



## **Appendix 5: Legal Report**

This report describes the major categories of legal (and to a certain extent policy) issues that emerged at the Ripple project partner institutions over the course of the project.

### ***Incidental inclusion of trademarks***

When filming or taking photographs to be included in Open Educational Resources, it often happens that trademarks of products will be included in the resulting images unintentionally. For example, an instructional video on the use of a certain class of tool may show the tool manufacturer's logo, or a trademark on the t-shirt of a presenter. There are two intellectual property issues that could potentially arise here. First, where the trademark includes a graphical design, this design is very likely to be protected by copyright. Secondly, the trademark itself, whether graphical, textual or both, will be protected as a means of identifying goods, a service or a business.

As for the copyright issue, section 31 (1) of the Copyright, Designs and Patents Act 1988 permits the 'incidental inclusion' of copyright material, and the specific instances raised by project partners seemed to fit firmly into this 'fair dealing' exception. As for the rights in the trade mark, according to section 10 of the Trade Marks Act 1994 these are not infringed unless the mark is being used in relation to goods and services which are similar or identical to the kind of goods or services the mark was registered to represent. As with the copyright example the specific instances raised in the project seemed firmly to fall outside the infringing category.

In discussion it emerged that the impression that any incidental inclusion of trademarks is impermissible may have been widely if erroneously communicated by children's programming on the BBC. In fact the practice of covering all trademarks on repurposed modelling materials (washing up bottles, matchboxes etc) with black tape in programmes like *Blue Peter* seems to have been intended to avoid promoting specific brands, rather than to avoid antagonising the brand owners.

### ***Licensing models to encourage user contributions***

Where the institution hosting a repository is looking to encourage contributions from external third parties, attention must be paid to how well the licensing model of the repository accommodates common requirements of depositors. One issue raised by a project partner was that of the large number of regionalised variations of the Creative Commons licences. If a repository wishes to operate a model where external contributors license their own material under a Creative Commons licence (and the repository acts as simply another Creative Commons Licensee) then it would seem appropriate for the licence selected to be the regionalised version specific to the contributor's home jurisdiction; after all, it is the provisions of that version which the contributor will have to seek to enforce if a licensee misuses the Creative Commons-licensed material in question.

However, for the repository, offering both a selection of Creative Commons licence terms and regionalised variations of those terms is onerous and potentially insupportable. How this question is resolved depends to a large extent on the resources that the repository has available for depositor support.

### ***Ownership of materials created by staff***

The ownership of copyright material generated by staff was an issue that arose repeatedly and which seems to be little understood by non-specialist staff. Even in institutions where the intellectual property policy was drafted clearly and briefly, awareness of its provisions tended to be low. This in turn can lead to staff being

unpleasantly surprised when they learn of the provisions, sometimes in the context of a proposed distribution of their work as OER.

The question of the creation of material which falls outside the contracted duties of an employee but which is nevertheless used by the employer was also discussed. While in this specific instance the 'additional' material's status was quickly resolved, it brought to light the fact that staff in HE institutions are often called upon (or indeed volunteer) to work creatively in ways that are not necessarily within their job description. This in turn highlighted the necessity of regular reassessment of job descriptions and of redrafting where necessary.

### ***Inclusion of third party materials***

The issue of analysing contributions for possible infringements of third party intellectual rights was inevitably a common one. Taking a maximally risk-averse approach seemed to be a popular strategy, and a resource-efficient one where the supply of potential material is large and there are no hard targets for through-put of release.

We also discussed how to handle the situation where a resource contains both

a) 'container' material which the institution owns and wishes to CC-license

and

b) material which the institution has licensed from a third party for inclusion in the resource but not in such a way as to allow it to be CC-licensed along with its 'container'

The two approaches to this issue – either stripping the (b) material entirely or flagging it very clearly as under a separate non-CC licence – both have obvious disadvantages. In the end we concluded that the 'stripping' method fitted better to the models where reuse was the key aim, while the 'flagging' method was a better fit for strategies whose chief aim was institutional promotion.

### ***Dealing with institutional policy***

While not strictly a legal issue in the largest sense, the effort associated with conforming to institutional policy and shaping that policy was another frequent topic. The interaction between the branding policy of an institution and the creation of an OER repository raised interesting questions about how items intended for reuse should be branded, and whether use of graphical institutional trademarks made sense in this context. While it would be possible to alert recipients of the material that the trademark itself was not licensed for adaptation and reuse, this increased the complexity of the licensing activity and would not provide complete assurance that downstream users would read or understand this stipulation.

Conversely, it was noted that the process of confirming that all released materials conformed to an institutional branding policy provided a pre-existent vetting workflow into which an IPR due diligence step could be inserted, perhaps avoiding the wasting of resources associated with two separate rounds of assessment.

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