

Institutional Repositories

Model Notice & Take Down Procedure

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Institutional Repositories

Model Notice & Take Down Procedure¹

Introduction

All institutions will be aware of the need to ensure that any material stored in their institutional repositories should be legitimate and comply with the law. They will have some mechanism for checking material at the deposit stage². However, the risk of an item infringing one or more laws can never be completely eliminated and problems may occur, complaints may be made. To minimise and manage the risks it is recommended that institutions draw up, implement and publish a 'notice and takedown' policy and procedures.

This document is aimed at the managers of institutional repositories, their staff and those responsible for compliance at Higher Education Institutions (HEIs) in the Netherlands and the UK. It focuses on institutional repositories set up to hold the articles and related content produced by staff, often published in a scholarly journal. This would ideally be the definitive publishers' version (often a PDF file) but the version deposited might be a pre print or post print in some circumstances.

The circumstances of each institution are specific but the Model Procedures suggested here should provide a starting point. It is based on the policy created for the JISC's JORUM repository, a national service.³ These include **a checklist** of questions (See Appendix 1) that might inform the procedures put in place for those depositing material in the institutions repository. This checklist also has the purpose of raising awareness of some of the potential legal issues such as infringement of copyright and other Intellectual Property Rights (IPR).

Managing risk

There is no 100% way of ensuring an article (or other item deposited) is risk free.⁴ An excellent summary of the risks facing a repository manager has been articulated by Professor Charles Oppenheim and this is reproduced separately at the end of this document.⁵

Likewise if a complaint is received by an institution there is no action which avoids all risk. There is a risk if the article remains in the repository while the complaint is investigated and there is a risk if the resource is removed whilst the investigation proceeds, whether or not it is subsequently reinstated.⁶ The time and therefore resources required to investigate a complaint and take the relevant action may also need to be put into the balance.⁷ There is also the area of quality assurance with respect to the content deposited both in terms of

¹ Prepared by Ralph Weedon & Wilma Mossink, 23rd December 2005

² See Appendices I & II

³ <http://www.jorum.ac.uk/> We are grateful to Leah Halliday of the JISC's JORUM project and the University of Edinburgh for allowing us to use advanced drafts of the Notice and Take Down procedure written for JORUM and we would like to acknowledge that we have based these Model Procedures on these drafts as well as other material.

⁴ HEIs may hold Liability Insurance; however this is not always the case. Bringing an Institutional Repository on-line would include checking this insurance is sufficient to cover the risks of running a repository where it exists.

⁵ See Appendix II 'An Inventory of Legal Issues associated with e prints' by Professor Charles Oppenheim, Professor of Information Science at the University of Loughborough.

⁶ Prof. Oppenheim argues that in the case of defamation, the alleged defamatory material should be removed immediately, though there is a view that some preliminary investigation should be done. Gavin Sutter also argues; "Upon receipt of notice of a claimed defamation, the institution should, of course, remove the posting complained of immediately." See the reference in 8 below.

⁷ Rightswatch, White Paper: A way forward for notice and takedown, www.rightswatch.com (accessed October 2005)

academic standards and format and layout. However these issues are outside the remit of this document but one which repository managers should consider.

E-Commerce regulations and ISP Liability

Institutional repositories may be covered by the Electronic Commerce (EC Directive) Regulations 2002 in the UK (and their Dutch equivalent) notwithstanding the repository may not be provided for any remuneration.⁸

Internet Service Providers (ISPs) that act as a 'mere conduit' for material, for example hosting a discussion list, may escape liability for illegal acts such as defamation. However this is only the case where they exercise no editorial control.⁹ With an institutional repository this is fairly unlikely to be the case and in some cases then, institutions may be regarded in law as a publisher and therefore likely to be liable as a service provider of the repository.

Conclusions

Taking all the above into consideration though, whilst running an institutional repository is not 100% risk free neither is it so risky that HEIs should feel it impossible to set up such a service. This is important given the encouragement given to institutions to set up institutional repositories.¹⁰ A risk assessment before a repository goes live is however good practice.

It should be noted that in many cases a complainant may (where the complaint is valid) be satisfied with an apology and relevant correction to, or removal of the offending articles. Taking legal action through the courts is often expensive for both sides and both parties may wish to avoid this. In more serious cases, where formal legal action is started, it is still possible for the parties to settle out of court and cut their costs. In some cases formal mediation procedures may be available. A valid complaint does not automatically mean a court case.

