

Appendix B

Glasgow Caledonian University Case Study

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The Spoken Word IPR Case Study Report

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1. Methodology

The study was carried out through a combination of interviews, a work log and desk research. Anne Longmuir interviewed key personnel and academics at Glasgow Caledonian, Northwestern University, Michigan State University and BBC Information & Archives. These individuals included:

- Content creators and owners – software developers, academics, a representative of the BBC and a sample of third party rights holders
- Users of third party materials – academics, repository builders
- And those involved with clearing third party rights – research librarian, digital library assistant

Those involved with clearing third party rights kept a daily log of their of current activities, augmenting the Spoken Word's existing copyright databases with the following information:

- Time spent
- Nature of task
- Incidental costs incurred e.g. stationary, telephone calls

A publicly available blog documenting Spoken Word clearance processes can be visited at <http://laramie.gcal.ac.uk/blogs/suzanne/>

The Spoken Word team also carried out desk research, to ensure current and comprehensive understanding of IPR issues. A bibliography is attached to this report.

In addition to the above, the Spoken Word team met with David Flint, a specialist IP lawyer, to discuss our end user agreement and IPR processes.

The following statistics were calculated from the Spoken Word's clearance database:

- Number of third party rights holders contacted
- Number and nature of response
- Average length of time for response
- Average costing per clearance (calculated on basis of staff time and incidental materials cost)

Notes from the interviews, desk research, clearance blog and legal consultation were collated and organised by topic area (Motivation, Objectives, Rewards and Business Models; Background Information; Licences, Agreements and Contracts; Jurisdiction; Enforcement; Geographical Considerations; Risk). These notes, together with the statistics from the clearance database, were critically analysed and assessed to build a narrative of the Spoken Word's IPR processes in the international environment. In particular, these processes were examined for instances of best practice – and areas where improvement is required.

The report was circulated to all interviewees prior to each submission date for comments and amendments.

Agreement (Licence, contract, email agreements etc)	Description
Deposit Agreement	Deposit Agreement between BBC Information & Archives and Glasgow Caledonian University
Permission letters	Letters send to third party rightsholders, principally interviewees post 1 st August 1989.
End User Licence Agreement	Agreement between users of GCU's Spoken Word repository and GCU.
GCU Copyright Statement	Copyright statement from Spoken Word at GCU's website.
GCU Copyright Policy	Copyright statement from Spoken Word at GCU's website. This includes call for third party rights holders to come forward.
Creative Commons Attribution-Noncommercial-Sharealike 1.0	This is the Creative Commons licence adopted by Northwestern University to licence the Oyez MP3 files.
Oyez Copyright Statement	Statement from Northwestern's Oyez Website.
Matrix Copyright Guidelines	Guidelines for teachers, produced by Matrix, the Spoken Word partners, at MSU.
Oyez METS record	Sample Oyez METS record, with rights information

Table 1: List of licences and details of their purpose

Name	Role in the programme	Topics covered/ to be covered
Noreen Adams	Head of Media Management, BBC Scotland	Deposit agreement with GCU; perceived IPR risks for BBC of international e-learning project; BBC Creative Archive plans; Creative Commons licences; DRM plans at BBC
Kirsty Crawford	Acting Head of Information & Archives, BBC Scotland	As above
Adam Lee	Deputy Head, Information & Archives, BBC	As above
Richard Wright	Technology Manager, Projects, I&A, BBC	As above
David Donald	Principal Investigator, Spoken Word	IPR issues raised by international dimension of the Spoken Word; Impact of IPR on content selection; Clearance processes; DRM; Consortium Agreement; Software Licensing; Creative Commons
Les Watson	Pro Vice Chancellor, Glasgow Caledonian University	As above

Mark Kornbluh	Principal Investigator, MSU	As above
Jerry Goldman	Principal Investigator, Northwestern	As above
Suzanne Lobban	Digital Library Assistant, GCU	As above
Mike Fegan	Systems Architect, MSU	As above
Jonathan Smith	Learning Architect, Northwestern	As above
Janice West	Lecturer, Social Work, GCU	Awareness of IPR issues; Influence of IPR on creation of learning content; Ownership of learning content.
Alan Hutton	Senior Lecturer, Economics, GCU	As above
Maureen Lister	Cilta, University of Bologna	Awareness of IPR issues; Influence of IPR on creation of learning content; Ownership of learning content.

Table 2: List of people contacted/to be contacted for this case study

2. Motivation and Objectives, Rewards and Business Models

The Spoken Word Project set out to transform undergraduate learning and teaching through the integration of the rich media resources of digital audio repositories into undergraduate courses in history, political science and cognate disciplines in the U.S. and the U. K. The project takes full advantage of the flexibility inherent in digital repositories to build processes for learning that fundamentally expand the way students and teachers understand knowledge, knowledge resources, and their own complementary roles in higher education. Michigan State University, in collaboration with Northwestern University and the National Archives and Records Administration (NARA), and Glasgow Caledonian University, in collaboration with the BBC - Information & Archives, are developing and implementing this vision. Starting with a rich collection of digitized audio resources, associated texts and images and a set of integrated online annotation tools, this work promotes the usability and integration of digital spoken word repositories to improve undergraduate teaching. The project tests whether and with what effect the integration of digital audio resources into university courses achieves four major project outcomes: (1) improving student learning, (2) augmenting student competence to write on --and for -- the Internet via citation tools and tools for integrating media, and, (3) enhancing digital libraries through a focus on learning.

Intellectual property rights have impinged on the vision of the Spoken Word from its very inception. It continues to drive content choice at all three universities, software development, and access models.

All three universities make content decisions on the basis on the copyright status. Prof Jerry Goldman at Northwestern University recognised that the benefits of digitising and making accessible the US Supreme Court's audio archive lay not only in their innate value, but also in the fact that they were a *public domain* resource. This vastly increased the feasibility of the project, as there are no associated rights clearance costs – or gating costs.

MSU similarly emphasise public domain resources, and as a matter of policy do not clear third party rights, instead passing that responsibility onto the MSU library, or the content depositor. Neither do MSU gate access to resources, regarding the cost of gating as prohibitive. Of course, by emphasising public domain resources, Northwestern and MSU also avoid many of the issues raised by delivering copyright content in an international environment.

Unlike MSU or Northwestern's collections, the vast majority of content in GCU's repository does have rights attached. GCU are opting for gated access to their Spoken Word materials as a direct consequence of these rights, because its deposit agreement with its main rights holder, the BBC, stipulates that BBC archive material is for "educational purposes only" and that GCU "must implement password protection". The BBC's motive for making this request is not protectionism; the BBC would like to be as generous as possible with its own content, as the establishment of the Creative Archive attests. Rather, this request is prompted by the risk the BBC runs in making material available in which other parties have rights. As well as its legal responsibility to protect third party rights, the BBC is conscious of facing constant scrutiny, and recognises the damage that any test case would cause the organisation. This stipulation, however, has serious consequences for GCU's business model, as gating material is a costly business. At present, GCU is not charging its users. However, as its user base grows and along with it attendant gating costs, GCU may be forced to pass an administrative charge onto its users. This would constitute the biggest difference between the business model adopted by GCU in Britain and the models adopted by MSU and Northwestern in the USA, both of whom as resolutely opposed to charging for access to educational materials.

GCU's deposit agreement with the BBC also stipulates that GCU should clear all associated rights. This is a time consuming task, heavily reliant on manual intervention, with cost implications. This again makes it more likely that GCU will have to introduce some administrative charge if it is to become a sustainable service, once its initial funding runs out. Furthermore, this stipulation also impacts on GCU's choice of material, leading the project to encourage its users to select "rights light" material, such as documentaries and current affairs, rather than "rights heavy" materials, such as drama or music based programmes. This policy reduces the number of right holders who must be contacted (usually interviewees post-1989 only) and the costs associated with clearing rights. Interviews generally do not have the same economic value as song lyrics, performances, drama or musical compositions, and no interviewee has yet asked for payment for the contribution. Crucially, interviewee rights holders are also more likely to sign over non-exclusive world rights. This is partly a result of the low economic value of their copyright – and partly a result of their inexperience and unfamiliarity (compared to other rights holders) with rights negotiation procedures. This willingness to sign over non-exclusive *world* rights is, of course, essential to a project that is currently delivering materials to universities in the UK and wider EU, as well as in the USA.

