

# Strategic Management of Intellectual Property Rights for OER in UK Higher Education

**Please Note:** This guidance is for information only and is not intended to replace legal advice when faced with a risk decision.

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## Key Points

- Universities should consider their approach to intellectual property rights, licensing and reuse of teaching and learning materials and research materials, and formulate a coherent policy to match their strategic mission.
- Institutions should be aware of the benefits of adopting an ‘open’ approach, such as the creation of open educational resources, potential promotion of “value added” courses building on materials, and the open access to research data and outputs, when determining and implementing the most appropriate policy.
- As well as adopting an appropriate policy, universities should ensure that such policy is effectively implemented. This may involve clarification of ownership, dealing with existing culture and values, and provision of IPR support and training for staff.

## 1. Introduction

This paper is written in the context of the JISC and Higher Education Academy Open Educational Resources Programme (Phase 2), and aims to address some of the background issues regarding management of intellectual property rights (IPR) in UK universities. In particular, this guidance aims to assist institutions by prompting strategic decisions that may need to be taken in relation to the management of intellectual property, and to inform those decisions.

This paper will focus on the issues surrounding copyright, as the management of potentially patentable inventions tends to be well serviced by university research offices, and the other types of intellectual property rights are secondary in importance to copyright (although not to be ignored). Although patent and copyright will be the two most significant types of IPR, it should be noted that a comprehensive approach will also deal with:

- Copyright related rights (including moral rights, performers' rights, and producers' rights)
- Database rights
- Design rights (including the design right, registered designs and semiconductor design right)
- Trademarks

More information about these rights is available at <http://www.jisclegal.ac.uk/IPR>.

## 2. New Approaches to IPR

Traditionally, in HE, a common approach to IPR has been dominated by two strands: exploitation of patents through a research or commercialisation office, and compliance activity in relation to the use of copyright material in teaching and learning.

There has been a growing recognition in the information-rich digital age that traditional models of the exploitation of content may cease to be relevant. Where once the physical medium (the music CD, the film on DVD, the printed journal) was the vehicle for commercial exploitation, it is becoming clearer that usage, the ability to reuse and repurpose, and the underlying expertise are key to future value. Where once owners sold sheets of paper bound as a book, now providing access to an ebook or database might be more appropriate.

There are a number of drivers which suggest that, for many institutions, traditional approaches to IPR may have become inappropriate or are likely to do so:

- There is increasing awareness that universities acting in partnership with business and the community can provide a model that is more likely to be effective than the solitary institution-led

exploitation of IPR. Such partnership entails sharing of IPR. More information on such partnership is available at <http://www.jisc.ac.uk/whatwedo/programmes/bce.aspx>.

- There is an increasing tendency to question why intellectual property produced through public funding should not be made openly available for the public – paralleling the trend towards openness of public sector information within government.
- There is growing appreciation of the tension between ownership, reward and value. Traditionally, academic staff have been possessive of teaching and learning materials, whilst seeking publication and dissemination of research output. This is changing through an increasing appreciation of the value of expertise, rather than materials.
- Traditional models for the exploitation of content in general are being challenged through models such as the international open access to research movement and the open educational resources movement pioneered by the likes of MIT in the USA (<http://ocw.mit.edu>) and new publishing models made possible by the web. This is accompanied by the realisation that, for most, traditional academic publishing models rarely provided significant commercial reward to institutions.
- With increasing pressure to improve efficiency in education, as with all publicly-funded activity, the independent creation of similar teaching and learning materials across the HE sector is being questioned.

At a time when IPR issues are becoming more prominent in society and business in general, now is an appropriate time for institutions to review whether their management of IPR meets their strategic mission, and to ensure that effective policies and procedures are in place to implement the IPR aspects of this strategic choice.

