' interests', especially financial interests. In deciding whether or not to use material without permission by relying on the fair dealing provisions, you must make a judgement whether or not, if you were the copyright owner, you would think it 'fair'. Fair dealing is not a right, but a defence against an infringement action. If sued for infringement, you must be prepared to demonstrate not only that the copying was done for one of the approved purposes, but also that it was indeed 'fair' to the copyright owner. Our advice is that this provision is unlikely to be much help in the present context, as multiple copying or subsequent publication are almost certainly unfair.

### **Incidental inclusion**

You may include an existing copyright work in an artistic work, sound recording, film, broadcast or cable programme provided the inclusion is incidental (meaning not the subject of, or essential to, your own work). An example might be if you were videotaping a person in the street and a Picasso painting was, by chance, in a shop window behind.

One proviso: music cannot be recorded deliberately, even if it is only incidental, so if it can be shown that the music *could* have been excluded, this would not be a defence.

## Copying artistic works in public

You may film, photograph or draw buildings, sculptures and works of artistic craftsmanship if situated in a public place. So, if you are filming in the street you do not need permission from the copyright owners of buildings, monuments, etc. Your work may also subsequently be sold or hired.

## Abstracts

An abstract that accompanies an article on a scientific or technical subject published in a periodical, may be retyped (not photocopied) and published. Note that this concession is restricted to 'scientific and technical' subjects; some commentators argue that this term extends to social sciences and the humanities, but it would be unwise to rely on this interpretation. The concession lapses if there is a licensing scheme on offer covering the publication you wish to use, although at present, no such licensing scheme exists.

## Educational concessions

Apart from fair dealing, the previous concessions, are not specifically designed to help education, although they can be utilised for that purpose. However, there are some limited concessions aimed specifically to help the teacher and learner.

### *Reprography*

Literary, dramatic and musical works (not artistic) and published editions may be photocopied by or on behalf of an educational establishment for the purposes of instruction. There are, however, severe limitations; only 'passages' (not defined) may be copied and only 1% of any work may be copied in any calendar quarter. Note that it is 1% of the work, so a short story in a collection would be a distinct work and 1% would apply to it and not to the collection as a whole. On the other hand, any number of copies may be made. Against this, computer programs are excluded and, in any event, the resulting copies may not be sold, hired or offered for sale. Before using this rather limited concession, a check should be made as to whether or not you are covered by a licence issued by the Copyright Licensing Agency (CLA) since the concession lapses if and to the extent that licensing schemes are on offer. The CLA might be able to offer a licence for reproduction for use in programmes for exploitation.

### *Anthologies*

A short passage from a published literary or dramatic work may be included in a collection that is intended for the educational use of educational establishments provided:

- the title of the collection and any advertising material make clear that the collection is for use in educational establishments;

- the collection consists mainly of material in which copyright does not subsist;
- the work from which the short passage is taken is not itself intended for use in educational establishments;
- not more than two passages from copyright works by the same author are used by the same publisher of a collection within any five-year period (this applies even where one of the passages was written by the author in collaboration with another author);
- there is to be sufficient acknowledgement of the author and original publication.

So, you can include (but not photocopy from a protected published edition) a short passage from a publication for use in a resource pack, which can then be sold. The irksome conditions render the concession less helpful than it might otherwise be.

### ***Copying audio visual material***

Sound recordings, films, videos, broadcasts and cable programmes may be copied by a person giving or receiving instruction in the making of films or sound tracks. The concession covers making a direct transfer and extends to any copyright material (like music) included in the item being copied. The copying may only be done during or in preparation for instruction in film or sound track production. The resulting new material may not be subsequently sold or hired.

### ***Off-air recording***

This is permitted by educational establishments either on their behalf or for other educational establishments. The recordings may be also copied. However, the concession lapses if there is a licensing scheme on offer, at which point the only way to legally record off-air is by having a licence. Most terrestrial material is covered by licences issued by the Educational Recording Agency. Unless permitted by licence, recordings may not subsequently be sold or hired.

### ***Examination use***

You may, with one proviso, do what you like with protected material if you are setting the questions, communicating them to candidates or if candidates are answering questions in an examination. The term 'examination' is not defined but probably involves some formal assessment leading to a certificate or qualification. The facility is limited to educational establishments and the proviso refers to sheet music that may not be copied so that a candidate can play the work. Nor may material be subsequently sold or hired.

The above-mentioned exceptions to copyright, along with the general principle relating to 'substantial part' are designed to assist those wishing to use copyright material for what Parliament regards as reasonable purposes. Those in education are able to benefit from the general provisions as well as those included for their particular needs. However,

readers must accept that in producing packs or projects for commercial distribution, *they move out of the educational sector and into that of the commercial publisher*. Hence the insertion in the educational provisions of the embargo on selling or hiring the finished product. Also, in many cases, the user must exercise judgement in matching the proposed use to the concession (for example, is this really a substantial part, short passage, fair dealing, or whatever) and, at least in theory, must be prepared to defend the decision if a legal action results. It is inevitable that most use will fall outside the limits of the concessions and our advice is that you should just seek permission *for all commercial distribution*. You should also check the terms and conditions of all relevant licences your HEI may have signed, for example with the CLA.

## 2.7 Moral rights

Moral rights are different from copyright. Moral rights are not property rights; they give the creators of certain copyright works, including certain literary works, artistic works and films, three further rights.

- 1 The right for the author of a work to be acknowledged as the author or creator, the so-called paternity right.
- 2 The right for anyone to object to his or her name being attributed to something he or she did not create.
- 3 The right not to have a work subjected to 'derogatory' treatment, that is to some amendment that impugns the author's or creator's integrity or reputation.

Moral rights, unlike copyrights, are not transferable and therefore always remain with the creator, even if the creator has chosen to license or assign his or her copyright in the material. Creators also must choose to *assert* the first of the moral rights (in other words, it is not automatic). It is also worth noting that in some circumstances, moral rights can never exist, e.g. if you are an employee who is paid to create copyright material in the course of your employment (as would be the case for most of the workers on JISC and TLTP projects), you cannot acquire moral rights to that material.

Moral rights can be extremely important in an electronic environment. It is very easy when copying material to either omit the original author's name or to cut and paste material in a manner that might be considered derogatory.

There are several ways that moral rights issues might arise in an electronic environment, and it is important not to trivialise or ignore the issue. An action that may be legal from a copyright point of view may nonetheless infringe moral rights. A few examples will show the importance of moral rights.

Notice that if you take a small portion of an item to be sure it is not infringement, you can still be caught out by the fact that such a small piece is derogatory as it does not give the whole picture of what the creator was trying to say. Because moral rights can never be assigned, *it is quite irrelevant what copyright clearances you have obtained from the copyright*

### Example 1

Suppose a library's on-demand service offers certain portions of texts that have been scanned, in electronic form or in printed form, to library users. This service is free of all copyright problems because the necessary licences from the copyright owners have been obtained. Nonetheless, the moral rights of the creators could still be infringed if the author's name is missing or if only a portion of the original material is offered, which may present a biased view of the author's thoughts on the topic and is, therefore, derogatory treatment.

### Example 2

Suppose a service takes original material, puts it on the WWW and adds value by inserting a number of WWW links into the text to link this item to other relevant items. All the relevant copyright clearances to download the material have been obtained. The author might still object to these links if he or she considers them derogatory. A link from the author's paper might be to a Web page of which the author disapproves (for example, Church of Scientology home page, tobacco company home page, anti-abortion group home page, neo-Nazi group home page, a link to a paper by the author's rival), and so on. The creator can sue because the article impugns the creator's integrity by associating the creator with something of which he or she disapproves.

### Example 3

Suppose a multimedia product includes a short extract of music, plus some pictures or moving images. These are either so short the creator is confident it does not infringe copyright or there is permission to make these copies. The product still could infringe the creator's moral rights by failing to acknowledge the creator by name, or because the short extract is derogatory.

*owner.* You must also get moral rights clearances from the original creator. In view of these issues, we suggest the following approach.

- 1 Check Clauses 79 and 81 of the CDPA. These clauses define the types of works that are *not* protected by Moral Rights. With luck, the piece you want to handle falls into one of these groups.
- 2 The right to be identified as author or director must be asserted; check whether it has been. For example, check the first few pages of a book or article; ask the copyright owner who owns the moral rights and whether they have been asserted or waived. If the moral rights have *not* been asserted, or if they have been waived, you are not obliged to name that individual.

- 3 Contact the creator, explain what you want to do, and ask him or her for explicit permission to do these acts. Do not ask the creator to waive all his or her moral rights; simply ask for explicit permission to do what you plan to do. If the creator says there is no problem, you are safe.
- 4 If having asked the creator for explicit permission, he or she says 'no', or does not reply at all, remember that it is only worth the creator's while to sue if you have caused damage to his or her reputation – rather like libel or slander. So, consider the question of what reputation the creator enjoys and how much damage you might cause. It may not be worth the creator's while to sue you! If the creator enjoys a reputation, then it would be best to completely change what you propose to do to avoid the potential difficulty.
- 5 Make sure you, or your employer, has appropriate liability insurance; ensure that any staff working for you, or people with access to your system are aware of the risks as well. Keep a close eye on what they do, as you could be caught up in any action if it were shown you had been negligent in your control over what your staff did.
- 6 If need be, seek expert advice before offering the service.

## 2.8 International copyright

Copyright law is subject to international treaties, the most important of which are the Berne Convention and the Universal Copyright Convention. These allow for basic minimum laws in all countries who are party to the particular treaty, and also allow for reciprocal protection for nationals from different countries. So, for example, a US citizen enjoys the same protection in UK copyright law as a UK citizen. Therefore, once a copyright work is created in, for example, the UK, it automatically has copyright protection in all other countries that are signatories to these conventions – in practice, all the major countries of the world. The significance of the Berne and Universal Copyright Conventions can be demonstrated by considering infringement actions. What is crucial is not where the material was created, *but where the alleged infringing act took place*. For example, if you download in the UK some data held on a computer in the USA, it is UK law that applies, not US law. This raises particularly awkward problems in an internationally networked environment. What if you, in the UK, send instructions to a computer in the USA to copy a large body of machine-readable data over to a computer in Saudi Arabia? The data neither starts, nor ends in the UK. Only your instructions came from the UK. The owner of the Saudi computer might know nothing of your instructions to add data to his or her computer. There is considerable debate, and no agreement, as to whose law would apply. This seems to imply an argument that there should, in a networked world, be a universal world law on copyright, and many have argued for it. However, it is most unlikely any such universal law will soon come about.

## 3 Electronic implications of copyright

### 3.1 Introduction

'Electronic copyright' is a convenient term to embrace copyright in machine-readable materials. Software, the Internet, off-line electronic databases such as those on diskette or CD-ROM, and on-line databases are all covered by the term. There are a number of reasons why this subject is important.

- 1 It is very easy to copy materials in machine-readable form, and to convert print documents into electronic form (so-called electrocopying).
- 2 Such copies are typically of high quality, in contrast to the poor quality of photocopies when compared to an original printed document.
- 3 It is extremely easy to place machine-readable items on the Internet, and thereby make them potentially available to millions of individuals, many of whom may not respect copyright.
- 4 Such copying or transmission can be undertaken at little or no cost.
- 5 It is very difficult to police such actions.
- 6 Different countries have different rules and traditions regarding such actions, and yet such copying often is carried out across national boundaries.

It is clear that the question of copyright in machine-readable records poses some problems that do not routinely turn up with print products. For this reason, it is worth considering some particular aspects of copyright that are relevant to such types of materials.

### 3.2 Databases and compilations

If you buy a CD-ROM, a diskette or a tape, you should treat it like a book; there is fair dealing in the literary works that form its contents. Typically, you will have signed a contract or accepted a shrink-wrapped licence to get a subscription or licence and, in addition, there may be further remarks about what you may or may not do in user manuals or on displayed screens. You must abide by the terms of the contract, especially those regarding downloading and re-dissemination of the work. However, contractual terms sometimes attempt to override copyright law terms, or they might be considered unreasonable and, as such, invalid. For example, a contract that attempted to extend the term of copyright beyond the standard term would probably be rejected as invalid by the courts. The recently introduced database regulations also specify users' rights that cannot be limited under contract. But if you willingly enter into a contract, and if the clauses are not invalid in law through being too one-sided or unreasonable, then you must abide by the contract. Some electronic publishers are sometimes prepared to amend clauses or negotiate them with you if you have particular needs, for example, on downloading or passing output to people outside your

organisation. However, you might be forced to pay over the odds for such negotiated deals.

Under UK law, each item added to a database may be protected under copyright as a work in its own right. Thus, items of which the author died more than 70 years ago are free from copyright, but all recent non-factual items are in copyright. Single facts, including bibliographic citations and URLs do not have copyright protection, but collections of facts enjoy copyright as literary works, databases or compilations. This means that even if a large number of individual items in a database are non-copyright, you cannot necessarily copy a significant number of them without infringing either the literary copyright, database right or compilation copyright afforded to the collection as a whole.

Before 1 January 1998, UK copyright law did not define or mention the term 'database'. However, electronic databases, whether comprising words or numbers, were considered as 'compilations' under UK law. The category 'compilations' also included selections of articles collected as edited books; telephone directories; lists of facts; and so on. Compilations were protected by copyright if sufficient effort had gone into their selection or arrangement and there might also be copyright in each item. The implementation (on 1 January 1998) of the Copyright and Rights in Databases Regulations 1997 amended the Copyright Designs and Patents Act 1988 so that, for the first time, specific provision was made in UK legislation for the protection of databases under copyright. Databases exhibiting a degree of intellectual originality or creativity are now accorded full copyright protection as literary works; those meeting a lesser requirement of investment and labour are offered protection under a newly established 'database right'.

The implementation of the regulations effectively brings together the conflicting views of copyright offered by the common and civil law traditions. The common law tradition followed by the UK, USA and others following or influenced by the UK tradition, offers copyright protection as a reward for work and effort without imposing a quality threshold for qualification. On the other hand, the civil law tradition of continental Europe emphasises the need for evidence of intellectual effort before works qualify for protection. The effect of bringing together these strands is to produce varying levels of protection: a higher degree of protection for those compilations or databases qualifying for protection as literary works and a lower, short-lived protection for those that do not meet the qualifying level of intellectual input.

The regulations define a database and accord copyright protection only to those databases which, by virtue of the selection or arrangement of the contents, constitute the author's own intellectual creation. Databases which fail to meet this definition are not protected by copyright but are protected instead by the database right

## What is a database?

In amending the Copyright Designs and Patents Act 1998, the regulations define databases in two ways.

- 1 As protected under the database right if they are a collection of works, data or other materials which:
  - (i) are arranged in a systematic or methodical way  
*and*
  - (ii) are individually accessible by electronic or other means  
*and*
  - (iii) result from a substantial investment in collecting, verifying or presenting the contents.
- 2 As protected under copyright if, and only if, by reason of the selection or arrangement of the contents of the database, the database constitutes the author's own intellectual creation.

It is likely, of course, that databases qualifying for full copyright protection will also qualify for protection under the database right.

