

NHS Education for Scotland

NES Intellectual Property Policy

2nd Edition

August 2015

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Objective	To set out NES's corporate expectations of staff, contractors and others in developing, using and protecting different types of intellectual property.	
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Document Sponsor	Name	Professor Stewart Irvine
	Job Title	Director, Medicine
	Division	Medicine
Approved by/ & Date	Executive Team	
Author	Name	Rob Coward
	Job Title	Educational Projects Manager

Amendment History

Date	Issue No.	Details of Change
26 May 15	1	Addition of further examples of NES IP

26 May 15	2	Inclusion of flow chart to illustrate decision making process
26 May 15	3	Text on NES use of licensed IP
26 May 15	4	Clarification on circumstances in which NES supported students will be asked to assign IP to NES
26 May 15	5	Further information about sources of expertise/help on IP related matters
26 May 15	6	Clarification of text at sections 9, 10.1 and 10.2
26 May 15	7	Clarification of distinction between IP and IP Rights (page 8, section 6.2 and page 9
4 Aug 15	8	Inclusion of Procurement team as a source of guidance on contracts
4 Aug 15	9	Clarification of responsibilities for approving the use of NES's IP
4 Aug 15	10	Inclusion of links to standard NES agreements including purchase order terms and conditions.

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1. Introduction

A significant proportion of NES's work involves the creation of intellectual property (IP) in the form of educational programmes, websites, learning resources, guidance materials, frameworks, policies, research papers etc. Whether this intellectual property is produced in-house by our staff or contracted out, there is a need for effective stewardship of NES's intellectual property to ensure it is used in the right way. This means ensuring that our work is widely accessible to health and social care staff across Scotland to support learning, innovation and improvement. Effective stewardship of our IP also means protecting our work from misuse in cases where there is a risk that its integrity may be compromised. This Policy is designed to provide clear directions to staff, contractors, trainees and others in the use and exploitation of NES's valuable IP.

NES is also highly reliant on the intellectual property of others in the form of their research papers, reference resources, websites, images and so on. This is vital for our work, but requires NES to use others' IP fairly and responsibly, giving due attribution and reward. The NES Intellectual Property Policy is a key reference point for staff in understanding legal and organisational expectations in the use of externally produced materials. Specifically, the Policy provides a convenient guide to the terms of the 2014 Copyright Licensing Agency (CLA) agreement for NHSScotland.

2. Definitions: Intellectual Property (IP) and Intellectual Property Rights (IPR)

'Intellectual property' is the legal term for any original work created by individuals, groups or organisations. Examples of intellectual property include published text, photographs, training resources, websites, artworks, music, videos and designs.

'Intellectual Property Rights'(IPR) are held by the creators, licencees or purchasers of intellectual property. Owners of IPR are entitled to use, licence, sell or adapt Intellectual Property. IPRs may be exclusive to the creator of the IP or shared where more than one individual or organisation is involved in its development.

3. Purpose:

The purpose of this document is to provide authoritative policy guidance to NES staff on the protection and exploitation of intellectual property generated by NHS Education for Scotland, taking into account the Scottish Government's directives on this issue¹.

¹ The Scottish Government's Statement of Policy and Procedures for the ownership and exploitation of Intellectual Property (IP), HDL (2004)9,

The Policy is also designed as an authoritative reference point on the use of externally generated intellectual property based on the 2014 CLA Copyright Licence and current legislation.

4. Scope of the Policy:

This Policy applies to all intellectual property produced by NES and external organisations/individuals including:

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

Information about these different types of IP is provided at Appendix 1.

The Policy applies to all employees and other staff who may be seconded to NES or are temporarily employed by NES, and to contractors who undertake work on our behalf. It applies to all digital resources and print materials produced and commissioned by NES.

Also covered by the Policy is intellectual property created by students whilst making use of NES funds, resources, equipment, material or information.

The Policy covers intellectual property that is developed in partnership with one or more external organisation.

