

# specialisms for generalists

## Education on-line – a legal perspective

*Gill Thomas and Kevin Calder*

Whether you use the internet to enrol students, to provide courses electronically or for procurement or staff recruitment purposes, you will need to address an ever-increasing range of legal issues. Understanding the implications of the law of e-commerce will maximise the effectiveness of your web site and minimise the legal risks you face advertising or providing educational services on-line. We outline here some of the legal issues to be considered and practical steps you can take when establishing and managing electronic educational services.



### Setting up and running a web site

Most, if not all, institutions have already established a web site as an electronic brochure to inform interested third parties about courses, research and job vacancies. Increasingly, institutions are considering using web sites to enrol students and to run courses on-line. Rather than develop and manage web sites themselves, institutions may appoint outside agencies to do so. Contracts with such third parties should address a number of issues including: a timetable for developing the site; the right of the institution to test the site before going live; ownership of rights in the web site; security; availability of the web site; and the time it takes users to access the site and the speed of downloading material.

All these issues are important as, should an on-line course be delayed, the site repeatedly be unavailable, or confidential information such as students' details be accessible, there can be an adverse impact on the professional reputation of an institution.

It is equally important to be aware of the legal issues that can arise in relation to the content of a web site. For example, rules on advertising apply, in the main, to the internet as to other media and all advertisements for a higher education institution (or for a third party but included on the web site) must comply with the British Code of Advertising and Sales Promotion (<http://www.asa.org.uk/codes/asaindex.htm>) and, in particular, be legal, decent, honest and truthful. Education institutions should, therefore, take care that any on-line information, whether a course prospectus or details of conference facilities, is accurate and up to date. Prices should give clear details about what they include, and who they apply to, and should mention any relevant taxes. Virgin Atlantic were, for example, fined \$14,000 in 1995 by the US authorities for failing to update pricing information on their web site.

To assist individuals accessing a site and to limit an institution's potential liability, it is advisable to have the institution's contact details clearly displayed and to include on a site a 'terms of use' page ensuring that this is binding on users (see later). Also, to be in a position to respond to any comments, queries or complaints, it



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is good practice to make hard copies, marked with the date, of each amendment to an institution's 'official' web pages, and regular electronic backups of all publicly available on-line information.

Many educational institutions provide staff and students with e-mail and internet access and allow them to create and amend their own web pages and this raises issues regarding the content of this material.

### **Defamatory e-mails**

In 1995 rumours circulated that Western Provident was insolvent and under investigation by the Department of Trade and Industry. The source of these rumours was traced to internal e-mails sent by Norwich Union staff. Two years later Norwich Union publicly apologised and paid Western Provident £450,000. The Head of IT at Norwich Union was quoted as saying: 'Every organisation needs to recognise responsibility for messages in all the new forms of communications media.' (Computer Weekly News, 24 July 1997)

If, for example, a member of staff includes a defamatory remark in an e-mail, the institution could be held liable if the staff member was acting within the scope of their employer's apparent or actual authority.

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To minimise exposure it is prudent to:

- take steps to limit those authorised to put information on-line, particularly on 'official' pages, such as department sub-sites, and ensure the content of this material is carefully vetted;
- give strict guidelines to staff and students (often in an institution's e-mail and internet policy) about what sort of material is acceptable in an e-mail or on a web page and those creating content should be aware of the risks and consequences of including material that may be defamatory, infringes third party copyright, is obscene or includes discriminatory statements;
- include a disclaimer at the end of e-mails to the effect that if the contents do not concern the business of the institution then it is not sent on behalf of or sanctioned by the institution;

- investigate and act promptly upon any complaints received.

## **Contracting on-line**

In every case where a business or other organisation sells goods or services on-line to individuals or to other businesses or organisations, an on-line contract will be formed. In the educational field this is likely to include enrolment over the web and the purchase of supplies on-line.

In England and Wales there are four elements of a contract and these apply to an on-line contract in the same way as they apply to written contracts. These elements are an offer, acceptance of the offer, an intention to create legal relations and payment (or other consideration). There are, however, a number of issues specific to contracting on-line. For example, there are statutory requirements for some contracts to be in writing, signed or witnessed and other countries may have their own requirements, such as that certain contracts must be notarised.