### ***Full copyright protection***

In the case of a database qualifying for full copyright protection by virtue being the author's own intellectual creation, the following restricted acts may be controlled by the copyright owner under licensing arrangements that are the same as those for any other literary work.

- 1 Temporary or permanent reproduction by any means or in any form in whole or in part.
- 2 Translation, adaptation, rearrangement or any other alteration.
- 3 Communication, display or performance to the public of the original database or any adaptation.
- 4 Distribution to the public of the database or copies thereof.

There are limitations to the control of these restricted acts.

- 1 Access to and use of the database by a licensed or lawful user is always legal.
- 2 Fair dealing provisions apply, so that fair dealing for the purposes of research or private study does not infringe any copyright in the database provided that the source is indicated.
- 3 Other permitted acts include those relating to the use of literary works for the purposes of criticism and review; for educational purposes; by libraries and archives; and for the purposes of public administration (see Chapter III of the Act, particularly sections 28 to 50).

Note that the fair dealing provisions for databases for the purposes of personal research state explicitly that:

*The doing of anything in relation to a database for the purposes of research for a commercial purpose is not fair dealing with the database.*

Note also that nothing included in a licence to use a database interferes with or limits the user's right to make use of it under one of the permitted acts. Although some copyright owners may attempt to limit users' rights by imposing licensing restrictions, the legislation protects rights to fair dealing under sections 50D and 296B.

### ***The database right***

The database right, as distinct from the protection offered to a literary work consisting of a database that enjoys the full protection of copyright, is a limited right extended to the owners of databases that meet the minimum requirements set out under 1 above. The maker of the database is the first owner of the right.

The right creates a new intellectual property right for databases in which there has been a substantial investment; it provides protection against unfair extraction and extends for 15 years from the end of the year in which the database was completed. However, substantial changes to a 'living' database may give rise to a further term of protection, thus allowing for the possibility of some databases developing a perpetual, rolling protection. Initial reaction from commentators is that extending protection in this way may cover the entirety of the amended database, not just the amended sections.

Owners have the right to prevent unfair extraction; this is defined in S 16 of the Database Right as being the extraction or re-utilisation of all or a substantial part of a database without the owner's consent. Repeated and systematic extraction, or re-use of insubstantial parts, may also amount to the extraction or re-use of a substantial part of the contents. The database right in databases made available to the public is not infringed by fair dealing by a lawful user, nor by use for the purpose of illustration for teaching or research and not for any commercial purpose and so long as *the source is indicated*. There are other exceptions to the right for the purpose of public administration.

### **Transitional provisions**

The database right will not be infringed by acts performed under agreements made before 1 January 1998.

Databases created before 27 March 1996 that qualified for copyright protection on 31 December 1997 will continue to enjoy copyright protection for the remainder of their copyright term, regardless of whether or not they would qualify as literary works in the form of a database under the new legislation.

Databases created after 1 January 1983 in which the database right would apply on 1 January 1998 are protected under the database right for a period of 15 years commencing 1 January 1998.

## Compilation copyright

The database right is explicit about the creation of two tiers of protection: the copyright protection offered to original databases qualifying as literary works and the database right offered to databases that fail to meet the threshold of originality but which are the result of substantial investment or effort.

There is a third category that may develop by a process of exclusion: that of a database fitting into neither of the two defined categories. Such works may have a residual compilation copyright and will, rather perversely, qualify for copyright protection as compilations for the whole term of copyright, 70 years.

### 3.3 Multimedia and copyright

Traditionally, text is literary work copyright; still images are artistic work copyright; moving images are film or TV copyright; the spoken word is sound recording copyright; and musical works have their own copyright. In multimedia, all of these items are bundled together into a single product. This would not cause a problem if the arrangements for obtaining protection, the ownership, lifetimes and rules regarding these intellectual property rights were identical, but they are not. The problem is compounded by the fact that the rules differ between countries, and yet multimedia, being in machine-readable form, can be passed from one country to another with trivial ease. There are four issues to consider.

- 1 Copyright laws vary from country to country. In some countries, for example, fair dealing is permitted for educational purposes, but not in others; the lifetime of copyright varies from country to country; the rules regarding who owns copyright in a film vary; the rights of performers of musical works vary, and so on.
- 2 Even within a country, the rules on the machine-readable text, still images, moving images, sound and music vary. In any multimedia work, there will be many copyrights, owned by different parties who often have different priorities and needs. The lifetimes of these copyrights vary significantly. Anyone wishing to copy a multimedia work can never be sure that he or she has catered for all possible copyrights.
- 3 The various industries (publishing, computer software, films, broadcasting, photographic) are very different in terms of the sorts of licences they are prepared to agree. The traditions of the lifetime of licences, the royalties paid, and the safeguards for the copyright owner differ hugely. Thus, if one wishes to negotiate licence rights to various components of a multimedia product, one has to negotiate with parties who have different perceptions of the appropriate financial reward.
- 4 It is often impossible to identify who owns the various rights in multimedia works. Copyrights are assigned and re-assigned, companies are formed and go broke, people move on and cannot be traced and yet, material cannot be copied without the copyright owner's permission, and the law requires the potential user to go to considerable lengths to identify the owner and then gain permission.

There has been some pressure for governments to look at the questions of adopting a single uniform law for all multimedia, that is to make the regimes for text, sound, images, and so on, consistent, thereby at least simplifying the issues regarding ownership and lifetime.

Disappointingly, so far no government has tackled the issue. There is little chance of a world law until each country agrees a standardised approach to all the components of multimedia.

As if that was not enough, multimedia poses another problem: moral rights (see Section 2.7). These mean that if you copy a portion, or amend a multimedia work, this might be deemed derogatory treatment, and therefore infringe the creator's moral rights. You may have also to acknowledge the author as the author. Moral rights cannot be assigned by an individual to a third party. Thus, even though you may have obtained copyright clearance to use some material in a multimedia work from the copyright owner, you must separately negotiate with the original creator, who is not necessarily any more the copyright owner, for permission to use his or her material in the way in which you want to do.

The copyright implications of multimedia information delivery are enormous, and can only be touched upon. A multimedia publisher has to negotiate rights to all the components in the product with the many rights owners. Among the issues the publisher must address are the following.

### **Identifying the rights holder**

It is not necessarily as easy to identify who owns the rights to a particular performance of a piece of music, or a small clip of a film. Considerable time can be spent hunting down the owner.

### **Technologies to be covered**

It is unlikely the rights owner will agree to broad non-specific rights to all multimedia, so definitions must be precise, and yet capable of flexibility.

### **Illustrations**

These may well not be owned by the copyright owners of the corresponding texts. Illustrators often retain copyright rights for themselves.

### **Moral rights**

A multimedia publisher may have to acknowledge individuals on its multimedia product. The right to prevent derogatory treatment can be significant, because, for example, if a multimedia publisher wishes to use a very short portion of an item, the owner may well object. The best way to avoid this problem is to obtain a waiver of moral rights.

### Geographic distribution

Restrictions on exploitation rights to a particular geographic area are not uncommon in the film industry and often are imposed on multimedia products.

### Language

Multimedia products frequently offer multilingual choices to their users. Rights licensed therefore often include translation rights.

### Duration

Because of the rapid development of multimedia, many rights holders are cautious about offering rights for more than a limited period; they want to see how this interesting market develops and whether they can exploit it yet further. One way round this would be for the publisher and rights owner to agree that if royalties reach a certain level in a certain period, then the licence agreement is automatically renewed.

## 3.4 Electrocopying

This is a major concern for the publishing industry. The usual understanding of the term is keying-in or machine-scanning publications to make or augment a database. At present, this can be done only with permission from the copyright owner. Any unauthorised copying, including electrocopying, transmission down a telecommunications network and transfer to a remote site, of a copyright work is *prima facie* infringement. The JISC and the Publisher's Association (PA) have developed a series of guidelines regarding electrocopying. In particular, they address questions of licence terms, the charging algorithms that should be implemented for electrocopying permission, and what is fair dealing in electrocopied materials. In addition, the CLA is developing a standard licence for HEIs that wish to licence electrocopying activities. You are advised to look out for announcements regarding the various guidelines and the CLA's new licence as details emerge. If you have Internet access, the URL for JISC/PA statements is: <http://www.ukoln.ac.uk/services/elib/papers/pa/>

## 3.5 Internet and copyright

E-mail messages, material loaded onto file transfer protocol (FTP) sites or WWW servers, and anything else put on the Internet is copyright. Just because it is widely available and free of charge does not change the situation; there is not necessarily an implied licence to copy. Therefore, you should be careful about copying such material, for example, forwarding it to someone else. However, in practice, such copying is only a real problem if the person who owns the copyright loses income as a result of your infringement, or if you gain income as a result of the infringement.

Individual Internet uniform resource locators (URLs), e-mail addresses and so on are facts and can be copied. Compilations of URLs or e-mail addresses are protected by copyright, as are Internet indexes such as those created by Yahoo, Alta Vista, and so on. FAQs (frequently asked questions) on USENET newsgroups are copyright. Downloading someone's WWW home page and using it as the basis of your own home page is clearly copyright infringement, and may also involve infringement of trademark rights (another form of intellectual property rights) if the WWW page included some device or logo that is a registered trademark – which is not uncommon. Create your own WWW pages from scratch – amending someone else's copyright material is 'adaptation' in copyright law, and is infringement.

If you wish to use material that is currently on the Internet for your project, our advice is to approach the copyright owners and request permission. It is most unlikely that redistribution of the material to many clients could ever qualify as 'fair dealing'. Remember, *there is no implied licence to copy material that is on the Internet* (see Section 6.1).

If you are a creator and you are worried about people ripping you off, do not put material up on the Internet. The problems of policing the Internet, identifying infringements and then prosecuting offenders are enormous. If, on the other hand, you want to make it explicit that you waive all copyright to the material you are putting up on the Internet, but still wish to retain your moral rights, a statement like the one below will probably suffice in law.

### Example copyright waiver retaining moral rights

**Copyright © 1997 by A. Researcher**

All rights reserved. This work may be copied in its entirety, without modification and with this statement attached. Redistribution in part or with modifications may infringe moral rights and is not permitted without the advance agreement of the copyright owner.

Remember, you do not have to make any statement at all to get copyright – it is automatic under UK law. However, you must make a statement if you wish to waive your copyright.

## 3.6 Software copyright

Even though software is quite clearly a 'literary work' under the terms of the CDPA and associated SIs, certain special rules are associated with software.

- 1 Because you cannot, in practice, 'fair deal' in software, you may not copy parts of computer code for the purposes of research, private study or any other reason. In order to 'fair deal', you would have to copy the entire software before tinkering with it on your machine.

Software houses argue that this cannot be fair dealing as you would be making an infringing copy.

- 2 You are explicitly permitted to make a single back-up copy of the software for *bona fide* reasons. If that back-up copy fails, you can then make another back-up copy. You may not make multiple copies unless you get a licence permitting this.
- 3 You may reverse engineer, that is, take portions of some software code to ensure that software you are developing is fully compatible with it.
- 4 The situation regarding rental and lending of software is particularly complex. Rental (i.e. lending for a charge) of third party computer software is an infringement if done without permission. There is no obligation upon the copyright owner to give such permission except in the case of public libraries, where the Act allows for the Secretary of State to impose compulsory licences on the copyright owner if a licensing scheme is not already in place. Free loan of software is never infringement as long as the software has been lawfully obtained. What, though, if the seller of the software, as is usually the case, tries to restrict that right? It could be argued that such a contractual clause is 'unfair' under the terms of the Unfair Contract Terms Act, but you would have to argue this case – there is no precedent to rely on.

It is clear that while in theory the Act gives you some leeway, in practice there are various bureaucratic problems. What about the general environment in which software is handled? It is probably safest for any organisation to have rigorous rules to prevent staff creating unauthorised copies of software. Thus, it should be a disciplinary offence for staff to have illegal software held on machines owned by their employers.

Turning to shrink-wrap licences, if you cannot read the licence before opening the package, and you do not find the licence terms acceptable, you have every right to negotiate or refuse the product. If you can read the licence terms before opening the package, the terms will apply unless a court finds them 'unreasonable'.

### 3.7 Browsing and transmission rights

In recent years, copyright owners have become increasingly concerned by the threats they perceive to copyright in an all-electronic and networked environment. They have attacked this issue from a number of angles – the development of electronic copyright management systems (see Section 3.9) is one approach. Another is to pressurise governments around the world to change laws so as to make explicit that among the restricted acts requiring permission from the copyright owner are those of 'browsing' (i.e. reading something on a VDU) and 'transmitting' (i.e. sending from one location to another) material in machine-readable form. It is interesting that there is no attempt to extend these concepts to material in print form, so there is no threat to the traditional right of users to read material in print.

Initially, copyright owners urged the US government, the UK government and the EU to adopt such changes to the law. When they failed to interest the legislators in the UK and the EU, and the Bill introduced in the USA proved too controversial, they switched to an attempt to change the Berne Convention (the major international copyright convention, see Section 2.8). A major diplomatic conference was held in Geneva at the end of 1996 to discuss these proposed changes, and a number of amendments to the Berne Convention were agreed. UK law has to be consistent with the terms of the Berne Convention, so there will be changes to UK law in due course.

### Long-term implications

The likely longer-term implications for readers of these guidelines are threefold.

- 1 As creators of new copyright materials, you will have, at least in theory, greater rights to prevent copyright abuse by third parties, although the key issues remain how to police rights, how to identify infringers, and deciding in which country to initiate the court case if the alleged illegality took place across national boundaries. In addition, courts may not be used to handling such cases and will have few precedents to guide them.
- 2 As users of pre-existing copyright materials, you will find little addition, once the new rights are implemented, to the burdens of licence negotiation that are already in place.
- 3 As both users and creators, you should explicitly include the rights to browse and to transmit in any licence that you negotiate. We recommend that you adopt this approach, although no legislation is yet in place in the UK.

## 3.8 Library issues

Libraries are always allowed to lend appropriate materials to their patrons. In addition, they have other key rights. There is an important difference between these special library privileges and fair dealing. Fair dealing is a defence against an infringement action, and depends upon the individual demonstrating that the copying was for one of the specified purposes and was indeed 'fair'. In contrast, HEI libraries are given guaranteed immunity against prosecution under the CDPA, so long as certain bureaucratic procedures are followed by them when making copies for their patrons. Incidentally, the CDPA does not define 'library' or 'librarian', but you can take it that anyone who is involved in a HEI library, qualifies under the term.

The Act and the associated SIs distinguish between two types of libraries – the so-called 'prescribed' libraries and others. 'Prescribed' libraries are, in essence, public libraries and other libraries associated with institutions that are not for profit, such as academic libraries. What follows only applies to prescribed libraries.

A prescribed library may make copies (including, in principle, electronic copies – although in practice, some publishers have expressed great concern about this activity) of material for patrons as long as two rules are followed:

- the person requesting the copy must personally sign a form requesting the copy and pay money for it;
- there must be no risk that copies of substantially the same material will be supplied to more than one person at substantially the same time for substantially the same purpose.

