

## Intellectual Property policy

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Consultation		
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## 1. Introduction

The National Health Service in Scotland launched a policy framework for the management of Intellectual Property arising from research and development, generated by NHS Scotland (MEL (1998)23). In light of the MEL a Statement of Policy and Procedures for the ownership and exploitation of Intellectual Property (IP) was issued, and in line with HDL (2004)9, places due emphasis on applicability to all employees.

There are four main types of intellectual property:

- Inventions/innovations covered by patent;
- Print, audio, video, electronic and other media protected by copyright
- Brands protected by trademarks;
- Designs covered by design rights

Of these four types of IP copyright is most pertinent to NHS Education for Scotland's (NES) work as it applies to all our published work in electronic, video and other media. This includes curriculum material, teaching materials, web based tools (e.g. e-Portfolio, DOTS, repositories and Community Builder) and commissioned research papers published by NES. There may be cases where there are advantages in trademarking NES products.

**Copyright** is a form of intellectual property that gives the author of an original work exclusive right for a [defined time period in relation to that work](#), including its publication, distribution and adaptation, after which time the work is said to enter the public domain. Copyright applies to any expressible form of an idea or information that is substantive and discrete and fixed in a medium (including photographs, images, articles, websites, recordings, artefacts etc.)

Copyright does not have to be registered: it is an automatic right. A Copyright work may be marked with ©, the owner's name, and the year it was created. Copyright does not protect ideas unless they are 'fixed' (e.g. written or recorded). Usually Copyright work automatically has the same protection abroad as it does in the UK. Most countries, (including all western European, the USA and Russia), belong to the Berne Convention<sup>1</sup>.

A **Trademark** is a "Badge of Origin" by which the public can distinguish the products and services of one organisation from those of another. It can be a word (including a personal name), letters, numerals, a logo, a slogan, or a combination of these features. It can also consist of a three-dimensional shape or a sound such as a jingle. A trademark must be distinctive for the goods and services provided. In other words it can be recognised as a sign that differentiates goods or service as different from someone else's work.

Trademarks may be unregistered (marked with the <sup>TM</sup> symbol) or registered (denoted by the ® symbol). The owner of a registered trademark may commence legal proceedings for trademark infringement to prevent unauthorized use of that trademark. However, registration is not required. The owner of a common law

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<sup>1</sup> <http://www.wipo.int/treaties/en/ip/berne/>

trademark may also file suit, but an unregistered mark may be protectable only within the geographical area within which it has been used or in geographical areas into which it may be reasonably expected to expand.

## **2. Scope**

This Policy applies to all NES employees and other staff who may be seconded to NES or are temporarily employed by NES, and to contractors who undertake work on behalf of NES. It applies to all publications, documents and educational resources produced and commissioned by NES.

## **3. Ownership of Intellectual Property Rights (IPR)**

### **3.1 NES staff**

IP made, created or added to by a member of staff belongs to and is the property of NES. This applies to IP developed in the course of the performance of his/her duties or field of responsibility as a member of staff, or in the performance of duties specifically assigned to him/her by NES. Similarly NES owns all IP created by staff whilst making use of NES funds, resources, equipment, materials or information belonging to NES. This will be made explicit in all contracts of employment. This policy applies equally to sessional staff and posts that are part-funded by NES.

### **3.2 Contractors**

All NES standard contracts contain clauses relating to IPR. It is assumed that NES has exclusive rights to IP made or created by suppliers in respect of work for which they are under contract to NES.

When drafting IPR contract clauses, in the interests of clarity staff are requested to specify the governance arrangements around foreground and background IP. This is particularly relevant in a commercial context where suppliers will be unwilling or unable to assign to NES any pre-existing IP which they own or have created.

Foreground IP is any IP which will be developed from ideas which occur during the development of a project that the supplier is obliged to provide to satisfy the terms of the contract.

This is distinct from background IP, which is the pre-existing IP used in fulfilling the contract, for example, the contractor's learning materials covered by Copyright which are used to deliver the commissioned educational programme by NES. Background IP is the contractor's property unless it is purchased, waived or otherwise assigned to NES.

If the contractor's IPR is transferred or incorporated into a NES commissioned project, due diligence must be carried out to ensure the contractor actually has the appropriate rights to background IP to allow this to be used appropriately in the NES product being commissioned. Wherever possible NES staff should ensure all IPR for commissioned work is vested in NES. This will ensure NES will have exclusive exploitation rights of any IP developed.