Should it stay or should it go?

One of the crucial policy decisions is whether to remove an article or suspend access to it immediately on receiving a complaint, however unfounded it might appear, or, investigate the complaint first.

Some institutions may feel that to remove an item without prior investigation might suggest an acceptance of the complainant's case and damage the reputation of the HEI in question. There have been cases of vexatious and serial complainants whose arguments may have proved unfounded in the past and HEIs may wish to allow for more than one course of action to be possible when a complaint is received.

Ultimately each case must be treated on its merits. On balance it is normally worth investigating the validity of the complaint first but this must be done quickly (but note the situation with regard to defamation earlier).

The policy on Notice and Take Down

The policy and procedures should be published prominently in a place where those who access the institutional repository and/or potential complainants would intuitively find it. If access to the repository is via a web portal then a link from the main or home page to the

⁸ Statutory Instrument 2002 No. 2013, the regulations were the result of a European Directive. See also 'FE/HE Institutions and Liability for Third Party Provided Content', Section 3, by Gavin Sutter, 2003. <http://www.jisclegal.ac.uk/publications/thirdpartycontent.htm#3> (accessed October 2005)

⁹ This does not absolve them from responding to complaints however as a UK case illustrated. *Godfrey v Demon Internet Ltd* (1999) QBD [1999] 4 All ER 342.

¹⁰ See the House of Commons Science and Technology Committee, Session 2003-2004, 10th Report, 7th July 2004, in particular section 6 'Self Archiving: Institutional Repositories'. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39909.htm#a37> (accessed October 2005) The JISC's Digital Repositories programme can be found at http://www.jisc.ac.uk/index.cfm?name=programme_digital_repositories (accessed October 2005).

policy should be made. The policy should be accessible to the public including, for example, rights holders such as publishers.

The policy should contain;

- Contact details for whoever will initially deal with any complaints or queries, though this may be a generic contact point or email address;
- General policy statements, such as that all complaints will be investigated;
- A template to assist complainants in sending in a complaint and in standardising records. The sort of information required would include:
 - A description of the article or content giving rise to the complaint;
 - The nature of the complaint, for example defamation;
 - A unique reference number or ID for the article where it exists, for example if the repository has a catalogue/index;
 - Contact details of the complainant.

Key personnel

It is important that the repository has:

- A person who will receive the complaint, acknowledge it, answer any queries and establish, where necessary, the exact item giving cause to the complaint and the nature of the complaint, all without undue delay;
- A person, (though it might be the same as the above) who is authorised to take action in line with the HEIs policy and procedures, such as start an investigation and where necessary remove, that is 'take down' content;
- A person who can act as a deputy if the above people are absent;
- A senior officer of the institution who can adjudicate where necessary if the depositor and repository staff cannot agree and who can authorise a request for professional legal advice, either internally and/or externally.

Procedures

1. The complaint should be acknowledged in some form. Probably in the media used by the complainant.
 - There may be cases where, if the complaint is clearly spurious no response is given. The same might go for vexatious or repeated complaints. However, institutions should generally err on the side of caution and acknowledge and investigate all complaints;
 - Ultimately all complaints must be dealt with on a case by case basis.
2. If policy and the case dictate, an investigation is started as soon as possible. Alternatively access to the article in question is suspended or it is removed pending investigation.
3. Where necessary the complaint will be referred to the institutions legal adviser.
4. Repository staff will make a preliminary investigation to establish the basic facts, for example that the repository does hold a copy of the item that the complainant alleges it does.
 - Such an investigation should also establish who deposited the item, basic details about it and any information and/or metadata attached to it;¹¹
 - The depositor will be made aware of the nature of the complaint and given a chance to respond
5. A decision will be made on whether the complaint is upheld or whether it is invalid. In either case the complainant and depositor will be informed.
6. If the complaint is upheld the material should be removed pending negotiation with the complainant and depositor. In some cases, such as copyright infringement, the rights holder may subsequently give permission for the repository to hold the item and in others the depositor may be able to rewrite an article or revise it to ensure it no longer infringes. However, in some cases the material may have to be permanently removed.
7. In most cases where a complaint is upheld, an apology to the complainant is good practice.
8. All these steps should have suitable time frames attached to them. At any event the complaint should be dealt with within 30 days where possible.

