

Intellectual Property Guidelines

Version 1.0

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1 Introduction

This guide has been developed for the use of cultural heritage institutions which are digitising cultural material and publishing it online, or are considering doing so. The objective of the document is to provide pragmatic, concise advice to cultural heritage institutions on the topic of intellectual property rights, as it impacts on digitisation projects.

The guide focuses in particular on the aspects of one body of intellectual property law, i.e. copyright law, which is **most relevant to cultural heritage institutions** involved in digitisation projects. Other aspects of industrial intellectual property, which focuses on patents, trademarks and other commercial intellectual property, are outlined in Appendix A.

Intellectual Property Rights impact on digitisation projects at two key points

- Permission from right-holders to digitise and publish must be obtained. This permission rule is referred to as **rights clearance**.
- The rights of right-holders and of the cultural heritage institution must be secured during the process of publication of the digitised material.
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This guide thus has **two main sections** – rights clearance and publication. For each section, a range of background information is provided. Guidelines on how a digitisation project should respond to this background information are then provided.

Note on links: All the links in this document were accessible in early June 2008.
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1.1 The Internet – Benefits and Risks for Cultural Heritage Institutions

Traditionally, cultural heritage institutions have controlled access to the material that they contain, by physically holding the material at their premises. To view or access the material, visitors, researchers and others were forced to physically visit the cultural institution. Once there, access was typically restricted to viewing the material.

By digitising their holdings and placing them online, cultural heritage institutions enable a new form of access, where anyone, anywhere, can view the material. The educational, cultural and quality of life benefits of such access are clear. However, such open access also means that third parties can view, copy and manipulate cultural content beyond the control of the institution. The potential exists for third parties to exploit the content in new ways and to benefit from access to the content in ways not anticipated, or approved, by the holding institution. This creates a vulnerability for the cultural heritage institution from two directions:

1. The institution may lose revenue or other benefits which should accrue to it from its holdings
2. If the author or copyright owner of the material is not the institution, he or she may make the institution legally and financially liable for the abuse of his or her intellectual property. This means that institutions wishing to digitise materials without breaking copyright laws and losing credibility should acquire the right to do so from the right-holders of such materials.

The benefits of digitisation and online publication of cultural heritage material are enormous – for the institution itself, for students, researchers and for the interested public. Opening access to the institution's collections raises the profile of the institution, underlines its public service value and helps to reinforce the message that the institution deserves public support. Online digital representations of cultural material enable re-use of the material across several fields of application, from printed t-shirts to scholarly works. Online access opens Europe's cultural riches to users around the globe, including the elderly or ill who cannot physically visit the institution. It also raises the profile of the institution, and encourages visits to view the original materials.

The potential for additional benefits from cultural tourism, from the sale of reproductions and other merchandise and from new scholarship and research is significant. However, if the legitimate interests of the institution and of the copyright holder are to be protected, then it is essential that intellectual property protection is taken into account from the very start of the digitisation project.

1.2 The Players – Institutions, Rights Owners, Users

A key player in any digitisation project is the **cultural heritage institution** which

- holds the cultural material
- digitises it and
- publishes it online in an online culture project.

However, the institution is not the only actor on this stage. Even if the material is owned by the institution, the right to represent or copy the material (e.g. by digitisation, by photography, by other means) may not be owned by the institution and may in fact be held by the **rights holder**, who may be the author of the material or by some other party. The key points are the following ones:

- digitisation is a form of reproduction that is subject to copyright restrictions;
- online publication entails a reproduction and subsequent diffusion of digitised copyrighted content that copyright law reserves to the author (or to the copyright owner) as a form of making the content available to the public;
- if the intellectual property rights on the material are not owned by the institution, the permission of the rights owner must be secured before such material is digitised or made available online. As mentioned in more depth in

section 1.3 (see below), this agreement is necessary since copyright laws prohibit any translation or modification (i.e., re-use) of protected content without the copyright owner's authorisation.

The third link in the chain is the **end user**, who accesses the digital material over the internet. Once in possession of the digital material, the user can re-use in a large number of ways. The manner in which it may be legally re-used must be clearly stated by the publisher (the cultural institution), who must have agreed this use policy in advance with the rights owner.

In many cases, of course, the cultural institution will also be the rights owner. However, this should not be taken for granted; an important step in any digitisation project is the verification that the institution has the right to digitise and to make each item available.

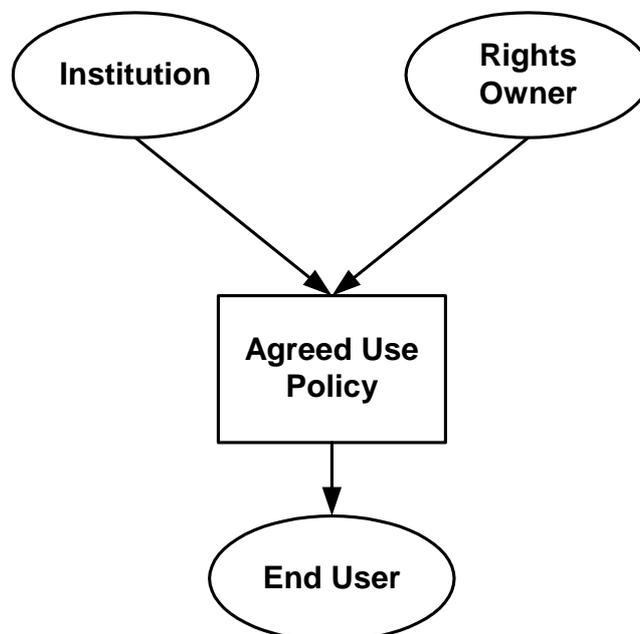


Figure 1 - The Players

1.3 What is Intellectual Property?

“Property” is something tangible that is owned, and that brings benefits to the owner. “Intellectual property” is constituted by a bundle of rights which are associated with (mostly intangible) works of intellect whose concrete expression or underlying ideas are granted temporary legal protection against uses not authorised by authors or inventors.

There are two major categories of intellectual property:

- **Copyright** protects creative ‘works’ such as literary works (e.g., novels, poems, newspapers and scientific articles, etc), paintings, architecture, sculpture and music. Copyright protects the right owners of such works, by

enabling them to allow, or to forbid, acts of reproduction, distribution, communication (or “making available”) to the public and re-use of these works. This usually means that if a third party wishes to reproduce or publish the work on the Internet, this party shall obtain permission from the right-holders. Copyright applies to original works, even if the notion of originality that makes a work eligible for copyright protection varies considerably in the EU from one jurisdiction to another, in light of the non-harmonisation of the copyright subject matter at the EU level. The copyrighted work shall ‘exist’ in some **tangible medium** (e.g. on a computer, on paper, on canvas, in stone) whereas a mere idea cannot be copyrighted as such. This means that copyright law affords protection to concrete expression embodied into a creative work without extending to protection of the ideas underlying the work. Copyright protection expires 70 years after the author’s death and, as opposite to other intellectual property rights conferred by patents, trademarks and industrial designs, it operates automatically (i.e., by law) without requiring the author of a work (or his/her assignees) to register the work at a public office to obtain the above-mentioned protection. Copyright protection covers artistic works, such as paintings, literature, music, performances, sound recordings. The owner of a piece of intellectual property is referred to as the ‘rights owner’, because he or she owns the right to allow or forbid use of the property. For example, if a group of musicians composes a song, copyright law entitles these musicians to claim paternity over the work by creating a moral right of attribution on the protected work and to secure the financial benefits deriving from commercial uses of the song (e.g., broadcasting, web-casting and recording activities).

- **Industrial intellectual property** concerns the protection of **ideas** that can be marketed in new, innovative products and processes. The most important example of industrial property is the patent, which grants exclusive use and application of an idea to the inventor, for a fixed period of time. Related concepts are trademarks, registered designs and appellations of origin.

A common feature of the two above-mentioned categories of intellectual property is that such property can, like other property, be freely acquired, sold and assigned. Importantly, intellectual property rights existing on a given item can be separated from the item itself as a consequence of the clear distinction between the *intellectual* and *real* (i.e., tangible) property regimes. For example, the owner of a painting may donate it to a gallery without conferring automatically to the gallery the right to copy the painting and to sell reproductions.

While copyright and industrial property rights are often dealt with together by law, it is **copyright** that is most relevant to cultural heritage institutions involved in digitisation projects. Industrial intellectual property is surveyed in Appendix A.

Guidance

There are countless resources online dedicated to Intellectual Property. A sample from reputable sources includes the following.

The **World Intellectual Property Organisation** is an agency of the United Nations, “dedicated to developing a balanced and accessible international [intellectual property](#) (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest”. Its handbook on Intellectual Property (“WIPO Intellectual Property Handbook: Policy, Law and Use”) is available at <http://www.wipo.int/about-ip/en/iprm/index.html>. WIPO’s FAQ on copyright is here <http://www.wipo.int/copyright/en/faq/>

Electronic Information for Libraries (EIFL.net) is a not-for-profit organisation focusing on access to electronic resources by library users in developing countries. Its “Handbook on Copyright and Related Issues” is available at <http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook>

A general helpdesk and source of knowledge about Intellectual Property is the **Intellectual Property Helpdesk**: see <http://www.wipo.int/about-ip/en/copyright.html> and <http://www.ipr-helpdesk.org/index.html>.

1.4 Why are Intellectual Property Laws Important?

Intellectual property laws provide a framework for rewarding creative people. Without them, inventors would derive no benefit from new ideas, artists would not gain from their work, and the investment made in works such as books, films and software would never be recouped. The fact that creativity is rewarded tends to stimulate new creativity, which has benefits for society as a whole.

Industrial intellectual property protects the consumer – branding and trademarks give the consumer confidence that what they are buying will meet their expectations.

For a cultural heritage institution involved in digitisation projects, the enforcement of intellectual property laws implies that the institution can safely place information online, in order to stimulate interest in its holdings, without the risk that the published material will be re-used without permission. However, it also places a responsibility on the institution, to ensure that it has copyright clearance from the right-holders, and to take appropriate measures to protect its intellectual property rights.

2 Background: The Regulatory Framework

Intellectual property is protected and regulated by a framework of laws which seek to reward creative people, while defining how new works and ideas can be used by society as a whole. The need to protect intellectual property has been recognised for centuries, as has the requirement for a common approach to intellectual property protection across national boundaries.

2.1 Global Framework

Global intellectual property frameworks were first agreed in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Since then, national and international initiatives have led to the current situation. Today's global intellectual property law is based on multilateral agreements which co-exist with and complement the Paris and Berne conventions. These agreements are the 1994 TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement and the 1996 WIPO (World Intellectual Property Organisation) Internet Treaties. The TRIPS agreement was promoted and adopted under the aegis of the World Trade Organisation to regulate intellectual property as an essential part of international trade. The WIPO Internet Treaties sought to adapt international legislation on copyright to the advent of digitisation and, in particular, of a digitally networked environment such as the Internet. In addition to that, it is worth noting that intellectual property is explicitly mentioned in the Universal Declaration of Human Rights and also in 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Guidance

The **Berne Convention for the Protection of Literary and Artistic Works** is available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

The **TRIPS Agreement** can be found at http://www.wto.org/english/tratop_e/TRIPS_e/TRIPS_e.htm

The **2005 Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions** is available at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

2.2 EU Legislation

The EU Directorate General Internal Market is responsible for the development of intellectual property law policies within the EU. The major EU initiative in the area of copyright was the 2001 EU **Copyright Directive** ("Directive 2001/29/EC of the

European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society”). The Directive mandates all member states to update their national legislation to a common, model. The Directive reaffirms the basic principles of intellectual property and in particular addresses the impact of the Internet on the scope of copyright.