Where NES considers it appropriate or where so required under the terms of a contract with a third party NES may assign or license IP to a third party on terms to be defined on a case by case basis and at the sole discretion of NES. Expert advice on IPR should be sought by teams where a third party wishes to share or licence NES IP.

Any external request to disclose commercially sensitive information must be referred to the Information Governance Manager to be dealt with in compliance with the Freedom of Information (Scotland) Act 2002 and to be considered under a confidentiality agreement where appropriate.

### **3.3 NES supported students**

NES reserves the right to require any student to assign all IPR to NES. This right is irrespective of whether the student works alone or is working in conjunction with others at NES. This right also applies to students IP developed whilst making use of NES funds, resources, equipment, material or information.

### **3.4 Waiving IPR**

NES has the discretion, in special circumstances, to waive its rights in favour of members of staff and/or students. For example, NES does not normally claim ownership of copyright in published text books or in articles published in academic journals by members of staff or student(s). For the avoidance of doubt, NES retains the right to exploit commercially any copyright work generated by a member of staff, contractor and/or a student in the circumstances noted in paragraphs 3.1, 3.2 and 3.3 above.

### **3.5 Contracts**

NES standard contract terms should normally be applied where:

- 3.5.1 a contract with an external organisation is entered into or negotiated where IP is likely to be or will be generated from the project covered by the contract or
- 3.5.2 there are likely to be any IP implications arising from the project work as specified by the contract.

All contracts must be signed by an authorised NES signatory with appropriate delegated authority to ensure that they have legal validity. It is in the interests of NES and members of staff to ensure that contracts with external organisations are on appropriate terms and that NES has obtained appropriate expert advice when deemed such to be appropriate.

In many cases, development of educational resources or other IP will be undertaken either with the support of or in conjunction with organisations that are external to NES (e.g. bodies, educational or professional institutions, commercial, government agencies or charities). In all cases it is essential that a contractual agreement is reached with the external organisation prior to any work commencing. Such agreements should provide for *inter alia* the following:

- input of all parties involved in the Project;
- IPR that may arise from the Project;
- respective obligations of all parties to the contractual agreement including obligations of confidentiality and publication procedures.

## **4. Asserting Intellectual Property Rights**

NES will not normally assert IPR with regards to the use of NES resources within NHSScotland (for example, NHSScotland Health Boards reproducing materials to distribute to staff), education institutions or the wider public sector in Scotland.

NES may also waive or share IPR to incentivise partners to develop further or to maintain educational resources, or to encourage uptake of a resource by educational providers. In some circumstances however, where the distribution or development of

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NES-owned IP will result in a revenue stream, NES may assert its IPR to secure a reasonable return on investment for the taxpayer.

In cases of suspected IPR infringement by external organisations or individuals, NES will take action to ensure such actions cease at the earliest opportunity. This will normally be through negotiation but, in exceptional circumstances, may involve external mediation or legal action to obtain an injunction or damages. Where IPR infringement is committed by a member of NES staff this may be subject to disciplinary proceedings.

### 5. Commercial exploitation of Intellectual Property

In most projects and initiatives, the management of NESs IPR is relatively straightforward as the commercial applications are limited. In these circumstances, agreements with suppliers and Service Level Agreements (SLAs) with NHSS Health Boards will normally be sufficient to protect copyright.

Managing potential or existing IP becomes significantly more complex in cases where NES wishes to exploit its right or potential right commercially. It is NES policy to take appropriate advice from legal and IP experts in concluding any agreements or licences necessary to deal with the commercial exploitation of IP owned or being developed by NES. All proposals to commercially exploit NES' IPR must be fully costed, taking into account NES policies on income generation, and must have the approval of the Director of Finance and the relevant Director.

Any request by a third party for permission to exploit NES IPR commercially must be given reasonable consideration in compliance with the Re-use of Public Sector Information regulations, and any refusal must be recorded together with the rationale for refusal. **See section 4 of the NES Freedom of Information procedures.** NES will, whenever appropriate, ensure that IP resulting from projects funded in whole or in part by NHS funds is exploited to the benefit of NES and ultimately the NHS.