The Policy applies to NES's use of externally owned intellectual property, including background intellectual property used in providing products and services to NES under contract.

5. Ownership of intellectual property

5.1 NES staff

IP made, created or added to by a member of staff 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 is made explicit in all contracts of employment. This policy applies equally to sessional staff and posts that are part-funded by NES.

5.2 Contractors

NES normally has exclusive rights to IP made or created by suppliers in respect of work for which they are under contract to NES. **It is essential that all contracts with suppliers specify the ownership of all IP produced under the agreement.** Without such agreement, copyright law stipulates that all IP is owned by the supplier. This will enable the supplier to withhold permission for future use of the IP, impose conditions of use, or to charge NES separately. For example, without an agreement on the rights in digital photographs taken on NES's behalf, a commercial photographer can charge separately for each use of the images or for a new kind of use.

When drafting IPR contract clauses, the NES Procurement Team should be consulted in the first instance to ensure commercial alignment to wider Public Sector obligations.

In the interests of clarity staff are requested to consider and specify the respective ownership of '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. Normally NES will be the owner of all foreground IP developed under contract. This will ensure NES will have exclusive exploitation rights of any IP developed.

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 an educational programme commissioned by NES. Background IP is the contractor's property unless it is purchased, used under a waiver or otherwise licensed to NES, and would be agreed and accepted prior to contract signature.

It is important to ensure that, 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 in the NES product being commissioned. This must be verified and accepted prior to contract signature by the Procurement team.

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. In the first instance, the Procurement Team will offer advice on the most effective approach to take.

Any external request to disclose commercially sensitive information relating to IP 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.

5.3 NES supported students

NES supported students may be asked to assign rights to IP produced during their work placements or academic studies to NES. This is irrespective of whether the student works alone or is working in conjunction with others at NES. This also applies to students' IP developed whilst making use of NES funds, resources, equipment, material or information.

It is essential that the rights to IP produced by NES funded students as part of their studies is assigned to NES where this is used in NES products and services. In these circumstances the rights to ownership of IP should be discussed with the relevant higher education institution.

Case study: NES fellowship funding

NES operates several fellowship schemes to support the ongoing development of practising healthcare professionals and enhance specific areas of service. In some cases this approved funding is used to support formal study in further and higher education. Such programmes of study are often intended to enhance the competence and capability of staff members, for the benefit of health services and patients. Other fellowships will support the participation of healthcare professionals in programmes leading to the development of specific products or services as assessed outcomes (e.g. educational materials).

In cases where the planned outputs of educational programmes are to be used by for wider service learning it is necessary for NES to claim rights to the IP. This should be clarified at the outset in agreements with staff in receipt of fellowship support and with all education providers involved.

5.4 External organisations and individuals not under contract

NES works collaboratively with a range of organisations and individuals for our mutual benefit e.g. work with third sector organisations to develop new educational resources. Such collaborations may not involve NES funding, but it is expected that an agreement will be put in place specifying the respective obligations of the parties

involved. Such agreements should identify the IP to be produced by the collaboration and specify how this will be shared and used.

5.5 Waiving IP rights

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 4.1, 4.2 and 4.3 above.

6. Contracts with suppliers, partner organisations and supported students/trainees

6.1 Contracts with suppliers and partner organisations

In all circumstances detailed below, the Procurement team can offer advice and support when dealing with any external body.

NES [standard contract terms](#) will normally be applied where:

- 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
- 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 the Procurement Team has verified and agreed that contracts with external organisations are on appropriate terms and that NES has obtained appropriate expert advice where 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 (including other NHSScotland Health Boards, other UK NHS organisations, 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;
- the use of any pre-existing IP (background IP);
- IP that may arise from the Project (foreground IP);

- respective obligations of all parties to the contractual agreement including obligations of confidentiality and publication procedures.