More difficult rights clearance has been undertaken by GCU on experimental basis on behalf of one teacher. Alex Thomson is an English literature lecturer at the University of Glasgow, who is hoping to incorporate a selection of BBC audio material on modern and contemporary American literature into his teaching. The nature of the subject matter means that it is difficult to avoid literary works, drama and performance copyright. Furthermore, publishers generally protect these rights more fiercely than interviewees protect the literary works copyright in their interviews. So while the copyright holders have been easier to trace in this instance, it has been far harder to secure permission for use. Though requests for permission were submitted in September 2004, only two publishers of nine contacted have replied as of December 2004, and permission to use the material has not been finalised in either instance. Clearly, such copyright difficulties force the

Spoken Word at GCU to assess whether access to “rights heavy” material can ever be feasible or timely option for its teachers.

MSU and Northwestern are committed to open access to their materials, and are uncomfortable for ideological reasons with the licensing model adopted by a number of Jisc and ex-Jisc projects in the UK, such as Scran and Education Media Online. The project teams at Northwestern and MSU believe access to information and content provided by educational bodies should be free of charge and ungated, in order to better promote learning, creativity and exchange of knowledge, within traditional and non-traditional educational communities. However, this commitment to open access has direct impact on MSU and Northwestern’s business model as their choice of content is determined by rights status. But it must also be stressed that the different jurisdiction in the USA, and in particular the differences between the legal defence of fair use in the US and fair dealing in the UK, has enabled and encouraged MSU and Northwestern to take this stance. Crucially, fair use exceptions in the United States include more generous teaching exceptions, than the fair dealing provisions of British law. In the UK, fair dealing exempts the reproduction of works for teaching, but it does not include the right of communication to the public, “thus implicitly excluding digital distance education from its scope” (Xalabarder). In contrast, fair use does exempt digital dissemination for teaching purposes in the US, thanks to the recent TEACH Act. Given the UK’s recent adoption of the EU’s copyright directive, and the weakening of the defence of fair dealing, it seems unlikely the GCU will be encouraged to adopt the ungated strategy of its American partners in the near future.

3. Development Process

One of the Spoken Word’s key aims is present the resources from its digital audio repositories in multiple pedagogical frameworks. Spoken Word material has been adapted for use in commercial VLEs, such as Blackboard, open source VLEs such as Moodle, bespoke websites, galleries and blogs, as well as being used with the Spoken Word’s own annotation tools, *MediaMatrix* and *ProjectPad*. This pedagogical plurality, however, vastly complicates the IPR issues facing the project.

Given the Spoken Word’s aim of bringing digital libraries, and hence third party content, into the classroom, the first stage in the development of Spoken Word learning content is to ascertain whether it is necessary to clear any rights. At this stage, Northwestern and MSU actively seek out public domain materials, like the US Supreme Court recordings. GCU also attempts to select content with no or few associated rights at this point. For example, GCU encourages its teachers to avoid drama or music based programming, in favour of documentaries or news and current affairs. GCU are also building a collection of pre-1954 BBC recordings. These are - for the most part - public domain, as the copyright on sound recordings ends fifty years after the year of recording. Unless some other copyright is involved (for instance literary, musical or dramatic works copyright), GCU do not clear these recordings.

Non-exclusive worldwide rights are sought *in perpetuity*, where permission is required. As the Spoken Word is seeking to build a sustainable service, it is anxious to make materials available on a long term basis. This become especially important as some of our users link to Spoken Word resources in theses and dissertations: in such instance these should be permalinks. GCU have the most developed copyright clearance procedures of all the project partners, as Northwestern usually avoid material with associated rights, while MSU require either the audio depositor or MSU library to clear copyright. In the case of the Studs Terkel interviews, for example, the Chicago Historical Society undertook to clear the rights associated with the recordings.

At GCU, Suzanne Lobban, Digital Library Assistant, undertakes most rights clearance work with assistance from Anne Longmuir, Research Librarian. GCU is required to clear all rights associated with BBC material, and recognised from the start the importance of streamlining and automating this procedure as far as possible. Indeed, it is especially important to maintain an audit trail where rights holders cannot be traced, as such paperwork may reduce (though not eliminate) liability in the event of any challenge. GCU maintain a rights database in Filemaker Pro 7, which records: rights holders' contact details; the nature of their contribution; the date that they were contacted; the date of any follow up contact; and the date and nature of their response. GCU's permission letter template is also held in the database, allowing GCU to automate letter production. The standard permissions letter template is included in the appendices to this report. Like GCU's End User Licence Agreement, it is written in "plain English", rather than legalese, and it includes a reply form, for the convenience of the rights holder. Given the international dimensions of the Spoken Word, GCU always requests "non exclusive world rights" in the first instance.

Most of GCU's rights holders are interviewees post-1st August 1989. Before the Copyright, Designs and Patents Act (1988) no copyright could subsist in a literary work until it was reduced to writing or some other material form by its author or someone acting on her behalf. The 1988 Act altered the previous law, and consequently the contribution made by anyone interviewed after 1st August 1989 amounts to a literary work and is protected under the copyright law. This change in the law creates a number of issues for GCU. Firstly, many copyright holders are extremely difficult to trace. The Act makes an exception for the use and re-use of interviews in broadcasting. This means the BBC has not had to keep records of interviewees for its own ends, and that GCU must endeavour to trace all interviewees from scratch. Secondly, interviewees are often entirely unaware of this legislation, and assume that the BBC wholly owns their interview. This has advantages for the project, as very few interviewees have said no (only two – both company spokespeople whose companies were shown in a bad light), and only one has sought to negotiate. Significantly, the rights holder who sought to negotiate is a poet, and hence much more familiar with rights clearance than most of GCU's rights holders. Furthermore, interviewee rights holders respond relatively quickly to requests. While interviewees have responded in an average of 64 days, only two of the nine publishing companies contacted in early September in association with BBC poetry recordings, have yet replied.

But while GCU have streamlined and automated the copyright clearance process, it must be stressed that it is still an intensive manual task. Tracing rights holders involves searching a variety of sources, and making numerous phonecalls. As Suzanne Lobban's blog demonstrates rights clearance can take anything from 2 hours to 18 hours a week. It costs approximately £3.13 to clear one interview – an expensive procedure given the relatively low risk of much of GCU's copyright materials.

Once each project partner has copyright cleared the raw materials, it sets about transforming it into usable learning content. At this stage each institution adds metadata to the audio "essence". At Northwestern, students create this metadata. In common with most universities in the USA and the UK, Northwestern does not usually own the intellectual property produced by its students. However, as students are paid for this task, the resulting intellectual property rights rest with their employer, Prof Jerry Goldman. At MSU, metadata is generally created either by student employees under the supervision of a content expert or by MSU staff. In either instance, it constitutes "work for hire" and is hence owned by MSU.

GCU's case is slightly different, as metadata, in the form of the BBC's own catalogue records, already exists for most of its audio items. The BBC catalogue is certainly covered by database right, which gives protection any collection of data which is "arranged in a systematic or methodical way" and which is "individually accessible by electronic or other means", though it may not also qualify for copyright protection. The BBC catalogue attempts to record every BBC programme; there has been no intellectual creative attempt to *select* its contents. However, some of the metadata content qualifies for copyright protection as well as protection under database right. For example, while the title and date of transmission of a programme are facts, and do not qualify for copyright protection, the description of that programme does qualify as it is an intellectual creation. The BBC has not much considered the status of its catalogue as "intellectual property", as it is not intended for public consumption. Instead, it has the specific purpose of aiding BBC staff and programme makers to locate suitable material for inclusion in other BBC programmes. This specific purpose also makes this metadata inadequate for educational needs, leading the Spoken Word at GCU to augment and amend original BBC catalogue records – hence adding their own intellectual property to existing records. The deposit agreement with the BBC does address the issue of ownership of this newly created metadata to some extent, with GCU undertaking to make available to the BBC any newly created descriptive metadata, while safeguarding the GCU's rights in such newly created metadata.

The issue of the ownership of metadata is further confused at each partner institution, by the Spoken Word's commitment to user-generated metadata. As the success of *Amazon* model indicates, user ratings and comments are an invaluable tool when dealing with information overload in the electronic age. Both *MediaMatrix* and *ProjectPad* allow users to add their own comments to Spoken Word audio. Both software annotation tools also allow such comments to be harvested. However, no formal contracts exist between users and the Spoken Word specifying the ownership of such comments. As such, ownership of student comments at all three institutions lies with the students themselves, while ownership of faculty comments may lie with their employer – if the comments are deemed to have been made in the course of their duties. The Spoken Word would like to allow all its users across the globe to benefit from the comments of others: in order to enable this vision it will need to seek permission to use comments for non-profit educational purposes in a worldwide context. Further, in the UK at least, where moral rights apply, the Spoken Word should ensure that any comments are not derogatory to the moral rights owner of any content.