¹¹ It is important appropriate records are kept of all items deposited in the repository.

Documentation

It would be worth the institution drafting the following standard forms and letters:

1. Depositors agreement (see Appendix 1 for a checklist), for example confirming that the depositor owns copyright in the article and that where any third party material is included within it, permission has been obtained where necessary¹²;
2. A Complaints Procedure template and/or form (on-line and downloadable to print) for complainants to use to document their complaint. This would include the complainants contact details, nature of the complaint, action they wish to be taken (for example that an article is withdrawn) additional information supporting their complaint and details of other action the complainant is taking;
3. Standard acknowledgement of complaint;
4. Standard notification of complaint to depositor;
5. When the complaint has been investigated and a decision made on its validity or otherwise:
 - Standard letter to the complainant informing them of the decision and any action taken;
 - Standard letter to the depositor likewise informing them of the decision;

Appeal Procedure

There may also be an internal Appeal Procedure which would be conducted by staff who did not investigate the original complaint and chaired by a senior officer. This would need to be appropriately documented. The complainant would have to have relevant grounds of appeal, for example new evidence, or an allegation that proper procedures were not followed.

¹² As an alternative a HEI may wish to encourage staff to deposit their material under a Creative Commons licence.

Model 'Notice & Takedown' Policy for X Institutional Repository

Every effort has been made to ensure that nothing in the X institutional repository infringes UK/Dutch law. Should you discover any content in X institutional repository you believe does infringe any law or rights you may possess, please send details to the repository complaints officer using the template available ([link to template form here](#)). This outlines the information we will need to help us identify the resource that is the subject of your complaint.

We would normally expect to respond to your communication within 30 calendar days.

What happens next?

On receipt of your complaint we will:

- Acknowledge your complaint;
- Make an initial judgement of the validity of the complaint and:
 - If your complaint is plausible based on UK/Dutch law, the resource will be removed or access will be suspended pending verification of the complaint¹³;
 - If we judge the complaint implausible or incorrect, we will inform you of this and our reasons;
- Where necessary we will seek professional legal advice on your complaint;
- We will advise the person who deposited the resource about which you are complaining, outline the nature of the complaint and give them the opportunity to refute the complaint;
- We will investigate your complaint in full and contact you with the result of this investigation and what action we have taken/will take;
- If the investigation finds in your favour, then we will remove the resource permanently from the repository unless you give us permission to retain it.

¹³Some institutions may prefer to omit the first bullet point above and replace with “If your complaint is plausible based on UK/Dutch law, it will be speedily investigated and you will be informed of the outcome as soon as possible.”

Model Text for form for ‘Submission of complaints about material held in the X Institutional Repository’

From: Insert your full Name and Contact details here including a telephone number and email address where you can be easily reached.

Your Reference: Insert the full title and any unique identifier you have given to the material which is the subject of your complaint.

Our Reference: Insert any unique title and identifier of the material to which the complaint refers, given by the repository.

Intellectual Property Rights (including Moral Rights)

If your complaint concerns an alleged infringement of Intellectual Property Rights, please indicate here where possible which type of right (for example copyright) and the type of work (for example literary work) concerned here.

Please describe the alleged infringing material in as much detail as possible including any details of content, edition, media and format.

Please state as exactly as possible the extent of the alleged infringement for example how many words of text have been reproduced.

Please confirm here that you are either the owner of the Intellectual Property Rights which are the subject of the complaint or are authorised to act on behalf of the rights owner.

Please indicate here in what way(s) your intellectual property rights have been infringed, for example by unauthorised reproduction.

Grounds for complaint other than IPR

Please state the nature of your grounds here (for example defamation, data protection/privacy, breach of confidence etc). If you are unsure what the exact legal grounds are for your concern please put your complaint here.

Please describe here the infringing content in as much detail as possible.

Describe, where possible, the exact nature of the infringement with respect to the applicable legislation, (for example that personal information has been processed and published without consent) If you do not know which law is applicable, please describe the subject of your concern in as much detail as possible.

Action requested

Please state what action(s) you are requesting, for example:

- Suspend access to the resource;
- Removal of the resource;
- Cease any further use of the material;
- Permission and fee required for continued use;
- Corrections required for continued use;
- Notification that your requests have been complied with or not.