Previous initiatives undertaken by the EU in the copyright field concerned the harmonisation of very specific aspects of national laws, where such laws acted as obstacles to the free circulation and marketing of goods embodying copyrighted works within the European Single Market. As of 1991, the EU started enacting copyright directives with a view to removing existing discrepancies at national level in the scope and duration of copyright protection. These directives targeted aspects such as the existence and scope of copyright protection on computer programmes and databases; the common duration of copyright (i.e., 70 years *post mortem auctoris*) and the establishment of common criteria for the identification of applicable copyright laws to satellite and cable broadcasts. All these measures were intended to enable and foster the development of single markets in all sectors where copyright law sets out EU-wide industrial policies.

Guidance

An **EU Website** dedicated to the Copyright Directive is at

http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm

A Section by Section summary of the Directive is available from the **Minerva Europe** website at

<http://www.minervaeurope.org/structure/workinggroups/servprov/ipr/documents/wp4ipr040806.pdf> (p. 10 et seq)

A complete overview of the **EU Directives** on copyright harmonisation is provided at: http://ec.europa.eu/internal_market/copyright/index_en.htm

The **US Copyright Act** § 302 is at <http://www.copyright.gov/title17/92chap3.htm>

2.3 National Laws

Each country has its own copyright laws, which reflect the overall copyright concept, flavoured by the national legislative background. Despite the fact that copyright laws vary considerably in many respects from one jurisdiction to another, **two legal models** are normally used to illustrate how lawmakers have tended to shape their national copyright systems:

- the *copy-right* model and
- the *droit d'auteur* model.

The “**copy-right**” model developed in common law countries (e.g., the UK, Ireland, the US, etc) provides for a kind of protection of creative works which is focused mainly on how to ensure a financial reward to creators and how to enable them to recoup the economic investments and to remunerate the efforts made in their creative activities. This model places emphasis on the protection of creative/useful works with a lesser focus on moral rights of paternity or integrity over their creations than is present in *droit d'auteur* systems.

Unlike the copyright model, **the *droit d'auteur* model** developed firstly in the post-revolutionary France and then adopted in most European-continental countries places the author at the core of the protection system by granting him or her non-waivable, moral (i.e., personal) rights of paternity and integrity over his or her works in addition to a bundle of very broad exclusive rights covering all commercial uses of such works.

As mentioned above, national laws within the EU are increasingly influenced by EU directives, which have served to establish a common baseline for copyright protection across the EU. What is most relevant for cultural heritage institutions online is a correct understanding of the scope of the harmonisation provisions embodied into European copyright directives and the **still fundamental role played in the European Union by national laws** in setting out basic principles of copyright protection. For instance, as things stand, the standard of originality which determines eligibility for copyright protection and statutory exceptions which exempt certain socially valuable uses (e.g., personal use, educational and research uses, news reporting, etc) from the copyright scope are not fully harmonised at the European level. This implies that cultural digitisation projects are advised to look primarily at their national legal codes to find out the copyright rules applicable to acts that they intend to perform with copyrighted works.

3 Rights Clearance Background

3.1 Copyright

From the perspective of a cultural heritage institution engaging in a digitisation and web project, copyright is the most important of the intellectual property rights. Digitisation is a form of copying, and placing material online is a form of making material available to the public; both copying and online publication are covered by copyright.

Two sets of copyright need to be respected and protected: the rights of the **rights-holders** existing on the cultural heritage items which are digitised, and the rights of the **cultural heritage institution** to protect the work for which it has invested in digitisation and online publication.

The following paragraphs focus on categories of works which are eligible for copyright protection (see §3.1.1), on the duration of this protection (see §3.1.2) and on the types of moral and economic rights that copyright laws - especially EU copyright law - provides to authors of creative works (see §3.1.4).

A specific paragraph on related rights shows that copyright systems establish intellectual property rights even for creations and activities that go beyond the categories of creative works eligible for copyright protection (see §3.1.5). These protected creations and activities are mostly associated with the performance and dissemination of both protected and out-of-copyright works by people such as performers, film and sound recording producers and broadcasters. Immediately after that, this section will focus then on the subject matter of EU database rights.

The second part of this section sheds light on issues which are of crucial importance for the activities carried out by cultural heritage institutions and, in particular, for the digital preservation of materials they may own or safeguard: the notion of public domain and the identification of categories of works for which it is worth outlining new legislative and policy trends: orphan works, out-of-print works and user-generated content.

3.1.1 To What Categories of Work does Copyright Apply?

In order to enjoy the protection of copyright law, a work must be original. It must be clear that this work is a new creation of the intellect. This does not mean that works which consist of the creative combination of elements of other works (like a collage, or a musical work which uses 'samples' of other music) cannot be copyrighted. The work must exhibit creativity and originality. Typically, all artworks, photographs, written compositions, statues, architectural plans and models fall under copyright.

As mentioned above, the *idea* expressed in the work does not need to be original. But the manner (i.e., the concrete expression) in which the idea is expressed (in words, in brush strokes, in sculpture...) must be original.

3.1.2 Does Copyright Last Forever ?

No. Copyright has a strict **duration**, which is set by law, and which in most cases follows the Berne Convention. As a general rule, copyright applies for the lifetime of the creator, plus 50 years. However, in the EU and the US, copyright applies for 70 years after the author's death date as a result of legislative initiatives and amendments undertaken firstly in the EU (by adoption of Directive 93/98/EEC, then codified and replaced by Directive 2006/116/EC) and later in the US, as a political response to the above EU initiative in this field (see the 1998 Sonny Bono Copyright Term Extension Act, which amended §302 of the U.S. Copyright Act of 1976 by replacing the original 50 years protection term with a new 70 years term).

The recent extension of the copyright term of protection in the EU and in the US aimed at protecting the economic interests of the author and his or her heirs. However, this term extension entailed that the freedom of others to use, integrate and build upon pre-existing materials would have been restricted by delaying the entrance of copyrighted materials into the public domain.

A clear issue is where a work has been created by several individuals (e.g. a pop song by Lennon and McCartney), or where the author is anonymous or pseudonymous. In this case, a typical approach is to establish a reasonable belief that the *last author* has been dead for seventy years.

Guidance

The texts of **Directives 93/98/EEC** and **2006/116/EC** are available on the EU's Eurlex system at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0098&model=quichett

§302 of the **US Copyright Act** can be found at <http://www.copyright.gov/title17/92chap3.html>

A profile of **copyright duration around the world** is provided by Australian consultancy Caslon Analytics at <http://www.caslon.com.au/durationprofile.htm>

Guidance on duration, and on other aspects of copyright, is available from the **UK National Archives** at http://www.nationalarchives.gov.uk/legal/pdf/copyright_full.pdf

3.1.3 Who Owns the Copyright?

In general, the owner of the copyright, i.e., the **right-holder**, is the author or creator of the work. However, there are exceptions to this principle that vary from one jurisdiction to another and are not harmonised at the EU legislative level. Common examples include the following:

- If the work was created by an employee of a company during working hours, the company will typically own the copyright.
- If the work is created by more than one person, all creators hold copyright, unless otherwise agreed.
- Where students have assigned copyright in their research or exercise works to the university or educational body, the copyright then resides with the body.

Copyright can be sold, inherited or assigned. It can also be divided, so that the rights holder can assign copyright for a particular application or medium. Thus, for example, an author may sell the movie rights to a book, while retaining merchandising, book publication, etc.

If a company goes out of business, its copyright assets belong to whoever bought the company. If the company is bankrupt, then no-one owns the copyright; however, if the company were to be re-established, its assets would belong to the new owners.

3.1.4 Moral and Economic Rights of the Author

In most EU countries (especially the European-continental systems adopting the above-mentioned *droit d'auteur* model), the author of a copyrighted work has both moral and economic rights on his or her creative works.

Moral rights typically include:

- A right to **paternity**, which ensures that a work cannot be falsely attributed. Thus, for example, the text of a book cannot be changed without the authorisation of the author, or a quotation must be accurate and must not misrepresent the work from which it is extracted. An interesting case is where a work is unfinished, and where the original creator does not wish to be associated with the work after it has been completed by a third party;
- A right to **integrity**, which guarantees the integrity of a work in such a way that the work cannot be modified or distorted without the author's permission. It is worth noting that this moral prerogative is associated by law with the grant of the economic right to authorise any adaptation or modification of the protected work;
- A right to **keep the work unpublished**, according to which the author is entitled to freely decide whether his or her work shall be released to the public or not.

Moral rights are distinct from economic rights (see below) insofar as **they are not limited in time and cannot be transferred**, since copyright laws in civil law systems express them as personal rights of the author

Economic Rights

Unlike moral rights and the right to authorise adaptations or modifications of copyrighted works, copyright's exclusive **economic rights** were harmonised at EU level by the adoption of Directive 2001/29. This makes it possible for us to refer to the directive text for a description of these prerogatives:

- the right of **reproduction**, which includes the right to authorise or prohibit digital reproductions and temporary copying such as that implied by acts of browsing and caching web-pages (see article 2 of Directive 2001/29/EC);
- the right of **communication to the public** (see article 3 of Directive 2001/29/EC), including the right of making the protected work available to the public in such a way that members of the public may access the work at a time and from a place individually chosen by them (i.e. on-demand dissemination);
- the right of **distribution** of tangible formats embodying the copyrighted work and the related right to authorise or prohibit the first sale or transfer of ownership in the EU territory (see article 4 of Directive 2001/29/EC).

A right-holder may freely assign the economic rights to a work to a third party; this does not authorise the third party to distort or modify the work in any way.

3.1.5 Related Rights

A further body of copyright law addresses the area of copyright related rights. These are rights which are similar to copyright, but do not protect the author of the work. Instead, they protect others who are in some way involved with the performance of the work or in its communication to the public or other audiences. The French term '*droits voisins*' (neighbouring rights) is perhaps clearer.

A good example is given by the performer of a piece of music and by the sound recording producer who records that performance by embodying it into a phonogram. While the core copyright protects the composer of the music, the performer also has a creative input which should be protected, as should the economic investment made by the recording producer. This type of creativity and investment is given an incentive by law through the establishment of copyright related rights. Producers and broadcasters of music, films, etc, are also typically protected under related rights law.

It is worth noting here that the major EU initiative in the field of copyright harmonisation, i.e. Directive 2001/29/EC, treated the subject matter of copyright-

related rights in the same way as author's rights. This means that holders of related rights in the EU enjoy the same economic rights granted to authors and briefly outlined above (see §3.1.4).

Finally, article 12(2) of Directive 2001/29/EC makes it clear that protection of rights related to copyright under the directive shall leave intact and shall in no way affect the protection of copyright.

Guidance

Related or neighbouring rights are treated under the **EU copyright directives** 92/100/EEC, 93/83/EEC, 93/98/EEC, 2001/29/EC, 2006/115/EC and 2006/116/EC. A guide to these directives and related documents is provided at http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm

3.1.6 EU Database Rights

EU database rights constitute an important category of copyright for cultural heritage institutions. These are the rights of the creator of a database to have his work protected against duplication and unauthorised extraction of data as well as large-scale copying by a third party.