Asides from the metadata created at each partner institution, each partner also endeavours to "add value" to its audio content for the purposes of education. Each partner collates images and text associated with its audio content. At Northwestern, some of these packages are available for download as smil files from the Oyez website, while MSU have produced a number of galleries, such as the Flint Sit Down Strike, which are augmented by sample lesson plans. (It should be noted that the development of the Oyez website, and MSU's galleries, known collectively as "Historical Voices", precedes the awarding of the NSF/JISC grant to found the Spoken Word project in 2002). At GCU, teachers such as Adrian Pierotti and Alan Hutton have supplemented Spoken Word audio with a range of other sources. While some of this content belongs to others, each Spoken Word institute can claim the IPR created in the aggregation of such "learning objects". The Oyez site provides clear instruction on permitted uses and constraints in its copyright statement (see appendices), while those produced by GCU are subject to its end-user agreement. At present, there are no general guidelines on the MSU site, however, it expects to implement Creative Commons licences in the near future.

Of course, the project can run into difficulties in the dissemination of such aggregated learning objects, particularly, where teachers include articles from licensed journals. While technology,

such as OpenURL, allows users at licensed institutions to click through to journal articles seamlessly, users at unlicensed institutions will not be able to access such material at all. This problem, evident when distributing resources lists across UK HEIs, is compounded once projects attempt to distribute such resources internationally.

As well as creating such subject based collections, each institution is also individually building bigger, general repositories of audio and associated material. For example, both MSU and GCU are building collections of audio in MSU's repository software, *Repos*, while Northwestern is creating a collection of Supreme Court audio recordings in the open source software, *Fedora*. These collections raise the issue of database rights, which is particularly problematic in any partnership between EU and non-EU institutions.

Database right was introduced by the 1996 European Directive on the legal protection of databases (96/9/EC, 'the directive'), with the deadline for implementation in national laws being 1st January 1998. GCU's repository qualifies for database right, being "a collection of independent works, data or other material" which is "arranged in a systematic or methodical way" and "individually accessible by electronic or other means", where there has been "substantial investment in obtaining, verifying, or presenting contents". This database right gives GCU the right to object to abstraction and to licence access to their repository. The right lasts for 15 years, but is renewed if "substantial" change is made to the database. Given the continually growing nature of GCU's repository, this database right is, in practice, continually renewed. The deposit agreement between the BBC and GCU does not licence database rights to the BBC, though it does guarantee the BBC access to the database. However, while GCU's repository is protected in this way, the repositories created by its project partners, MSU and Northwestern, are not protected, as US law has no equivalent of database right. Furthermore, it is uncertain whether a jointly created repository would qualify for this protection. As Nettleton and Obhi write: "The Directive requires that 'makers or rightsholders' have their centre of administration or principal place of business in the Community. Whether all of the makers must do so, however, is not made clear" (272). In other words, a database *jointly* created between MSU, Northwestern and GCU may not be eligible for protection as one or more of its makers are based outside the EEA (European Economic Area). The situation under the UK's particular implementation of this directive seems more transparent, as the UK regulations specifically state that "where there are joint makers, only one of them needs to be a qualifying maker for database right to *subsist*." (273). However, the UK law contradicts the EU directive here, which states database right should only be given to non-EEA makers, where a reciprocal protection of databases produced by EU residents exists. According to Nettleton and Obhi, this discrepancy has not yet been considered by the UK courts (273). It is also worth bearing in mind that some implementations of database right in the EU may actually disqualify non-EEA makers from claiming database right.

However, though MSU and Northwestern's repositories do not qualify for database right, they may qualify for protection under copyright law, if it can be shown that they show a "modicum of creativity" in order to meet the originality test copyright protection requires. To that end, each US partner has created multiple galleries or subject based collections from their broader repositories. Selections such as MSU's "American Voices" are far more likely to meet the originality threshold required by US copyright law, than a general collection of spoken word audio.

Such compilations of material can also qualify for literary works copyright protection under UK law, if "by reason of the selection or arrangement of the contents of the database, the database constitutes the authors' own intellectual creation". As such Alan Hutton's collection of audio and related material, "Talking Economics", may well qualify for copyright protection, as it is his intellectual creation. In this instance, ownership is easy to resolve, as Alan Hutton's employer,

GCU, owns this copyright, just as it owns the database rights to the Spoken Word at GCU's repository. But GCU have also built subject based collections with academics based at Northwestern University, Columbia University and the University of Bologna. In such examples, GCU may own the database rights to its repository, but each of these institutions may claim the copyright of their own specific compilations of material, such as Ken Alder's History of Science collection (Northwestern), Rashmi Sadana's Gandhi collection (Columbia) and Maureen Lister's Lockerbie collection (Bologna). At present GCU have no contract with such collaborators addressing this issue – nor has it been discussed. In the future, it may be wise for GCU to request non-exclusive, worldwide rights to the copyright of such collections.

There is also the issue of the particular software environment in which Spoken Word audio is delivered. *ProjectPad* and *MediaMatrix* have been created by project partners, Northwestern and MSU, respectively. Each institution claims ownership over software products created by its employees in the course of their duties, and hence *ProjectPad* and *MediaMatrix* are owned, respectively, by Northwestern University and MSU. This causes no particular problems for the Spoken Word as *ProjectPad* is to be released under a open GNU General Public Licence, while the creators of *MediaMatrix* intend to distribute it freely for non-profit educational use around the world, regardless of the success of its patent application. So despite the absence of a consortium agreement, each partner's use of the others' software in an international environment is guaranteed. It is also important to state that development of both *ProjectPad* and *MediaMatrix* have been influenced by US copyright law, as both allow users to annotate streamed media files *without making a copy*. In the US at least, where no "right to communication" exists, this allows users to annotate and "collect" copyright material, without clearance. The issue of "right of communication" is discussed later in this report, however, project members nonetheless recognise these software tools as an important contribution to the eLearning community, as both enable and promote educational access to culturally significant copyright material.

At present, each partner influences the development of each others' pedagogy, learning materials and software, through discussion on a fortnightly conference call, the project portal and biannual face to face project meetings. The project partners also use each others' materials. For example, GCU uses both MSU's *Repos* repository software and Northwestern's *Project Pad*, while Northwestern have used BBC audio from the GCU repository in teaching. However, the project partners have not yet *jointly* created a great deal of material with IP content. The project does have a website (www.historicalvoices.org/spokenword), which is hosted on servers at MSU, while the project's educational evaluator Steve Cohen of Tufts University created a citation tool with the project team at MSU, based on *MediaMatrix*. But in neither instance has the project team discussed ownership of the jointly created content, though there is an implicit agreement that no partner will exploit the material for commercial gain.

There are plans to introduce a political science course in 2006 using Spoken Word materials, jointly devised and taught by David Donald and Jerry Goldman. This course is aimed at third year students at GCU and Northwestern. The project has not yet discussed the ownership of coursework and material for this projected joint creation. Again, however, it is expected that neither partner would exploit any jointly created material for commercial ends. As this report discusses later at length, the Spoken Word has not chosen to sign a consortium agreement, as some project members feel it could hamper rather than promote co-operation. However, the project does acknowledge that some written understanding of the ownership and use of jointly created materials will become essential as it produces more elaborate joint creations in the future.

Spoken Word audio is also being incorporated into custom build websites, such as GCU's *Clydetown*. *Clydetown* is a virtual city community, based on Glasgow, used to train social work

students to deal with particular case studies. It has a complicated IPR history, as it is derived from *Family and Lifespan*, a collaborative project between the four west of Scotland HEIs, funded by Shefca. *Family and Lifespan* had no consortium agreement, and the project partners had no written agreement that addressed the ownership of the intellectual property they were creating. According to one of project partner, IPR was not considered, though there was an unwritten – and unspoken – expectation that materials would not be exploited for commercial purposes. Its creator at GCU decided to update and augment *Clydetown* independently in 2003. She contracted a commercial software company, *Equator*, through GCU to rebuilt *Clydetown*. As specified in *Equator*'s contract with GCU, the rights to any newly created IP lie with GCU. However, the original four HEIs, of course, still jointly own the IP of much of the content of *Clydetown*. In this instance, GCU must therefore deal with its own IP (the new *Clydetown* software environment, content and enhanced Spoken Word metadata), the IP it owns jointly with University of Strathclyde, University of Glasgow and the University of Paisley, as well as third party content (BBC audio). *Clydetown* is accessible by password only, a measure that protects both GCU's IP, that of the original *Family and Lifespan* project partners, and that of the BBC.

