



Legal Issues for e-Portfolio Systems

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The Legal Study

- UK JISC Lifelong Learner Record (LLR) Legal Study was set up to:
 - Identify & assess legal risks in development of LLR/ePortfolio systems at institutional, regional and national level
 - Assess legal risks arising in relation to wider use of LLR/ePortfolio data - linkages to external data sources
 - Liaise with & provide guidance & support to existing JISC LLR/ePortfolio projects
 - Produce strategic reports on the key legal issues likely to affect the direction & viability of LLR/ePortfolio systems
- In practice much of the initial work was centred on ‘fire-fighting’ legal problems faced by JISC LLR/ePortfolio projects.

Context of Legal Risk

- Legal systems don't operate in a vacuum – either in their development or application.
- Success of LLR/ePortfolio systems often rests on perceptions of general public:
 - Valuable resource or administrative boondoggle
 - State or commercial intrusion into privacy
 - Discriminatory or exclusionary effects
- Legal problems usually arise from:
 - Poor planning and failure to seek advice on legal issues
 - Inadequate mechanisms for ensuring legal compliance
 - Poor communication of aims and objectives to users.

Key Legal Issues

- Areas of legal risk arising from LLR/ePortfolio projects:
 - Administrative/management framework
 - Data protection, privacy and confidentiality
 - Ownership & IPR in technical framework
 - Ownership & IPR in LLR/ePortfolio contents
 - User accessibility, disabilities legislation, social exclusion
 - Internationalisation of education provision

Administration & Management

- Sustainable/scaleable technology framework
 - Data storage – silos, snowball, main store
 - Software core – proprietary, OSS or combination
 - Front-end & linkage software issues – suitability/security & development standards.
 - Access controls – staff/learners/others
- Location of risk and liability
 - Ensuring certainty between institutions permitting effective risk management
 - Impact of failure/closure/merger of parties

Privacy and confidentiality of learner data

- Is the system subject to national DP law (or other privacy/confidentiality rules)?
 - Are the data collection methods and proposed data uses permissible?
 - On whom will the legal obligations for compliance with any DP requirements lie?
 - Are there appropriate formal/informal mechanisms to ensure conformity with DP obligations, e.g. data sharing agreements, data processing agreements, joint data controller agreements, data use protocols?

Privacy and confidentiality of learner data

- Who will have, or is envisaged as having, access to data held in the application?
 - Is access granted to all a learner's data or a subset?
 - Who determines the degree of access granted?
 - What safeguards are there to prevent pressure being placed on learners by 3rd parties to grant wider access?
 - What conditions are placed on use of data by 3rd parties?
 - Reuse of data, secondary uses of data, time limits on retention etc.
 - How are these conditions monitored/enforced?
- What provision is there to prevent corruption or loss of data?

Ownership and IPRs I

- Is the software purchased from 3rd party?
 - Is it 'off the shelf', customisable, or bespoke?
 - Cost, suitability, fitness for purpose, testing
 - What are the terms of the licence?
 - Warranties, indemnities, limitation of liability
 - What happens if 3rd party goes bankrupt, is taken over, or stops supporting the software?
 - Error correction, code improvements, escrow agreements

Ownership and IPRs II

- Is the software to be developed in-house?
 - Commercially exploited or open source?
 - Who owns the IPRs in the application (or elements of it) – employees, contractors etc?
- Is a partnership/consortium agreement required?
 - Does this make adequate provision for ownership & licensing of IPRs?
 - Are there appropriate terms to cover future development and use?

Ownership and IPRs III

- Who owns the IPRs in the data contained within the application?
- What rights do learners have regarding access to, and/or control over, info in the e-portfolio:
 - Data about them created by the institution
 - Data about them created by 3rd parties
 - Data created by them - taught coursework
 - Data created by them - research output
 - Data created as part of wider PDP activities

Liability for content in learner-created data

- If learners can grant access to 3rd parties to all or part of their e-portfolio; or publish parts of it on the Web.
 - Are learners informed about content liability (e.g. defamation, © infringement)?
 - What is the institutional liability for that content?
 - What procedures are there to deal with 3rd party complaints about learner published material?
 - Who is responsible for seeing those procedures are followed?

Accessibility of an e-portfolio system

- Is the system flexible enough to cater for learners (and staff) with special needs?
 - National legislative requirements
 - Ethical requirements
- What are the implications for learners who don't wish to, or can't, use the system?
 - Technology have-nots/don't-wants
- Interoperability – can data be easily transferred from the system to other e-portfolio systems
 - Free movement of learners between educational systems (progression, change of institution, international)

International Dimension

- Education is increasingly a trans-national operation, esp. at FE/HE level, with fierce competition for students.
- Diversity in learner/provider population
 - Geographical as well as timeline expansion
 - Provision of accessibility to non-UK students (notably EU/EEA) – non-discrimination.
- Lack of concerted co-operation between national/regional interest groups to assess legal risks arising at trans-national level
- National ePortfolio systems will need to avoid an inadvertent conflict with:
 - EU free internal market in goods and services
 - International trade liberalisation in educational services

Legal Processes for Projects I

■ Preliminary stage

- Legal issues are an essential part of project risk assessment
- Need to identify legal issues relevant to ePortfolio development
- Conduct risk assessment and consider how legal issues might be appropriately addressed
- Ensure appropriate time/financial costs allocated
- Include legal planning in project timetable/milestones
- Assess need for liability cover/insurance.

Legal Processes for Projects II

■ Start of a project

□ Consortium Agreement (or Project Plan)

- Principal actors and term of agreement
- Obligations of principal actors inc. data protection
- Administrative framework of consortium
- Entry and departure of principal actors
- IPRs (background and foreground) & exploitation
- Liability and warranties
- Exit strategy

□ Ensure project team understand what the Consortium Agreement means!

Legal Processes for Projects III

- Project lifetime – development and audit
 - Review of legal risks & project responses
 - Awareness of changes to legal environment
 - Continuing documentation of processes, decisions and outcomes
 - ‘Big Red Bus’ scenarios
 - Continuing training, esp. where staff turnover
 - Knowledge Management issues
 - Dialogue with institutions & partners

Legal Processes for Projects IV

- As projects enter new phases or end
 - Appropriate to engage in a legal health check
 - Ensure documentation, both administrative & explanatory, is complete and appropriate
 - Complete (or retrofit) and sign off on rights management register, as necessary
 - Ensure that project partners are briefed on legal issues relating to exit strategy
 - If project is continuing, check whether partner agreements automatically continue, or need renewing.

Planning and Oversight

- Identification of legal issues is essential to support appropriate risk analysis and action
 - Adequate time and resources early in project lifecycle
 - Clearly documented rationales for institutional policy.
- Guidelines, protocols and procedures are valuable only if both understood and used.
 - Identification of person/persons with responsibility for development, training and implementation of policy.
- Legal issues will change over time, policies & practices must adapt to these changes