One of the most important legislative developments in the United Kingdom regarding on-line contracting has been the implementation of the EU Distance Selling Directive, known in this country as *The Consumer Protection (Distance Selling) Regulations 2000*. The Regulations came into force on 31 October 2000 and will lead to a change in culture and procedure for many transactions concluded by distance communication.

They apply to most contracts for goods or services which are concluded at a distance between suppliers and consumers. This covers any contract where the supplier and consumer do not come face to face prior to the contract being concluded and is wide enough, for example, to cover educational institutions and prospective students enrolling on-line.

Under the Regulations a supplier must provide a consumer with certain information in a clear and comprehensible manner prior to the contract being concluded (not performed). This includes the identity of the supplier, a description of the main characteristics of the goods or services, the price of the goods or services including all taxes, payment arrangements, the consumer's right to cancel under the Regulations and the period during which the offer or price remains valid. In addition, any supplier must provide the consumer with confirmation of the above either prior to the conclusion of the contract or in good time before or during the performance of the contract in a different medium (i.e. in writing or in another electronic form). Under the Regulations the consumer has an unconditional right to cancel the contract within a certain period of time and to be reimbursed any payment made. The cancellation period runs for seven working days from the day after the contract is formed for services and from the date of receipt of goods. Should the requisite information not be provided at the correct stage in the contracting process,

this right continues for a period of three months and seven working days.

Despite lobbying by UCAS and the CVCP, there is no exception for educational institutions. The general view, therefore, is that the Regulations do apply to educational institutions and where any contract is formed at a distance procedures should be reviewed to ensure they comply with the Regulations. In most circumstances compliance will be relatively straightforward. However, the position becomes complicated when students are offered and accept places through UCAS. The cautious approach is to ensure that applicants receive the information specified in the Regulations prior to their accepting an offer from UCAS, which will mean in practice sending the information to applicants at the same time as institutions instruct UCAS as to who should receive offers.

***Can you verify the identity of the other party to a contract and does it matter?***

Last year, at an on-line auction by eBay, a 13 year-old went on a \$3.1 million bidding spree when eBay's security was unable to identify that the bidder was not the 65 year-old millionaire it believed him to be! Governments and e-businesses have yet to agree on a reliable method of identification.

*...where a contract is to be formed on-line, it is essential to ensure that an institution's terms are incorporated into the contract...*

Where a contract is to be formed on-line, it is essential to ensure that an institution's terms are incorporated into the contract. To be part of a contract, the terms and conditions must be drawn to the attention of the user prior to the contract being concluded. This poses problems for many web site managers as the look and feel of web sites is important and few institutions want to discourage users by forcing them to read through lengthy pages of legalese. There are a number of ways of ensuring the terms form part of the contract varying from having a button on the site, which when clicked on links to the terms and conditions, to displaying the full terms and conditions and asking the user to scroll through them before clicking their acceptance. The method which should be

used will depend on the nature of the contract and whether there are any unusual or onerous terms.

***£2.99 televisions***

Due to a data problem, Argos offered £299 televisions for sale at £2.99. News of this 'bargain' spread quickly and Argos received orders for more than 330,000 of these televisions in less than a day. After discussing its position with the Consumers Association, Argos stated that customers should have known this was a mistake and any contract was therefore void!

Further, when and where an on-line contract is formed is central to determining issues such as which country's laws apply to the contract and tax liabilities. It is not yet clear whether, in general, on-line contracts are formed when a customer clicks 'I accept', or when a confirmation of order is displayed/issued, or when it is received. It is, therefore, advisable to state in the terms and conditions at what point the contract will be formed and to ensure all pages and documents, such as confirmatory letters or e-mails, are drafted to reflect this.

It is also important on a practical level to keep an audit trail of the pages which are displayed to users and on which they click 'I accept', some of which may be generated automatically by software. Hard copies should be retained whenever possible.

**Copyright**

Most material on a web site such as written text, graphics, photographs, the design of the web site and any software code will be protected by copyright. This has a number of different implications.