Directive 96/9/EC shaped the legal protection of databases in the EU as a two-fold regime of protection. On the one hand, databases which are 'compilations' of data and which can be argued to have involved some originality or creativity in the selection of the material embodied in the database are protected under the copyright regime applicable to all creative works eligible for this protection. On the other hand, databases are protected in the EU by a so-called *sui generis* right insofar as they represent a significant investment of effort, regardless of whether or not any creativity, judgement or originality was involved in the selection of the material in the database. This *sui generis* right is particularly important for databases holding comprehensive or complete data sets, where no selection of materials can be demonstrated. Under EU law, unlike the term of 70 years after the author's death applicable for copyrighted works, the *sui generis* database right lasts for 15 years after the completion of the database. This period may be re-started if the database is substantially updated.

The law regarding the EU *sui generis* right created a significant difference between the EU and the US, where a mere aggregation of data does not qualify for copyright (or copyright-like) protection.

Guidance

The **Directive** which directly addresses the IP protection for databases is at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>

3.1.7 What can legally be done with a copyright work? A look at copyright exceptions

The details of the laws on copyright exceptions and limitations vary considerably from one country to another. This is due to the fact that exceptions and limitations are designed to pursue disparate public policies and to serve different cultural objectives by exempting socially valuable uses of protected materials from the scope of copyright.

However, article 5 of Directive 2001/29/EC provided harmonisation measures at EU level for exceptions and limitations. The coming into force of this harmonisation provision had the effect of obliging EU Member States to choose the exceptions and limitations to be introduced or maintained in their copyright regimes from a detailed list of acts exempted from the scope of copyright .

Unfortunately, the Directive made the exceptions listed in the above-mentioned provision *optional*, so that Member States were entitled to choose whether to implement these copyright exemptions or not. This legislative measure resulted in a low level of effective harmonisation of copyright exceptions and limitations under national laws, with the consequence that certain uses of copyrighted materials permitted by law in one EU jurisdiction may not be permitted in another.

Copyright exceptions in *droit d'auteur* systems are drafted very narrowly and refer to specific cases of exemptions from copyright that are enforced restrictively by courts. In common law systems such as UK and US laws, to the contrary, this body of copyright law is given a broader and more flexible shape. Under U.S. law, in particular, the *fair use doctrine* embodied into §107 of the Copyright Act provides for a set of factors to be considered by courts when reviewing cases of copyright infringement. These factors include the purpose and character of the use; the nature of the copyrighted work; the portion of the work used and, most importantly, the effect of the use on the potential market for or value of the copyrighted work. Under UK copyright law, copyright exceptions are embodied into the *fair dealing* doctrine, which gives courts a high degree of discretion in evaluating its case-by-case applicability (in the same way as the fair use doctrine allows in the U.S.) while drawing on a set of specific statutory exceptions, as *droit d'auteur* systems do.

Notwithstanding the above-mentioned differences among national laws on this point, the following remarks may apply in most EU countries:

1. Certain categories of work may be free of copyright. In some countries, the text of legislation is free of copyright. In the US, maps and other

- materials created with public money are in the public domain. This does not apply in most European countries, however.
2. A small part of written copyright works can be quoted in another work, so long as the source and copyright holder of the quotation is cited.
 3. A part of the work may be used for news reporting
 4. A work may be used by way of illustration for educational purposes.
 5. The owner of an authorised copy of a work may make copies of his or her own, for archive, private and non-commercial use. In particular, in most EU Member States (this is not the case of UK, Ireland and Malta, though) a complex statutory exception exists to legalise acts of (unauthorised) private copying carried out on recordable formats and by virtue of copying devices on the price of which the user pays a copyright tax collected by authors' collecting societies. Under this statutory licence scheme, for instance, the lawful acquirer of a music CD is entitled to make a copy for his or her own use.

As regards **applicable copyright exceptions**, cultural heritage institutions should always bear in mind the following issues raised by the enactment of **Directive 2001/29/EC**:

1. Article 6 of this Directive on copyright in the information society protects the use of digital rights management (DRM) and copy protection devices, and legislates against efforts to overcome them. This means that the above-mentioned making of copies of copyrighted works for personal and archive purposes or for other purposes that up to now have been covered by statutory exceptions may be legally prevented by the right-holder through license agreements automatically enforced by DRM technologies. In addition, the Directive tends to make copyright laws more stringent than they were before. See *section 5.2.8* for more on DRM.
2. The interpretation of copyright exceptions, and the implementation of the 2001 EU Copyright Directive, may vary significantly from one EU member state to another. Cultural heritage institutions should review their own legislation and case law before relying on a copyright exception as the basis for a decision to publish material online.
3. In particular, prior to publishing their materials online, cultural heritage institutions should check carefully whether their applicable national law has opted for (or maintained) and implemented a few copyright exceptions embodied into article 5 of Directive 2001/29/EC and applicable to acts carried out by libraries and other cultural institutions.

These acts that national laws are entitled to exempt from copyright are:

- Specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage (see art. 5(2)(c));
- Use of works, such as works of architecture or sculpture, made to be located permanently in public spaces (see art. 5(3)(h));
- Use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use (see art. 5(3)(j));
- Use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of libraries, educational institutions, museums and archives of works not subject to purchase or licensing terms which are contained in their collections (see art. 5(3)(n)).

3.1.8 The Public Domain

When a work is not protected by copyright, related rights or other legal constraints, it is said to be 'in the public domain'. Because the laws which govern intellectual property vary from one country to another, items may be in the public domain in one country, and protected in another. When a copyright has expired, the work will usually enter the public domain. In EU countries, for example, books where the author has died more than seventy years ago will be in the public domain. Particular editions or presentations may be protected by intellectual property law, but the literature itself may be re-used without restriction. The works of Beethoven are in the public domain; however a performance of Beethoven's music will be protected by related rights for the performers, sound recording producer, broadcaster, etc.

Precise details of how a work enters the public domain vary from jurisdiction to jurisdiction. In general, it is best to assume that an item is not in the public domain. In particular:

- An item received for free (e.g. downloaded from the internet) is not necessarily in the public domain: this is the case of open source software and works released under various internet-friendly copyright licensing models such as the GNU Public License, Copyleft and Creative Commons, which are not in the public domain;
- An item without a copyright © notice is not automatically in the public domain.

Guidance

Several **EU projects** address the public domain. Examples include **Communia** (www.communia-project.eu), and **Rightscom** (www.rightscom.com)

More in-depth discussion of the underlying rationale is presented by the **Foundation for Information Policy Research (FIPR)** at <http://www.fipr.org/intellectual.html>

3.1.9 Orphan Works

An orphan work is a copyrighted work where it is practically impossible to identify or contact the right-holder in order to gain authorisation to use the work. There is little definitive legislation on the topic of orphan works, although the (slow) trend is towards making it possible to move orphan works into the public domain.

Orphan works are a major issue: an enormous amount of material exists which has been created in the last 100 years (so the likelihood is that the creator has not been dead for seventy years) and so is under copyright, but the rights holder is impossible to identify or contact. As a result, enormous amounts of cultural material (e.g., documentary films, photographs, and so on) are not being reproduced, included in other works or made available to the public, even though in many cases the rights holder might have no objection. The risk for the user of an orphan work is great: if a copyright holder emerges after an orphan work has been used, the resulting costs may be significant.

There are several **ongoing efforts** to deal with orphan works, including proposals from the US Copyright Office (report submitted to US Congress Jan 31, 2006) and the Gowers Report in the UK. The overall thrust of these initiatives is to allow the use of orphan works after a 'reasonable search' by the user for the copyright holder. A certain amount of resistance is being driven by the photographic, graphical and textile design industries, where copyright information is easy to detach from the work itself.

The major initiative undertaken by the EU in this field is the **i2010 Digital Libraries initiative** started in September 2005 and then developed by the European Commission – DG Information Society and Media. Within this initiative, the European Commission set up a High Level Experts Group (HLEG) to examine various legal, technological and economic issues involved in the Digital Library initiative. This group brought together cultural institutions, publishers, technology firms and academics to find ways forward that are agreeable to stakeholders on potentially difficult issues. A "copyright sub-group" was established within the HLEG to study and report on the implications for copyright of digitisation projects involving orphan works as well as out-of-print works.

As regards orphan works, a **Memorandum of Understanding** was signed on 4 June 2008 by 24 European and international organisations of all categories of stakeholders including libraries. In this document, the parties have established a common understanding of what measures have to be taken before a work can be considered to be orphan. In this regard, the Memorandum provides **guidelines**

for **diligent search for right-holders to orphan works**, which address four main sectors: text, audiovisual, music/sound, visual/photography.

In particular, these guidelines detail an agreed **procedure of diligent search** for right-holders, according to which:

- Search is carried out prior to the use of the work;
- Search is performed title by title or work by work;
- Search starts usually from the country of origin/publication/production of the work;
- Search shall be documented (dates, resources and search terms employed, copies of public announcements where relevant);
- An orphan work notice should be attached to the work at the time of publication (e.g. "Work still in ©, right-holder could not be traced...").

In addition to that, the HLEG June 2008 Memorandum of Understanding provided **guidelines for avoiding orphan works in the future** by use of electronic identifiers (including the name of the author); automatic metadata on works and right-holders upon creation; standard identifiers recording the devolution of rights (i.e. right-holders chain); and records of authors' death dates in national bibliographies.

Guidance

The **i2010 Digital Libraries High Level Experts Group** addresses Orphan Works in its report at

http://www.edlproject.eu/downloads/report_HLEG_preserv_orphan_works.pdf

The **EU i2010 Digital Libraries initiative** has led the development of the above-mentioned **Memorandum of Understanding on Orphan Works**. It can be viewed and downloaded at

<http://www.eblida.org/uploads/eblida/2/1213704515.pdf>

More information on the **High Level Experts Group** is available at

http://ec.europa.eu/information_society/activities/digital_libraries/cultural/actions_on_consultations/hleg/index_en.htm

3.1.10 Out of Print Works

When demand for a work from the public drops below economic levels, publishers stop reproducing it. This makes it difficult to acquire a copy of the work, which is said to be 'out of print'. In general the fact that a work is out of print and a commercial copy of the work is not available does *not* mean that it is out of copyright. Out of print works remain protected by the same laws as works which are easily commercially available.

In the EU, a report by the above-mentioned **i2010 Digital Libraries High Level Experts Group (HLEG)** suggested new model licenses to allow libraries and

archives to make digital versions of out of print works available on secure networks.

If a long-term solution for out of print works did not emerge in the EU, for the public and for cultural heritage institutions this would mean that a large number of works could become obscure and unknown, due to being protected by copyright law despite the fact that there is no commercial exploitation ongoing. The i2010 Digital Libraries HLEG has sought a permanent solution to this problem by drafting and recommending a **model license for the digitisation and accessibility of out of print works** to the European Commission.

This proposal by the HLEG copyright sub-group was based on four main elements:

- a model license;
- the establishment of a database of out-of-print works;
- a joint clearance centre;
- a procedure to clear rights.

It is worth noting here that the HLEG proposal of adoption of a model license was two-fold, since it included standard agreements for the digitisation and online presentation of out-of-market books over both **open networks** accessible by the general public and **secure networks** accessible by authorised users only.