Other information

Please give any further relevant information in relation to your complaint here.

Declaration from complainant

The information contained in this notice is accurate and I believe, is supplied in good faith and that the material in question and how it is being used is as described above and that this is not authorised by the rights holder(s)/agent/owner/complainant (delete as appropriate) and infringes UK/Dutch law as described above (delete if not applicable)

This notice is given without prejudice to any other communication or correspondence relating to the protected rights or any other right.

Please sign and date below

Appendix 1 – Checklist of questions for depositors

This checklist is designed to assist institutions design and develop their own procedures and forms. This is not in itself a depositors licence or agreement.

- Is the depositor the owner of copyright and other IPR in the content (for example a journal article)?
- If not, or only in part, have they secured permission for deposit from third party rights holders such as publishers or other authors?
- Has the depositor warranted that the content does not infringe the copyright or other IPR or Moral Rights of any other rights holder?
- Has the depositor confirmed that the content has not previously been deposited in the repository?
- Has the depositor published or had published the content elsewhere and if so, do they have the right to deposit the version of the content they are submitting?
- Has the depositor confirmed that the content is not illegal in anyway, does not break any laws and complies with all relevant legislation, including but not limited to; defamation, contempt of court, inciting race hatred and obscenity.
- Has the depositor confirmed that where any living individual is identified in the content, this is in line with the Data Protection Act (in the UK or Dutch equivalent)?
- Has the depositor confirmed that the content does not breach the confidence of a third party?

Appendix II¹⁴

Inventory of Legal issues associated with e prints by Professor Charles Oppenheim¹⁵

The creation and maintenance of eprint repositories, whether institutional or subject-based, raise a number of legal issues that have significant implications for those running the repositories. The major legal issues are the same as those that face all electronic publishers, namely,

- Breach of confidentiality and official secrets
- Personality and image rights
- Data protection
- Copyright and database right
- Moral rights
- Defamation
- Obscenity and race hate material
- Contempt of Court
- Trade marks and domain name disputes

Further details about these issues can be found in standard texts, (such as Armstrong & Bebbington, 2003; Gringras, 2003; Jones & Benson, 2002; Pedley, 2003), but key points are highlighted below.

Breach of confidentiality

There is a general rule that a person who receives information in confidence has a duty to keep that confidence and not disclose the information to others, unless there is a just reason for doing so. Whilst it is unlikely that whoever manages a repository will deliberately breach confidence, it is possible that material offered to the repository does breach confidentiality, and the manager will be a party to a breach of confidence case if it can be shown that the manager acted recklessly in accepting, and then making public, the material in question. Similar rules apply to official secrets. In certain circumstances, it is acceptable to breach such confidentiality, e.g., if the information has become public knowledge or if there is a public interest in disclosure, but the manager of a repository would have to take legal advice before going ahead and loading material that he or she believes breaches confidentiality and hopes to rely on such defences.

Personality and image rights

Whilst traditionally those in the public eye have a weaker case than others when complaining about their image appearing in published materials without their consent, that should not be taken as a *carte blanche* to use such images as one sees fit. Certainly those who are not in the public eye will receive a sympathetic hearing from the Courts if they claim their privacy has been breached, notwithstanding the lack of any formal right to privacy in UK law. Certainly, images of patients should never be reproduced on a repository without the patients' express written consent.

Data protection

The Data Protection Act 1998 is designed to ensure that information about identifiable living individuals is not processed (and that includes published on a repository) without their implied or express consent. Furthermore, individuals are given a number of rights to inspect data about themselves, to request amendment of incorrect information, and to sue for damage under certain circumstances. Furthermore, the Act restricts the transfer of personal data to a number of non-EU countries (including the USA) unless permission is obtained from the data subject or certain other conditions apply. Whilst there is no problem in having authors of items within a repository named, as they have given their

¹⁴ Please note that the text of Professor Oppenheim's briefing reflects UK law, it will not necessarily reflect Dutch law. This briefing is for informational purposes only and does not constitute nor is it intended to be, legal advice. If in doubt professional legal advice is strongly suggested.

¹⁵ Professor of Information Science at the University of Loughborough

implicit consent to such publication, issues can arise if the material on the repository relates to other individuals. (Jay & Hamilton, 1999) provides full information on the Act and its implications.