The Spoken Word also delivers content through commercial and open source VLEs, such as Blackboard and Moodle. The Spoken Word's key responsibility in such instances is to protect its IP and that of third party content. GCU achieves this in three ways: firstly, it has put in place an end user licence agreement (see appendix), secondly, it utilises the existing password protection of such VLEs and thirdly, it delivers Spoken Word content from its own servers, rather than allowing users to download and repost material on servers outside of the Spoken Word partner institutions. This ensures that the Spoken Word can track and monitor usage, and in the case of any breach, withdraw access to its audio.

Users are subject to a different set of conditions when accessing *Clydetown*, Blackboard or Moodle and Spoken Word audio. The challenge for the Spoken Word is to ensure users are made aware of the different set of conditions attached to each environment. This is a problem for any project that seeks distributed access to its resources. It is clearly far easier to manage this problem when all users are directed through a single portal or home page. However, the Spoken Word is determined to take this IPR risk, believing multiple access points increase the educational effectiveness of its resources. The Spoken Word at GCU is reluctant to present its end-user licence agreement as a splash screen each time a user accesses an audio file: consequently it is currently investigating some kind of user registration system. Furthermore, registration also ensures active user agreement to terms and conditions of use. This raises other serious issues for an international e-learning project in terms of authentication, however. While Athens offers an answer of sorts in a UK context (albeit a costly one) by allowing a single sign on, there is no international equivalent at the moment. The Spoken Word is monitoring the development of Shibboleth authentication closely, though this solution still seems a couple of years off at least. In the meantime, GCU are implementing a LDAP server, which will allow them to manage user authentication internally.

In conclusion, IPR influences the development process of learning material at every stage in work of the Spoken Word. It impacts on the choice of content, leading our teachers to select material with few or no associated rights, and it impacts on access to materials, resulting in GCU's imposition of password protection. It impinges on the delivery of content, leading GCU to deliver material from its own servers and implement user registration, in order that it can track, monitor and if necessary suspend usage. Finally, it impacts on software development itself, prompting both MSU and Northwestern to develop streaming media annotation tools, which alleviate the problem of IPR – under US law at least.

4. Permitted Uses and Constraints

At present, the Spoken Word partners have not signed a consortium agreement and there is no project wide agreed policy on the release of learning content. Instead there are variations in the permitted uses and the constraints of learning content across the Spoken Word's collections and partners. The Spoken Word itself is not a legal entity, and cannot claim ownership of IPR itself. Instead each institution claims ownership over content produced by its employees in the course of their work.

Northwestern University releases its MP3 files of Supreme Court audio under the Creative Commons Attribution-NonCommercial-ShareAlike 1.0 licence. This allows users "to copy, distribute, display and perform the work" and "to make derivative works". However, the user must also provide attribution and is only permitted to use the work for non-commercial purposes. Furthermore, this is a share alike licence, which means any derivative work can only be redistributed under an identical licence. Crucially, each MP3 is also tagged with a machine-readable version of this licence. This reduces the likelihood of incorrect or fraudulent labelling and sharing of Oyez's MP3 files.

Northwestern's Oyez website, however, is subject to much more rigorous restrictions. Only personal use of the website is permitted. Visitors are not permitted to "reproduce, sell, publish, distribute, modify, display, repost or otherwise use any portion of the Content in any other way or for any other purpose without the written consent of Jerry Goldman or The OYEZ Project".

In line with Oyez's commitment to open access and open source, Northwestern's software annotation tool, *ProjectPad* is to be released under a GNU General Public Licence. This licence allows others to copy, distribute and modify the software, provided they distribute any derivative software under the same licence. Northwestern, like most other universities around the world, does have procedures in place to patent software, but the software developer, Jonathan Smith and head of academic technologies at Northwestern, Bob Taylor, felt the development of *ProjectPad* is best served by an open source release. Northwestern University, however, still owns the software.

At present, guidelines explaining the permitted uses of content of MSU's resources vary from site to site, and are generally dictated by content provider. For example, the Celebrity Lecture Series stipulates that "Unless otherwise indicated, the photographs at the site are reproduced with the permission of the photographer, Douglas Elbinger". However, MSU's general policy is to favour open access with no restrictions on use – which means they do not house material to which they cannot give open access. Like Northwestern and GCU, MSU recognise the importance and benefits of asserting ownership – and asserting permission to modify, copy and share alike – and it plans to implement Creative Commons licences to distribute its learning content in the very near future.

MSU, in line with other American universities, seeks "the best development of a research agenda" when it comes to licensing its software products, rather than pure financial interest. In the case of its audio annotation software, *Media Matrix*, MSU decided to pursue a patent application, believing it offered the best development of its research agenda. At present this application is pending. Even if the patent is successful, however, MSU intend to make *MediaMatrix* freely available to non-profit educational users.

The permitted uses and constraints of GCU's learning content are largely determined by the conditions imposed by third party rights holders. Its biggest current content provider, the BBC,

has specified that material should be made available for educational use only, copyright cleared and password protected. Users are permitted, however, to download, annotate, amend and modify this content for educational purposes. There are no geographic constraints on the distribution of the BBC content, however, there is a temporal restraint as GCU's deposit agreement is subject to renegotiation in September 2006. These are far broader rights than the BBC has given a deposit institute in the past, where traditionally the public are permitted only to "play" a piece of BBC audio or video. Furthermore, users are not permitted to make copies, and access is usually limited to specific physical locations, such as the British library sound archive, or the National Film and Television archive. If members of the public contact the BBC archive directly, they will be required to pay a substantial fee to access any archive material. As such, the Spoken Word project represents an important relaxation of BBC policy. This shift in attitude is also reflected in the BBC's planned Creative Archive, where clips from the television archive will be made available to the British public, under a Creative Commons style licence.

Despite this shift in BBC policy, some project members have suggested that the BBC's requirement that the Spoken Word both clear rights and password protect material is too draconian. The BBC is motivated – not by anxieties about its own content – but by anxieties about third party content. As well as its legal responsibility to protect third party rights, the BBC is conscious of facing constant and sometimes hostile scrutiny, and recognises the damage any test case would cause the organisation. This caution is also reflected in the BBC's approach to the Creative Archive. Not only is the BBC clearing all third party rights associated with material in the Creative Archive, but it is also investigating means of limiting it to British users, just as GCU is required to limit its BBC material to education users. GCU have accepted this position, regarding that the immense value of the BBC sound archive outweighs these considerations. It is also, however, monitoring its copyright clearance process, and in particular, the number of refusals and the impact of using uncleared material where rights holders cannot be traced. If this data suggests the rights risk associated with this material is low, GCU will push to remove either the copyright clearance or password requirement when it renegotiates its deposit agreement with the BBC in 2006.

GCU have drafted an end user agreement, in conjunction with specialist IP lawyer, David Flint, which is included as an appendix to this report. The end user license agreement is very deliberately written in "plain English", much like the Creative Commons licenses. Dense, legalistic licenses are, undoubtedly, another barrier to use, and while GCU has had to put restrictions on its users, it is also determined to ensure that its users understand what they are allowed to do with Spoken Word content – as well as what they are not. Though some readers have expressed surprise – and delight – at the tone of the licence, there has been no suggestion that it is not legally valid.

It should also be mentioned that any UK educational establishment in possession of an ERA licence (Educational Recording Agency) may use British terrestrial TV and radio in teaching without authorisation. The ERA licence is particularly helpful when dealing with material such as drama, which involves numerous rights holders. But though the ERA licence can offer the Spoken Word in the UK a stopgap measure, while copyright clearance is sought or where clearance is particularly difficult, it does not offer a longterm solution. The ERA permits broadcast on the "bricks and mortar" campus only. Thus, while the Spoken Word can make BBC radio available online without clearance under the ERA licence, it cannot give access to students and staff at other UK institutions – or even GCU students and staff off campus. And of course, the ERA licence has no provision for overseas institutions.

5. Analysis

A) Licences, Agreements and Contracts

Examples of Spoken Word licences, agreements and contracts are included in the appendices of this report.

The Spoken Word uses two standard licences. One is the Creative Commons' licence currently employed by Northwestern University, and which will shortly be adopted by MSU. The other is the deposit agreement with the BBC.