A current movement in terms of strategic management of IPR is the promotion of the creation and use of open educational resources (OER) where appropriate. This involves the release of materials under a relatively liberal licence, allowing users to reuse the materials, and potentially to adapt and re-disseminate them, without coming back to ask permission each time. Creative Commons licences involve the combination of certain elements, and at their core is the right for others to reuse the licensed materials. Beyond this, institutions may decide whether to require attribution, whether to allow commercial reuse of the materials, and whether to allow derivatives to be made (and if so, to require similar relicensing of those derivative works). Further information on Creative Commons licensing is available from Web2Rights at <http://tinyurl.com/web2rights-b1a> .

### **3. Adopting an OER Approach - The Institutional and Wider Benefits of Appropriate Licensing**

The adoption of an OER approach, if appropriate, by an institution can lead to a number of benefits. The JISC / Higher Education Academy infoKit on Open Educational Resources, available at

<https://openeducationalresources.pbworks.com/w/page/24838012/Stakeholders-and-benefits>, analyses the potential benefits that may be realised.

One summary of institutional benefits, derived from an earlier OECD paper, is provided by JISC CETIS in section 3.3 of a 2008 paper entitled *Open Educational Resources – Opportunities and Challenges for Higher Education* (available at <http://tinyurl.com/kkek7r>). It lists:

“The altruistic argument that sharing knowledge is in line with academic traditions and a good thing to do.

Educational institutions should leverage taxpayers’ money by allowing free sharing and reuse of resources.

Quality can be improved and the cost of content development reduced by sharing and reusing.

It is good for the institution’s public relations to have an OER project as a showcase for attracting new students.

There is a need to look for new cost recovery models as institutions experience growing competition.

Open sharing will speed up the development of new learning resources, stimulate internal improvement, innovation and reuse and help the institution to keep good records of materials and their internal and external use.”

And the individual benefits as:

“The altruistic motivation of sharing (as for institutions), which again is supported by traditional academic values.

Personal non-monetary gain, such as publicity, reputation within the open community (egoboost).

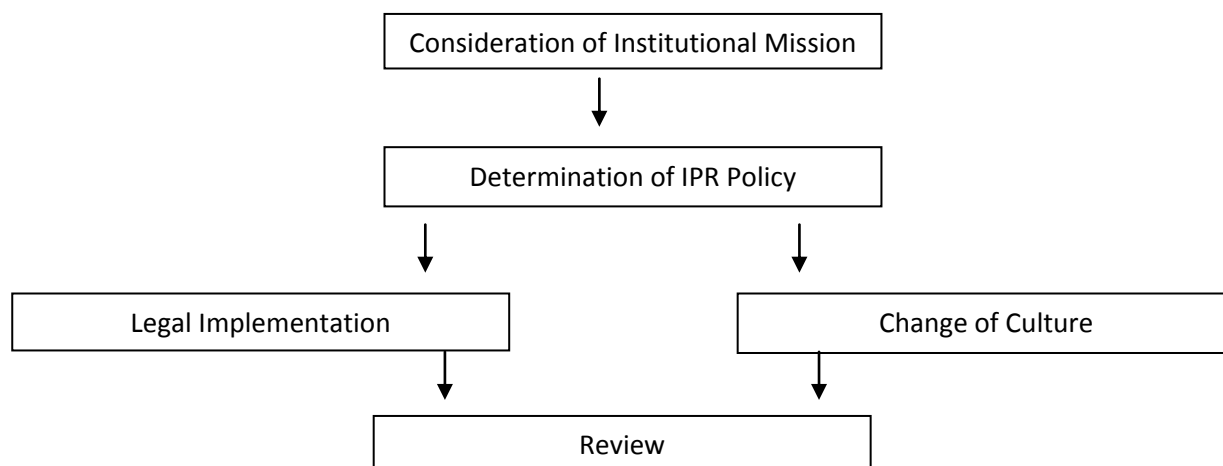
Free sharing can be good for economic or commercial reasons, as a way of getting publicity, reaching the market more quickly, gaining the first-mover advantage, etc.

Sometimes it is not worth the effort to keep the resource closed. If it can be of value to other people one might just as well share it for free.”