Guidance

Out of Print works are addressed by the **i2010 Digital Libraries High Level Experts Group** at http://www.edlproject.eu/downloads/report_HLEG_preserv_orphan_works.pdf

3.2 IPR and Digital Preservation

The preservation of digital material relies on its repeated copying, in order, as a minimum, to ensure that the media on which the digital material is stored remains current, and that hardware is available which can read the media. Thus, for example, digital content originally stored on 5.25 inch floppy disks are almost unreadable now, and will need to have been copied to 3.5 inch disks, then to CD.

The archiving or backing up of a digital artefact is itself a form of copying and so governed by intellectual property law. Fortunately, there are exceptions to copyright law that can often be applied. These include specific acts of reproduction made by publicly accessible libraries, educational establishments, museums or archives which are not for direct or indirect economic or commercial advantage (see Article 5(2)(c) of Directive 2001/29/EC) and use for educational and archive purposes.

A need to ask the right-holder of a digital artefact for a specific authorisation could arise where copying for purposes of archiving or backing up were not covered by a copyright exception under the applicable national legislation. As a result, cultural heritage institutions which engage in digital preservation may need to seek to secure the right-holder's permission before archiving takes place. In so doing, the institution should emphasise that the copying is for preservation only and will have no impact on the commercial value or exploitation of the work, and that the integrity of the digital object will not be reduced.

Digital preservation may be covered under Article 5(2) of the above-mentioned 2001 EU Copyright Directive, which lists several exceptions to the right of reproduction. The most relevant among these exceptions for purposes of digital preservation is provided by article 5(2)(c), which allows EU Member States to exempt from copyright

"...specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage [...]"

However, all these exceptions, including the most important one for cultural institutions, are *optional* under the 2001 Copyright Directive, which means that some Member States may enshrine them in national law, and some may not.

The enforcing of intellectual property using digital rights management has an impact on the preservation of digital material. This is discussed in *section 5.2.12*, below.

Guidance

The **CEDARs project** addressed the relationship between Digital Preservation and IPR. The key results are published here: <http://www.cus.cam.ac.uk/~ew206/ipr.html>

The **Digital Preservation Coalition** is an organisation dedicated to addressing many issues in this area. Their website is at www.dpconline.org

3.3 IPR and User-Generated Content (Web 2.0)

Web 2.0 content is created to a large degree by the users. Typical applications such as YouTube, Flickr and Facebook combine an infrastructure provided by the website with content provided by the users. There are several issues here.

- Much of the material on sites such as YouTube is uploaded in contravention of copyright. While this is mainly a concern for the YouTube

site (and its parent company, Google), it does highlight the fact that ‘user-generated’ content may not in fact be generated by users.

- Material on Web 2.0 sites is typically uploaded in compliance with set terms and conditions of use. These will often make the content, which is generated by the users, subject to copyright which is vested in the site. It may also license the site to re-use the content for its own purposes.

For a cultural heritage institution which wishes to add some Web 2.0 functionality to its own web application, for example by enabling users to comment on cultural material online, or to upload old photos of their own families, or to tell stories that their ancestors told them, etc., it is essential that IPR be clearly managed from the start. That means that cultural heritage institution sites must also have clear terms of use, to which users must consent, before they create content on the site. This protects the site from third parties (e.g. the creators of copyright material which users are uploading without considering IPR), and also ensures that the site can re-use and re-format user content if the cultural heritage institution sees fit.

Guidance

JISC in the UK has funded a project (Web2Rights) which addresses this issue. See <http://www.web2rights.org.uk/index.html>

3.4 Other Legal Issues

Copyright law and licensing are important issues to take into account when creating digital item, digitising non-digital items and providing access over the internet. In many cases, copyright and other intellectual property issues are the most important obstacle to be overcome. They may, for example, have a decisive impact on the choice of material to be included in the online resource.

However, there are other legal issues which need to be considered when offering an online cultural heritage resource. These include the following:

- The need to protect personal privacy
- Indecency and obscenity laws
- The right to freedom of expression
- Personality rights

Material placed on the internet is accessible globally. This means that cultural heritage institutions may need to take legal and cultural sensibilities in other countries into account, when creating online resources.

3.4.1 Personal Privacy

Cultural heritage institutions should not intrude upon the personal privacy of any individual while creating and publishing content on the internet. In particular, no pictures of individuals should be taken and published without their consent. Even

if the picture is, for example, covering an exhibition, it is important that no individual can be identified in the picture.

Guidance

The **w3c** has an initiative on personal privacy policies at <http://www.w3.org/P3P/details.html> and some guiding principles at http://www.w3.org/TR/P3P/#guiding_principles

EU Data Protection law is outlined at http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

3.4.2 Indecency and Obscenity

The line between art and indecency varies from one jurisdiction to another. In particular, the laws concerning nudity are typically stricter in the US than in Europe, while Middle Eastern customs are often even more conservative. While selecting material for an online resource, cultural heritage institutions may take into account the greater sensitivity of some audiences to certain types of material.

3.4.3 Freedom of Expression

The previous paragraph may be in direct conflict with beliefs and laws which support freedom of expression. It is the responsibility of the cultural heritage institution to decide where the limits of good taste and freedom of expression lie.

Freedom of expression also applies to artists, and may conflict with personal privacy laws. If an artistic installation includes representations of individuals, the potential exists for these individuals to believe that their personal privacy has been intruded upon. Again, this is something which the cultural heritage institution may take into account.

Guidance

IFLA and **UNESCO** have published guidelines on access to online material, at <http://www.ifla.org/faife/policy/iflastat/Internet-ManifestoGuidelines.pdf>. This follows on from IFLA's Internet Manifesto, at <http://www.ifla.org/III/misc/im-e.htm>

3.4.4 Personality Rights

In most jurisdictions, individuals have legal rights over the use of their likeness (i.e., face, voice, other distinguishing characteristics). This is particularly relevant for famous persons. This bundle of personality rights known in the US as "right of publicity" prevents the use of their likeness for promotion of products or services

without their authorisation, and protects revenue from endorsements. Cultural heritage institutions must avoid the unauthorised use of images of famous persons in promotional or online resources. Similar laws protect the use of images of fictional characters.

The right of publicity shall not be confused with the (potentially conflicting) freedom enjoyed in most legal systems by the press or educational institutions to freely use pictures of public characters insofar as the use and display of such images is justified by purposes of news reporting, educational uses etc. A good example of this approach in relation to free use of public characters' images is given by article 97 of the Italian Copyright Act (i.e. Law 633/41).

Guidance

The Arts and Humanities Research Council Centre for Studies in Intellectual Property and Technology Law at The University of Edinburgh (**AHRC**) has a database of personality rights cases, including analysis, at

http://personalityrightsdatabase.com/index.php?title=Main_Page

The **Italian** copyright law referenced above can be consulted at

http://www.agcom.it/L_naz/I_633_41.htm

3.4.5 Authenticity and Certification

It is of course essential that cultural items which are published online by cultural heritage institutions are authentic. The credibility of the cultural heritage institution is at stake if the material published by the institution is not authentic.

3.4.6 Reproduction Rights

The cultural heritage institution must ensure that it has authorisation to *reproduce* the items that it wishes to include in its online resource. Since placing an item on the Internet amounts to effectively copying and making the item available to the public, the cultural heritage institution must be able to show that it owns not just the item, but also the right to reproduce it. The fact that a cultural heritage institution happens to own an item does not necessarily imply that it has the right to reproduce it, or to publish it online. In particular, the fact that national laws (e.g., the Italian Code of Cultural Heritage and Landscape) may establish copyright-like reproduction rights on out-of-copyright cultural assets (e.g., works of art, archaeological findings, etc) in favour of the cultural heritage institutions that own and physically safeguard them should also be taken into account prior to undertaking digitisation and online publication projects.

Guidance

The **International Federation of Reproduction Rights Organisations** is at <http://www.ifrro.org/show.aspx?pageid=home>

3.4.7 Donor Restrictions

The fact that a person or organisation has donated an item to a cultural heritage institution does not necessarily imply that the intellectual property rights to the item have also been donated. In addition, donors may sometimes explicitly restrict the manner in which items may be used. Prior to online publication, the cultural heritage institution must verify that there are no restrictions of this nature, and that rights have been cleared.

3.4.8 Safety of Cultural Property

The publication of information about cultural property raises its profile. More people become aware of the cultural property, its location, its value and its other properties. This creates a risk that unscrupulous third parties may use the information provided on the internet to identify and steal or damage cultural property. A significant proportion of all cultural property is not protected – it is outdoors, often in relatively remote locations, sometimes under the sea. Care must be taken that cultural heritage information published online does not lead to an increase in theft, vandalism or other damage.

3.4.9 Unfair Competition

While creating a new online resource, the cultural heritage institution may investigate the existence of similar resources which are provided on a commercial basis. For example, genealogical resources are provided by a number of companies online; the provision of free online access to similar resources may impact on the business of commercial companies. In order to avoid accusations of unfair competition, the cultural heritage institution may review the marketplace and attempt to avoid intruding on the business space of established enterprises. However, this prudent approach should not discourage cultural heritage institutions from commercially exploiting their digitised resources insofar as the services they are able to provide through digitisation techniques are integral to their institutional mission.

3.5 New Licensing and Access Models

The copyright and industrial intellectual property rights described in section 3.1 and Appendix A are all based on the Berne and Paris conventions. While the intellectual property laws have developed continuously in the last century, the fundamental concepts remain constant.

The arrival of the internet and the opportunity for large-scale publishing of ideas and works at very low cost has led to the demand for new forms of intellectual property protection, and for new models which enable free sharing and duplication of ideas, without the loss of ownership of an idea or a work. This demand is also driven by a perception (see *section 5.2.9 et seq*) that traditional copyright law and more recent rights management technologies have a negative effect on society's ability to create, to innovate or to enjoy content.

One response to these perceptions is the *open source software* movement; a more recent development is the creation and publication of other (non-software) forms of content on the internet, using a class of intellectual property management called '*Creative Commons*'. These are explored here.

By and large, these new license models are applied most often to digitally-born works such as web pages, documents, diagrams, software and documentation. They are also increasingly applied to digital photographs, music recorded in digital formats and other forms of digital art. In general, the new licensing schemes aim at "deactivating" copyright restrictions by making duplication and distribution of works easier.

3.5.1 Collective Rights Management

Collective Licensing is an access model where copyright holders make their works available for duplication, download, sharing, public performance, broadcast, etc. *through a collective organisation*. The collective organisation receives fees for the use of the material it manages, and it allocates these fees to its members on the basis of the popularity of their works. A similar model exists in the payment of fees for music broadcasts by radio stations. This has significant benefits for all concerned – the radio stations do not need to discover and pay thousands of different rights holders; musicians do not need to concern themselves with monitoring and demanding payment for the broadcast of their works.

It has been suggested by the Electronic Frontier Foundation that a similar model could be used for music sharing online.

Guidance

The **Electronic Frontier Foundation's** paper on collective licensing for music sharing is at <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>

A Danish approach to **extending collective licensing** in the library sector is provided at http://ec.europa.eu/information_society/activities/digital_libraries/doc/mseg_meet/1st/von_hielmcrone.ppt#1

3.5.2 Creative Commons

Creative Commons is a non-profit organisation which develops and publishes legally binding licences that allow a rights holder to grant some or all of their rights to the public while keeping others. Creative Commons licences offer a set of licensing models which range from dedication of a protected work to the public domain to retention of most rights of commercial use.