### 6. Attribution

In copyright law, **attribution** is the requirement to acknowledge or credit the author of a work or idea used or appearing in another work. It is often considered the most basic of requirements made by a license, as it allows the rights holder due recognition for their work (or sponsorship). Attribution provides acknowledgement of their efforts in terms of enhanced reputation (in most cases). The requirement for attribution also prevents others from claiming fraudulently to have produced the work and is regarded a sign of respect to acknowledge the creator of the work. All agreements with external organisations relating to NES intellectual property must include a requirement for due attribution.

### 7. Copyright notice

All NES published resources must bear a copyright notice as follows, together with appropriate contact details:

**© NHS Education for Scotland 2010. You can copy or reproduce the information in this document for use within NHSScotland and for non-**

**commercial educational purposes. Use of this document for commercial purposes is permitted only with the written permission of NES.**

## **8. Summary**

In commissioning work, staff should ensure that the standard contract terms for IPR in the NES contract templates are adhered to, unless there is reasonable cause to revisit the terms. This should only be done with advice from procurement experts and with director-level approval.

All permissions to re-use NES IP must require full attribution to NHS Education for Scotland. All published NES documents and resources must bear the appropriate copyright statement.

Commercial exploitation of resources must be undertaken only with appropriate contracts and agreements in place, based on independent advice, and approved by the Director of Finance and the appropriate Director.

## **9. Review**

The Intellectual Property Policy will be reviewed periodically by the Education & Research Governance Committee to ensure that it is current and supportive of these aspects of NES' work.

## **10. Sources of advice**

Intellectual Assets Centre: [www.ia-centre.org.uk](http://www.ia-centre.org.uk)

Intellectual Property Office (The official Government body responsible for granting intellectual property rights in the UK): [www.ipo.gov.uk](http://www.ipo.gov.uk)

Scottish Health Innovations Ltd: <http://www.shil.co.uk/>

Chief Scientist's Office: <http://www.cso.scot.nhs.uk/>

Guidance on Re-use of Public Information Regulations:  
<http://www.nationalarchives.gov.uk/documents/guide-to-psi-regulations-and-best-practice.doc>

Intangible Assets Network (toolkit of guidance resources published by the Intellectual Property Office) <http://www.ipo.gov.uk/ian.htm>

Department of Health (2006) [NHS Income Generation – Best Practice](#)

## Definitions

In this Policy the following definitions are used:-

"Background Intellectual Property"	is the pre-existing IP used by a contractor in producing new foreground IP in fulfilling the requirements of a contract for services, for example, the use of published textbooks to deliver a commissioned educational programme.
"Copyright Work"	includes any copyrightable material, such as printed material, computer software or computer databases, audio and visual materials, lecture or clinical notes, teaching aids, flexible or distance learning materials, computer generated works, circuit diagrams, architectural and engineering plans or drawings, musical or dramatic compositions, choreographic works, pictorial or graphic works and all other forms of literary, artistic or dramatic works.
"Foreground Intellectual Property"	Foreground IP is any IP which will be developed from ideas which occur during the development of a project that the supplier is obliged to provide to satisfy the terms of the contract.
"Intellectual Property" or "IP"	means Inventions (whether or not patentable), designs and design rights (whether or not registrable), Copyright Work, technical formulae, research or clinical results, database rights, Trade or service names or marks or logos used in relation to any of the above and any other IPR (whether or not of the same nature).
"IP Policy"	means this Policy and the procedures for the ownership and exploitation of Intellectual Property with NES (as amended from time to time).
"Member of Staff"	includes all full-time and part-time employees of NES; appointees of NES including members of any Service Group within NES; persons paid (whether in whole or in part) by or through NES, including visiting fellows, and anyone working under NES auspices; but excluding employees of sub-contractors engaged on a Project for NES.
"Student"	means all students, including postgraduate students, exchange students and any other person who is not a member of staff but who is engaged in any form of research or Project work for or on behalf of NES but excluding employees of sub-contractors engaged on a Project for NES.
"SHIL"	means Scottish Health Innovations Limited (registered company number SC236303).
"Trademark"	is a "Badge of Origin" by which the public can distinguish the products and services of one organisation from those of another. It can be a word (including a personal name), letters, numerals, a logo, a slogan, a jingle or a combination of these features. It can also consist of a three-dimensional shape or a sound. A trademark must be distinctive for the goods and services provided.