Whether these benefits are worth pursuing will depend on a number of factors to be considered in the next section.

## 4. Choosing an Appropriate IPR Strategy for Teaching and Learning Materials

A comprehensive approach to IPR may require the adoption of separate strategies in relation to teaching and learning material and research material. This paper focuses on the adoption of a strategy in relation to teaching and learning materials. This will require a number of stages:



In determining the most appropriate approach in relation to the management of IPR in teaching and learning materials, a number of factors relating to the particular institution will need to be considered:

### *The institutional mission*

The appropriate approach will depend, first and foremost, on the institution's mission. There are two aspects to this. The first is the geographical focus of the institution's mission – at the extremes, institutions which aim to locate themselves primarily in the local community on the one hand, and institutions with global ambitions on the other. The second aspect pertains to activity, and in particular, the extent to which the institution mixes the elements of teaching and learning, research, and external engagement/third stream activity.

Engaging with the global OER community by publishing OERs can be an effective way of reinvigorating and changing the institutional cultures related to teaching and learning – often the single largest source of income. For those institutions that have a pressing business case for introducing more flexible and blended learning offerings to their portfolio this approach can be an effective driver for change. The JISC-funded TrustDR project has produced a development pack (available at <http://trustdr.ulster.ac.uk/outputs.php>) to help senior management teams work through the practical and policy issues involved in IPR in such contexts.

### *Risk appetite*

Intellectual property law is an area where informed judgements have often to be made as to the limits of the law. In most of its aspects, there is little case law, as disputes tend to be sorted out

through negotiation and settlement. In these circumstances it is important that institutions have sufficient expertise and effective procedures for making decisions in relation to intellectual property legal risk. In order to do that, those delegated with making the decision on behalf of the institution will need a steer and support as to the degree of risk that it is willing to take in order to pursue its strategic mission. To explore appetite for risk in using third party resources, Web2Rights provides a risk management tool, giving an indication as to the likely level of risk in relation to particular cases, available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>.

#### *Internal structure*

The development of the strategic management of IPR is likely to be different at a largely unified, centralised institution, as opposed to a devolved or federated one. The particular approach adopted may depend on whether the differences across the institution are historic, or whether they are justified by differences in each part's mission.

#### *External drivers*

Institutions may be constrained in their adoption of particular IPR models by conditions of operation and of funding. For example, there is a growing trend for the award of public research funding to require some or all of the resulting data and outputs to be made openly and freely available.

Many institutions are likely to decide an OER approach is appropriate and thus to realise the benefits given in section 3 above, or at least in relation to part of the institution's activities. However, the adoption of an OER approach is less likely to be appropriate for:

- Institutions at which there is little creation of new teaching and learning or research material
- Institutions which have adopted a strategy based on realising commercial value in teaching and learning or research material
- Institutions which are substantially led by external drivers in the choice of licence that they use

## **5. Implementing an Appropriate IPR Strategy**

It is expected that many institutions will decide to follow funding body, governmental and international leads and engage with the move towards the development, dissemination and use of open educational resources (OER). In order to develop successfully policies, processes and procedures in relation to intellectual property rights, an institution will have to:

1. **Identify the IPR implications of the strategic mission.** An institution which positions itself as a face-to-face training provider in the local community will pursue a different set of objectives over one focussing on global mass-market distance learning of traditional university subjects.
2. **Develop appropriate policies** in order to lay the framework of IPR management which will meet the strategic mission's requirements. The objective of the policies will be to ensure that the management of IPR at the institution best facilitates the achievement of the university's mission.
3. **Implement the legal changes which may be required** in terms of IPR ownership and the associated relationships between those connected with IPR. This may involve the use of an updated contract of employment in relation to new staff, the renegotiation of terms of existing contracts, the use of *ad hoc* agreements with staff and students in relation to particular activities or projects, and the review of procurement terms and conditions. Further information on the legal consequences of adopting an OER approach are available at <http://www.jisclegal.ac.uk/OERlegalconsequences>.
4. **Address cultural issues, sensitivities and emotions**, in parallel with the legal issues, which, naturally perhaps, often arise in relation to the feeling of ownership a creator has over his or her creations. Providing explanation of the institution's approach, ensuring recognition and reward as appropriate, and seeking participation and "buy-in" are all likely to assist the successful introduction of changes.
5. **Review the effect of the policy and changes**, and consider periodically whether the IPR policy continues to support the institution's mission. The development of new activities and initiatives can bring to light deficiencies in the existing IPR set-up, particularly in today's digital world, and it is important that such barriers be identified and addressed when appropriate.