The underlying driver for Creative Commons is the fact that the organisation believes that copyright legislation does not stimulate the re-use and further development of copyrighted information, and that creators are held back by the restrictions of standard copyright models. Creative Commons licenses protect the rights of creators, while enabling more open use of the works which they create.



Creative Commons licenses were originally created for the US legislative context; a wide range of localised licenses are now available.

Several million pages of web content use Creative Commons licenses.

Guidance

The Creative Commons **website** is at www.creativecommons.org.

An exploration of the value of **Creative Commons for public sector information** (in the Netherlands), including a description of Creative Commons, is at

http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.df

3.5.3 Open Content

The OpenContent Licence is another licensing model which provides a legal



solution to enable the copying and distribution of content without payment.

Open content describes any creative work which can be freely copied or modified by anyone. Wikipedia is the largest open content project. Open content is royalty free – it may be in the public domain or it may be governed by a free (i.e., no-payment) license such as one of the Creative Commons licenses.

Open Content licenses vary somewhat in terms of what they allow. In general, open content licenses allow free copying and distribution of the work. However, the creation of **derivative** works by the grant of permission to re-use the licensed content may be more controlled. Some common restrictions include the following:

- works which derive from an open content license must themselves be released under an open content license – this prevents a third party from making a commercial product on the basis of content he received for free;
- the open content shall not be used in a commercial application;
- a copy of the license must be attached to any derivative work – this ensures that further descendant works are covered by the same licence;

- attribution of the source of the content must be attached to the content, and retained in later derivative ('descendant') works. This attribution is often the only form of reward enjoyed by the original/previous creator, and is used by him as a method to develop reputation, employability, etc;
- no warranty is provided – the work is provided on an 'as is' basis.
- The license cannot be modified.

Guidance

A **website** providing general information on Open Content is at <http://opencontent.org>

3.5.4 Open Source

Open source is a software development method where teams of volunteer programmers work on projects which are released free of charge, typically over the internet. The source code is released, which means that other programmers can review, modify and enhance the software, and release it again. This can lead to high-quality software development, as well as the involvement of many talented people in each project. It also means that the user of an open source product can adjust it to his own ends.



An open source software license complies with the following:

- The software can be redistributed, either on its own or as part of a larger solution.
- The software must include the source code, and must allow the distribution of the source code.
- The software must allow the creation of derivative works, which may be distributed under the same license. If the author wishes to protect the integrity of his source code, he must allow the parallel distribution of 'patch files' which modify the code at build time.
- The software must be available to all groups and in all fields of endeavour.
- The software license must not rely on the software being part of a greater solution or package.
- The software license must not restrict the distribution of any other software with the software
- The license must not enforce any particular technology or style of interface.

There are dozens of major open source licenses, each slightly different from the other, but all meeting the criteria outlined above. Examples include the Apache Software licence (covering the popular Apache Web Server), the GNU General Public Licence (GPL), CeCILL, the Nokia Open Source Licence, the Mozilla Public License, and many more.

It is worth noting the recent approval and release in all languages of EU Member States of the European Union Public License (EUPL) by the European Commission – DG for Informatics, within the Open Source Observatory project. This new open source licence was developed by the European Commission with a view to applying it to the free distribution of its own software to citizens, undertakings and public administrations in the context of e-government and e-learning programs.



Figure 2 - Copyleft and anti-copyright logos. From 'A Guide to Open Content Licences' by Lawrence Liang (http://pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide).

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A large proportion of all Internet sites use open source components. Particularly popular are

- Apache, the web server that drives more websites than any other
- Linux, a very popular operating system
- MySQL, PostgreSQL, Firebird and other open source databases
- PHP, Python, and other scripting languages

3.5.4.1 How Open Source Works

Open source software is developed by teams of collaborating programmers, who typically work in different organisations and even in different parts of the world, who are interested in a particular problem domain. There are many thousands of open source projects being developed at any one time, depending on the time and the enthusiasm of their development teams.

Typically, open source software does not offer professional support or make guarantees as to functionality; however, this limitation is overcome by the availability of active, enthusiastic user communities, who share an ethos of assistance and open knowledge. The communities may include the developers of

the software, or simply those who have used it and are in a position to help others. Commercial support for very popular open source software is often also available, from companies and individuals who are expert in the software. While the software cannot be sold, support and consultancy can be.

3.5.4.2 Impact of Open Source Model on Cultural Heritage Applications

Open source software, by its very nature, is flexible and easily modifiable by a competent programmer. This means that the software can evolve over time, to cope with the requirements and demands of changing legislation and technology. A cultural heritage project which uses open source software thus has the opportunity, given the right human resources, to maintain access to its materials across new technology versions, in compliance with new standards, and in the face of new requirements from users, government and other stakeholders. Interoperability with other (and future) systems is facilitated in the open source context, by the fact that the software can be extended, without losing existing functionality.

Guidance

A **website** outlining open source initiatives is at www.opensource.org

EUPL: <http://ec.europa.eu/idabc/en/document/7330>

CeCILL, Licence française de logiciel libre <http://www.cecill.info>

3.5.5 Open Access

As mentioned above, Open Access (OA) is a publication model for cultural and academic publications that relies on the use of the internet. Peer review in academic open access publication is carried out either by OA journals or by readers commenting on the papers online. Authors, peer reviewers and OA journal editors all donate their time – this is not incompatible with existing academic publishing, where authors are not paid for their papers.

OA is also supported by cultural heritage organisations which believe that it should be easier to gain access to cultural content online.

OA is typically funded by institutions which host the material, sponsorships, fee payments by authors, subscription by academic institutions or companies, or the provision of advertising or auxiliary services.

OA has a number of advantages for the publication of scholarly communications:

- there are no price barriers: access is free;
- there are no permission barriers: OA publications are copyright-free (the use of OA material in a commercial application may or may not be free);
- OA licences typically protect the integrity and attribution of content;

- OA does not preclude copyright, peer review, career advancement, revenue or other aspects of traditional scholarly publication. But the costs are not borne by readers, and so do not serve as barriers to access;
- scholars lose nothing by using OA – unlike musicians and movie producers, scholars typically receive no payment from journals or publishers.

Much OA content is published under a Creative Commons-like license. The wide range of such licensing standards allows authors to control the degree of freedom enjoyed by the public in terms of re-use of their work.

OA requires the consent of the author. It is *not* the same as the public domain. Nor is it similar to file sharing networks such as KazaA, e-Mule or Bit Torrent, where copyrighted works are often copied, made available and accessed by users illegally, i.e. without the right-holders' authorisation. This does not mean that the adoption of open access licences is not relevant to peer-to-peer networks. On the contrary, the use of standardised OA licences to protected content by its author and the subsequent insertion of a link to the text of the licence into the metadata of the file embedding the content makes it much easier for the users to understand that the content can be freely copied and disseminated under certain conditions.

Guidance

IFLA (International Federation of Library Associations and Institutions) has a statement on Open Access here <http://www.ifla.org/V/cdoc/open-access04.html>

The **Berlin Declaration** on Open Access to Knowledge in the Sciences and Humanities is available here:

http://oa.mpg.de/openaccess-berlin/berlin_declaration.pdf

The **ECHO project** is an example of an open access project focusing on cultural heritage, at <http://echo.mpiwg-berlin.mpg.de/home>

4 Rights Clearance Guidelines

This section provides practical guidelines on rights clearance for cultural heritage institutions which are engaging in projects which digitise cultural heritage items and provide access to the digital material over the internet. Such projects are referred to here as “*online culture projects*” or simply ‘*projects*’.

Requirement Levels

Further, in standards documents, the key words ‘must, should and may’, when printed in bold text, are used to convey precise meanings about requirement levels. These requirement levels reflect the terminology used in Internet Engineering Task Force (IETF) documentation, and defined in IETF RFC 2119.

- **Must:** This word indicates absolute technical requirement with which all projects must comply.
- **Should:** This word indicates that there may be valid reasons not to treat this point of guidance as an absolute requirement, but the full implications need to be understood and the case carefully weighed before it is disregarded.
- **May:** This word indicates that the topic deserves attention, but projects are not bound by this advice.

There are **two main issues to be considered – rights clearance and publication**. **Rights clearance** is concerned with identifying the rights holder for any material that you plan to publish. **Publication** is concerned with protecting your own rights, and those of your rights holders, when your material is accessible online.

4.1 Summary

Before digitising a work, a cultural heritage institution should carry out at least the following steps

1. **Rights Clearance** – ensure that permission from the rights holder is available, where necessary, for the digitisation and publication of the work.
2. Where the rights holder cannot be identified, or does not respond to communication, or no longer exists (e.g. a bankrupt company) – **take and record all reasonable steps to secure copyright clearance**. If clearance cannot be obtained, consider not digitising the works. Only proceed where the benefit, risk of problems and potential costs of problems have been considered and balanced. This applies particularly to **orphan works**. The Memorandum of Understanding approved in June 2008 under the **i2010 Digital Libraries initiative** details a useful **procedure of diligent search** for right-holders to orphan works.

3. While there is clearly no requirement to obtain permission to digitise **digital-born** works, all other rights (such as reproduction and publication) must be cleared.
4. Where it is assumed that a work falls into the **public domain**, ensure that this is the case.
5. Where a project considers its use to be covered by a copyright exception, and thus not subject to copyright restrictions, this must be fully verified. The key criterion is the impact which your actions may have on the commercial interests of the rights holder. Only proceed where the benefit, risk of problems and potential costs of problems have been considered and balanced. Bear in mind that the 2001 Copyright Directive is not overall very supportive of copyright exceptions, and that web publication of copyright works is unlikely to be able to use any exceptions as a justification.

*Pragmatically, cultural heritage institutions **may** consider digitising **only** items which are either certainly in the public domain or items to which the institution certainly owns the full copyright.*

4.2 Obtaining Permission

A fundamental first step for online culture projects is to **ensure that the cultural heritage institution has authorisation from rights holders to duplicate (digitise) items and to place them online (publish and distribute)**. If items are expected to be free of copyright restrictions, this must be verified.

The rights status of items will be an important factor in the selection of which items to digitise and publish online.

Guidance

Excellent resources on copyright can be found at

British Academy: <http://www.britac.ac.uk/reports/copyright-guidelines/final%20guidelines.pdf>

Technical Advisory Service for Images (TASI)
<http://www.tasi.ac.uk/advice/managing/copyright.html>

A **case study** of how rights holders were tracked down by two UK projects is presented by **AHDS** at <http://ahds.ac.uk/creating/case-studies/tracing-copyright/index.html>

4.2.1 Digitisation and Publication of Physical (non-Digital) Items

Projects **must** establish the copyright status of all physical items which are to be digitised and placed online. Projects **may** use the copyright status of an item as a criterion in the selection of which items to include in the scope of the project. Projects **should** establish the intellectual property status of items before beginning the digitisation process.

Projects **should** establish whether an item falls into the *public domain*. The most common test will be to establish the identity and time of death of the creator of the item. Items where the creator has been dead for over seventy years will usually be in the public domain.

Guidance

Several EU projects address the public domain. Examples include Communia (www.communia-project.eu), rightscom (www.rightscom.com)

More in-depth discussion of the underlying rationale is presented by the Foundation for Information Policy Research (FIPR) at <http://www.fipr.org/intellectual.html>

Where an item does not immediately fall into the public domain, projects **should** create a record (a diligence file) of the research and other effort invested in identifying the rights holder, contacting the rights holder and receiving authorisation to digitise and place the item online. Such a record will be valuable in the event that no rights holder authorisation can be established, to demonstrate that the project took all reasonable efforts to secure the authorisation. This applies particularly to orphan works (see *section 3.1.9*) and follows the approach suggested by the guidelines for diligent search for right-holders to orphan works developed within the EU i2010 Digital Libraries initiative.