A library is permitted to make single copies of individual articles in a journal for patrons; the law states a library may never supply more than one copy to the same patron, or copies of more than one article from the same issue of a journal to the same patron. This raises all sorts of problems when one considers electronic journals, and what constitutes an 'issue' of such a journal. The law defines an 'article' as 'any item', so you should regard the contents page, the editorial, an individual article, or a letter to the editor as articles. Thus, if you have supplied the contents page to an individual, you cannot then supply him or her with a copy of an actual article from the same issue.

A library may also copy a reasonable proportion of any book or monograph on a request from a patron. 'Reasonable' is undefined, but 10% maximum would be a good working rule. The user is required to make a payment that covers the cost of making the copy plus any overheads associated with the copying facility.

A library may *not* pro-actively pass a copy of an article to a patron but must wait for a formal request. Requests by phone or e-mail are unacceptable; the request form must be personally signed by the individual patron. This means a secretary's signature or a stamped signature is not acceptable. Payment does not have to be direct, although this is the preferred method. It could be that a library charges out its services to departments and, as part of the calculation, copying of articles is included. Incidentally, the wording on the copyright declaration form is prescribed in an SI and should not be varied.

Just because a library has received payment and a correctly filled-out form does not necessarily mean the end of its problems. Remember, a library cannot in law supply more than one copy to a patron. So if the patron loses the copy, the library may not supply him or her with another. However, there is nothing to stop the patron making a second copy him or herself – that could be within fair dealing.

Any library can make and supply copies, including, in principle, electronic copies of items from its collection, but *only a prescribed library* may make requests for copies from another library. A prescribed library *may*, if it wishes, add the inter-library loan to its collections. Indeed, the requesting prescribed library *should* retain the copy of the item requested by one patron in the library for loan to any other patron who wants the

item, as it cannot re-request the item. No library may be supplied with more than one copy of any article. In theory, no library can be supplied with more than one article from a journal issue. Inter-library supply of copies must be charged in the same way as patrons asking for photocopies.

There are also special privileges for libraries making copies of print material for preservation, but these are not considered in this booklet.

The CDPA makes it difficult for a library to be pro-active or to do things that its patrons would like it to do. However, HEI libraries are all party to the higher education licensing scheme operated by the CLA.

Unfortunately, at present this licence does not extend to electrocopying or to electronic copies.

### 3.9 ECMS

An electronic copyright management system (ECMS) allows a copyright owner to identify or tag copyright material and to govern or control distribution of the work, which is typically in electronic form. This can be used to limit what can be done with the original or a copy of the file containing the work. For example, it can limit the use of the file to view only; it can limit the number of times the work can be retrieved, opened, duplicated or printed; it can be linked to a charging system, such as one using credit cards or smart cards.

No country's law at present notes the existence of such systems. However, following the 1996 Geneva meeting (see Section 3.7), ECMSs will probably soon have legal protection world-wide. This will make it illegal to tamper with or to disable them.

The use of an ECMS is seen as desirable by many in the publishing industry, but as undesirable by some users. Users believe that an ECMS will deter people from using electronic information because it increases the number of steps that have to be taken to gain access to the material (for example, entering a password) or because of the costs to the user. Users are also very concerned that the introduction of ECMSs will restrict their rights to browse or make copies under the 'fair dealing' provisions of the law, or that the tracking of their usage of electronic materials is an invasion of their privacy.

JISC-funded project leaders who are creating products that may benefit from the protection afforded by an ECMS need to carefully weigh the pros and cons of using such a mechanism to control copying or use. Under some circumstances, such as when the project needs to make use of material that is owned by a third party, there may be no choice – the copyright owner may not be willing to give permission for material to be used unless an ECMS is in place. If, on the other hand, the project involves the creation of copyright material from scratch, there is a choice.

Our advice is that if an ECMS is installed, it should not, without good reason, restrict the right of an individual to browse or to make a copy

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under fair dealing, or the right of a library to serve its patrons. If an ECMS does prevent fair dealing, the licence contract should make this explicit.

If an ECMS results in personal data being collected, for example, on an individual's reading habits, the data protection implications need to be carefully considered. Under present UK law, the only implication is that this use must be registered with the Data Protection Registrar, and that any individual has the right to inspect the record regarding him or herself, to object to errors, etc. However, the EU directive on data protection, which will come into force in stages from 1998 onward, provides greater protection: in particular, the collection of such personal information will only be permitted if the ECMS controller can demonstrate that the collection is necessary for its legitimate interests and it does not over-ride the individual's right to privacy. Under the directive, the ECMS controller will be obliged to inform individuals of the details of who has received copies of the collected personal information. These implications should be remembered before an ECMS is implemented.

## 4 Copyright ownership

### 4.1 Ownership of rights in works

In theory, the original owner of copyright in a given work is the person who created it. There are, however, exceptions: in many cases, under UK law, copyright in works created in the course of employment will be owned by the employer. Universities are unusual in that, by convention, much of the literary copyright remains with academic authors. It should be stressed that this is just a convention and should university authorities be so minded, they could choose to acquire the copyright in literary works created by academics in the course of their employment, by virtue of being the employer (see Section 4.2). Ownership of copyright in a work can change hands and, like any property, can be sold or assigned or passed on in a will.

#### ***Literary, dramatic, musical and artistic works***

The rights in a literary, dramatic, musical or artistic work are owned by the author, unless it is created in the course of his or her employment, or unless otherwise assigned.

#### ***Sound recording and film***

The rights in sound recordings and films are owned by the person by whom the arrangements necessary for the making of the recording or film are undertaken, unless otherwise assigned.

#### ***Broadcasts***

The rights in broadcasts are owned by the person making the broadcast, unless otherwise assigned.

#### ***Cable programmes***

The rights in cable programmes are owned by the person providing the cable programme service in which the programme is included, unless otherwise assigned.

#### ***Published editions***

The rights in typography of published editions of literary, dramatic and musical works are owned by the publisher, unless otherwise assigned.

For some works created before the implementation of the CDPA, original ownership was different. For instance, under the 1956 Act, the ownership of copyright in a photograph was vested in the person who owned the material on which the photograph was taken (that is, the negative film) unless it was a commissioned work. Nowadays, copyright ownership is vested in the person taking the photograph.

## 4.2 Contractual considerations for staff employed on JISC projects

The CDPA states that where a copyright work has been produced by someone 'in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary'. There are two very important phrases in this short statement:

- in the course of his employment;
- subject to any agreement to the contrary.

### Employment contracts

What does 'in the course of his employment' mean? It is quite straightforward that if a person is employed by a greetings card manufacturer to write verses for the inside of the cards, then verses written are copyright-protected works that are the property of the employer. However, if the production of a copyright work is not within the normal job description of the employee, or if the work is produced outside the contracted working hours of the employee, the position alters. The term 'employee' is usually, but not always, fairly clear. It means the relationship of what used to be called 'master and servant'. The employer pays a wage, is able to control how the work is carried out, deducts income tax, National Insurance, and so on. The arrangement is called a 'contract *of service*'. The alternative, called a 'contract *for services*' is where the employer pays a fee or charge, but cannot control the work and has no responsibility towards the other party other than to pay the money. In a school, a teacher would be employed under a contract of service whereas the local plumber, brought in to clean the drains, would be there under a contract for services. The provision that the copyright in any work belongs to the employer would apply to the teacher but not the plumber. Similarly, a freelance lecturer engaged to visit a university would be engaged under a contract for services, and the university would have no claim on copyright in materials created by him or her.

Some material, especially that prepared by university academics or research staff, does not fall so neatly into one category or the other. When acquiring material from staff members, it is most important to ensure that they really do hold the rights and that you should be dealing with them rather than their employer. Academics often assume they own the copyright in their works, whereas in law they often do not. Although employing institutions have been rather lax about the matter, they are increasingly vigorous about their copyrights, especially when commercial exploitation is likely. Any agreement with either party should include the warranty and indemnity clauses suggested in Section 6.4. The inclusion of these clauses will ensure that the author or potential contributor will check his or her contract of employment or, at least, consult the employer for clearance.

### Other agreements

The phrase 'subject to any agreement to the contrary' allows for an employer and an employee to agree to a different assignment of copyright in the work produced. At many universities, staff retain

copyright in the written work they produce. Therefore, it is vital that if you use staff members to produce copyright material for JISC projects, you ensure that the terms of their employment allow the material they produce to be used as you require. This may mean that they have to sign a separate agreement or contract to cover projects produced for JISC. This agreement should assign copyright to the consortium or lead body (as with other copyright material). If the author will not assign copyright, then the material he or she produces will have to be treated as other third party material and cleared for the uses you require (see Section 3).

Although the law provides that works made 'in the course of employment under a contract of service' are the copyright of the employer, this does not affect the work of students since they are not the employees of the institution in which they study. Consequently, an institution has, in law, no claim or right to reproduce, publish or otherwise use the material of students even when this is the direct result of the instruction being given. However, ownership of copyright can be transferred even in prospective works, that is those yet to be produced. A common example is when a popular novelist agrees that a certain publisher will handle a specified number of future novels. In the same way, an educational institution may, as a condition of accepting a student on the roll, provide that it has the sole right to copy or publish any material that the student may produce while attending the institution and which relates to the course being followed. To be binding, the condition must be conveyed to the student at the time of enrolment and should, preferably, form part of the written agreement between the parties. Of course, if the student takes a holiday job and is employed under a contract of service by, say, an advertising agency, then the normal employee provisions would apply and the agency would own the copyright, subject to any agreement to the contrary.

In the case of research assistants, the copyright in any materials created by them generally automatically belongs to the HEI.

### **HEIs and academic staff**

Academic staff typically produce three types of copyright material:

- lecture notes and other materials for students;
- published research work, such as monographs and research articles;
- multimedia teaching materials and software, both for teaching and potential commercial exploitation.

The attitudes of HEIs to academics' copyright vary considerably. Many have no policy at all. A number argue that materials produced for teaching purposes (including of course, multimedia products produced under TLTP) are part of the employee duties and the copyright therefore rests with the employer. Some further argue that if the academic produces copyright material, such as a multimedia product, book or software, which has significant commercial potential, then the university

is at least entitled to a portion of the royalties derived from such works. There are two key questions.

- 1 Is there a contract that explicitly states who owns the copyright?
- 2 Were the materials produced by the academic in the course of his or her employment? In other words, is the employee *expected* to produce such materials?

With teaching quality assessment (TQA), increasing emphasis is being placed on the quality of the *teaching materials* created by academic staff, so it is arguable that academics are indeed expected to create such materials, and so, even without a contract that states this, copyright in teaching materials belongs to the HEI.

However, the writing of a *textbook* is not an essential component of the contract of employment of academics. This can be seen from the fact that the majority of academics have not written textbooks, and yet are not criticised for this. Therefore, copyright in these clearly initially belongs to the academic.

The pressures of the research assessment exercise (RAE) have led to a situation where it is arguable that academics are required to create *research publications*, whether learned journal articles or monographs, and that failure to produce such articles will adversely influence their chances of promotion or tenure within the HEI. Thus, there is an arguable case that research publications are produced by an academic as part of his or her employee duties, and a strong case can be made that the HEI owns the copyright in such publications automatically, unless there is a contract to the contrary.

Hitherto, HEIs have shown no interest in claiming copyright ownership in such materials because there was no money to be made from research articles. However, there is good reason for HEIs now to become interested in ownership of copyright in learned journal articles – not as a means of earning money, but as a means of saving expenditure. This is because if HEIs can retain the copyright of their academics' research output, then they may not have to subscribe to so many highly priced commercial research journals comprising articles whose copyright is owned by the publisher, as the author has willingly assigned copyright to that publisher. HEIs would, in fact, be in a much stronger position to grant only a limited licence to such publishers, retaining the copyright for, say, electronic distribution free of charge, for themselves.

While HEIs may be justified in arguing that materials such as research output and multimedia teaching products are automatically their copyright, they should ensure there is no ambiguity by introducing intellectual property rights (IPR) ownership clauses into their contracts of employment. This need not lead to loss of control by the creators, as these individuals would no doubt continue to decide what is created and where it is placed in the case of research materials.

***HEI issues in summary***

There are four issues that need to be addressed.

- 1 Clarification of the copyright ownership of the different types of materials created by academics. If, in law, copyright in particular materials does indeed belong to the employer, then moral rights do not apply to such materials.
- 2 Greater consistency between HEIs regarding their policies on IPR and the contracts of employment they impose on their academic staff.
- 3 Greater co-ordination between HEIs regarding their policies on (or advice given to their academics about) the assignment or licensing of copyright to commercial publishers of print, multimedia and software.
- 4 Greater IPR expertise needs to be developed within HEIs.

Even when copyright in materials clearly belongs initially to the academic or the employing HEI, it may not remain with them. For example, if copyright is assigned to a publisher, the original creator no longer owns it. Thus, if an academic writes an article or book and assigns copyright to a publisher, the academic cannot subsequently use that material in, say, a multimedia product without the publisher's permission. In such cases, the academic must treat the material as third party and go through copyright clearance processes, even though he or she created the material in the first place.

### 4.3 Copyright ownership and consortium projects

Obtaining the formal agreement of consortium members to the assignment of copyright and ownership of original material developed during the course of the project is vital. In many cases, the consortium will wish to continue after funding ceases, so it will need to develop some kind of exit strategy or business plan. This will often involve forms of exploitation of the intellectual property created by the project; most likely, these are copyrights. The division of benefits and liabilities arising from this and other activities of the consortium need to be clearly defined. The example in Appendix III sets out a possible solution to this issue, as well as other matters of organisation and purpose of the consortium. The actual terms will vary depending upon project goals and objectives, and the nature of the existing relationship between the consortium partners.

In drawing up a letter of understanding, the following should be considered:

- a statement that sets out the goals or objectives of the consortium;
- how the consortium's funding will be allocated and accounted for;
- what happens if a consortium partner leaves the consortium or is asked to leave;
- who owns software and the copyright in the material produced.

The agreed letter of understanding should be signed by an appropriate person at each partner institution.

## 4.4 Choosing the appropriate structure

What organisational structure is adopted to undertake the commercialisation of project materials is probably one of the most important decisions a project manager will take. A well thought out structure of ownership and responsibilities can fundamentally affect the success of any commercial venture.

In commercialising the materials produced under JISC and TLTP, you have three options:

- a commercial partnership;
- an own marketing strategy;
- a mixture of commercial partnership with a strategy for own marketing in some areas.

### Commercial partnership

With commercial partners you have to accept that you will lose a degree of control over the development and marketing of the product. For JISC projects, the most likely commercial partners are publishers. However, in some instances there might be interest from software houses or professional associations. Publishers have a very high level of expertise in marketing printed works, but are often beginners when it comes to computer-based materials. All publishers recognise that the nature of their market is changing and are keen to build up electronic publishing expertise. The downside is that they tend to treat the marketing and royalty structure of computer-based materials in much the same way those of printed books. Successful marketing of computer-based materials may require a different approach.