In order to implement successfully an OER approach, institutions must:

- Raise staff awareness of the institution's reason for the adoption of such an approach as part of its strategic direction
- Ensure that the issue of copyright ownership is determined, particularly for staff-produced materials. Guidance on this issue is available at <http://www.jisclegal.ac.uk/OERcopyrightownership>
- Make effective use of pre-existing material that is, by terms of its own licence, repurposable for release under the CC licence adopted. This will be clear in relation to material where the university is already the copyright owner. Clearing rights in non-open licensed third party material within the learning resource will make its release as an OER burdensome in many cases (particularly in relation to multimedia content with multiple rights holders)
- Provide staff with sufficient support to allow them confidence in producing OERs
- Ensure that the efforts of staff engaged in the production of OERs is rewarded
- Ensure that the institution's external relations / marketing department are made aware of the university's adoption of the open educational resource model, and assist them in ensuring the

institution's reputation is enhanced by the open release of reusable, repurposable educational resources

- Be aware of the potential barriers to adopting an OER-based approach – further guidance is available at <http://www.jisclegal.ac.uk/OERpotentialbarriers>

## 6. Implementing an OER IPR Strategy – Staff and IPR Issues

This section considers how staff IPR impacts on an IPR policy in relation to teaching and learning materials. The implementation of any particular IPR strategy will be constrained by ownership of intellectual property rights – in particular, the release of copyright works under a Creative Commons licence can only be done by the rights holder, or with the rights holder's permission.

By default, the law provides, by virtue of s.11(2) of the Copyright, Designs and Patents Act 1988, that copyright in most copyright works created in the course of employment belong to the employer – the university (though this may be varied by agreement otherwise). However, this default does not apply to performance rights, material created for a previous employer, personal material not created in the course of employment, and sound recordings.

There are two approaches to dealing with the intellectual property rights issues in relation to members of staff:

- A reactive or *ad hoc* approach will require, where necessary, the clearing of rights on a case-by-case basis as necessary. For example, where a lecture is to be video recorded and released under a Creative Commons licence as an open educational resource, the lecturer's performer's right (and copyright, if retained by the lecturer by agreement) will need to be addressed. This approach is generally non-contentious, allowing those not willing to participate effectively to opt-out. It may also be the case that if third party (non-employee created) material is being rights cleared in any case, the additional overhead in clearing the employee's rights is minimal. The disadvantage is that the institution cannot be certain of employee's permission, and therefore cannot be sure of being able to release any particular materials as an OER. Further, such an approach does not suit a consistent policy (based on choice of materials, for example, rather than determined by the choice of particular staff). Finally, there is some additional overhead in rights clearance.
- A proactive approach depends on the institution ensuring that it is in a position to relicence all or some of its teaching and learning materials without seeking further permission in relation to staff created work. Although this will not affect the need to seek permission with regards to non-staff third party content, it will give a higher degree of certainty to the university as to its ability to pursue a particular IPR strategy – particularly one including the release of OERs. There are two issues which require consideration:



- Existing staff are unlikely to have a contract of employment which clears all rights to allow release of their material without a change to their contract of employment. Where a decision is taken to propose changes to contracts of employment in order to progress an IPR policy (such as promoting OER release), this will need to be handled carefully both in terms of employment law and employment relations.
- New staff may be taken on under an updated contract of employment, providing for clearance of all rights as part of the conditions of employment. This is a legally valid approach, though it may require consultation with staff and relevant trade unions in order to achieve non-contentious adoption.