Firstly, if someone other than an employee of the institution, such as a design company, develops the web site, it is important to ensure the institution has sufficient rights to use the site in any way it requires. Ideally, the design company will transfer all their rights in the work to the institution. However, on some occasions the company may wish to use their work, such as software or scripts they have developed, in the future and will only grant a licence. Care should be taken in these circumstances to ensure that the institution has unfettered rights to use the material. It may also be appropriate to ensure that the design company cannot produce for a third party an identical or similar-looking web site.

Secondly, if material written or created by someone other than an employee is incorporated into material on the site, such as extracts from a song or material already available on the internet, then copyright law will apply. You will need to make sure that the third party has consented to such use of their material, including if appropriate their consent for users of your web site printing and distributing the material.

Thirdly, for material generated by the institution itself, this is automatically protected by copyright and there is no need to register the right to gain protection. However, it is advisable to keep records of when the material was created and to put a copyright notice on the work, stating that it is protected by copyright, the name of the copyright owner and the date the work was created.

There is considerable confusion as to what right a third party has to use another academic's material, such as lecture notes or course material available on-line. Clearly anyone can access and view material on a public web site. However, no-one is permitted to copy or adapt a copyright work without the consent of the owner. Although it is difficult to enforce such rights over the internet, including on a web site a copyright notice and statement of use of the material may discourage users from copying material and can be used as a basis for infringement action. The notice should cover issues such as whether users can print material for personal use, whether they can distribute the material or use it for teaching purposes and whether they should retain all copyright notices on material printed from the internet. It can also cover restrictions on third parties linking to your site.

## Domain names

A domain name is that part of a web page address from the 'www' to the 'ac.uk' or other suffix and domain names are becoming a problem area for academic institutions. Whilst the academic community has some control over the allocation of academic internet addresses ending 'ac.uk' (they are managed by the United Kingdom Education & Research Networking Association, with strict rules about eligibility<sup>1</sup>), there are no restrictions on who can register domains with the more common 'co.uk' or 'com' suffixes.

Not everyone is aware that the common suffix for academic institutions is 'ac.uk' and someone looking for information about an institution may try 'co.uk' or 'com' before trying 'ac.uk'. If an organisation unrelated to an institution has registered a name the same as or similar to an academic institution with a 'co.uk' or 'com' suffix, an enquirer once in this site may look no further assuming that she or he has found the institution she or he is looking for. The courts on both sides of the Atlantic are coming down hard on opportunistic domain name registration, where an organisation or individual with no bona fide intention to use a name registers it and offers it for sale to the relevant trade mark owner. There are also independent arbitration procedures for resolving domain name disputes which can provide a quicker and cheaper mechanism than the courts. However, it is difficult to obtain an order for the transfer of a domain name

where the owner can also claim legitimate use of the brand name in question.

Our experience of where problems have arisen over rights in domain names includes the conflicting rights of a university and its independent alumni association. The best advice is to register any names important to an institution as domain names, in as many combinations as possible – '.com', '.co.uk', '.org.uk' and '.ac.uk', to name but a few.

## Data Protection

Many internet sites collect and process personal data about individuals – i.e. data relating to a living individual who can be identified directly or indirectly from that data. Higher education institutions that provide a mechanism for individuals to request information about the institution or register for a course on-line will similarly be processing personal data and will need to comply with the provisions of the Data Protection Act 1998. In short, this means that the institution must (1) notify the Data Protection Commissioner of such activities; (2) process the data fairly and in accordance with the Data Protection Act; and (3) on request provide individuals with access to their data.

All higher education institutions will currently be processing personal data and will be registered with the Data Protection Commissioner. However, it may well be the case that the notification will need amending and updating to ensure it covers on-line activities. Similarly, present practices for the processing of personal data should be reviewed to ensure they are appropriate in an electronic environment.

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*...unencrypted  
information transmitted  
over the internet is not  
secure...*

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For example, should an institution appoint a third party to manage a web site, which includes the storage of student information on the site, a number of issues need to be addressed. It will not be apparent to students when providing information about themselves that it will be processed by this third party. So, to comply with the data protection principles, students must be informed of this. If their details contain sensitive data such as information relating to ethnic origins, religious/political beliefs or physical or mental health then students must explicitly consent to this manner of processing. The institution must contract in writing with the third party processing the data and the contract must clearly define that party's obligations in relation to the data. Finally, if the data is to be provided electronically, how will it be transmitted? The Data

1 See <http://www.ja.net/documents/naming/ac.uk-naming-procedure.html> for further details.

Protection Commissioner has said that unencrypted information transmitted over the internet is not secure. As the seventh data protection principle states that appropriate technical and organisational methods must be taken against unauthorised or unlawful processing of personal data – i.e. all data controllers must put in place adequate security measures – consideration should be given as to whether the data is to be encrypted.