If no authorisation is secured, projects **should** establish whether or not the digitisation and online publication of the item may benefit from a copyright exception (see *section 3.1.7*). If the project concludes that its work does in fact fall under an applicable exception, the arguments and evidence supporting this **must** be recorded.

If an item has been donated to the cultural heritage institution, the project **must** establish whether or not a deed of gift or other documentation exists, and whether or not this documentation covers copyright, reproduction or publishing. Where such restrictions exist, the donor **may** be contacted and authorisation to digitise and publish **must** be secured prior to publication.

4.2.2 Publication of Digital Born Items

Where the items to be included in the scope of the project are digital born, there is no requirement to secure authorisation to digitise them. However, such items are certain to be covered by copyright restrictions.

If the cultural heritage institution does not possess explicit authorisation to duplicate, publish and distribute the digital born item, clearance must be secured from the rights holder. Projects **must** create a record of the research and other effort invested in identifying the rights holder, contacting the rights holder and receiving authorisation to publish the item online. Such a record will be valuable in the event that no rights holder authorisation can be established, to demonstrate that the project took all reasonable efforts to secure the authorisation. This applies particularly to orphan works (see *section 3.1.9*) and follows the approach suggested by the guidelines for diligent search for right-holders to orphan works developed within the EU i2010 Digital Libraries initiative.

If no authorisation is secured, projects **should** establish whether or not the online publication of the item is shielded by a copyright exception (see *section 3.1.7*). If the project concludes that its work does in fact fall under an applicable exception, the arguments and evidence supporting this **must** be recorded.

If an item has been donated to the cultural heritage institution, the project **must** establish whether or not a deed of gift or other documentation exist, and whether or not this documentation covers copyright, reproduction or publishing. Where such restrictions exist, the donor **may** be contacted and authorisation to publish **must** be secured prior to publication.

4.2.3 Rights Assessment Examples

This section provides some **examples** of rights clearance rules. However, these vary from country to country, and cultural heritage institutions **should** verify which rules apply to them.

4.2.3.1 Photographs

In general, copyright in a photograph rests with the photographer, unless a contract exists to the contrary (e.g. with an employer, with a customer). Photographs of art works are an exception, however. However, like all copyright, the rights over photographs have a limited duration. Let us take UK copyright law as a useful example.

In the UK, the following applies with regard to photographs:

1. all photographs taken before 1946 have no copyright.
2. Photographs taken since the start of 1946, but before 1989 are protected by copyright for seventy years from the death of the photographer.
3. If the photograph was commissioned, copyright is vested in the commissioner.

4. If the copyright is not commissioned, copyright belongs to the person who owned the film on which the photograph was taken (not to the photographer).
5. After 1989, the photographer has copyright over the image he creates.
6. It may be noted that if a photograph has never been published before, copyright is created *when it is first published* (e.g. on the website of a cultural heritage institution), with a duration of 25 years.

The complexity of the UK situation is not unusual, since many countries have similarly complex rules. The cultural heritage institution **must** ensure that it fully understands these national copyright rules prior to publication of photographs on a website.

Guidance

The above points, and much more, are to be found at the **artquest** website <http://www.artquest.org.uk/artlaw/artlaw.htm>

4.2.3.2 Photographs of Artwork

If a photographer makes a photograph of an artwork, the copyright remains with the artist, not the photographer. The photographer is considered to have created a 'mere or slavish' copy of the artwork, rather than having exercised his own creativity. This applies even if a great deal of effort and expertise was invested in taking the photograph. The underlying case law is from a 1999 US court case between the Bridgeman Art Library and Corel Corporation. To date there is no EU case law, though UK legislation follows the same logic as the US court decision.

This means that cultural heritage institutions who publish photographs of artworks in their collections, where the artworks themselves are out of copyright due to age, do not automatically have copyright in these photographs. Instead, they **must** rely on the terms and conditions, and the contracts with users of their websites, to protect their interests and prevent exploitation of the images of their artwork.

If the artwork is itself subject to copyright (e.g. relatively modern) then the photograph is a breach of copyright and **must** be authorised by the copyright holder. Any subsequent publication or distribution of the photograph **must** also be authorised.

4.2.3.3 Photographs of Persons

The general rule that a photographer owns the copyright to his photographs applies to photographs of persons. However, personal privacy legislation protects persons from intrusive publication of their images and activities; personality law adds additional protection (*section 3.4.4*). The permission of the persons shown

in the photograph, or named in the photograph metadata or caption, **must** be secured before a cultural heritage institution publishes such photographs online.

Guidance

The Arts and Humanities Research Council Centre for Studies in Intellectual Property and Technology Law at The University of Edinburgh (**AHRC**) has a database of personality rights cases, including analysis, at http://personalityrightsdatabase.com/index.php?title=Main_Page

4.2.3.4 Databases

Databases are protected in the EU by database rights (*section 3.1.6*). In general, projects **should not** extract large amounts of data from third party databases and use them on their own online projects. In addition, where material is extracted from a database, the copyright status of the material itself (as well as the database) **must** be clarified.

Where a cultural heritage institution wishes to provide a metasearch or portal functionality to third party databases, the authorisation of the database owner and creator **should** be secured in advance. The terms of use agreement between the end user and the database owner may also be relevant.

Guidance

The **Directive** which directly addresses the IP protection for databases is at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>

4.2.3.5 Metadata

The publication of metadata for online images must take into account personal privacy legislation. If individuals can be identified from the image metadata, their consent must be secured before such metadata is published online.

The assembly of metadata is itself protected under copyright law – the metadata is a literary composition and involves significant intellectual input from its creator.

The harvesting of metadata and its subsequent publication online (e.g. in a project which utilises the OAI-PMH protocol) **must** first be authorised by the metadata owners.

4.2.3.6 Personal Letters and Diaries

Personal letters and diaries are protected under copyright legislation. The authors of the letters and diaries are the rights holders. However, copyright

exceptions under national laws (*section 3.1.7*) may allow the publication of extracts or quotations from such personal correspondence.

In addition, personal privacy legislation will apply; this may include in its scope both the author, the recipient (if a letter) and any other persons mentioned in the letters and/or diaries. Defamation and libel law may also apply. Cultural heritage institutions **should** carefully review the content of personal letters and diaries prior to publication – such documents may not have been composed with publication in mind.

Guidance

The **w3c** has an initiative on personal privacy policies at <http://www.w3.org/P3P/details.html> and some guiding principles at http://www.w3.org/TR/P3P/#guiding_principles

EU Data Protection law is outlined at http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

4.2.3.7 Musical Works and Sound Recordings

As discussed under Related Rights (*section 3.1.5*), there are several rights holders in a musical work. These include the composer of the music, who usually holds copyright, the performer, the producer and potentially also the broadcaster (all of whom usually hold related rights). The likelihood is that music works and sound recordings will be subject to both copyright and related rights. Authorisation **must** be secured from each stakeholder before the musical work or sound recording can be duplicated or published.

In EU countries, sound recordings (i.e., the recording of the music performance, rather than the composition of the music) are protected for 50 years from the year of recording or from date of release. The common duration of this protection in all EU countries was initially set out under Directive 93/98/EEC, which was recently replaced by Directive 2006/116/EC for a pure matter of codification of later amendments.

4.2.3.8 Moving Images

Moving images (films, movies) have much in common with music – there are several rights holders, with rights ranging from copyright to related rights. Again, it is likely that any moving image work will be in copyright, and so projects **must** secure authorisation from all rights holders before the moving image can be duplicated or published.

In the EU, under the directive (93/98/EEC, replaced by 2006/116/EC), copyright protection extends for 70 years from the death of the last principal director, author or composer.

Guidance

Directive 2006/116/EC is available at

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_372/l_37220061227en00120018.pdf

4.2.3.9 Software

Software is protected by copyright throughout the EU. The authorisation of the copyright holder is needed to run, copy, modify or distribute the software. Where software is modified, the modifier may have copyright in his changes; the original author will also usually retain his rights. Software copyright is covered by directive 91/250/EEC. In order to be protected under the directive, the software must be original.

Guidance

The EU has a **directive** (Directive 91/250/EEC) on software copyright, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>

A **briefing document** on the Directive is available from the IPR Helpdesk project at <http://www.ipr-helpdesk.org/docs/docs.EN/softwareCopyright.html#N40013B>

Projects using software **must** ensure that the software has been distributed to them in a manner authorised by the copyright holder and with his authorisation. Projects **must** also abide by whatever licence agreement governs the software.

Software is the type of content most often governed by open source, copyleft and other less-restrictive forms of licence. Where appropriate, a project **may** prefer to use software which is available under such licences. However, the project **must** be fully aware of the details of such licenses and **must** abide by them.

Guidance

The **website** of the open source initiative is at www.opensource.org

Copyleft is well explained here: <http://www.gnu.org/copyleft/copyleft.html>

4.2.4 Authorisation, Permissions and Licence Negotiation

It is clear that an online culture project **must** have authorisation from the holders of rights in the items to be used in the project. Alternatively, the items **must** be

free of copyright or the project **must** plan to use the item in a manner for which authorisation is not required.

4.2.4.1 Establishing a Legal Basis

If a project intends to enter into legal agreements with rights holders, in order to enable the distribution, publication or duplication of protected works, the project **must** have a clear legal identity. This will usually be the cultural heritage institution which is running the project (e.g. the library or museum). However, project managers **should** verify that there is no obstacle or legal restriction to entering into legal agreements of this type.

4.2.4.2 Obtaining Authorisation

The first step to obtaining authorisation is to identify the copyright holder. The institution **should** open a 'diligence file' for each item –an information repository which records the work done by the institution to gain authorisation. Where it is possible to identify the rights holder, the project **must** contact the rights holder and secure his permission.

Guidance

Diligence files are described by VADS and TASI at http://vads.ahds.ac.uk/guides/creating_guide/sect29.html

In order to gain permission, the project is very likely to need to state the purpose of the project, the manner in which the item will be used, the duration of use and the intended audience. This information will enable the rights holder to assess the commercial or other impact of granting permission.

The project **should** have the rights holder sign a licence agreement for the use of the item by the project. This **should** state any restrictions over the manner of use of the item, so that there is no potential for subsequent conflict. All documentation **should** be stored in the diligence file.

Guidance

Licences are outlined by VADS and TASI at http://vads.ahds.ac.uk/guides/creating_guide/sect27.html

Sample licence agreements can be found at the University of Texas website <http://www.utsystem.edu/ogc/intellectualProperty/contract/cprtlic.htm>.

A much wider selection of sample agreements is available from the same source, at <http://www.utsystem.edu/ogc/intellectualProperty/dbmock.htm>

It is likely that the rights holder will place *constraints* on the manner of publication of the item, so that it has minimal impact on the commercial or other potential of the item. For example, it may be necessary to restrict the resolution of images, or to place a large watermark on the image. The rights holder may also wish to review the terms of use of the project website, so that the rules governing the end users are clear. Projects **may** offer several *technology options* to rights holders, in order to gain permission for the most beneficial end product for the users. For example, if high resolution images are not to be published, a ‘zooming’ version of the images may be allowed, which enables users to view portions of the image in high resolution, without any access to a high-resolution image

All agreements **must** be carefully preserved.