NES's [standard Purchase Order form](#) sets out the terms and conditions of procurement, including the ownership of IP created on behalf of NES, their use of NES's IP, and their duty to warrant against any IPR infringement in the provision services

6.2 Agreements with NES supported students

Agreements with NES supported students must make it clear that NES reserves the rights to any IP created by students using NES funding, equipment or other resources. This includes publications, innovations and resources developed by students during their course of funded study.

7. Use of NES's intellectual property

7.1 Health and social care organisations in Scotland

Given NES's remit for the education and training of the health and social care workforce in Scotland, we will normally not charge a fee for use of our IP by Health Boards, healthcare contractor organisations and social care providers. Providers of health and social care education and their students will may also use NES's IP free of charge in normal circumstances. This is with the proviso that copyright materials are not altered without NES's written permission and are used in ways consistent with their intended purpose.

Health and social care organisations are not permitted to customise NES IP for local use except in extraordinary circumstances. Changes to our IP are considered antithetical to national consistency and may involve additional work for staff in reviewing and approving proposed changes. Where permission for customisation is granted for exceptional reasons, NES staff should authorise the revised materials prior to use.

All uses of NES's IP by external organisations must be agreed and accepted in advance and must give due attribution to NES as the owner (see 'Copyright Statement' 8.1).

Case study: Health Protection training materials

NES works with Health Protection Scotland and other agencies to develop a range of resources to support the training of healthcare professionals in preventing and treating infectious diseases and managing critical incidents. The Health Protection programme includes production of training materials for immunisation, blood borne diseases, sexual health and pandemic flu for use by Health Boards and other organisations. The materials are developed by the NES Health Protection team in accordance with a series of Scottish and international standards, and following a rigorous governance process.

The Health Protection Team has been approached by several Health Boards with requests to provide the training materials in editable formats (often as editable slides). This is to enable them to add details of related local policies, provide local contact details and make other changes as considered appropriate.

The NES Health Protection team has refused to provide fully editable versions of the training materials given that they support the consistent implementation of agreed national standards. There was concern that local customisation might result in unhelpful variations in practice and consequent reputational harm for NES and partner organisations. A compromise solution was adopted, allowing Health Boards to modify specific parts of materials, for example to include local contact details.

7.2 Commercial use of NES's intellectual property

Directors or senior managers will consider requests for the use of its IP for commercial purposes on a case-by-case basis. In some instances the use of NES IP by commercial organisations may be consistent with our strategic aims; for example, by incentivising partners to encourage uptake of our educational resources. This may require NES to specify the terms on which our IP is used and, in some circumstances, consider obtaining a reasonable return on investment for the Scottish taxpayer. Guidelines on the commercialisation of NES's IP are provided at section 10 below.

Attribution of NES as the owner of the IPR will always be required.

7.3 Requests outwith Scotland

As with requests from commercial organisations, Directors and senior managers will consider requests for use its IP from outwith Scotland on a case-by-case basis. NES should specify the terms on which our IP is used and, in some circumstances,

consider charging to obtain a reasonable return on investment. Guidelines on the commercialisation of NES's IP are provided at section 10 below.

Attribution of NES as the owner of the IPR will always be required for commercial and non-commercial use of NES IPR.

8. Protecting NES's intellectual property

Our IPR is automatically protected in law by virtue of it being published in digital or printed formats. It is required however that staff must take appropriate additional measures to safeguard NES against inappropriate use of our IP e.g. unauthorised reproduction or customisation of resources. Options available for protecting our intellectual property are set out below.

8.1 Copyright statements and Creative Commons licences

All published NES IP should include a statement indicating NES's ownership, the date of publication and the basic terms of use. This statement may take the form of the following Copyright Statement:

© NHS Education for Scotland 2015. 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.

As an alternative to copyright statements staff may use Creative Commons licenses. These licenses are based on normal copyright protections but also communicate what other rights are granted to users (e.g. the ability to reproduce the resource without changing it). This is a free, internationally recognised method of communicating permissions with a range of licensing options. A key advantage of this approach is that it allows users to understand the terms of use without the need to contact NES. Further information about Creative Commons licenses, including guidance on selecting licenses, is available from the [Creative Commons website](#).