The project partners have been very pleased with the experience of using a Creative Commons licence. Prof. Jerry Goldman is particularly close to the Creative Commons endeavour, and has even appeared as a "Commoner of the Week". The philosophy behind Creative Commons is very attractive to the project partners, each of whom would like to enable open and free access to copyright materials for non-profit educational use. The project admires the flexibility of Creative Commons licences, which allow rights holders to mix and match a range of terms and conditions. They also like their user friendliness, as all Creative Commons licences are accompanied by an easy to read set of symbols, and a "human readable licence", written in plain English. Furthermore, Creative Commons have developed an application, ccTAG, which allows content creators to tag MP3s easily with a machine-readable licence. This is of enormous value, as it substantially reduces the chances of accidental or deliberate mislabelling and distribution of files.

GCU would like to adopt a similar model to Creative Commons in the UK to licence their IP, and are monitoring closely the development of British Creative Commons licences at Oxford University. In the meantime, they have created their own End-User Licence Agreement in the same spirit as Creative Commons. This licence subjects the user to many of the same permissions and constraint as the Creative Commons' Attribution-NonCommercial-Sharealike Licence, and is written in plain English.

GCU's deposit agreement with the BBC is based on BBC Scotland's standard deposit licence, which was originally created a number of years ago. It required quite substantial work, however, to render it suitable for the purposes of the Spoken Word. In the past, the BBC tended to not to grant deposit organisation many rights, beyond the right to play BBC material to users for the purposes of private study or research. The BBC has shifted its position, and it is now willing to allow users to modify, excerpt, annotate and aggregate some of its material for non-profit educational purposes either through the Spoken Word or through the newly launched Creative Archive. The original deposit agreement had to be amended to include these other rights. The deposit agreement also had to be adapted to reflect GCU's relationship with the BBC, which is different from that of other deposit organisations, as GCU and the BBC also work together as project partners. While the Spoken Word as a whole has no consortium agreement, the deposit agreement with the BBC was augmented to settle ownership of new metadata and software developments created by the Spoken Word at GCU. This content was deemed to belong to GCU, however, GCU were required to give access to the BBC. Furthermore, GCU was required to give the BBC access to its repository. Making these changes to the deposit agreement delayed its signing quite considerably. Despite this, other institutions may not have to face delays in the future when dealing with the BBC, as it has now rewritten its standard deposit agreement to reflect its new position on the use of its content.

The deposit agreement will be renegotiated in 2006. At that point GCU may push to remove either the copyright clearance or password protection requirement, if its copyright clearance

records show the risk of any IPR breach is low. Furthermore, the deposit agreement currently limits GCU to 100 hours audio accessible online at any one time. Recognising the importance of permalinks, and the value of creating a comprehensive and growing repository, GCU will push to increase this limit, or, indeed, remove it altogether.

B) Jurisdiction

Though initially a transatlantic project, the Spoken Word aims to deliver and disseminate its resources in a global context. Recognising that “technically there is no such thing as ‘international copyright’” (Cornish, 165), Spoken Word partners rely instead on their own licences, or in the current case of MSU, the Berne and WIPO agreements, whereby signatory countries award the same protection to foreign materials, as they do home grown content. These licences and contracts with end users do not vary according to jurisdiction at any of the three project partners.

Northwestern University’s material is available on an open access website and hence accessible across the globe. It has no special precautions in place for use of material outside of US or UK jurisdiction, however, such users are still subject to Northwestern’s Creative Commons licence and copyright statement. The Creative Commons licence and copyright statement are both enforceable under US law, of course.

MSU work with partners across the world, including in the EU and Africa. It has no specific international policy on IPR, as it always favours open access without geographic or temporal restrictions. As such MSU will not house material to which it cannot give open access. It expects to implement Creative Commons licences in the near future, which would bind international, as well as domestic users. Until these licences are in place, MSU are relying on the Berne and WIPO agreements.

The Spoken Word at GCU is currently delivering material to Columbia University in the USA, as well as the University of Bologna in Italy. There are also plans to begin collaboration with the University of Cyprus. Given the expanding geographic scale of GCU’s service, GCU ensured that the deposit agreement with the BBC included no geographic restriction: GCU are free to deliver BBC material anywhere in the world provided it is for educational use. Instead of a geographic restriction, the BBC choose to impose a time restriction in the deposit agreement, which runs for three years only (until September 2006) in the first instance. This is the same policy that the BBC itself has adopted with regard to its Listen Again Radio Player: programmes are cleared for worldwide broadcast, but for one week only. When approaching rights holders for clearance, the Spoken Word at GCU always request non-exclusive worldwide rights. If any rights holder sought to reduce the scope of these rights, GCU’s policy is to offer a time restriction, rather than geographic restriction. (It should be noted that no rights holders has made this request so far.)

The BBC are, of course, aware that GCU deliver material to the United States, and are happy for it to be used under US fair use provisions. Indeed, the USA’s fair use exemptions facilitate the sharing of material from the UK to the USA, as the recent TEACH Act permits limited unauthorised use of copyright content. The TEACH Act allows GCU to supply content for particular courses and classes without permission, where content is only available for a short time to enrolled students. Unfortunately, the UK’s fair dealing exemptions are not as generous to teaching, and online dissemination of copyright material is not permitted. Thus any material used by our American partners under the US defence of fair use must be cleared for us in the UK – even if it is accessible only to enrolled students for a brief time period.

In terms of precautions against misuse, all users of material held by GCU, regardless of location, are subject to its end user licence agreement (see appendix). The licence makes clear its jurisdiction (Scottish Law) and that it will be enforced by the Scottish Courts.

C) Enforcement

The Spoken Word takes steps to protect both the IP it produces, and the IP of others that it uses. A key step in protecting its own IP is to assert ownership. While the project favours open access for non-commercial users to the software it produces, it is also careful to assert ownership of this software. This prevents others from falsely claiming the software as their own or exploiting it for commercial purposes. *ProjectPad* is to be released under a GNU General Public Licence, while MSU are currently exploring patenting *MediaMatrix*. In neither instance, will any geographic restriction be placed on use of the software.

Similarly, the Creative Commons Non-Commercial-Attribution-Sharealike Licence is used by Northwestern to licence Spoken Word audio and teaching materials. MSU also intend to implement this licence to cover its content and teaching materials shortly. GCU could not, of course, implement this licence, despite its interest in the spirit of Creative Commons, as it is operating under Scottish not US law. Instead GCU has drawn up its own End-User Licence Agreement. However, GCU has deliberately adopted a simple, plain English approach, like that of Creative Commons, in its licence.

Aside from such legal protection, the Spoken Word at GCU also employ password protection, and are currently investigating solutions such as Shibboleth, which promise to enable transnational authentication. Furthermore, Spoken Word content is also only delivered from the servers of project partners. This allows the project to track and monitor use and – in the case of any breach – suspend access.

The Spoken Word also takes care to record rights information in its metadata. Not only are Oyez's MP3's tagged with a machine readable Creative Commons licence, each project also uses METS record structure, and can expose its metadata through OAI-PMH. This allows others to harvest metadata, including – crucially -- rights metadata. This enables the Spoken Word to redistribute content with its rights information easily. Furthermore, both the Creative Commons and the GCU end user licence forbid users from removing or altering this rights information. The GCU end user licence also requests that users inform the Spoken Word of any derivative works that they create. The Spoken Word at GCU are also endeavouring to track rights and rights holder through the construction of a rights database. This database includes names, contact detail and responses of every rights holder contacted. The Spoken Word at GCU also maintains a hard copy archive of permission letters and signed permission slips.

No Spoken Word partner has yet encountered any infringement of its copyright, or the copyright of any material it makes available.

D) Geographical Considerations

There are a number of barriers to the expanded use and exploitation of e-Learning. GCU's decision to gate its material undoubtedly hinders the access of its transatlantic partners. While Athens offers a single sign on solution within the UK, international measures are essential if projects are to succeed in delivering rights sensitive materials across international boundaries.

The project does currently exchange materials over international boundaries. Ken Alder, a history professor at Northwestern University, is presently using a selection of BBC audio material on the

history of science in his teaching. Maureen Lister, an English Language teacher at the University of Bologna in Italy has incorporated a selection of Supreme Court audio and BBC materials on the Lockerbie bombing into an English Language course for Law students. Rashmi Sadana at Columbia University in New York is supplementing Francis Watson's book, *Talking of Gandhiji*, with the original BBC radio programmes that the book accompanied. Where Supreme Court audio is used overseas, there are no IP considerations, as the Supreme Court recordings, in common with many US government publications, are public domain. In contrast, the BBC material requires password protection, and often clearance before it can be shared with international partners. GCU always undertake the rights clearance for BBC material itself (as stipulated in its deposit agreement with the BBC). However, as GCU request worldwide rights as standard, delivery to international partners requires no special action. GCU currently sometimes require its international partners to password protect these materials themselves.