4.2.4.3 Items free of Copyright

If a project believes that items to be published are free of copyright, this **should** be verified and the reasons for this belief **should** be noted in the diligence file. While the guidelines in this document will provide some of the information needed, projects **should** also review the national legislation on copyright limitations. The usual reason to believe that items are free of copyright is if copyright has expired (see *section 3.1.2*).

To recap, most works under EU copyright law are out of copyright 70 years after the death of the author or after that of the last co-author.

Guidance

Guidance on duration, and on other aspects of copyright, is available from the **UK National Archives** at http://www.nationalarchives.gov.uk/legal/pdf/copyright_full.pdf

4.2.4.4 Copyright exceptions

If the project believes that its use of a work can benefit from a copyright exception (see *section 3.1.7*), the reasons for this **must** be noted in the diligence file. While the guidelines in this document will provide some of the information needed, projects **should** also review the national legislation on copyright exceptions, and the effective implementation of the 2001 EU Copyright Directive in this field.

The key issue for copyright exceptions is that their effective enforcement should not impact significantly on the commercial or other interests of the copyright holder. This general rule is ultimately upheld by the so-called three-step test embodied into article 5(5) of the 2001 EU Copyright Directive.

According to the most convincing interpretation of this test under EU law (which borrowed it from article 9(2) of the Berne Convention), courts are entitled to apply copyright exceptions and limitations insofar as exceptions

- Refer to certain special cases (first step);
- Do not conflict with a normal exploitation of the copyrighted work (second step);
- Do not unreasonably prejudice the legitimate interests of the right-holder (third step).

Examples of areas of application where exceptions may apply include

1. Quotations
2. News reporting
3. Educational illustration
4. Personal, private and archive copies which are not distributed.

An interesting statement on the limited function that copyright exceptions are expected to play with regard to digitisation projects was released in the UK, with specific regard to the local fair dealing doctrine by AHDS (see <http://ahds.ac.uk/creating/information-papers/copyright-introduction/>):

... Fair Dealing is aimed more at those engaged in private research or for use in the classroom, i.e. those that are only producing a small number of copies. The **digitisation project** that aims to disseminate a digital resource on the Internet, with the potential for infinite copying, **will not find much assistance from Fair Dealing.**

Guidance

JISC also has a publication on Fair Dealing and 'Permitted Actions' at <http://www.jisclegal.ac.uk/pdfs/FairDealing.pdf>

4.2.4.5 Orphan Works

Orphan works (see *section 3.1.9*) are works which are in copyright but where the rights holder is impossible to identify or to contact. In general, orphan works may be used by projects only after all reasonable efforts to gain authorisation for their use have been made. A full record of such efforts **must** be recorded in the diligence file.

As mentioned above, useful guidelines for diligent search of right-holders on orphan works are provided now by the annexes to the Memorandum of

Understanding agreed upon by 24 stakeholders in June 2008 in the context of the EU Commission's **i2010 Digital Libraries initiative**.

Guidance

The i2010 Digital Libraries High Level Experts Group addresses Orphan Works in its report at

http://www.edlproject.eu/downloads/report_HLEG_preserv_orphan_works.pdf

The **June 2008 Memorandum of Understanding** and its annexes are available on the Commission's website at:

http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm

5 Publication Background

The following sections explore IPR aspects of the **publication** process. In the scope of these guidelines, *publication* means publication on the internet, on a website which is accessible to the general public, but which may have terms and conditions of use with which users must comply.

5.1 Website Design

The website of an online culture project **should** have certain legal elements in order to protect the cultural heritage institution which owns it. These include

- Terms and conditions of use
- A copyright statement
- A disclaimer
- Credits and attribution

These are described in more detail later in these guidelines (section 5.3).

The technology and functional design of the website **should** reflect the items published on the site, the intended use of the items (and the agreement with their rights holders, if applicable) and the intended audience.

Typically, an online culture project website will be driven by a database which holds the content, and a rendering engine which creates web pages based on the database content which the user wishes to see. Items such as photographs, music, film, etc. may be stored in the database or may be stored in the file system and linked to by the database.

Where feasible, the presentation elements of the website (the look and feel of the end user interface) **should** be separated from the content shown on the website and from the technical workings of the rendering engine.

5.1.1 Specific Design Decisions

A number of specific decisions must be taken by any online culture project in the planning of its website. These decisions affect the way in which the website can be used and how the items which it publishes can be accessed. These are discussed in the following sections.

5.1.1.1 Deep Linking

The project must decide whether or not to allow *deep linking* – the use of hyperlinks which link directly to a digital item, bypassing introductory screens and removing any branding or informational content. An online culture project may decide not to allow deep linking, by limiting the pages which are allowed to link to a particular item (the 'Referer') or by using Cookies. Deep linking prevention does not stop any user from downloading or saving images from a website onto a

local hard drive, and then re-using them, but it does prevent other websites from bypassing the front pages of your site.

It should be noted that sending fake 'referrer' information (referrer spoofing) is technically not very difficult, and can be used to overcome some prevention strategies. Several free software packages are available to do this.

Guidance

W3C has a guide to deep linking at <http://www.w3.org/2001/tag/doc/deeplinking.html>

Wikipedia describes deep linking at http://en.wikipedia.org/wiki/Deep_linking

A description of the use of the 'referrer' information to **prevent deep linking** is provided at http://www.albionresearch.com/disaster/sex_sells.php

5.1.1.2 Framing

Any web page can be broken up into 'frames' – areas of the page which contain content from a single HTML document. This is very common on sites where the sidebar or the header is intended not to move (e.g. not to leave the visible part of the screen) when the main part of the screen is scrolled.

It is possible to populate frames with web pages from third party sites – this opens the opportunity for one web site to 'wrap' third party content with its own headers, navigation, etc. This can lead to users being misled as to the source of material they are viewing, or mistakenly believing that one site endorses or is associated with another.

It is possible to ensure that your website is not 'framed' by a third party site. This is achieved by ensuring that the window in which your site opens on top of any frameset, using the '_top' frame name.

Guidance

Wikipedia has a section on framing, at http://en.wikipedia.org/wiki/Framing_%28World_Wide_Web%29,

Another online **resource** about framing is at <http://www.techrealm.co.uk/design/frame-targetting.html>

A **simple script** to ensure that your content is not framed by another site is available at <http://en.wikipedia.org/wiki/Framekiller>

The **W3C** page which describes frames is at <http://www.w3.org/TR/REC-html40/present/frames.html>

5.1.1.3 Inlining

Inlining (or *inline linking*, *hot linking*, *leeching*...) is the practice of embedding images or other content from a remote website within your own website. For example, if a website author wishes to include a cultural image from a museum website, he can embed an image () tag which points (deep links) to that image on the museum site. This leads to bandwidth costs for the site hosting the image; it also constitutes unauthorised use of the image on the linking site. Inlining also means that visitors to a third party site will view images without the surrounding information, such as terms and conditions, which might appear on the home site of the image.

In general, inline linking is frowned upon in the web community. It can lead to a lack of clarity as to the source and owner of content.

Technical solutions which prevent inlining are similar to those used for deep linking.

Guidance

Wikipedia's page on inlining is at http://en.wikipedia.org/wiki/Inline_linking

A description of the use of the 'referrer' information to **prevent inlining** is provided at http://www.albionresearch.com/disaster/sex_sells.php

A **less easily circumvented** approach to avoiding inlining of your content is presented at <http://www.alistapart.com/articles/hotlinking/>

5.1.1.4 Graphic Layout

The layout and 'look and feel' of the online culture project website is largely a matter for the project team. However, the following may be noted

- Compliance with accessibility guidelines such as the W3C Web Content Accessibility Guidelines is to be encouraged, and is in some cases mandated by funding agencies
- Multilingual text and user interfaces are to be encouraged, and may be mandated by the EU or other funding agencies
- Not all browsers support frames, javascript or Flash, and so these technologies may not be appropriate. That said, the large majority of browsers do in fact support frames and javascript, while Flash support is also very common.

There are thousands of sites online with web design tips – no specific sites are listed here.

Guidance

Accessibility guidelines published by the **W3C** Web Accessibility Initiative are available at <http://www.w3.org/WAI/>

A useful accessibility assessment tool is available at <http://www.tawdis.net/taw3/cms/en>

Guidelines on **how to assess** your site are provided at <http://www.w3.org/WAI/eval/Overview.html>

5.1.1.5 Domain Names

Domain names are important pieces of intellectual property, in that they represent the ‘brand’ of an online culture project. The domain name **should** be carefully chosen and registered without delay; renewal of domain names **should** take place in a timely manner. The more active a domain name is, the more attractive it is to a third party who can attempt to gain control of the domain name in order to use it to host advertising or to sell it back to the cultural heritage institution.

Domain names are allocated on a first-come first-serve basis. This means that popular names and brands may be registered by third parties, who expect to sell them to companies or others with whom the name is associated, for a profit. This practice is known as ‘cybersquatting’.

In the US, cybersquatting is illegal under the Anticybersquatting Consumer Protection Act (ACPA) 1999. In other countries, the Internet body ICANN has a resolution process (UDNRP) which may apply. The World Intellectual Property organization (WIPO) also provides an arbitration system.

Guidance

Domain names and related Intellectual Property issues are discussed by the **W3C** at <http://www.w3.org/IPR/>

Domain name disputes are covered by the **World Intellectual Property Organisation** at <http://www.wipo.int/amc/en/index.html>

5.1.1.6 Meta Tags

Meta tags or *meta elements* are HTML tags which provide information about a website. They are used primarily by search engines, to categorise web sites.

Meta tags are important for end users because they influence the appearance of web sites in search engine results. They are important to the owners of web sites for the same reason.

Meta tags are placed in the <head> element of HTML and XHTML documents. They may include a page description, some key words, information about how the page was constructed, and other information not provided by other <head> elements.

While meta elements were, in the 1990s, a very important influence on the ranking of websites by search engines, this is less the case in recent years, where links to a website (particularly from popular websites) are more important, as are intrinsic factors such as uniqueness, quantity and quality of content, quality of hyperlinks, etc.

Of the meta elements, the *keyword* meta attribute is now largely ignored (*inktomi* is the only large crawler-based search engine which still indexes the keyword tag), while the *description* attribute is still used to a degree. *Pragmatically, online culture projects may ignore the keyword attribute, and should not place excessive emphasis on the description tag.*

Despite the decrease in value of the keyword and description tags, other meta tags remain useful for purposes other than search engine ranking. These include the *author*, *language*, *copyright*, *date* and PICS-related (age/adult content rating, etc.) tags.

Guidance

The W3C's meta data (META) tags are described at <http://www.w3.org/TR/REC-html40/struct/global.html#h-7.4.4>

5.1.1.7 Software

As noted above, most online culture projects use a database and a rendering engine to store and to display their content. These elements, combined with a back-end system for data entry, are often referred to as a *content management system*. The system will run on an operating system (typically Windows, linux or some other form of UNIX) and utilise a web server such as Apache or IIS. The database will often be an open-source offering such as MySQL or PostgreSQL. (See *section 3.5.4* for more information on open source).