Copyright and database right

Probably the most problematic area for managers of repositories will lie in copyright law. This is because many academics do not understand the law and/or may have signed away copyright in works to publishers prior to submitting the material to a repository. It is therefore essential that those who are depositing materials into the repository fully understand both copyright law and the implications of any contracts they may have signed with other publishers. It is also essential that any material included in the repository is free of plagiarism, as that is copyright infringement and could lead to legal action against the repository.

In addition, there are a number of legal issues associated with copyright ownership of the material in a repository, and the associated metadata. These were explored in the ROMEO Project and are touched on elsewhere in this Appendix.¹⁶ Finally, there are legal issues associated with the use of Creative Commons or similar licences that express what may, or may not be done by third parties with the material held on a repository. Managers of repositories will need to consider both what sorts of licences they should issue and how they intend to police the use of materials from their repository to ensure that the terms of the licence are adhered to and that no unauthorised infringement of copyright occurs.

A repository, in addition to being a series of copyright works, is also a database in its own right under the terms of the Copyright, Designs and Patents Act 1988. The manager of the repository is therefore also responsible for protecting the database rights associated with the repository. These rights are similar to those of copyright, but the manager needs to ensure that he or she is familiar with database law as well, see, e.g., (Rees & Chalton, 1998).

Moral Rights

The creator of a copyright work has, under many circumstances, the right to be identified as the author of the work, and the right to sue if his or her work is subjected to derogatory treatment. Although not everything in a repository will be subject to Moral Rights, the manager should assume that all of it is. Therefore, the manager must ensure that any materials in the repository do indeed identify the author of the work correctly, and that the material has not been amended in such a way as to impugn the reputation of the author.

Defamation

There is a very real danger that works appearing a repository defame a third party. Unlike other areas of legal risk, where the manager of the repository is only liable if he or she was reckless in the handling of the materials in the repository, in the case of defamation, the manager is at risk unless he or she can demonstrate that they did not know, or had no good reason to know, that the material was defamatory – a somewhat different test. It is possible for the manager of the repository (or his or her employer) will be successfully sued even if they acted in good faith, but failed to take the necessary steps to ensure that there was nothing defamatory in the text or images loaded. In particular, the manager must always delete the material in question as soon as a complaint about defamation is made, even if subsequently it turns out that the material was innocuous. The law is unforgiving on this matter. Similarly, if a published journal article has had to be withdrawn because of defamation, the repository equivalent must be withdrawn as well.

Obscenity and race hate material

It should be obvious that managers of repositories should never upload text or images that might be considered obscene (or other illegality, such as race hate material) without taking legal advice. There are only very restricted circumstances when offering such materials is permissible.

¹⁶ RoMEO project: <http://www.lboro.ac.uk/departments/ls/disresearch/romeo/>

Contempt of Court

Material relevant to on-going Court cases should not be added to the repository except following clear legal advice that it is safe to do so.

Trade Mark and domain names

In general, items that are subject to Registered Trade marks should always be acknowledged as such, and authors submitting materials should confirm they have done so. Reproduction of logos, images and names is probably acceptable for *bona fide* academic use, but should not be used in the course of business, i.e., for any commercial venture associated with the repository, without the express permission of the Trade Mark owner.

The repositories own URL may find itself the subject of a domain name dispute with another domain name that is confusingly similar. There are now well-established ground rules for deciding which party “wins” such disputes and the manager should take legal advice should the repository become embroiled in such a dispute.

Furthermore, if any commercial activity occurs at the institutional or subject-based repository (such as charging to view certain parts of the repository), then a number of other legal issues associated with e-commerce arise. These are well reviewed in (Tunkel, 2000).

It will be clear from this discussion that the maintenance of a repository entails significant legal risks. Most of these can be avoided by a combination of the following actions:

1. Ensure that every author submitting material to the repository provides the repository with a warranty that nothing in the content being offered infringes copyright, is defamatory or breaks any other law. Standard texts on publishing agreements (Owen, 2002) provide an appropriate form of words.
2. Ensure that any complaint about defamatory or copyright infringing material on the repository is dealt with as a matter of urgency, and that the material in question is blocked whilst the inquiry proceeds.
3. Take legal advice in all cases of uncertainty.

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