8.2 Patents and Trademarks

Patents, trademarks and design rights are to be used in cases where we are considering commercialisation of our IP. Where Patents and Trademarks are being considered as options for protecting our commercial and/or interests NES staff must obtain advice from relevant external IP experts. Please refer to section 10 below on Commercial exploitation of NES's intellectual property.

9. Enforcing NES's intellectual property rights

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, in consultation with the CLO, to obtain an injunction and/or damages. Where IPR infringement is committed by a member of NES staff this may be subject to disciplinary proceedings. The relevant NES director is responsible for investigating cases of suspected IPR infringement and for taking action to ensure that misuse of our IP ceases as soon as possible.

10. Commercial use of NES's intellectual property

In most projects and initiatives, the management of our IPR is relatively straightforward as the commercial applications are limited. Where there is no prospect of a financial return, agreements with suppliers and Service Level Agreements (SLAs) with NHSS Health Boards will normally be sufficient to protect our copyright.

Managing potential or existing IP becomes significantly more complex in cases where we wish to exploit our right or potential right commercially. It is NES policy to take appropriate advice from legal and IP experts² 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 our 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.

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 NHSScotland.

11. Use of externally owned intellectual property by NES staff and contractors

We use others' IP at NES in numerous formats for a variety of purposes ranging from training, to research and creating new products. But whether we are accessing, copying, distributing or using materials to create new work, NES staff, contractors

² Including the NHSScotland [Central Legal Office](#)

and others need to respect the time, effort and skill invested by external organisations and individuals in developing their IP.

11.1 Use of others' IP in NES publications

11.1.1 Rights clearance

There are numerous valid reasons for wishing to use IP created and owned by external organisations and individuals in our published materials, courses, presentations etc. This includes copyright diagrams, photographs, text, ideas, care bundles etc. In these cases staff are expected to identify the owners of the IPR and to obtain permission for its use. This 'rights clearance' should specify the planned use of the IPR indicating any commercial uses, target audiences, whether the request is for a one-off use or in perpetuity etc. In some cases a licence fee for use of another organisation's IP may need to be negotiated. NES has produced a [standard letter for use in obtaining rights clearance](#) from IPR owners.

11.1.2 Where the owner of externally owned IP is unknown – 'Orphan works'

There are numerous published assets available on the internet and elsewhere where the IPR owners are unknown or cannot be located. NES staff must make diligent efforts to identify IP owners before using these 'orphan works'. Where the owners cannot be identified and located staff are required to obtain an [orphan works licence](#) from the UK Intellectual Property Office (IPO) allowing them to use the material without infringing UK copyright laws. A fee will be charged by the IPO for processing the license application and for the license where this is granted.

11.2 Accessing, copying and distributing others' IP

11.2.1 NHSScotland Copyright Licence

NHSScotland has negotiated an [exclusive licence](#) with the Copyright Licensing Authority for the use of copyright materials including extracts from books, journals and periodicals published in print and from selected digital publications. The NHSS licence allows specific amounts of published material to be copied for internal use within NHSScotland. It does not cover all publications, and the coverage of digital publications is much less widespread than paper publications – though it does include many major commercial publishers. Copies may be made from publications including those to which the NHSS subscribes and from articles or press cuttings provided by licensed external suppliers (e.g. a public relations or press cuttings agency or the British Library) where a copyright fee has been paid.

All use should be checked against the online catalogue of permissions at www.cla.org.uk.

The CLA licence covers:

- photocopying

- scanning
- copying of digital content, e.g. PDFs from electronic subscriptions or scanned articles circulated by email – that is, digital-to-digital, digital-to-print, and print-to-digital-to-print.

The terms of the Licence specify which publications may be copied, how much can be copied, and who is permitted to copy and receive copies made by NHSS staff. NES staff found to be deliberately and recklessly infringing the terms of the CLA Licence may be subject to disciplinary action.