### **Security and the Internet**

In the UK electronic fraud and forgery rose by 29% in 1999 to 70,000 offences and earlier this year CD Universe, an on-line retailer based in the USA, was held to ransom to the amount of \$100,000 when a Russian computer hacker copied 300,000 credit card numbers from their customer files. Security issues are central for all web site owners, particularly in relation to personal details and financial information.

As the Data Protection Act only came into force in March 2000 and use of interactive web sites is relatively new, there is a great deal of uncertainty as to how the Act will be enforced particularly in relation to electronic transactions. It is, therefore, widely seen as good practice to have a Data Protection and Privacy Statement on web sites. These are used to inform visitors and others who register for services through the site what personal data is collected, how it will be used, the security arrangements in place on the site, the use of 'cookies' on the site and how visitors or other users can update or, if appropriate, remove their details from the site.

### **Addressing international issues**

The internet was once hailed as the 'place where laws don't apply'. The contrary is closer to the truth – in many cases a greater number of laws regulate an activity carried out on the internet than would otherwise apply.

A web site will generally be accessible to anyone in the world with a web browsing software who wants to look at it. No single body of laws applies to the internet. Currently each country simply applies its own laws and therefore the legal relationship the producer of the web site has with those who read it may be governed by laws of a range of countries.

If students are, for example, to enrol on-line and fill in their details in an on-line form and click 'I accept' to a set of terms and conditions, a number of factors could affect the laws which govern the contract between student and institution e.g. the location of the educational establishment; the location of the student; the nationality of the student; the location of the server hosting the web pages; and the wording of any 'choice of law' clause in the terms and conditions.

In the absence of any international agreements on which country's courts have jurisdiction of an e-commerce case or which country's laws apply to an

on-line dispute, national courts need to fall back on existing rules which were developed on a state basis and are ill equipped to deal with global networks, leaving e-businesses facing uncertainty. However, the EU E-Commerce Directive, passed in June 2000 and to be implemented in member states by January 2002, takes the first step on the path towards providing certainty. Under the Directive, an institution using e-commerce for business purposes will only be subject to the laws of the country in which it is established. Although this only applies to business carried out in member states and the Directive does not address the jurisdiction of courts, it does lay the basis for a European internal e-market. Until international agreements are in place, care should be taken when contracting on-line with businesses and individuals outside the United Kingdom to identify which country's laws apply to the contract and whether any disputes can be dealt with by the UK courts.

### **The e-future**

Over the next few years the Internet will become increasingly regulated and we will see various legal developments aimed at promoting e-commerce, in particular to reduce barriers to the development of e-commerce and to encourage consumer confidence in on-line transactions. To date in the United Kingdom three pieces of legislation have been passed which deal specifically with electronic issues.

The Electronic Communications Act received Royal Assent on 25 May 2000 and central to the Act are provisions for the legal recognition of electronic signatures and the process under which they may be generated, communicated or verified. The Act also sets up a framework for the recognition of the use of electronic communications and electronic storage and provides for a register of approved cryptography service providers – i.e. those providing security services for electronic communications. Fast on its heels, the highly unpopular Regulation of Investigatory Powers Act and Regulation of Investigatory Powers (Scotland) Act were passed which update interception and surveillance legislation to deal with technological advances and provide among other matters the right for law enforcement agencies to tap e-mail and seize decryption keys. Thirdly, and as discussed above, the government has implemented the EU Distance Selling Directive and must implement a further EU Directive on e-commerce by January 2002.

Whilst much of this legislation is aimed at clarification, for example as to whether contracts can be entered into electronically or at the protection of the consumer, we have yet to see how it will be enforced and, in particular, how the courts will apply existing law to the internet. Nonetheless, electronic communication provides a real opportunity for educational institutions and the law should not be a barrier to this. Understanding the legal issues is one component of using electronic communications successfully.