In relation to work created by contractors, freelancers, consultants, volunteers and interns, in the absence of a contract of employment, rights in the work will remain with the creator by default. It will therefore be necessary to ensure that an agreement is in place for either assignment or licensing any material produced in order to allow release as an OER (or to allow reuse under another IPR policy). This is best achieved by agreement at the time of engaging the person, but otherwise may be done *ad hoc*, though running the risk of the person not giving permission, or imposing a condition such as payment.

## 7. Further Resources

For the most up-to-date relevant resources, visit the OER IPR Support website at <http://www.web2rights.com/OERIPRSupport>.

In addition, JISC Legal provides a free-to-use legal helpdesk for UK further and higher education, on all matters of ICT law, including intellectual property rights and legal issues in relation to OER. For details, visit <http://www.jisclegal.ac.uk/Helpdesk>.

JISC infoNet maintains further resources on the OER process, and managing change, available at <http://bit.ly/oerinfokit>.

JISC CETIS, the Centre for Educational Technology and Interoperability Standards, offers further guidance on OER, available at <http://jisc.cetis.ac.uk/topic/oer>.

Further information in relation to the JISC and Higher Education Academy Open Educational Resources Programme (Phase 2) is available at <http://www.jisc.ac.uk/oer>.

The screenshot shows the JISC Legal website homepage. At the top, there is a navigation bar with links for Home, My Role, Legal Areas (with a dropdown menu), Themes, Contact Us, and About Us. The 'Legal Areas' dropdown menu is open, listing categories such as Copyright / IPR, Data Protection, Freedom of Information, Human Rights, e-Commerce, Accessibility Law, Defamation, Harassment, Computer Misuse, Terrorism, Interception and Monitoring, Hosting Liability, Employment Law, and Health and Safety. Below the navigation bar, there is a search bar on the right and a 'Resources & Tools' section on the left containing links for FAQs, Law Watch, Multimedia, and Newsletter. The main content area features several news items and event announcements, including 'JISC Legal @ JISC Innovation Forum 2010' and 'JISC Legal @ UKOER 2010'. A 'Guidance' section is also visible, featuring an 'e-Safety Background Video for England'.

## About JISC Legal

JISC Legal, a JISC Advance service, provides guidance to prevent legal issues being a barrier to the development and adoption of new ICT within the education sector. It supports a wide range of staff within FE and HE, including managers, IT directors, administrators, and academics, with the aim to make best use of technology in developing institutional effectiveness, without legal issues becoming a barrier to appropriate use.

High quality, practical support is delivered through:

- Written publications e.g. Web 2.0 series, blanket copyright licences, e-repositories and the law
- Multimedia presentations, such as recorded webcasts on staying legal with web 2.0, and digital copyright. These offer the benefit of training delivered directly to lecturers and tutors at a time convenient for them
- Events at various locations around the country
- A short turnaround help desk. This enquiry service addresses problems specific to the enquirer. Common problems are then identified by the JISC legal staff and converted into helpful FAQs on the website
- Commissioned research projects and joint activities with other JISC Advance services

### “ what can JISC Legal do for me? ”

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|---------------------|--|
| <b>Essentials</b>   | Succinct guides to areas of law relevant to ICT use in further and higher education  |
| <b>Overviews</b>    | <b>More detailed guides to relevant areas of law</b>                                 |
| <b>Publications</b> | A range of materials on specific issues  |
| <b>Videos</b>       | On important areas of law  |
| <b>News</b>         | Recent events relevant to ICT and law, with a focus on practical consequences        |
| <b>Events</b>       | A calendar of forthcoming events from JISC Legal                                     |
| <b>Useful Links</b> | An access point to other relevant information providers                              |
| <b>Enquiries</b>    | <b>A quick turnaround enquiry service, for those specific questions you may have</b> |

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