11.2.2 Knowledge Network Document Delivery Service

The Knowledge Network: Document Delivery: Individual copies of articles can be requested online using the Document Delivery Service. This service can be used to obtain copies from the British Library with a copyright fee paid. These copies can then be used to produce further copies for internal use within NHSScotland, provided the source is covered by the Copyright Licensing Agency – it must be checked in each case, as the British Library also has separate licences with some publishers, which only allow provision of individual copies.

11.2.3 National Copyright Permissions Repository

National copyright permissions repository: the CLA licence does not cover all published material. One area that is of importance to NES and clinical practice in NHSScotland is the use of clinical tools and measures. The National Copyright Permissions Repository records the copyright status of particular clinical tools and measures and details of any permissions that have been negotiated for NHSScotland users. Registered Knowledge Network users may ask the NCPR team to investigate the terms on which particular clinical tools and measures may be used within NHSScotland.

11.2.4 RightsLink

RightsLink is a service run by the Copyright Clearance Center (the United States equivalent of the Copyright Licensing Agency) on behalf of many commercial publishers. It allows you to ask for permissions such as republishing in booklets, using in educational handouts, posting on secure intranet sites, etc. There will be a 'RightsLink' link displayed on the publisher's website to connect you to the service. Other publishers may offer a 'rights and permissions' link to their own permissions department.

11.3 Using others' IP under licence

On occasions NES uses IP created by other organisations under the terms of an agreed licence. Such licences will specify which IP can be used, the purposes for which it may be used and the standard of implementation. For example, NES delivers several courses under licence from the IPR owner, where the use of

educational materials is tightly controlled. In these instances the agreed licence sets out the fees payable by NES, the permitted types of staff (and number of staff) to be trained, the quality management arrangements to be applied and the individuals permitted to deliver the training.

12. Review of the Policy

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's work.

13. Sources of information and guidance

13.1 Informal guidance

Please contact [Rob Coward](#), Educational Projects Manager (Educational Governance) for further information and informal guidance on Intellectual Property matters at NES.

[NES Procurement Team](#) is a source of advice and guidance on agreements with suppliers and other organisations with respect to intellectual property.

13.2 Legal advice and opinion

More formal advice and legal opinion is available from the NHSScotland Central Legal Office – a part of NHS National Services Scotland. Please be aware that any advice provided by the Central Legal Office is charged to NES at full economic cost. The approval of your director should be obtained before making any contact with the CLO to request assistance.

13.3 Other sources of information

Other sources of information and guidance are as follows:

[Copyright User](#) - website providing guidance on UK copyright law

[Creative Commons website](#) – information about and access to Creative Commons licenses for published materials

[NHSScotland Copyright Toolkit](#)

[Using copyright material flowchart](#)

[Copyright Licensing Agency website](#)

[Copyright Licensing Authority NHSScotland Licence 2014 – Explanatory Leaflet](#)

[Copyright Guidance for NHSScotland](#)

[National Copyright Permissions Repository](#) – Database containing information on the permissions status of clinical tools and measures (whose use is not covered by the CLA license)

[UK Intellectual Property Office website](#)

[Orphan Works Licensing Scheme, Intellectual Property Office](#) – Overview of process for obtaining Orphan Works licenses

[Rights Clearance Letter template](#) – template to be used in seeking permission to use copyright materials where appropriate

Appendix 1

Four types of intellectual property

There are several different types of intellectual property protected by law. Some of the most relevant of these to NES's work are described below.

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 Convention¹.

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. NES's current Trademarks include ['Flying Start'](#).

Trademarks may be unregistered (marked with the TM 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 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.

Patent protection applies to inventions or innovations relating to things that are genuinely new and can be made or used. A patent protects inventions by allowing legal action to be taken against anyone who makes, uses, sells or imports an invention without the permission of the owner.

A **Design Right** provides protection for the shape and colour of original three-dimensional objects produced by individuals and organisations.

Appendix 2

Responding to requests to use NES IP – decision tree