### Own marketing

Despite what commercial companies may claim, marketing educational materials is not that complex. A well organised and thought through marketing plan, plus a degree of enthusiasm and a good product are what really matters. If necessary, you can always buy in specialist advice to help when it is required. The advantage is that you retain control and get to keep the majority of the income. The disadvantage is that marketing takes time and staff, and there is a danger that your project's future development will be compromised by the effort expended in marketing the existing materials.

### The mixture

For example, you might work with a commercial partner to market the software in the USA while retaining the remaining territories for your own marketing. Before entering into an agreement of this type, there are a number of questions you should ask yourself.

- 1 Do you have a clear idea of what you plan to market (the core product, accompanying printed materials)?

- 2 Have you developed a business plan?
- 3 Have you a clear view on the benefits that any commercial partner can provide?
- 4 Are you prepared to commit the time and effort required for successful own marketing?

## 4.5 Protecting ownership through trademarks

This is a very brief introduction. You should consult professional advisors if you believe registered or unregistered trademarks may apply to materials you are using or creating.

The granting of a licence to use the software or information that a project has developed is a way of protecting rights of copyright holders. A further form of protection can be obtained through registered trademarking. This involves the formal registration of a name or mark that is used to identify a particular product or service. Anyone else who uses a registered trademark is liable to legal proceedings for trademark infringement. A registered trademark is usually identified by the symbol ®.

Obtaining a registered trademark is a relatively long and expensive process and little international agreement exists to recognise trademarks registered in another country. Therefore, you are advised to register in all countries in which you want to protect your trademark. The full process of registering a trademark takes around two years and costs approximately £1000 for a UK registration and £1500 for each overseas registration. The cost can be higher if you wish to register the trademark for more than one 'class'. For example, class 9 is computing and class 16 is paper and printed materials. The protection you obtain from infringement only relates to the class of product that you have registered the name for.

An alternative, or precursor, to registration is to simply highlight the fact that you regard the name of your product as being a trademark. This is often signified by using the symbol ™. This symbol carries no formal registration protection; indeed many names which carry it would be rejected if a formal application for trademark registration were filed. The advantage is that it gives you some rights to prevent another person registering the name later, if you can prove you used it first. The normal method of establishing the use of a name is to place an advertisement in a magazine or journal. Using the symbol would also give you a stronger case if you sued for damages under 'passing off'. The trademark symbol does not provide as strong a protection as a registered trademark, but is sufficient in many cases. The use of the symbol is cheap and as such is worth adopting, even if you have no intention of registering.

# 5 Exploiting copyright material

## 5.1 Exploiting ownership

Assuming that you own the materials you intend to market, there are two ways in which ownership can be exploited:

- licensing;
- assignment.

### Licensing

It is common for computer software to be licensed to the user rather than sold. When you buy a piece of software, and even when it is given away at no charge, the copyright owner grants you a licence to use it. Usually, there are restrictions on the uses that are permitted (the long list on the back of the envelope containing the disks that you are meant to read before opening). The most common restriction is that you may only copy the software for the purposes of backing-up. Thus, if you provide a colleague with a copy of the software you are breaching the terms of the licence and are liable to legal proceedings. The licence that is granted may vary, depending on what terms the licensor has agreed to. So, for example, a 'site licence' simply means that the licensor has agreed that you may copy the software and circulate it within an agreed group or area. Licences are discussed in more detail in Section 6.

### Assignment

Once an individual has bought the copyright (that is, the copyright owner has assigned the copyright to someone else), he or she is free to do with it as they wish, including selling it on. It is common for the rights to be assigned as part of a publication deal. Anyone who has signed a standard publisher's contract should know that this assignment is usually for world rights and covers all forms in which the material might be published. Obviously, new media for publishing can cause problems, for example, rights assigned before the arrival of electronic publishing. In assigning the rights to a publisher, the assignor will receive some form of payment. Typically, this is calculated in relation to the sales achieved, that is, a royalty arrangement.

Before agreeing to a licence or the assignment of rights, you may, as project manager, wish to consider the following questions.

- 1 Has the licence been drawn up and checked by someone legally qualified?
- 2 Are you certain that you understand the extent (and implications) of any assignment of rights?

## 5.2 What can be sold?

It was agreed by the TLTP Advisory Group that any materials produced could be sold commercially. However, any project proposing to sell materials that originated from JISC funding must seek formal approval from the funding bodies.

## 5.3 Information required for the use of third party materials

If you don't own the copyright to material you plan to incorporate in a new work, you should identify the owner of the rights in the existing work (or their agent) before negotiations start. This can be difficult, partly because there are those who claim rights in a work when they have none, and partly because there may be no record of the original author or creator. There is no central registry of rights owners.

## 5.4 Obtaining copyright clearance

Clearing the use of third party material with the appropriate rights holders is the next step. It is vital because you may be infringing copyright if you perform any restricted act without permission. It is essential to get such clearance *before* work starts on the project. *The onus is on the project manager to obtain clearance.*

Assuming you have located the *bona fide* owner (or their agent) you need to have the following information to hand when approaching them:

- the title and description of the new work together with its extent and aims;
- a description of the target audience;
- a description of the method of distribution and the geographical territories to which new work may be marketed;
- the name of the commercial publisher or distributor (if there is one) dealing with the new work.

In relation to the material for which you are seeking clearance, you should have exact details on:

- the piece of material you want to use;
- the use you want to make of the material.

You should have considered and have answers to the following questions.

- 1 Is the new work to be sold?
- 2 Will distribution of the new work be restricted to HEIs in the UK?
- 3 Will distribution of the new work later be expanded to include other UK and overseas institutions?
- 4 Will the new work be presented on computer, on disc, on paper or as a sound or video recording? (You need to obtain rights to use the third party material in different media.)

Remember that repeatedly going back to the rights holder for additional permission will add to your costs. In relatively minor works, it is often possible to take 'all rights'. For more important works, you will have to decide on the limits you can set for your project.

## Different approaches

When you approach the rights holder(s), different approaches are appropriate for different types of material.

### ***Published text***

You will be expected to write requesting permission to reproduce material. Allow plenty of time for approval, as the process is usually fairly slow.

### ***Photographs or illustrations***

An initial telephone call to establish verbal agreement is acceptable. This may then be followed by a letter or a signed licence agreement.

### ***Licensing the use of proprietary software***

You should telephone the software company, who will then issue you with a written licence.

### ***Broadcast material or film footage***

Again, a telephone call followed by the issuing of a standard licence is normal practice.

### ***Music***

You will have to make a written application first, and then follow up with a telephone call soon after.

## Licensing agencies

Some rights holders nominate agents or collecting societies to act for them on the use of their work (see CLA leaflet for useful addresses and telephone numbers). These agencies often have standard terms and licences, so it may be more beneficial to approach rights holders direct.

## Record keeping

*All agreements regarding copyright and associated rights must be made in writing.* Everything agreed by you for your project must be recorded with evidence of the acceptance of your terms by the rights holder. You must keep all agreements for the life of the project or product, so that you have proof of permission.

Clearing rights can be time consuming and demands good negotiating skills, but setting up a good system of recording early on will save valuable time in the long run. Some example letters for obtaining copyright clearance are given in Section 5.5.

## Commissioning material

If you want to commission a person to do some work for you (such as writing material for the project, or being recorded doing something), then you must follow up your initial discussions with a contract.

## 5.5 Example letters for obtaining copyright clearance

### A one-stage approach asking for permission to use material

Date

Addressee

Dear Sir or Madam

I am writing from the Teaching and Learning Technology Programme Project No. 12. This project is supported by the Higher Education Funding Council and is currently collecting materials for computer-based modules in mathematics. The modules are being written under the supervision of academics to be distributed as part of degree programmes in the UK and overseas.

In constructing one of the modules we would like to use the material referred to below.

**Module:** A3AGRC Applications of Mathematics to Agriculture

**Requested material:** B/W photograph 'Farmer struggling to count sheep' (your ref. 2234232) as seen on page 23 of your 1994 catalogue.

The module will be distributed by the project to institutions administered by the UK higher education funding bodies at a charge sufficient only to cover distribution costs. There are approximately 150 such institutions including universities, and the package will be used by students in their studies. The planned distribution will commence in October 1998.

In addition, the project would now like to make this module available for sale world-wide. The maximum number of copies of the module being made available for sale is 200.

We would be grateful for permission to use the materials mentioned above. I would be pleased to provide further information on the aims and extent of the project and on the overall programme should you wish to know more.

Yours sincerely

Permission is hereby granted for use of the above materials as outlined in this letter.

Signed ..... Dated .....

## A two-stage approach asking for permission to use material

Letter 1

Date

Addressee

Dear Sir or Madam

I am writing from the Teaching and Learning Technology Programme Project No. 12. This project is supported by the Higher Education Funding Council and is currently collecting materials for computer-based modules in mathematics. The modules are being written under the supervision of academics and will be distributed as part of degree programmes in universities.

In constructing one of the modules we would like to use the material referred to below.

**Module:** A3AGRC Applications of Mathematics to Agriculture

**Requested material:** B/W photograph 'Farmer struggling to count sheep' (your ref. 2234232) as seen on page 23 of your 1994 catalogue.

The module will be distributed by the project to institutions administered by the UK higher education funding bodies at a charge sufficient only to cover distribution costs. There are approximately 150 such institutions including universities, and the package will be used by students in their studies. The planned distribution will commence in October 1998.

We would be grateful for permission to use the materials as indicated. In addition, it would be useful to know under what conditions you could give permission to cover sale of the module world-wide, anticipating that the maximum number of copies being made available in this way would be 200.

I would be pleased to provide further information on the aims and extent of the project and on the overall programme should you wish to know more.

To save you time and trouble, the return of this letter or a photocopy of it, will suffice.

Yours sincerely

Permission is hereby granted for use of the above mentioned material at institutions administered by the UK Higher Education funding bodies as outlined in this letter.

Signed ..... Dated .....

*Letter 2*

Date

Addressee

Dear Sir or Madam

**Re:** Teaching and Learning Technology Programme Project No. 12.

Module A3AGRC Applications of Mathematics to Agriculture

In 1997, you kindly gave the project permission to include the following photograph in the above computer-based module.

B/W photograph 'Farmer struggling to count sheep' ref. 2234232

The project would now like to make this module available for sale world-wide and we are requesting if the original permission could be extended to cover this use. The maximum number of copies of the module being made available for sale is 200.

It would be appreciated if you would sign and return to us a copy of this letter.

Thank you in advance for your continued support for the project.

Yours sincerely

Permission is hereby granted for use of the above mentioned material as outlined in this letter.

Signed ..... Dated .....

## 5.6 The importance of record keeping

Participants in JISC and TLTP projects may be dealing with copyright issues for the first time. Inadvertent misuse of third party materials can prove very costly. This section is to help you avoid problems by careful documentation and record keeping.

### **Procedures for documentation and record keeping**

It is advisable to keep records of all materials used in a project. This task should be undertaken by a nominated individual and the materials carefully categorised according to type, for example, literary works, computer programs, musical works, and so on. Materials used will usually fall into one of two classes.

- 1 Materials generated by the project, for example, original programs and designs created by the team programmers.
- 2 Materials from outside sources, for example, literary works, photographs.

There are times when it may not be clear which class material belongs to, for example, when individual academics not directly contracted to the project contribute their material. These 'grey' areas serve to highlight the importance of keeping a detailed record of every piece of material, however seemingly trivial.

### ***Software and technical design***

Software packages are normally available on licence under terms described in the shrink-wrap package. Special code written by programming staff will be available at the discretion of the institution where the staff were employed and will often be handed over to a project as part of that institution's contribution. However, there may be conditions, for example, the inclusion of the institution's logo. These requirements must be recorded and action taken at the appropriate time.

### ***Instructional design and academic content***

All JISC projects are likely to have a large and varied input from academics. The resulting ideas will come from their unique individual professional experiences. Whenever such material is referred to, its source should be acknowledged and recorded in an identical manner to other sourced material.

### ***Literary, musical and dramatic works, photographs, sound and video recordings***

There are two aspects of using such material that must be considered, as payment may be necessary:

- the right to use, quote or play material;
- the performance by the individual artist(s).

There are established procedures for the acquisition and use of this type of material, which should be followed. You are advised to be precise about the actual duration of required text or sequence of film, as payment will relate directly to the amount used.

**Map and data sets**

Collecting, selling and distributing commercially exploitable data is a business in itself. Data sets are normally protected in the same way as any other written work, however, keepers of data may look closely at the exact manner in which it is displayed.

Data should, therefore, be carefully sourced and the level and manner of presentation recorded.

**Example module log****1 Consortium**

TLTP Project No. 12 Mathematics

**2 Module**

A3AGRC Applications of Mathematics to Agriculture

**3 Editor-in-charge**

Hans Josef, University of Didford

**4 Assignment date**

1/1/98

**5 Completion date**

31/12/98

**6 Number of screens**

20

**7 Support materials**

Dictionary Module A33

**8 Software***Authorising packages*

- 1 'Visual Authorbook' Author licences purchased for machines used by A. Author and A. Programmer (reg. Nos. 234223432, 324234234). Invoice date 1/2/97. Order no. 1231223.
- 2 'Visual Authorbook' Run-time licence as per run-time agreement. No explicit charge (see file copy licence agreement contained in shrink-wrap package received on 1/2/97 – see above).

*Routine libraries*

- 1 Windows EXE 'spread.exe'. OLE support used on screen 12 'Experiment Goodfit'. Program purchased from A. Vendor, invoice date 1/2/97, order no. 4323423. No charge for distribution with product (see file copy licence).

*Special code*

- 1 Windows DLL 'tkfixit.dll'. Fix screen transition. Specification 1/7/97. Written in Microsoft C++ v.7. Systems programmer A. P. Coder. Employed University of Rummage and services provided on TLTP funds (contract with the university dated 1/1/97), four weeks work allocated 8/97. Loaded into memory for the duration of screens 3 through 5. Acknowledge University of Rummage as a member of the consortium. No additional charge.

*Instructional design*

- 1 Screens 1 through 8 (section 'Basics') based on lecture notes of A. Francis, lecturer University of Rummage. Contributed 1/4/93.
- 2 Screens 9 through 20 (section 'Development') new material by A. Francis 5/93. No individual contract. Part of U. Rummage's contribution to consortium (acknowledge U. Rummage as a member of consortium).

*Academic content*

- 1 Exercises 3 through 7 on screen 4 ('Exercise 1a') taken from London Examination Board papers April 1983. No charge. Acknowledgement required on page (letter 6/6/97).
- 2 Exercises 1, 2, 8 through 12 on screen 4 ('Exercises 1a') new exercises contributed by A. Wells, lecturer, University of Rummage. No individual contract. Requires acknowledgement (see letter 1/4/97) at head of module.

*Technical design*

- 1 Screens 1 through 20 designed by A. Designer, support staff employed at the University of Rummage on TLTP funds. Allocated two weeks work 2/97 (contract with Rummage dated 1/1/97).