However, that all three partners select content on the basis of rights is a barrier to e-learning, particularly in areas of the arts and hard sciences, where copyright and patents are most likely to be in place - and enforced. The BBC, for example, has an extremely valuable collection of radio drama. However, the Spoken Word has neither the administrative staff nor the funds necessary to deal with the rights associated with such materials – especially in terms of securing the *world* rights to the success of a project like the Spoken Word. The BBC's own difficulties over the Creative Archive, reported in *The Independent* newspaper, demonstrate the problems associated with attempting to clear such materials for open access (Luckhurst, 15).

The way in which HEIs handle the issue of copyright internally can also be seen as a barrier to the expanded use and exploitation of elearning. Interviews carried out for this case study reveal that the common HEI practice of claiming ownership of learning objects created by teachers, while expecting teachers to deal with their own rights clearance, leaves teachers feeling demotivated. The educators contacted for this study each confirmed that they had not considered IPR until they began creating online content, and that each felt ill-equipped to deal with clearance and rights negotiation – especially in international contexts. Interviewees complained of feeling “paralysed” by the situation, and like “babes in arms” in terms of negotiating rights issues. One interviewee had requested training and administrative help from her HEI -- unsuccessfully. Despite this lack of assistance, her HEI was keen to claim ownership of the resulting content she created – so much so that she discovered artwork created for one course had been re-used in another course without her permission (she, of course, still owned the moral rights). If HEIs are to ensure educators are motivated to create content for international eLearning programmes, they must ensure that they retain some control (if not ownership) over the fruits of their labour, and they must provide educators with assistance to deal with IPR issues, both in terms of their own productions and third party content. The Open University, with its centralised copyright clearance department, would seem to offer a useful model here. The Spoken Word hopes it goes some way to encourage educators to produce content for international consumption by ensuring that its content is cleared for non-profit educational use across the world.

Alerting users to End User Licence Agreements is also problematic in distributed learning environments, where users access content from multiple points. However, such are the pedagogical benefits of integrating content from digital libraries into multiple educational frameworks, that it would be unfortunate to abandon this practice for the sake of IPR concerns.

The project does offer some technical solutions to these problems, however. For example, both *MediaMatrix* and *ProjectPad* allow users to annotate streamed audio and video. This technology was partly inspired by its authors' apprehension of the future development and direction of ICT; it is predicated on the belief that users will increasingly access remote servers rather than

download materials to local storage. However, that *MediaMatrix* and *ProjectPad* allow users to exploit materials for educational purposes, without making an actual copy was not a secondary consideration. Instead, this was an important motivating force behind the development of these products, which are, in part, a response to restrictive IPR regimes that limit educational access to cultural heritage materials. It should be stressed however, that *ProjectPad* and *MediaMatrix* were devised in response to US copyright legislation and that there are questions over the right to communication in the EU.

The right to communication was introduced by the European directive “Copyright and related rights in the information society” (2001/29/EC), and implemented in UK law in October 2003. The right of communication gives authors “an exclusive right to authorise or prohibit any communication to the public of the originals and copies of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”. Neither *MediaMatrix* nor *ProjectPad* make copies of streamed audio and video material. Instead, both provide an environment in which to annotate, segment and collect streamed audio and video that is *already available* on the web, from the Library of Congress, or the BBC’s Listen Again site, for example. However, both *MediaMatrix* and *ProjectPad* present such streamed audio or video in an entirely different context from the one sanctioned by their owner – which may not include author information or source acknowledgement. Though it is unclear, it seems that under EU law, this may constitute a form of republishing, and hence require copyright permission. Indeed, this was the advice given by the JISC Legal Information Service (telephone call 3rd December). However, it seems that use of *MediaMatrix* and *ProjectPad* do not constitute republishing in the USA. The landmark *ACLU v Reno* decision in the USA declared that: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provider by another information content provider”. Just as this judgement provided ISPs with immunity from civil liability for third content under US law, so it would seem – though it is by no means certain – to provide *MediaMatrix* and *ProjectPad* immunity from the designation “publisher”.

E) Risk

Dealing with Intellectual Property Rights is always a question of risk management. The levels of risk taken with regard in the use of third party content vary from partner to partner. GCU has adopted the most cautious approach so far. This is partly a result of the nature of the content concerned and the stipulations made in the deposit agreement with the BBC, and partly a result of an absence of fair dealing provisions for dissemination of content for teaching in the UK. GCU have sought to contact every rights holder in every piece of audio used by its teachers. It has adopted this approach primarily because it is required by the deposit agreement with the BBC. The primary risk perceived by GCU is not that a disgruntled rights holder will sue GCU (GCU has indemnity insurance up to £2 million pounds, which would amply cover any claim). Rather, it is the damage that any claim could do to GCU’s relationship with the BBC. The BBC has never granted a deposit body or educational project such generous rights to its content before, and it is imperative to the success of the project that the BBC trust GCU to look after its interests. As stated several times in this report, the BBC is extremely nervous that third party rights could be violated. Post-Hutton, the BBC is extremely sensitive to any accusation of wrongdoing, and is anxious not to become a test case. Given the BBC’s concerns, GCU are providing the BBC access to its clearance database and records. But this careful approach does incur other risks for the project, which should not be ignored. Firstly, rights clearance is time consuming and costly. Secondly, rights clearance can delay the release of educational materials until clearance is

granted. These factors require teachers to have foresight and patience when planning courses and modules.

Where rights holders cannot be traced, the Research Librarian, Anne Longmuir, and Digital Library Assistant, Suzanne Lobban, must decide whether or not to use the material. Being unable to trace a rights holder or to get a response from them does not constitute a legal basis for unauthorised use – though records showing proper attempts to trace and contact rights holders may reduce liability. Any use of unauthorised material constitutes a risk therefore. In assessing this risk, the team at GCU consider a number of factors:

- What is the economic worth of the content?
- Will our use damage the market for the content?
- Is our use derogatory in any way?
- How likely is it that the rights holder will discover that we have used their material?
- How likely is it that the rights holder will be upset that we have used their material?
- How likely is it that the rights holder will take legal action against our use?

The economic value of most of the content GCU seek to use is low, as the project deliberately selects radio programmes with few rights attached. Most rights holders contacted are interviewees. Educational use will seldom damage the market for such content, as interviews, with exception of some explosive examples such as Andrew Morton's Diana tapes, have little market value. Given the educational focus of the project, Spoken Word use could seldom be deemed derogatory – though the project does give careful thought to the use of interviewees on sensitive subjects without permission (for example, an interview about the death of a family member in the Lockerbie bombing). Password protection ensures that it is unlikely any untraced rights holder will discover that GCU have used their material, while it seems few rights holders will actually be unhappy at use of their interviews, given that only two contacted rights holders have refused permission so far.

Thus, GCU does generally use interviews, where the interviewee cannot be traced, without permission. Its website (www.spokenword.ac.uk) requests “that any person who has a claim on the rights of Spoken Word audio material contact the service immediately.” In case of any complaint from an unhappy rights holder, the Spoken Word at GCU would investigate immediately, and take down the material if the complaint was deemed genuine. Some argue that the Spoken Word at GCU should abandon its current copyright clearance policy in favour of “notice and take down” for all material. However, GCU are currently unwilling to do this. Firstly, the policy of “notice and take down” employed by many ISPs is predicated on the notion that it is impossible for an ISP to monitor all the content it hosts. In contrast, GCU is aware of the IP status of all the audio content it hosts. Any failure to clear rights would therefore be interpreted as a knowing and willful act of negligence, increasing GCU's legal liability. Furthermore, GCU's deposit agreement with the BBC stipulates that GCU will clear rights. In other words, failure to clear rights would also constitute a breach of this contract. But “notice and take down” has other implications for an education project. Any unexpected claim could force the project to remove content in the middle of a course or semester, disrupting a teacher's pedagogical strategy and students' education.

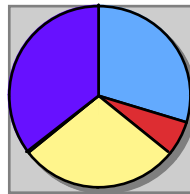
Neither of the project teams at MSU and Northwestern undertake rights clearance as matter of course, relying instead on public domain materials, or on material cleared by its depositors. MSU and Northwestern also enjoy the more generous fair use provisions of US law, which -- unlike UK law -- encompass teaching. In the instance of any legal challenge to their fair use defence (which is small given the fact that both partners choose their content with care), they are unlikely

to face any costs, but will simply be asked to remove content from teaching materials. Neither has yet found itself in that situation.

The Spoken Word is also taking a risk in terms of the intellectual property that it creates itself, as the project partners have chosen not to sign a consortium agreement so far. By choosing not to stipulate ownership of jointly created materials (such as its website, and some learning objects), the project is potentially exposing itself to legal wranglings in the future (for example, if one partner wished to withdraw all its IP from the project). However, project partners feel that such an agreement would hinder as much as consolidate co-operation. Some consortium members deem the approach of lawyers too restrictive, arguing that trying to put down on paper all the eventualities of evolving interpersonal relationships would hamper the “organic development” of the project. They argue that getting such agreements past each partner’s lawyers would be a long and protracted process – and would itself pose a risk to the success of the project. Indeed, this process would be especially difficult, given existence of Oyez at Northwestern and Historical Voices at MSU prior to the NSF/JISC grant to found the Spoken Word project. While MSU and Northwestern are keen to develop Oyez and Historical Voices under the auspices of the Spoken Word, they would be uncomfortable including the rights to any pre-existing material in a consortium agreement. There are good working relationships between project staff at each institution, and there is an unwritten understanding that project partners will not remove their own IPR preemptorily, or infringe each others’ copyright. Furthermore, this unwritten understanding is supported by other specific legal documents, such as GCU’s deposit agreement with the BBC and Northwestern’s use of Creative Common’s licences.

6. Additional Findings

The case study also set out to collect a set of statistics on the copyright clearance process at GCU.



- First contact 29%
- Follow up contact 6%
- Permission granted 29%
- Permission denied 0%
- Could not trace 36%

As the pie chart above illustrates, copyright clearance is a hit or miss procedure – especially when dealing with “non-traditional” copyright such as broadcast interviews. By 16th December 2004, 102 of the 227 rights holders contacted since the inception of the Spoken Word had replied, while 127 of 354 rights holders sought could not be traced. Those who responded did so in an average of 57 days.

Suzanne Lobban spent 67 hours working on copyright clearance between 11th October 2004 and 15th December 2004. This represents 29% of Suzanne’s time (based on a 35 hour working week).

She created records for 156 rights holders, of whom 113 were contacted by letter, while 43 could not be traced. Suzanne also had responses from 27 rights holders contacted before the start of the case study. In other words, she dealt with 183 rights holders in some form or other, from 11th October to 15th December. This represents an average of 22 minutes per rights holder, and an average salary cost of £3.13 (plus additional sundry expenses of postage and stationary). In terms of Suzanne's salary then, the study suggests copyright clearance costs the Spoken Word project £4,599.40 a year. As a percentage of the Spoken Word's overall budget this is negligible (around 1.8%), however, in terms of staff time (the project has a staff of 5), the costs are substantial. These results have persuaded the Spoken Word at GCU to continue monitoring its copyright clearance procedures, with the aim of discussing its strategy with the BBC. The very low number of refusals (only 2) suggests more material could be released without full clearance, especially given the costs to the project in terms of money – and more significantly – staff time.

7. Conclusions

A) Key Challenges

1. Providing authentication and authorisation system for international users
2. Dealing with project partners' different cultural attitudes
3. Drafting a consortium agreement
4. Jurisdiction choice
5. Implementation of DRM technologies
6. Licensing software
7. Drafting End-User Licence Agreement, Permission Letters, Deposit Agreement
8. Tracing rights holders and obtaining permission
9. Maintaining audit trail for copyright clearance

Of the challenges listed above, nos. 1-4 carry the most implications for the use and delivery of Spoken Word IP in an international context.

It is a requirement of GCU's deposit agreement with the BBC that BBC audio be password protected. Within the UK, Athens can solve the issue of authentication, however, in an international context, authentication is difficult without maintaining some kind of password repository. The project is monitoring Shibboleth, which could potentially help resolve this issue. In the meantime, the team at GCU are installing a LDAP server to enable them to handle user authentication. They have chosen to handle authentication internally, rather than opting for Athens authentication at present, partly because Athens is an expensive option given the size of the current user base in the UK and partly because it is essential to the success of the project that international users are given access of GCU's Spoken Word materials.

There has been some difference of opinion between the Spoken Word's partners in the US and in the UK regarding IPR issues. The project's US partners are uncomfortable with GCU's policy of gating its resources, and its plan to introduce a licensing model similar to that of Scran or Education Media Online. MSU and Northwestern argue for free and open access to educational resources. However, MSU and Northwestern University operate under a more generous IPR jurisdiction, as fair use in the US provides exceptions for teaching, which fair dealing does not in the UK. Section 107 of US Copyright Act, Title 17, has allowed fair use exemptions for face to face teaching since its introduction. These exemptions allow the copying, collation and

dissemination of material for classroom teaching. Furthermore, the recent TEACH Act (2002) in the USA now also allows digital dissemination of materials for online teaching purposes. While the TEACH Act is limited in scope (material must be accessible by enrolled students only, and only available for a brief time period), the impact of such fair use exemptions for teaching in USA has supported the expectation that copyright material should be freely available for teaching purposes. In contrast, the lack of fair dealing provisions for teaching in the UK has resulted in a different cultural attitude, with less faculty resistance to gated educational resources. These different cultural attitudes to access to university education materials are paralleled in even university library buildings in the US and UK: while US university libraries are often openly accessible to the public, in the UK visitors must register even to enter the building.

Negotiating a consortium agreement is always a difficult procedure, but never more so than when an international partnership is involved. Selecting which jurisdiction should govern the agreement raises a number of issues. Firstly, this decision can be difficult politically, as selecting one partner's domestic jurisdiction, can be perceived as giving that partner the upper hand. Secondly, partners may feel uncomfortable negotiating under a law with which they are unfamiliar. Thirdly, there are very real cost implications for partners in a consortium agreement, which is governed by a foreign jurisdiction. These partners generally have to seek specialist lawyers, and are less likely to be able to use their institution's own lawyers – who usually specialise in the national law of the HEI.

Furthermore, different funding conditions in different countries often make consortium agreements difficult. For example, some national grants travel with individual investigators. This makes a consortium agreement between institutions redundant. In other instances, national grants stipulate that ownership of any IP produced belongs to the funding body. This again renders an agreement between institutions pointless, raising the issue of whether consortium agreements in such instances should be between national funding bodies, instead of HEIs.

The Spoken Word has not yet signed a consortium agreement. This is partly due to the difficulties peculiar to international agreements cited above, and partly due to a resistance on the part of project partners who feel that such a legal document would impede rather than foster co-operation. One partner pointed out that their institution would be unwilling to sign any legal document that included restrictions beyond what is in the research grant.

Despite these issues, the benefits of a consortium agreement are considerable – especially for international projects. Consortium agreements substantially reduce the risk of conflict over IP in the future as a result of changes in project staff or university administration. Further consortium agreements between international HEIs, reduce the likelihood of two or more jurisdictions and laws being involved in any conflict – an expensive and difficult scenario. As such, it would be advisable for funding bodies to make such agreements a condition of funding (as JISC now does), and to provide project staff with assistance and model agreements in order to ensure more projects overcome the difficulties outlined above and complete an agreement.

Many of the issues over choice of jurisdiction and law have been mentioned already. However, it is worth mentioning that the situation is especially difficult for UK - and perhaps particularly Scottish – HEIs, who must also choose whether to use Scottish or English law. The Spoken Word at GCU, for example, have signed a deposit agreement with the BBC that operates under English law, while its End User Licence Agreement operates under Scottish law.

B) Options/Solutions/Advice

It is crucial to consider IPR at the very inception of any eLearning project. Every eLearning project, whether national or international, should consider as early as possible how to deal with both its own IP and that of others that it uses. Projects should seek and employ knowledgeable staff, ensuring that responsibility for IPR issues is included in at least one project member's job specification. Furthermore, the project as a whole should reflect on its attitude to IPR, and consider writing a joint DRM policy document. This document could still reflect the different opinions of each project partner, but may help avoid conflict and promote understanding between project partners – especially partners operating in different countries, cultures and under different jurisdictions.