**9 Literary, musical and dramatic works**

- 1 Poem 'Let's dig some maths', by A. Poet quoted on screens 3 and 4 ('Background 1' and 'Background 2'). Text displayed on screen 3.
- 2 Copyright A. D. Lawyer & Partners (contract 3/6/93).
- 3 Extract from *Principia Digestarum* (page 234) on Screen 5 Literary work dated 1645. Free use. Copy obtained from U. Rummage library. General acknowledgement of the university's services in consortium header.

**10 Artistic works**

- 1 Cartoon hypertext buttons screens 1, 5, 7, 8. Artwork commissioned (contract 1/7/97 from A. N. Artwork. Fee to be paid.
- 2 Illustrations screens 2, 4, 6 'Leverage on a spades and pitchforks' donated by S. Friend. (Letter of thanks 3/7/97). Acknowledge in module head.
- 3 Screen 1. Water-colour 'Fields in May', by A. Artist scanned from a photograph acquired from The Whispers Gallery (letter 1/6/98). Fee paid.

**11 Photographs, sound and video recordings**

- 1 Entry to screen 1 has 30 seconds of original midi production 'Intro. module Agriculture' composed by A. N. Professional. (Commissioned 1/2/97. Letter 1/5/98.) Fee paid.
- 2 Screen 15 call two minutes from BBC programme 'Count the daisies'. Acquired on video from BBC publications. Fee to be negotiated for educational HE rights (letter 4/9/98).

**12 Maps and data sets**

- 1 Screen 13. Data taken from p.123 Census data 1981. HMSO. ISBN 9-445 34534 (letter 3/8/98).

As many JISC products will be accessed by students, the incorporation of material might be best monitored on a module basis. The use of each item could then be recorded over the screens and totalled for each module. Items could be cross-referenced for correspondence.

## 5.7 Territorial issues

Copyright is like a bundle of sticks each of which represents an act or use that only the copyright owner may undertake or authorise. One of the sticks is the right to issue copies to the public, usually referred to as publication. The copyright owner may exploit this right as he or she chooses. In practice, the publication stick is divided in various ways to meet public demand and to maximise the financial return. So, an author may choose to license publication in the UK, but withhold permission to publish in America or Canada.

The principle of 'territorial rights' must be understood both as a user of existing material and, when the project is completed, as a copyright holder. For example, if you are seeking permission to use an item in a pack that you know will be sold to Australia, you need to negotiate for this territory at the start, along with the UK. In this way you can probably negotiate a better price as you will not have to refer back later for the right to sell in Australia and, most importantly, you know before you include the material that it is available for the Australian market. A number of projects have failed to reach their market potential because essential material was included and could not be removed, but the right to sell on was not forthcoming.

On the other hand, there is no point in acquiring rights you do not need, especially as the wider the range of territory, the higher the fees are likely to be. A useful ploy is the option in which clearance is obtained for an additional right and a price agreed, but the money is not paid until distribution in that territory takes place. Thus, if expectations are not realised, at least you are not committed to pay unnecessary royalty fees.

All these matters require careful assessment of the exploitation potential and the confidence to back your judgement. When the project is finished and you are at the exploitation stage, decisions must be made about how the rights are to be split up. This is particularly important if you are using agents, as allocating large areas of territory to one agent may produce less revenue than a more narrow division. Generally, it pays to keep back as many rights as possible. Many copyright owners have regretted parting with the whole stick for a sum that appealed at the time, only to see the value later increase and the new owner get the financial benefit. It is a matter of judgement, but what you hold you can either sell or license; once sold, it is gone forever.

## 5.8 Collecting societies

It is possible to negotiate the clearance for re-use of a work through a collecting society. These societies offer an efficient service and have clear policies on rates and their negotiation. It should be remembered, however, that the collecting societies do not represent all rights owners. The author or creator of a work has to be registered with, or be a member of, the society. In some cases, a society will take money into trust on behalf of an author if he or she is untraceable.

Organisations that issue licences include:

- Authors' Licensing and Collecting Society (ALCS);
- British Phonographic Industry Ltd. (BPI);
- Christian Copyright Licensing (CCL);
- Copyright Licensing Agency (CLA);
- Design and Artists' Copyright Society (DACS);
- International Federation of Phonographic Industries (IFPI);
- Mechanical Copyright Protection Society (MCPS);
- Newspaper Licensing Agency (NLA);
- The Ordnance Survey (OS);
- Performing Right Society (PRS);
- Phonographic Performance Ltd. (PPL);
- Video Performance Ltd. (VPL).

An excellent leaflet describing the major interest groups, the relevant rights societies and all their contact names and telephone numbers is available from:

The Copyright Licensing Agency Ltd  
90 Tottenham Court Road  
London, W1P 9HE  
Tel: 0171-436 5931 Fax: 0171-436 3986

## 6 Licences and commercialisation

### 6.1 Introduction

Copyright, like any other property, may be transferred from one owner to another on whatever terms and conditions are acceptable to the parties concerned. There are two broad types of agreement that are recognised in law, the assignment and the licence.

#### **Assignments**

In an assignment, the actual ownership of the copyright is transferred. By law, assignments are only valid if they are in written form. An assignment can concern the complete copyright or be limited in various ways.

Using the analogy of the bundle of sticks, the ownership of just one stick may be assigned leaving the rest in the possession of the existing owner. Or, the assignment can be limited in time or extent. For example, a composer might assign the 'right to public performance' stick to the PRS which then administers the right on the composer's behalf. The same composer might retain the 'right to publish' stick of the same work and assign it to a music publisher limited to five years and only for distribution in the UK and Europe. The other part of the stick might never be assigned or might be transferred to an American publisher to cover the USA and the Pacific. The point about assignment is that it gives to the assignee a right of possession which is enforceable even against the assignor but is limited to any terms or conditions imposed by the assignor.

#### **Licences**

Licences give no right of ownership but merely grant a permission to undertake a restricted act which, without the licence, would be illegal. So, licences are rather like a railway ticket that gives you permission to take a particular journey, perhaps with other restrictions, but gives no right of ownership in the railway itself. Licences are of two kinds: the exclusive and the non-exclusive.

#### ***Exclusive licences***

An exclusive licence gives the licensee the sole right, which no other person has, to undertake the restricted act though the extent of the right may be quite limited. For example, the BBC has an exclusive licence to transmit *The Sound of Music*. This means that for the period of the licence, the film cannot be licensed to a rival commercial network. Exclusive licences must be in writing to be legally valid.

#### ***Non-exclusive licences***

A non-exclusive licence grants the same right to different licensees and covers the same extent of use. So, for example, the BBC has a licence to broadcast all copyright music but a similar licence is simultaneously issued to the commercial companies. This could result in both networks playing the same music at the same time – 'Jingle Bells' played at

Christmas is a likely example. Although most non-exclusive licences are in written form, there is no legal requirement for this, so a verbal non-exclusive licence is enforceable.

A licence may also sometimes be implied (see below).

### **Commissioning work**

When material is specially commissioned for use in a project, then the arrangement might be such that the complete copyright is assigned to the commissioner. Whether or not this can be achieved depends on the opinion of the author, whether or not material has any value outside the project and the fee being paid for the work. The copyright is part of the value of the deal so seeking to acquire the complete copyright may be more expensive. Limiting the rights acquired to inclusion in the project, leaving the author with the rest of the copyright, could reduce the value acquired and, consequently, the fee to be paid. Contrary to a common misunderstanding, the law does *not* give the commissioner of a work automatic ownership of the copyright in it.

### **Using existing material**

When negotiating for the inclusion of existing material (usually already published), it is most likely that you will be offered a licence limited to inclusion as part of the project material and with the extent of the right to distribution clearly defined. It will normally be a non-exclusive licence. In practice, there is little point in acquiring, and paying extra for, an exclusive licence if there is no objection to the material also being used elsewhere. Exclusivity protects your own use and that is its only value. An example where an exclusive licence might be appropriate is where a specially commissioned work is not to be assigned to the commissioner who is merely to have a licence to use. In such cases an exclusive licence, preventing the author from also licensing others to use in a competing product, might be desirable.

### **Implied licences**

Most licences are explicit as the result of a direct communication between the licensor and the licensee. An implied licence is when there is no formal arrangement on copyright but the actions of the parties and the circumstances make it reasonable to assume that a licence has been granted. For example, consider a letter written to the editor of a newspaper. The letter, provided the conditions for protection are met, is a literary work and since publication is a restricted act, the editor requires permission for it to be legally printed in the paper. No such permission is ever sought or given because the editor assumes, and the courts would agree, that in writing to the editor, the author implied that permission to publish was given.

Implied licences should be interpreted narrowly; the editor in the above example would not be justified in permitting the letter to be broadcast. The test is what the author intended should be the extent of use in the circumstances in which the work was produced. Similarly, an *unsolicited* article sent to a magazine without cover of an agreement may be printed

once in the magazine, but the implied licence could not be relied upon for subsequent use. If an article is *commissioned* by an editor, the author becomes a freelancer and no implied licence exists; therefore a formal transfer of copyright notice is essential, whether or not money changes hands.

Computer programs, where supplied without a licence, are an example where the mere use of them may automatically involve a restricted act but the very supply implies a licence to use. *Those involved in on-line activities should be wary of assuming the existence of implied licences, both as users and producers.*

To have an agreement to photocopy or distribute material in paper form does not imply a right to disseminate on-line, even though this is the most sensible way to achieve the same result. Similarly, when granting permission for the use of new material, the need to specify explicitly what may and may not be done, especially on-line, should be carefully considered.

## 6.2 Author licences

When an author submits an article or some other material for publication by a distributor, he or she is typically asked to sign a form assigning copyright to that publisher or distributor. The form may also require the author to confirm that the material is indeed his or her copyright, and to agree to indemnify the publisher or distributor against the costs of any legal action that may result because the publisher disseminated the material.

Our advice on such author contracts is that, as an author, you should only assign copyright in its entirety under exceptional circumstances. Generally, you should give the publisher or distributor permission to reproduce your material for the express purpose of the particular product in question, and you should retain for yourself all other rights, such as the right to distribute as part of a course you run, or to provide copies to interested colleagues. Many publishers will agree to such amendments to their standard contracts. A few will refuse to consider any amendments, and you must then make the judgement for yourself whether or not what you are giving up is justified in terms of benefit to you or your institution. Indemnities against illegality are reasonable, and unless worded in a manner that you feel is particularly onerous, you should be prepared to accept these. ('Onerous', for example, includes the indemnities continuing even if the publisher makes changes to the material you submitted without your approval; the indemnity should always cease if the publisher makes changes you have not agreed to). The example author licence shown below include typical warranty and indemnity clauses (see also Section 6.4).

On the other hand, as a multimedia project manager or controller of an electronic journal, you will want to own as many rights as possible. It would be disappointing if electronic journals or other projects were to adopt the stance of demanding that authors assign to them all rights, but you must have some policy in place regarding copyright. There must, at

least, be some clear warranty that an article accepted for publication is the author's own copyright and that the author has given permission for the project to publish. If a multimedia project or electronic (or any other type of) journal accepts and publishes an article without such a warranty, it could be infringing someone else's copyright. The one thing you cannot do is ignore this issue.

### Example author licence

..... (hereinafter called the Author) wishes to submit for publication in

.....

the article entitled

.....

Copyright in the above article is hereby transferred to .....

(hereinafter called the Publisher) for the sole purpose of reproducing the article in

.....

The Author reserves the following rights:

- 1 All proprietary rights other than copyright (such as designs and patents).
- 2 Right to re-use all or parts of the above article in other works.
- 3 Reproduction for personal use and not for sale subject to marking copies with a copyright notice indicating where the article was published.
- 4 Pre-publication distribution of copies at no cost to colleagues.

The Author warrants to the Publisher that he or she is the owner of the copyright in the material submitted, or that he or she is duly licensed to use the material, and that the material does not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person. The Author indemnifies and holds the Publisher harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any actual or alleged infringement of such rights save where this is the direct result of any amendment of the material done by the Publisher without the agreement of the Author. The Publisher shall promptly inform the Author of any such infringement or suspected or threatened infringement upon the Publisher becoming aware of the same.

The Author further warrants to the Publisher that publication of the material will not contravene any British laws, including but not limited to the laws of libel, defamation and contempt of court (or concepts approximating thereto). The Author shall indemnify and hold the Publisher harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any illegality or alleged illegality save where this is the direct result of any amendment of the material done by the Publisher without the agreement of the Author. Any party shall promptly inform the others of any illegality or alleged illegality upon the party becoming aware of the same.

Signed (date) ..... by sole or senior Author, on behalf of co-authors if any,

.....

## 6.3 Reader/subscriber licences

Subscribers and users of materials created under eLib or TLTP should be required to sign a contract (this can be done electronically but, ideally, it should be done in writing) to ensure that subscribers do not re-disseminate or download materials in a manner that you, as creators, do not approve of. You are advised to examine contracts issued by on-line hosts or CD-ROM publishers to get some idea of the wording involved. The JISC and the Publishers' Association have set up a number of working groups to develop standard contractual terms for particular circumstances such as site licences, or agreeing what can be considered 'fair dealing' in an electronic environment. Their advice should be used when you develop your own contractual terms, and to that end many of the reports from these working groups will be published in this series of studies.

### Components of a standard reader/subscriber licence

It is not unreasonable to impose certain restrictions on subscribers in this way. Although, in theory, copyright law provides all the protection that is needed, making subscribers sign a contract draws their attention to your ground rules, so they have no excuse to say later that they didn't realise they were doing something wrong. Secondly, you are able to offer terms more generous than copyright law allows. In addition, if someone breaks the rules, you are entitled to cut off access to your material as they are in breach of their contract.

The basic structure of a standard reader contract includes the following components:

- law;
- changes;
- contributors' terms;
- limitations of use;
- payment;
- passwords;
- termination;
- waivers of liability.

These components are individually described and discussed below.

#### *Law*

A statement of which country's law the contract will be interpreted under. Since the subscriber has probably to take the contract as he finds it, complete with waivers and exclusions of liability, it is important to know under which country's law the contract will be considered if a question of fairness arises. Typically, if you own the material, you will impose English or Scottish law as appropriate.

### ***Changes***

You should reserve the right to change the content of the material offered with reasonable notice. You must have this freedom if the content available is beyond your control.

You should also reserve the right to raise or lower prices. Provide for 'reasonable' notice (perhaps three months?) of such changes. You should permit the subscriber to cancel the contract upon receipt of notice of any such changes to price or content.

### ***Contributors' terms***

Providers of data to your end-product might have particular concerns (say, about downloading) that they want to impose on all your clients; they may insist in their contract with you that such terms are imposed on subscribers.

This can be very annoying for subscribers, who may be faced with a series of similar, but not quite compatible special conditions imposed on them.

### ***Limitations of use of materials***

It may be that you wish to prevent subscribers from using the material other than in the normal course of their business; or to prevent them from re-selling or re-disseminating the search output to any third parties. Special terms have to be negotiated for site licences for, say, connecting the material to a local or wide area network. There may be other special terms such as:

- a copyright notice on each item;
- a requirement to report on the number of items downloaded;
- a maximum time for which items can be downloaded;
- a right to inspect for verification purposes;
- a statement to the effect that stored data may not be changed, repackaged, merged with other data or otherwise manipulated for the purpose of inclusion in a database.

We suggest that the temporary downloading of data for editing and reformatting should always be permitted at no charge. If, on the other hand, your client wishes to maintain the downloaded data for a time, perhaps to add to an in house database, then an extra licence fee is justifiable, or indeed you may wish to refuse permission. Unfortunately, it is impossible to distinguish the intentions of the user when he downloads data.

We recommend that hosts and distributors should support distribution through local or wide area networks, or intranets, and should make appropriate charges. Charges could be based on a 'contended access' system whereby, say, the network has 100 keystations attached but only 10 can access the database at any one time. If an eleventh tries to connect,

it is put in a queue until someone logs off. Charges are based on the number (10 in this case) of permitted simultaneous accesses, and not on the actual number of connections.

### ***Payment***

There should be an obligation on the subscriber to pay his bills promptly. There may be remarks about VAT or other taxes to be paid as well.

### ***Passwords***

You may want a requirement that the client keeps all passwords confidential and immediately informs you if he suspects the password has been obtained by an unauthorised third party. The subscriber may not pass his password to a third party without prior approval.

### ***Termination***

You should include the right to terminate if the subscriber is in breach of the contract.

### ***Waivers of liability***

We advise that you avoid statements such as:

*We can accept no liability whatsoever for the accuracy of the information, and can accept no responsibility for any loss or damage caused by subscribers' use of such information.*

Such statements are probably invalid in law. If you are in the business of distributing information, and if you have been reckless or negligent in the way you have handled or distributed it, courts will find you liable for damage your information has caused. Such clauses will not protect you. You should use more reasonable wording and take out third party liability insurance cover.

## **Specific clauses for reader/subscriber licences**

This checklist illustrates the issues that need to be considered:

- a preamble;
- the materials or courseware;
- rights;
- period of licence;
- cost;
- payment;
- return of material;
- updating;
- adaptation and copying;
- moral rights;
- warranty and indemnity;
- general;
- choice of law.

These are discussed briefly below and a sample agreement is shown in Section 6.5; the precise wording should be left to legal advisors.

### ***Preamble***

This states who the licensor and the licensee are, and indicates the subject matter of the licence. It is a condition of JISC that within the UK, licences must be with institutions not individuals.

### ***The materials (or courseware)***

This clause clearly describes the materials so there is no ambiguity (for example, video, accompanying paperwork, electronic journal, digitised data, computer software, hardware, handbook). The licensee must be clear what is being supplied.

### ***Rights***

This section describes the extent of use permitted (for example, within a specific establishment, with certain students on named courses, using closed-circuit satellite, for no charge or for profit). Alternatively, a very open description such as 'for the educational purposes of the establishment' may be sufficient.

### ***Period of licence***

The period for which the rights granted may be exercised (for example, the full period of copyright, one year or any other as may be decided). Factors in determining the period include the likelihood of the material 'dating' and any restrictions imposed by third party copyright owners.

### ***Cost***

The fee to be paid to the licensor. For the licence to be legally enforceable, it is desirable that there should be some payment, however nominal. It is a condition of JISC funding that where materials are distributed to HEIs within the UK, no income other than that required to cover reasonable costs may be made. The definition of 'reasonable costs' may vary from the costs incurred in making the copies to be supplied plus postage and packing, to such fees as are required to support a self-sustaining service, depending on the nature of the project in question.

### ***Payment***

When payment is due (for example, on ordering, on receipt of material).

### ***Return of material***

Once the contract has ended, is the material to be retained, returned or destroyed?

### ***Updating***

If the material is likely to be amended, improved or developed, is the licensee to be supplied with new versions as a right, at discretion of licensor, for free, or at a cost? The terms on which updated material can be offered will depend on the business plan to be agreed with JISC.

***Adaptation and copying***

Will the licensee have the right to make copies of the material, adapt or otherwise modify software? May copies be made for students and may students be permitted to make copies? May copies be made for supply to non-students and may all these activities be done for free, for cost or on a profit making basis?

***Moral rights***

If the material, or any element of it is subject to moral rights, protection of these must be passed on as an obligation to the licensee.

***Warranty and indemnity***

The licensor warrants that it has the right to enter into the licence and then indemnifies the licensee against any claims as a result of the warranty being at fault. Conversely, the licensee indemnifies the licensor against any action resulting from failure to observe the limitations of the licence. A fuller discussion of this area is given in Section 6.4.

***General***

Licence cannot be changed or terminated orally.

***Choice of law***

A clause establishing the law under which the licence is to be interpreted is necessary if licensor is covered by a different legal system from the licensee.

## 6.4 Warranties and indemnities

A warranty, in the copyright context, is a statement by whoever is transferring copyright or granting permission to use material, that they have a legal right to do so. Such a statement in a contract or licence provides an assurance that the document may be relied upon as authorising the actions licensed.

In practice, when dealing with those engaged professionally in copyright matters such as licensing bodies like the CLA or PRS, you can assume they do indeed hold the rights being granted. Not only do they understand the intricacies of copyright law, but in the running of their business, they keep records of the extent of the rights they administer on behalf of authors. The PRS, for example, will hold performing rights on behalf of composers and publishers, and will license public performances of music but will not handle requests for making photocopies of printed music.

In contrast to such certainties in traditional uses of material negotiated with licensing agencies, the rapid development of new technologies, such as on-line distribution, has revealed that publishers may be unsure whether or not the rights they hold embrace the use of material in these novel ways. Reference to their contracts with authors often fails to clarify the issue.

## Problem areas

Difficulty is more likely to arise, and the need for warranty clauses becomes essential, when acquiring rights from those not familiar with copyright law and practice – and this sometimes includes publishers. Frequently, permission to use is given in good faith by someone who falsely believes they own the copyright; this results in an invalid licence and an illegal use of material. A common example is the university academic who writes an article or paper and gives permission for publication or on-line use. As the employing university may hold the copyright, the academic's consent is worthless and unnecessary (common courtesy apart). Similarly, those who own photographs or pictures readily give permission for their use because they have mistaken ownership of the object with ownership of the copyright in it.

Care must be taken when acquiring permission to use compilations such as a video. The 'author' of the video will own the copyright but if the video includes bought-in material such as photographs, scripts and (especially) sound recordings and music, it is likely these were included under a limited licence, restricted to the video, so subsequent use will require separate arrangements. A warranty clause for a video must either cover all the elements within it, or a list of those elements with copyright owners identified must form part of the agreement.

## Think carefully

*A licence always should include a warranty clause.* Such a clause prompts second thoughts and the need to check on the part of the licensor. It concentrates the mind wonderfully, especially when coupled with the follow up – the indemnity. This is where the licensor agrees to reimburse the licensee for losses or damages incurred as a result of the use of material by the licensee acting in reliance on a false warranty. The intention of the clause is to ensure that where the licensee is successfully sued for copyright infringement while using the material within the terms of the licence, the licensor will cover the damages and costs. The warranty clause is worthless without the indemnity clause. As the party ultimately responsible, the licensor usually insists on being informed of and having the right to be involved in any legal action or threat.

*We cannot over-estimate the importance of ensuring that all licences to use protected material include adequate warranty and indemnity provisions, the precise wording of which should be left to your legal advisors.*

## 6.5 Example reader/ subscriber licence

The example below is simply an illustration of such an agreement; a real document should be drawn up to fit your circumstances by your legal advisor.

### Example licensing agreement

This is a licence under which *[name of producer]* of *[address]* (hereafter known as the Licensor) agrees to supply the *material* known as *[name of product]* (hereafter referred to as the Courseware) to *[name of institution]* of *[address]* (hereafter known as the Licensee) on the following terms and conditions.

#### 1 The courseware

The Licensor, on receipt of the signed copy of this licence, agrees to provide the Licensee with the following:

*[list of elements]*

#### 2 Rights

In consideration of the money referred to in clause 4, the Licensor hereby grants to the Licensee a non-exclusive licence to use the Courseware as follows:

*[list extent of use permitted – see examples below:*

- (a) for teaching purposes to full-time enrolled art students on the premises of the licence;
- (b) on networks linking sites within the jurisdiction of the licence.]

All subject to permissions and limitations referred to in clause 8.

#### 3 Period of licence

The rights granted by this licence expire on *[date]*.

*[You may wish to offer automatic renewal]*

#### 4 Cost

In respect of the supply of the Courseware listed at clause 1 and of the rights granted at clause 2, the Licensee agrees to pay the Licensor the sum of £*[cost figure]*.

**[Note:** *Where the Licensee is an institution of higher education within the UK, this sum must be limited to the cost of distributing the materials supplied plus post and packing.]*

#### 5 Payment

Payment of the sum at clause 4 shall be made in two stages, one half on the signing of this licence, the other half on receipt by the Licensee of the Courseware.

*[If the Licensee is a foreign organisation provision must be included for the appropriate transfer of currency.]*

#### 6 Return of the Courseware

The Licensee agrees to return/destroy the Courseware at the request of the Licensor on the expiry of the licence.

## 7 Updating

Should the Licensor update, improve or amend the Courseware during the period of the licence, it agrees to:

- (a) provide replacement element(s) of the Courseware as appropriate free of charge to the Licensee;
- (b) permit the Licensee to acquire the amended versions on payment of an additional amount as the Licensor may decide.

OR

The Licensor is under no obligation to update or otherwise amend the Courseware supplied to the Licensee or to make available any updated versions as may be developed, nor to provide technical or other support.

## 8 Adaptation and copying

Under the rights granted at clause 2, the Licensee may:

- (a) permit students to copy not more than a maximum of 1000 words or 5% of any workbook or handbook (whichever is the greater) or 3000 words from the resource book at any one login or period of computer use;
- (b) modify the Courseware
  - (i) in order to ensure its effective technical operation
  - (ii) by using the special editor supplied with the Courseware in order to annotate the Courseware and to customise it to the needs of the Licensee
  - (iii) by amending any hard copy supplied;
- (c) make a back-up copy of computer software.

The Licensee hereby undertakes not to:

- (a) sell, hire or otherwise distribute the Courseware or copies of it other than to its students on a cost of material basis only;
- (b) permit the Courseware to be copied or otherwise used in contravention of any law;
- (c) permit the Courseware to be modified in any way except as specifically permitted under the terms of this licence or with the written agreement of the Licensor.

## 9 Moral rights

In respect of any amendment or modification of the Courseware permitted by this licence, the Licensee agrees to respect the moral rights of the authors, and in particular:

- (a) the overall original authorship of the Courseware shall be clearly acknowledged;
- (b) any amendment shall clearly indicate that it is made by someone other than the author;
- (c) in case of substantial amendment, the permission of the Licensor must be obtained, such permission may be subject to the consent of third parties.

**10 Warranties and indemnities**

The Licensor warrants that it is legally entitled to grant this licence and has obtained the appropriate copyright and other rights necessary. The Licensor indemnifies the Licensee against all liabilities and claims arising out of the warranty.

The Licensee agrees to indemnify the Licensor against any claims arising from the failure of the Licensee to abide by the terms of the licence.

**11 General**

This licence cannot be terminated or amended orally.

**12 Choice of law**

This licence shall be interpreted in accordance with English law and be subject to the jurisdiction of the English courts.

I have read, understood and accept the terms and conditions stated:

Signed ..... Dated .....

For and on behalf of the Licensor.

Signed ..... Dated .....

For and on behalf of the Licensee.

## 7 Archiving and preservation

### 7.1 Copyright implications of copying and backing-up

Any long-term preservation or archiving of data requires copying. Data has to be copied from disk to back-up media, from one generation of disk to another, from one machine to another, and so on. These acts of copying are subject to copyright law. Without doubt, some of the data will be bundled with software. UK copyright law includes provisions for making back-up copies of software. The law explicitly permits a *bona fide* user to make a single back-up copy, irrespective of whether the software licence allows this or not. In practice, several back-up copies of software will be embedded in the multiple back-ups of data that are inevitable when archiving data. However, the chances of any software supplier suing for infringement when the back-ups are a precaution against corruption or loss of the original material are so slight that they can safely be ignored.

### 7.2 Data and licence agreements

Generally, data that is subject to licence agreements tends to have specific provisions in the licence for making back-up copies. In some cases, back-up copies are prohibited (some CD-ROM products, for example, or where data is accessed on-line rather than stored locally). Where data is not subject to licence agreements, and is not software (for example, WWW documents), there are no provisions allowing copying for archiving or preservation. In other words, creating back-up copies or archives would in principle be infringement. However, it is worth remembering that to succeed in an infringement action, the copyright owner must demonstrate that the act of copying damaged the owner's legitimate commercial interests.

### 7.3 Deposit of hand- held electronic objects

The British Library, with other UK copyright libraries, have made proposals to government for legislation for legal deposit of non-print information. A government discussion document was issued in early 1997 and was positive about the idea, but no legislation can be expected until 1999 at the earliest. The British Library submission contained detailed proposals for deposit of 'hand-held electronic objects' (CD-ROMs, floppy disks). These proposals include provisions for access to this material on the premises of the copyright libraries. There are no detailed proposals for legal deposit of on-line information. Despite the absence of legislation requiring deposit, JISC encourages its project teams to make voluntary deposits of the hand-held and on-line electronic objects they create to the copyright libraries and appropriate data archives, and to any preservation agency that the JISC may set up.

## 7.4 JISC project licence agreements

JISC also encourages its project teams to include in their licence agreements specific provision for back-up copies, and to define how these may be used.

### Example clause for back-up provision

Under the rights granted at clause *[clause number]*, the Licensee is permitted to make copies of any machine-readable version of ..... and updates for back-up purposes. For the avoidance of doubt, such back-up copies may be made so that the Licensee can fulfil its obligations to its own patrons for the distribution of ....., and/or for archival or preservation purposes. The original material and any back-ups created under the terms of this clause may not under any circumstances be offered, whether for sale or not, to anyone who is not an authorised user.

This license is granted on condition that the Licensee draws the following notice to the attention of each authorised user.

*This ..... is protected by copyright, and duplication or sale of all or part of the .....is not permitted, except that extracts may be duplicated by you for your own private research or educational purposes either as prints or by downloading. Such prints or downloaded records may not be offered, whether for sale or not, to anyone else. You are not permitted to alter any downloaded records without prior permission from the copyright owner.*

The Licensee acknowledges that copyright in ..... is owned by the Licensor, and that no transfer of ownership of copyright is conveyed by this agreement. The Licensee agrees to cause the service to display a copyright notice to this effect for all users.

JISC-sponsored projects that involve the mounting of on-line data should in general not offer their data to third parties without those third parties signing a license agreement. Terms similar to those shown in the example clause could form the basis of some of the clauses in such an agreement.

---

## 8 The copyright balancing act

### 8.1 Protecting everybody's investment

Copyright is clearly a complex system. It aims to balance the rights of authors, publishers and readers. These groups can also be thought of as creators, providers and consumers. Another party often involved is the library or museum, acting to provide material to many readers.