In terms of the IPR produced by the project, project partners should firstly negotiate and sign a consortium agreement. This can prevent expensive legal wrangling in the future. However, projects should also consider how they want to make their IP available. Releasing material without a licence is a risky enterprise, as outside of EEA countries, any infringement may need to be resolved under the law of the country where the infringement took place. Furthermore, material released without any special provision has “All rights reserved” by default, whereas it is often essential to the success of eLearning projects that some rights are granted to non-profit educational users. In such instances projects should look to the Creative Commons licensing model. While licences are not yet available for all jurisdictions, they are already available for the following countries: Austria; Brazil; Canada; Finland; Germany; Japan; Netherlands; Spain; Taiwan. Furthermore, licences are currently being drafted in the following countries: Australia; Belgium; China; Croatia; Ireland; Israel; Italy; Jordan; South Africa; Sweden and the United Kingdom. If a Creative Commons licence is not yet available, partners should consider drafting their own user-friendly End-User Licence Agreement with legal assistance, as the Spoken Word at GCU have done. As well as placing certain conditions on its users, this Licence Agreement grants users rights, such as permission to download, excerpt, aggregate and amend material for non-profit educational purposes.

eLearning projects should consider the nature of the third party content they wish to use at the point that they formulate the project. Avoiding material with many associated rights will save time, money and effort, and will allow the project to give wider access to its materials. Of course, most projects will still have to clear some third party rights, even adopting this policy. This process should be as streamlined as possible. Where feasible, projects should seek the kind of blanket clearance from rights holders, that the deposit agreement grants GCU. Furthermore, project should ensure that no geographic restriction is put on the delivery of material, unless absolutely unavoidable. When clearing copyright, projects should request “non-exclusive World rights (including the USA)”. It is also essential to maintain a proper record of any rights clearance procedures. Constructing a database not only allows projects to automate letter production, it could also support a legal defence in case of any challenge. Finally, if rights holders ask for password protection, projects should monitor progress of Shibboleth, a middleware system, which may enable international authentication.

Any new eLearning project should also consider DRM technologies (such as machine2machine exposure of rights metadata, watermarking, encryption and specialist Digital Rights Expression Languages) from the start. The Spoken Word currently records rights information in its metadata (though it has not yet adopted any specialist DREL), exposes rights metadata through OAI-PMH, and in the case of Northwestern, tags MP3 files with licences. DRM technologies should be a consideration in the adoption or purchase of any repository software. For example, the Spoken Word at GCU's purchase Intrallect's Intralibrary repository software was influenced by the DRM

technologies it incorporates. For example, Intralibrary allows role-dependent usage agreements, utilises rights icons, like those used by Creative Commons, and allows the exchange of rights metadata in content packages, while there are plans to support a broader set of rights expression (ODRL) attributes and encrypted licences.

C) Further Work

- Existing licences such as the ERA Licence: could these be expanded to include online delivery and delivery beyond the UK?
- Authentication and authorisation across national borders
- Model consortium agreement for international eLearning programmes

10. References

- AAU Task Force on Intellectual Property Rights in an Electronic Environments. 1994. Available: <http://arl.cni.org/aau/IPCharge.html>.
- Christian Ahlert, Chris Marsden, Chester Yung. How 'Liberty' Disappeared from Cyberspace. 2004. Available: <http://pcmlp.socleg.ox.ac.uk/liberty.pdf>. 10th December 2004.
- AURIL/UUK/Patent Office. Managing Intellectual Property. 2002. Available: <http://www.patent.gov.uk/about/notices/manip/index.htm>.
- Beal, B. D., and D. B. Marin. "Confronting the Information Age: Strategy, Copyright, and Digital Intellectual Goods." Business Horizons 46.4 (2003): 21-31.
- Bently, Lionel, and Spyros M. Maniatis. Intellectual Property and Ethics. Perspectives on Intellectual Property ; Vol.4.: Sweet & Maxwell, 1998.
- Booton, D. "Framing Pictures: Defining Art in Uk Copyright Law." Intellectual Property Quarterly.1 (2003): 38-68.
- Casey, John. Intellectual Property Rights (Ipr) in Networked E-Learning. 2004. Available: www.jisclegal.ac.uk/publications/johncasey_1.htm.
- Cornish, G. P., and Library Association. Copyright : Interpreting the Law for Libraries, Archives and Information Services. 3rd rev. ed. ed. London: Library Association, 2001.
- Davis, D. M., and T. Lafferty. "Digital Rights Management: Implications for Libraries." Bottom Line 15.1 (2002): 18-23.
- Drahos, Peter. "The Universality of Intellectual Property Rights: Origins and Development." WIPO Panel Discussion on Intellectual Property and Human Rights. Geneva, 1998.
- Gadd, E. "An Examination of the Copyright Clearance Activities in Uk Higher Education." Journal of Librarianship and Information Science 33.3 (2001): 112-25.
- . "An Examination of the Copyright Clearance Activities in Uk Higher Education." Journal of Librarianship and Information Science 33.3 (2001): 112-25.
- . "Managing Copyright Clearance Services in Higher Education Libraries." Journal of Information Science 27.5 (2001): 291-302.
- . "Clearing the Way: Copyright Clearance in Uk Libraries Empirical Research on the Problems of Copyright Clearance in Higher Education Libraries." Managing Information (2002): 4-6.
- Galloway, Terrel, and Douglas Kinnear. "Open Source Software, the Wrong of Copyright, and the Rise of Technology." Journal of Economic Issues 38.2 (2004): 464-474
- Gurnsey, John. Copyright Theft. Aldershot, Hampshire, England Brookfield, VT: Aslib Gower ; Gower, 1995.
- Hefce. Intellectual Property Rights in E-Learning Programmes, 2003.
- Heikkinen, Sanna. On the Service Provider Liability for Illegal Content. 2001. Available:

- <http://www.tml.hut.fi/Studies/T-110.501/2001/papers/index.html>.
- IPR Helpdesk. Database Protection in the EU. 2004. European Commission DG Enterprise. Available: <http://www.ipr-helpdesk.org/docs/docs.EN/databaseProtectionEU.pdf>.
- Jaszi, Peter. "On the Author Effect: Contemporary Copyright and Collective Creativity," The construction of authorship: textual appropriation in law and literature. Eds. M. Woodmansee and P. Jaszi: Durham, 1994. 29-56.
- JISC. Policy Approaches to Copyright in HEIs. 2000. Available: <http://www.strath.ac.uk/ces/projects/jiscipr>.
- JISC. Digital Rights Management, 2004. Available: <http://www.intrallect.com/drm-study/index.htm>
- Kretschmer, M. "Digital Copyright: The End of an Era." European Intellectual Property Review 25.8 (2003): 333-41.
- Luckhurst, Tim. "The Lost Treasures; the Bbc Has Failed to Deliver on Its Promise to Put Its Archive Online." The Independent 11 October 2004 2004: 15.
- Nettleton, E., and H. Obhi. "Legal Protection for Databases in Europe: The Vexed Question of Whether Us Businesses Can Benefit." Journal of Database Marketing and Customer Strategy Management 11 (2004): 268-73.
- Owen, L. "Piracy." Learned Publishing 14.1 (2001): 67-70.
- Porter, James E. "Legal Realities and Ethical Hyperrealities: A Critical Approach Toward Cyberwriting." Computers and Technical Communication: Pedagogical and Programmatic Perspectives. Ed. Stuart C. Selber. Greenwich, CT: Ablex/ATTW Studies in Technical Communication, 1997. 45-73.
- Stokes, A. "Authorship, Collaboration and Copyright: A View from the United Kingdom." Entertainment Law Review 13.6 (2002): 121-27.
- Sutherland, John. "Who Owns John Sutherland?" London Review of Books 21.1 (1999).
- Sutter, G. "'Don't Shoot the Messenger?' the UK and Online Intermediary Liability." International Review of Law Computers and Technology 17.1 (2003): 73-84.
- Wall, Raymond A., and Aslib. Copyright Made Easier. 2nd ed. ed. London: Aslib, 1998.
- Weedon, Ralph. Policy Approaches to Copyright in HEIs: University of Strathclyde, 2000.
- Wiese, H. "The Justification of the Copyright System in the Digital Age." European Intellectual Property Review 24.8 (2002): 387-96.
- Xalabarder, Raquel. Copyright Exceptions for Teaching Purposes in Europe. July 2004 2004. IN3:UOC. Available: <http://www.uoc.edu/in3/dt/eng/20418.html>.
- Yen, A. C. "The Interdisciplinary Future of Copyright Theory." The construction of authorship: textual appropriation in law and literature. Eds. M. Woodmansee and P. Jaszi: Durham, 1994. 159-74.

11. Appendices

The appendices to this report are provided in a separate document.