The 'trick' in copyright is to ensure that the interests of all parties are adequately met. Many authors depend on their writing for their living, and copyright provides them the basis for their earnings. But if copyright law were too tight, it would be difficult for publishers to make authors' works available, or for readers to assess whether or not they want to buy them. Publishers take authors' works and package them, making considerable investments in doing so. The system needs to protect their income or they will go out of business and what they do will not get done. Libraries take works and make them available; in many cases (for example, scholarly journals) they are nearly the whole market. They need to be able to make things available, without open-ended bills, but in such a way that they do not destroy the publishers' market to sell to the public where that is applicable. Readers need access to the material they have acquired, when and where they want it, and need to be able to assess works before purchase. They may need to pass works to colleagues, or allow others to read what they have bought; again these things have to be done without destroying the market, or future works will not become available.

Overall, it is hardly surprising that there is tension between the various stakeholders and that technology has exacerbated this tension. We hope that these guidelines will help resolve some of the difficulties that can arise in this potentially contentious area.

# Appendix I

## Dealing with copyright issues on a multimedia project

Some idea of the problems that face producers of multimedia works can be seen in the following two project examples.

### Some general points to note

A multimedia or WWW publication may include some or all of the following copyrightable components:

- literary elements – protected as literary works;
- dramatic elements – protected as dramatic works;
- musical elements – protected as musical works;
- artistic work (graphics, photographs, drawings and models) – protected as artistic works;
- moving images – protected in the same way as films;
- sound recordings – protected as sound recordings;
- typographical arrangements of published editions of literary, dramatic or musical work;
- computer program – protected as a literary work;
- choreographic routine – protected as a literary work.

### Project 1 Using existing material

Suppose that as a multimedia producer, you wish to produce a CD-ROM that contains no specially commissioned material on the life of Dame Margot Fonteyn. The work will include:

- photographs of Dame Margot Fonteyn and her family;
- photographs of Dame Margot Fonteyn's performances;
- excerpts from a film of *Swan Lake*;
- TV documentary footage;
- TV news footage;
- text from a published biography;
- text from newspaper articles;
- text from letters written by Dame Margot Fonteyn to a friend and excerpts from the friend's replies;
- music by several composers, living and dead, performed by different musical ensembles;
- pictures of original musical scores;
- diagrams of choreographic routines;
- underlying computer program to structure the data and allow it to be searched.

***A note on performers' consents***

Where a multimedia product includes recordings of performances, various consents will be required from differing categories of performers. At UK law (but not US law) performers rights exist in:

- musical works;
- dramatic performances;
- readings or recitations of literary works;
- performances of variety acts.

Obtaining this consent may not be easy especially if dealing with older material. Problems include:

- identifying performers (not just featured performers but also back-up musicians and singers, chorus girls, and crowd extras – but note rock concert exclusions);
- performer may be dead but the right of consent is transmittable to heirs.

In certain circumstances, the Copyright Tribunal under CDPA can give consent on behalf of untraceable or unreasonable rights holders – but only for the UK.

On the following pages, Tables 1–4 examine the path that you should take in order to ensure conformity with UK copyright and associated rights law.

**Table 1**  
***Determining authorship,  
ownership and relevant rights***

<b>What should be established</b>	<b>Why establishment is important</b>
What type of work is it?	The length of term of copyright, the person who is deemed to be the author, and the types of associated rights that may exist are affected by the category of the work
Who is the author of the work?	In many cases, the lifespan of the author determines the length of term of copyright
Who owns the copyright?	The necessary rights can only be obtained from the copyright owner who may be someone other than the author
How long does the copyright run?	Despite the effect of Directive 93/98/EEC and SI 1995 No. 3297, copyright terms still differ for various works
How long until copyright expires?	If the copyright has only a short term left, an assignment or a licence may cost less than one for a new work in which copyright has 70+ years to run (If a work is out of copyright, the problems of obtaining assignments or licences are removed)
Are there any other copyright-related rights involved?	There may be copyright-related rights, such as performers rights and moral rights, which attach to some works; the owner of the copyright may not be in a position to permit use of the work by others without the acquisition of further consents or waivers
Who holds those rights?	Copyright and associated rights in works may be held or exercised by individuals other than the original author; copyright may be passed by virtue of employment, or assigned by contract or testamentary dispositions (In some cases copyright may have expired)
When do those rights expire?	The remaining duration of copyright or associated rights in a work may affect your willingness to use them

*Table 2*  
*Determining which rights and waivers are needed*

<b>Rights and waivers needed</b>	<b>Why it is important to have them</b>
The right to copy the work	Without this right, there is little you can do without breaching copyright
The right to issue copies of the work to the public	Without this right, you cannot sell the copies of the resulting multimedia application to the public without breaching copyright
A limited right to let the public make the work	Using multimedia products inevitably results in the production of copies that may be ephemeral in a user's RAM, various other ephemeral copies if the product is used over a network, or more permanent copies if the product is copied onto the hard drive of a stand-alone machine or a file server; a limited right to let the public make copies of the work should be requested, if any such copies are likely to be made
The right to adapt the work	If a literary or musical work is to be abridged in any form, broadcast or film footage excerpted, photographs cropped, and so on, the right to adapt the work should be requested
The right to perform the work in public	The need for this right depends on the purpose to which the multimedia product is to be put; for instance, if the multimedia work is likely to be on a publicly available touchscreen (for example, in a museum), then this right should be requested
The right to broadcast the work	Again, the need for this work depends on the purpose to which the multimedia product is to be put; examples of a multimedia work being broadcast are rare, if not non-existent
Waivers of moral rights	Waivers of moral rights might be required when it is impractical to identify individual authors; for example, hundreds or even thousands of authors might contribute to a multimedia encyclopaedia; although paternity right must be asserted by an author, it might prove wise to ask the author to contractually waive that right in certain circumstances, to prevent him or her asserting that right at a later stage
Waivers of performers' rights	Waivers of performers rights might be needed when it is necessary to alter, adapt, make additions to or deletions from the original performance

**Table 3**  
**The existing rights at issue in project 1**

<b>Requirement</b>	<i>Literary</i>	<i>Musical</i>	<i>Artistic</i>	<i>Film</i>	<i>Sound</i>	<i>Broadcast</i>	<i>Typography</i>	<i>Performers</i>	<i>MR1</i>	<i>MR2</i>	<i>MR3</i>	<i>MR4</i>
Photographs of Dame Margot Fonteyn and her family			✓						?	?	✓	?
Photographs of Dame Margot Fonteyn's performances			✓						?	?	✓	?
Excerpts from a film of <i>Swan Lake</i>				✓	✓			✓	?	?	✓	✗
TV documentary footage					?	✓		?	?	?	✓	✗
TV news footage					?	✓			✗	✗	✓	✗
Text from a published biography	✓						?		?	?	✓	✗
Text from newspaper articles	✓						?		✗	✗	✓	✗
Text from letters written by Dame Margot Fonteyn to a friend	✓								?	?	✓	✗
Excerpts from the friend's replies	✓								?	?	✓	✗
Music by several composers, living and dead, performed by different musical ensembles					✓			✓	?	?	✓	✗
Pictures of original musical scores	?	✓					?		?	?	✓	✗
Diagrams of choreographic routines	✓						?		?	?	✓	✗
Computer program	✓								✗	✗	✓	✗

**Key**

MR1 = right to be identified as the author or director of a work (paternity right)

MR2 = right to object to derogatory treatment of a copyright work (right of integrity)

MR3 = right not to suffer false attribution of a copyright work

MR4 = right to privacy in respect of certain films and photographs

✓ = yes

✗ = no

? = maybe

**Table 4**  
**Obtaining the necessary rights and**  
**waivers for project 1**

What is required	Forms of copyright protection that may be involved	Plan of action
Photographs of Dame Margot Fonteyn and her family	Copyright as an artistic work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the photographs</li> <li>■ Determine who now owns the copy right in the photographs</li> <li>■ Determine the remaining duration of copyright in the photographs</li> <li>■ Request from the owner of copyright in the photographs either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
	Associated right: right to privacy	<ul style="list-style-type: none"> <li>■ Where photograph was commissioned for private and domestic purposes, request from the commissioner a waiver of the right to privacy</li> </ul>
Photographs of Dame Margot Fonteyn’s performances	Copyright as an artistic work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the photographs</li> <li>■ Determine who now owns the copyright in the photographs</li> <li>■ Determine the remaining duration of copyright in the photographs</li> <li>■ Request from the owner of copyright in the photographs either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
	Associated right: right to privacy	<ul style="list-style-type: none"> <li>■ Where photograph was commissioned for private and domestic purposes, request from the commissioner a waiver of the right to privacy</li> </ul>

Excerpts from a film of <i>Swan Lake</i>	Copyright as a film	<ul style="list-style-type: none"> <li>■ Determine who is the author of the film</li> <li>■ Determine who now owns the copyright in the film</li> <li>■ Determine the remaining duration of copyright in the film</li> <li>■ Request from the owner of copyright in the film either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Copyright as a sound recording	<ul style="list-style-type: none"> <li>■ Determine who is the author of the soundtrack</li> <li>■ Determine who now owns the copyright in the soundtrack</li> <li>■ Determine the remaining duration of copyright in the soundtrack</li> <li>■ Request from the owner of copyright in the soundtrack either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: performers' rights	<ul style="list-style-type: none"> <li>■ Determine if there is an issue of performers' rights</li> <li>■ Request from the performers in question a waiver of those rights</li> </ul>
TV documentary footage	Copyright as a broadcast work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the broadcast</li> <li>■ Determine who now owns the copyright in the broadcast</li> <li>■ Determine the remaining duration of copyright in the broadcast</li> <li>■ Request from the owner of copyright in the broadcast either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: performers' rights	<ul style="list-style-type: none"> <li>■ Determine if there is an issue of performers' rights</li> <li>■ Request from the performers in question a waiver of those rights</li> </ul>
TV news footage	Copyright as a broadcast work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the broadcast</li> <li>■ Determine who now owns the copyright in the broadcast</li> <li>■ Determine the remaining duration of copyright in the broadcast</li> <li>■ Request from the owner of copyright in the broadcast either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>

Text from a published biography	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the literary work</li> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
	Copyright as a typographical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the typographical work</li> <li>■ Determine the remaining duration of copyright in the typographical work</li> <li>■ Request from the owner of copyright in the typographical work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
Text from newspaper articles Music by several composers, living and dead, performed by a number of different musical ensembles	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who is the author of the literary work</li> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
	Copyright as a typographical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the typographical work</li> <li>■ Determine the remaining duration of copyright in the typographical work</li> <li>■ Request from the owner of copyright in the typographical work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>

Text from letters written by Dame Margot Fonteyn to a friend	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
Excerpts from the friend's replies	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
	Copyright as a musical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the musical work</li> <li>■ Determine the remaining duration of copyright in the musical work</li> <li>■ Request from the owner of copyright in the musical work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Copyright as a sound recording	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the sound recording</li> <li>■ Determine the remaining duration of copyright in the sound recording</li> <li>■ Request from the owner of copyright in the sound recording either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>

	Associated right: performers' rights	<ul style="list-style-type: none"> <li>■ Determine if there is an issue of performers' rights</li> <li>■ Request from the performers in question a waiver of those rights</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights – if such a waiver is required</li> </ul>
Pictures of original musical scores	Copyright as a musical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the musical work</li> <li>■ Determine the remaining duration of copyright in the musical work</li> <li>■ Request from the owner of copyright in the musical work either an assignment of copyright or a licence of the necessary rights for the multimedia work.</li> </ul>
	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine whether or not the score contains a significant amount of annotation to decide if it qualifies as a literary work</li> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Copyright as a typographical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the typographical work</li> <li>■ Determine the remaining duration of copyright in the typographical work</li> <li>■ Request from the owner of copyright in the typographical work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights– if such a waiver is required</li> </ul>

Diagrams of choreographic routines	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Copyright as a typographical work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the typographical work</li> <li>■ Determine the remaining duration of copyright in the typographical work</li> <li>■ Request from the owner of copyright in the typographical work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>
	Associated right: moral rights	<ul style="list-style-type: none"> <li>■ Request from the author (or the person who now exercises them) a waiver of moral rights- if such a waiver is required</li> </ul>
Computer program	Copyright as a literary work	<ul style="list-style-type: none"> <li>■ Determine who now owns the copyright in the literary work</li> <li>■ Determine the remaining duration of copyright in the literary work</li> <li>■ Request from the owner of copyright in the literary work either an assignment of copyright or a licence of the necessary rights for the multimedia work</li> </ul>

## Project 2 Using new material

Suppose you, as a multimedia producer, wish to produce a CD-ROM on African wildlife. You do not wish to use existing material, but rather intend to have your employees produce some of the work, and to commission the rest from other individuals and firms. The CD-ROM will include:

- video footage of wildlife including soundtrack;
- photographs of wildlife;
- text;
- narrative for video footage;
- music for video footage;
- sound recordings of animal noises;
- interviews with naturalists;
- drawings of animal footprints;
- underlying computer program to structure the data and allow it to be searched.

***Rights of employees of multimedia producers and independent contractors***

While copyright in literary, dramatic, musical and artistic works belongs to the employer, and independent contractors can be required to assign copyright, performance rights are more complicated. In the case of the employee, they do not automatically transfer to the employer, consent should therefore be obtained contractually. Note that consent applies only to 'first fixing' although this problem can be overcome by copyright.

***Copyrights in films and sound recordings***

These belong to the person or persons who undertook the arrangements which resulted in the film being made. Multimedia producers should therefore ensure that it is clear in contracts of employment that such arrangements are undertaken on the understanding that they are on behalf of the producers.

***Terms of employment***

When employees undertake work that is outside their normal employment duties, whether it be making arrangements that result in film or sound recordings, or creating a literary, dramatic, musical or artistic work, these works might not be covered by the employer's right to the copyright. A complicating factor can be that an employee's formal job description might not accurately describe his or her current duties. Employers should ensure that job descriptions are regularly reviewed to cover employees' current duties, and that job contracts are flexible enough to cater for this eventuality.

***Personality rights (US and other jurisdictions – not UK)***

Under these rights, a person has the right to prevent his or her name, likeness or biography from being used without his or her consent. Therefore, individuals mentioned in credits and packaging should be asked for their consent as well as those featured in a multimedia product.

***Music in multimedia***

A synchronisation licence is the consent of the copyright owner to use music and lyrics in synchronisation with or in timed relation to moving images. Mechanical royalties are payments above and beyond the synchronisation licence. Commissioned music can avoid both these problems, and may lead to potentially lucrative spin-offs – as in the case of the Super Mario music.

On the following pages, Tables 5 and 6 examine the path that you should take in order to ensure conformity with UK copyright and associated rights law.

*Table 5*  
*The existing rights at issue in project 2*

What is required	<i>Literary</i>	<i>Musical</i>	<i>Artistic</i>	<i>Film</i>	<i>Sound</i>	<i>Broadcast</i>	<i>Typography</i>	<i>Performers</i>	<i>MR1</i>	<i>MR2</i>	<i>MR3</i>	<i>MR4</i>
Video footage of wildlife including soundtrack				✓	✓				✓	✓	✓	✗
Photographs of wildlife			✓						✓	✓	✓	✗
Text	✓								✓	✓	✓	✗
Narrative for video footage	✓				✓			✓	✓	✓	✓	✗
Music for video footage		✓			✓			✓	✓	✓	✓	✗
Sound recordings of animal noises					✓				✓	✓	✓	✗
Interviews with naturalists					✓				✓	✓	✓	✗
Drawings of animal footprints			✓						✓	✓	✓	✗
Computer program	✓								✗	✗	✓	✗

**Key**

MR1 = right to be identified as the author or director of a work (paternity right)

MR2 = right to object to derogatory treatment of a copyright work (right of integrity)

MR3 = right not to suffer false attribution of a copyright work

MR4 = right to privacy in respect of certain films and photographs

✓ = yes

✗ = no

*Table 6*  
*Obtaining the necessary rights and waivers for project 2*

<b>What is required</b>	<b>Forms of copyright protection that may be involved</b>	<b>Plan of action</b>
Video footage of wildlife including soundtrack	Copyright as a film	When using contractors, it is essential to have the copyright assigned by contract, or to have negotiated a satisfactory licence, before filming starts. Even where employees are making the film, it is a sensible precaution to ensure that all potential rights arising from the work are also assigned by contract, thus avoiding the issue of whether or not the employee created the work during the course of his or her employment.
	Copyright as a sound recording	When using contractors, it is essential to have the copyright assigned by contract, or to have negotiated a satisfactory licence, before sound recording starts. Even where employees are making the sound recording, it is a sensible precaution to ensure that all potential rights arising from the work are also assigned by contract, thus avoiding the issue of whether or not the employee created the work during the course of his or her employment.
	Associated right: moral rights	Any moral rights arising from the production of either a film or sound recording should also be dealt with in advance of their creation. This applies equally to contractors and employees, in both cases, a waiver of moral rights by contract should suffice.
Photographs of wildlife	Copyright as an artistic work	When using contractors, it is essential to have the copyright assigned by contract, or to have negotiated a satisfactory licence, before the artistic work is created. Even where employees are creating the work, it is a sensible precaution to ensure that all potential rights arising from the work are also assigned by contract, thus avoiding the issue of whether or not the employee created the work during the course of his or her employment.
	Associated right: moral rights	Any moral rights arising from the production of artistic works should also be dealt with in advance of their creation. This applies equally to contractors and employees, in both cases, a waiver of moral rights by contract should suffice.

Text	Copyright as a literary work	When using contractors, it is essential to have the copyright assigned by contract, or to have negotiated a satisfactory licence, before the work is created. Even where employees are making the work, it is a sensible precaution to ensure that all potential rights arising from the work are also assigned by contract, thus avoiding the issue of whether or not the employee created the work during the course of his or her employment.
	Associated right: moral rights	Any moral rights arising from the production of literary works should also be dealt with in advance of their creation. This applies equally to contractors and employees, in both cases, a waiver of moral rights by contract should suffice.
Narrative for video footage	Copyright as a literary work	See the comments on literary work above.
	Copyright as a sound recording	See the comments on sound recording above.
	Associated right: performers' rights	Any performers rights arising should be dealt with in advance of their creation. This applies equally to contractors and employees, in both cases, a waiver of performers rights by contract should suffice.
	Associated right: moral rights	See the comments on moral rights above.
Music for video footage	Copyright as a musical work	When using contractors, it is essential to have the copyright assigned by contract, or to have negotiated a satisfactory licence, before the works are created. Even where employees are creating the works, it is a sensible precaution to ensure that all potential rights arising from the works are also assigned by contract, thus avoiding the issue of whether or not the employee created the works during the course of their employment.
	Copyright as a sound recording	See the comments on sound recording above.
	Associated right: performers rights	See the comments on performers' rights above.
	Associated right: moral rights	See the comments on moral rights above.

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Sound recordings of animal noises	Copyright as a sound recording	See the comments on sound recording above.
	Associated right: moral rights	See the comments on moral rights above.
Interviews with naturalists	Copyright as a sound recording	See the comments on sound recording above.
	Associated right: moral rights	See the comments on moral rights above.
Drawings of animal footprints	Copyright as an artistic work	See the comments on artistic work above.
	Associated right: moral rights	See the comments on moral rights above.
Computer program	Copyright as a literary work	See the comments on literary work above.

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# Appendix II

## Consortium agreements

It is essential that any project is well managed and this is especially the case with consortium-based projects. Here, dedicated project management is required and this involves people, time and, therefore, money. A foundation of good project management is a formal agreement that outlines how the consortium will operate and addresses a wide range of issues of which copyright, ownership, and use and exploitation of the results of the project are all of importance.

A well-drafted consortium agreement, used as a project management tool, can be the most effective way of addressing, at the start of a project, issues which are certain to arise later. The early act of producing the agreement focuses attention on downstream issues such as the use and exploitation of the results of the project, revenue sharing among the participants, and participants leaving and joining the consortium.

There is no fixed formula for a consortium agreement, *but it is essential that any agreement fits the particular circumstances of the project*. The example document below can be adapted for any consortium agreement. However, you are advised to go to a lawyer to draw up your agreement.

## Example agreement for collaborative research and development projects

This agreement is made the ..... day of ..... 199X between  
The University of England of ..... and  
The University of Northern Ireland of ..... and  
The University of Scotland of ..... and  
The University of Wales of .....  
(hereinafter referred to individually as a Party, and collectively or in groups as the Parties).

### INTRODUCTION

**A** In response to the HEFCE circular 99/97 *Yet Another Way Of Getting Funding From Government* the Parties to this agreement have submitted a proposal to HEFCE to undertake a project entitled *Assessment of ways of getting funding from government*. The Parties are hereinafter collectively referred to as the Consortium.

**B** The Consortium intends to carry out a programme of work which is described in the bid submitted to the HEFCE and detailed in Annex 1 (hereinafter referred to as the Project).

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

**D** This agreement sets out the details of the relationship between the Parties of the Consortium.

### IT IS HEREBY AGREED AS FOLLOWS

#### 1 Purpose of the Consortium

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

#### 2 Commencement and duration

The Consortium was formed and the Project commenced with an effective date of 1 October 1998 and the Project has a duration of three years, unless otherwise agreed in writing by the Parties.

#### 3 Over-riding conditions

In all instances, conditions laid down by the HEFCE or its successor will override any agreement between the Consortium members.

## 4 Project resources

### 4.1 Allocation

The total grant funding awarded for the Project is as follows:

Year 1	£.....
Year 2	£.....
Year 3	£.....
Total	£.....

and the budget shall be apportioned between the Parties in accordance with the schedule detailed in Annex 2.

### 4.2 Distribution

Payments shall be made from the HEFCE to the University of England and the project manager will instruct the University of England to make payments to the Parties shortly after receipt in proportion to the share of the total budget each Party is receiving.

### 4.3 Invoicing/Claims

Where equipment items are purchased or other claimable expenses are incurred, claims should be passed to the project manager as soon as they have been paid, with copies of original invoices attached.

## 5 Project management

### 5.1 Identification

The Parties agree that the Project lead site is the University of England. The Parties agree that the Project will be managed by Professor Gillian Shepherd of the University of England (the Project Manager). The Project Manager will report to a group established by the Consortium and made up of:

*[as outlined in bid]* (the Steering Group).

The chairman of the Steering Group is the Deputy Vice-Chancellor of the University of England (the Chairman). The nominated individuals are listed in Annex 3.

### 5.2 Responsibilities of the Project Manager

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

*[as outlined in bid]*

### *5.3 Responsibilities of the Steering Group*

The Steering Group will determine the overall nature of the Product and will retain responsibility for determining the technical standards to be adopted in the Project. The academic, scientific and technical content of the Product will be determined by the Steering Group.

The Steering Group will meet at least twice yearly. Additional meetings may be called by two or more Parties or on the advice of the Project Manager. The Steering Group may choose to take advice from third parties as is required. *[It is proposed that]* meetings will operate under the following rules:

- (a) the Project Manager will notify Steering Group members of the dates of meetings and outline agenda with at least 14 days notice;
- (b) each Steering Group member will have one vote, except the Chairman who has a casting vote (but a member may not vote on matters concerning a dispute with the Consortium where the member is the subject of the dispute);
- (c) Steering Group members may nominate a representative to attend meetings and vote on their behalf;
- (d) decisions will be taken on the basis of a majority vote of those attending and eligible to vote;
- (e) the minimum number of voting members required for meetings is .....

### *5.4 Responsibilities of the Chairman*

To act as chairman of the Steering Group.

### *5.5 Responsibilities of the Parties*

Each Party undertakes to use all reasonable endeavours to:

- (a) perform on time the tasks and work packages assigned to it under the schedules shown in Annex 4;
- (b) participate actively with other Parties where necessary;
- (c) promptly notify the Project Manager of any delay in performance;
- (d) prepare and present reports as required.

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

Institutions may be invited to join the Consortium only by the unanimous decision of the Steering Group and on the condition that the new institution becomes a Party to this agreement. A Party may withdraw or be expelled from the Consortium only in the event of irremediable breach of this agreement or breach of the conditions laid down by the HEFCE and with the unanimous agreement of the remaining Parties. In the event of withdrawal or expulsion, the

Consortium will only be liable to meet the cost of any work undertaken up to the point at which an institution ceases to be a member of the Consortium. The balance of any payments made to the Party will be returned to the Project Manager within 30 days of withdrawal or expulsion. In all cases, the Consortium reserves the right to retrieve any work produced as a result of the Project.

## 6 Data management

### 6.1 Data collection

In the course of the Project, each Party is involved in the collection of data in the form of ..... The data are to be sent to the Project Manager and stored in an archive at..... (the Project Archive). Each Party agrees to ensure that all data submitted to the Project Manager are accompanied by documentation detailing the origin of the data, together with the necessary ethical and patient consent.

### 6.2 Data maintenance

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

### 6.3 Confidentiality

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

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

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

- (a) known to the receiving Party prior to the date of this agreement and not obtained directly or indirectly from any other Party;

or

(b) obtained from a third party who lawfully possesses such information which has not been obtained in breach of a duty of confidence owed to any Party by any person;

or

(c) in the public domain in the form in which it is possessed by any other Party other than as a result of a breach of a duty of confidence owed to such other Party by any person;

or

(d) required to be disclosed by legal process, law or regulatory authority.

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

## 7 Intellectual property

### 7.1 Ownership

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

(a) all materials not incorporated into a Deliverable shall be owned by the Party generating the material;

(b) all Deliverables, and the materials contained therein, not incorporated into a Product shall be owned jointly by all the Parties;

(c) any Product shall be owned by one Party, and the Steering Group will decide which Party shall own a Product on a case by case basis.

### 7.2 Marking

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

### 7.3 User rights

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

Deliverables and the development and creation of Products in accordance with the provisions of subsection 8.1. (The Consortium is required at the end of the Project to provide to those institutions defined by Section 65(5) of the Further and Higher Education Act 1992 with free copies of the Deliverables and a non-exclusive free licence to use the Deliverables for non-commercial purposes. The Parties hereby agree to supply such copies and to grant such licences as may be required by HEFCE.

## **8 Commercial exploitation**

### *8.1 Procedures*

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

### *8.2 Exploitation income sharing*

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

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

x% .....

y% .....

z% .....

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

## **9 Publication and press releases**

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

## 10 Liability

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

## 11 Miscellaneous

### *11.1 Assignment*

No Party will be entitled to assign this agreement nor all or any of their rights and obligations hereunder without the prior written consent of the others.

### *11.2 Disputes and arbitration*

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

### *11.3 Relationship*

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

### *11.4 Law and jurisdiction*

This agreement will be governed by the laws of England. This agreement is subject to the exclusive jurisdiction of the English courts to which the Parties hereto submit. This clause does not prevent a Party from seeking interim relief in any court of competent jurisdiction.

**AGREED BY THE PARTIES THROUGH THEIR AUTHORISED SIGNATORIES**

For and on behalf of the University of England

Signed .....

Dated .....

Name .....

For and on behalf of the University of Northern Ireland

Signed .....

Dated .....

Name .....

For and on behalf of the University of Scotland

Signed .....

Dated .....

Name .....

For and on behalf of the University of Wales

Signed .....

Dated .....

Name .....

## Appendix III

### A reading list and sources of information

#### Books

- Cassell, Don  
*The Photographer and the Law*  
London: BFP Books, 1989.
- Cavendish, J. M. and Pool, Kate  
*Handbook of Copyright in British Publishing Practice*  
(3rd edition) London: Cassell, 1993.
- Cornish, Graham P.  
*Copyright: Interpreting the Law for Libraries and Archives*  
(2nd edition) The Library Association, 1997.
- Crabb, Geoffrey A.  
*Copyright Clearance: A Practical Guide*  
London: National Council for Educational Technology, 1990.
- Flint, Michael F.  
*A User's Guide to Copyright*  
London: Butterworths, 1990.
- Henry, Michael  
*Publishing and Multimedia Law*  
London: Butterworths, 1994.
- McCracken, R. and Gilbert, M.  
*Buying and Clearing rights: Print broadcast and multimedia*  
London: Blueprint, 1995.
- Merkin, Robert M. and Black, Jack  
*Copyright and Designs Law*  
London: Longman, 1993.
- Owen, Lynette  
*Selling Rights: A publisher's guide to success*  
London: Blueprint/The Publisher's Association, 1991.
- Phillips, J., Oppenheim, C. and Wall, R. (eds.)  
*ASLIB Guide to Copyright*  
London: ASLIB, 1994-.
- Post, J. B.  
*Copyright: A Handbook for Archivists*  
Edited by M. R. Foster.  
London: Society of Archivists, 1992.

Robertson, Geoffrey and Nicol, Andrew G. L.  
*Media Law*  
(2nd edition) London: Longman, 1990.

*Intellectual Property Guidelines for the Teaching and Learning Technology Programme*  
London: Beachcroft Stanleys Solicitors, 1994.

### **Video programmes**

*The Boy's a Genius: an Introduction to Copyright*

Distributor: The Patent Office. Sale. 1992.

Production company: Javelin Productions; YPL Communications Ltd  
Videocassette, VHS, col. 35 min.

Explains the principles of copyright and how it affects different people, and introduces some of the organisations associated with copyright.  
Documentation: accompanying information booklet.

*Copyright in Education: a Video Introduction*

Distributor: National Council for Educational Technology. Sale. 1992.

Production company: National Council for Educational Technology  
Videocassette, VHS, col. 30 min.

Introduces the law of copyright as embodied in the Copyright Designs and Patents Act 1988 and explains the law in broad terms. In six parts: introduction; the 1988 Act; conditions of copyright; who owns copyright and how long it lasts; how copyright works and concessions; special concessions for education.

Documentation: video-based pack includes 28-page A4 guide, 126-page A4 handbook, and A2 chart showing copyright concessions.

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