The software which is used by the site will have an impact on the security of the site, the end user experience and the protection of the intellectual property represented by the site. Some guidelines include

- Projects **should** ensure that unauthorised large-scale harvesting of data from the site database is not feasible. This may be implemented using software component authentication.
- Projects may prevent access to particular files and directories/folders within their website, in order to control access to (for example) high resolution images. In websites running on the popular Apache web server, access can be controlled in a comprehensive manner using .htaccess files.
- Projects **should** ensure that the systems software they are using (e.g. the database, the scripting language) is up to date and includes any security upgrades or patches. Such software is typically updated several times per year, to deal with issues or vulnerabilities which have been identified.
- If a common content management system (e.g. PHPNuke, Joomla, Mambo, Wordpress, many more) is used, the project should monitor the website of the development community in order to track any new issues or vulnerabilities that should be dealt with.

Additional software may be used to provide specific functions such as watermarking, image zooming, etc. These are discussed later.

Guidance

An **overview** of open source content management systems is provided at <http://www.la-grange.net/cms>

An **evaluation environment** for open source content management systems is provided at www.opensourcecms.com

Guidance on using **htaccess** to prevent access to particular files in particular directories of your site is available here:
<http://httpd.apache.org/docs/1.3/howto/htaccess.html>

A wide range of **open source content management systems** can be found at the open source repository SourceForge www.sourceforge.net

5.1.2 Re-Use

While an online culture project may have very clear objectives at the time of project start, there is a strong likelihood that the material hosted by the project will be suitable for re-use in other domains. In such cases, projects **must** be aware that authorisation obtained for the purpose of the project may not be sufficient for the re-use of the material.

A good example is the educational sector, where the availability of high-quality cultural material online is an important teaching asset.

It is important that any intellectual property implications of such re-use are fully understood, and that additional authorisation is obtained where necessary. While Exceptions (*section 3.1.7*) may cover a certain amount of educational use, it should not be regarded as an authorisation to use copyrighted material freely in an educational context.

For each item that is to be re-used, the diligence file **must** be reviewed. Where authorisation was obtained, the rights holder **must** be contacted again and clearance obtained for the new application of the item. For material which was not authorised, the project **must** verify that the reasons quoted for its inclusion in the original project also apply to its new use.

5.2 Technological Protection Measures

Over and above the legal and documentary protection described in the next section (*section 5.3*), online culture projects can protect their own and their contributors' intellectual property rights using a range of technological tools which have been created for the purpose.

The use of technology to protect online copyright is an active research area. The commercial value of such research is enormous, particularly in the management of rights to music, images and film online. A wide variety of models, schemes and processes have been developed. In this section, a selection is considered:

- Protecting images by restricting resolution
- Watermarking, both visible and invisible
- Digital Rights Management schemes

5.2.1 Image Resolution

The resolution of an image refers to the density and level of detail with which the image is shown – higher resolution images show more detail and are higher-quality in terms of the visual experience. In technology terms, resolution is defined in terms of the number of dots of colour ('pixels' or picture elements) per inch of image, and the number of bits of digital information per pixel.

The medium on which an image is viewed will have its own limitations in terms of the level of resolution it can display. A computer monitor typically displays 72 dots (pixels) per inch, while a commercially-printed image onto glossy paper or a printed digital photograph may have a resolution of several hundred dots per inch.

This leads to a common approach to copyright protection by online culture projects – items are shown in low resolution only and at a restricted size (usually less than 800 pixels wide by 600 pixels high). This stops third parties from

downloading high-resolution images and re-using them elsewhere, thus protecting the commercial interests of the rights holder, while still enabling the material to be represented online.

5.2.2 Zoomable Images

An attractive alternative approach is the use of ‘zooming’ technologies that allow the end user to view parts of an image in great detail, without enabling the download of a high-resolution image. This works by cutting the master image into a number of smaller images or ‘tiles’, which are recorded at various levels of resolution. The amount of the original image shown in any one tile varies as the user zooms into and out of the image. The same process is used in the popular Google Maps online application.

It may be noted that it is technically feasible to reverse the process, given access to the directory with the tile images.

Where high-quality master images are stored on the same web server, access control may be used to ensure that the master images cannot be downloaded.

Guidance

Access control based on .htaccess may be suitable for many projects which use the Apache web server. Guidance on using **.htaccess** to prevent access to particular files in particular directories of your site is available here: <http://httpd.apache.org/docs/1.3/howto/htaccess.html>

A useful tool for the **display and manipulation of high-resolution images** is available at www.zoomify.com

Another **zooming tool** is provided by the brainmaps project at www.brainmaps.org

5.2.3 Watermarking

Watermarking refers to the practice of embedding an image and/or some text on or within a digital item. This may be as simple as writing a copyright notice over an image, or may use sophisticated digital techniques which incorporate encryption technologies.

Watermarks serve a range of purposes

- They may simply indicate the assertion of copyright
- They may make an image usable for personal purposes, but not suitable for commercial re-use (e.g. by placing a visible mark on the image)
- They may include information about the supplier and the purchaser of a digital item, so that the individual item (and copies thereof) can be identified

It is important to note that while watermarks can act as a deterrent to the unauthorised use/re-use of content, they do not actually prevent copying, converting from one format to another, etc. Indeed, resizing, resampling and converting are all functions which are available in common image processing software and which can contribute to the breaking of a digital fingerprint, as described in section 5.2.6 below.

5.2.4 Visible Digital Watermarks

The simplest form of digital watermark is the placing of a copyright image or text (e.g. '© thismuseum.org') on top of all images before placing them on the web. This can be simply achieved in an automated manner using common image processing tools such as Photoshop, or using a system like imagemagick. The example below shows a watermark ('Brian Kell 2006'). (The image itself is in the public domain). In order to avoid the situation where the copyright notice is simply cropped from the image, watermarks are often placed centrally on the image.



Figure 3 - Visible Watermark

Overall, the use of visible watermarks impacts on the quality of the end user experience, and it may be suggested to use them only where necessary to protect intellectual property rights.

5.2.5 Invisible Digital Watermarks

Invisible digital watermarks are watermarks which are not visible to the viewer, but which are embedded in an image and detectable by appropriate software. Some digital watermark products combine a watermarking process with a service

which searches the web for images containing the digital watermark, thus identifying some of the locations where the copyright image is in use.

While digital watermarks have the advantage of being invisible and non-intrusive, they can sometimes be circumvented by suitable image processing (e.g. breaking the image into many smaller images and then re-assembling it, adjusting colours and resolution, changing image formats, etc.). The robustness of watermarks against such attacks depends on the details of the technological algorithms used to create the watermarks.

5.2.6 Fingerprinting

An important issue for rights holders is how to control the duplication of an image where they have sold one copy to a legitimate purchaser. They then wish to know the purchaser of an image if it appears in an unauthorised location. An invisible watermark may contain information about the authorised purchaser of an image, so that if images are found being used elsewhere, they can be tracked back to the original purchaser. This is known as '**fingerprinting**', because the original purchaser can be uniquely identified. Such fingerprints are generated at the time of purchase of the image, and embedded in the image before it is downloaded by the purchaser. Fingerprints can be attacked by the unscrupulous user, however, using methods similar to those for attacking invisible digital watermarks.

Guidance

The **industry perspective** on digital watermarking can be found at <http://www.digitalwatermarkingalliance.org/>

TASI has a digital watermarking briefing page at <http://www.ukoln.ac.uk/qa-focus/documents/briefings/briefing-76/html/> and further advice at <http://www.tasi.ac.uk/advice/using/uiissues.html#ui6>

The **AHDS** touches on digital watermarking at http://vads.ahds.ac.uk/guides/creating_guide/sect63.html

5.2.7 Encryption

The underlying technologies for watermarking and for DRM include encryption. Encryption is the process of combining content with a secret key value, in a manner that makes the original content unusable and impossible to understand. Only if the user has access to the corresponding secret key value can he/she retrieve the original content from the encrypted material.

The use of encryption enables content owners or distributors to share secret keys with their end users, and then to distribute their content freely, knowing that only those with a secret key will be able to access the content. This is usually achieved by distributing keys as part of the registration or payment process.

The details of how to encrypt content, and which encryption process ('algorithm') to use are not covered here. However it may be noted that international standards for encryption include the Digital Encryption Standard (DES) and the more modern Advanced Encryption Standard (AES).

Guidance

There are many good websites which describe encryption and cryptography, the science concerned with encryption. Open source encryption software is also available across the internet. However, the design and implementation of an encrypted content distribution system, with appropriate secret key management facilities is not a simple task, and requires specialist skills.

Wikipedia has several pages on encryption, most linked from <http://en.wikipedia.org/wiki/Encryption>

Get Safe Online has a simple overview at http://www.getsafeonline.org/nqcontent.cfm?a_id=1104

RSA Laboratories has a good crypto FAQ at <http://www.rsa.com/rsalabs/node.asp?id=2152>

5.2.8 Digital Rights Management (DRM)

Digital Rights Management or DRM is the management of copyright and other rights in the digital domain. More specifically, 'DRM' is used to describe the models and processes to be used to *state and enforce intellectual property rights* for digital material, both on and off the Internet.

In its Communication to the Council and to the European Parliament of April 2004, concerning the complex issue of the management of copyright and related rights in the EU Internal Market, the European Commission referred to DRM technologies by means of a comprehensive definition that addressed all the purposes enabled by these technologies:

"In the context of the discussions on the management of copyright and related rights in the new digital environment, digital rights management (DRM) has become a key issue [...] DRM systems can be used to clear rights, to secure payment, to trace behaviour and to enforce rights. DRM systems are, therefore, crucial for the development of new high volume, low transactional value business models, which include the pricing of access, usage, and the service itself, subscription models, reliance on advertising revenue, credit sales or billing schemes. DRM systems are a means to an end, and as such, clearly are an important, if not the most important, tool for rights management in the Internal Market of the new digital services [...]"

The Commission acknowledged that DRM technologies had become crucial for today's copyright management because they enable the translation of digital property rights into the technical languages of encryption and other algorithm-based techniques (*i.e.*, the so-called RELs). Nonetheless, the Communication testified its full awareness of the risk that DRM systems might end up replacing copyright law by dictating the supremacy of what a system of private governance in which the DRM software code (not the law) regulates which acts users are entitled to perform or not.

Commonly, DRM functionality is delivered by software that is embedded in the applications enabling digital media (images, music, etc.) to be consumed. This means that DRM software is found in music players and music management software (Apple iTunes is a good example), and in the systems software of PCs (particularly in Microsoft Windows). It may also be found embedded in CDs, DVDs and their respective hardware. The objective of DRM is to stop the unauthorised storage or copying of digital media. In some cases, the DRM rules may be stricter than the underlying legal framework – many advocates suggest that DRM infringes on the freedoms embodied in copyright exceptions .

Digital rights can be **expressed** using rights expression languages (see *section 5.3.4*), which offer an unambiguous way to link items, users, rights and conditions of use. The rights thus expressed are then implemented by DRM systems using a combination of software, hardware, encryption and legal components.

Guidance

The most widely used DRM is **Apple's FairPlay** system, as implemented in iTunes, iPods, etc. Wikipedia has a good page on this, at <http://en.wikipedia.org/wiki/FairPlay>

Microsoft Windows Vista also includes a DRM system called Protected Media Path. See http://en.wikipedia.org/wiki/Protected_Media_Path for an overview.

The 1996 WIPO Copyright Treaty made it an offence under international copyright law to circumvent so-called "technological protection measures" (TPM) insofar as these measures are used by right-holders to restrict acts that are not authorised by them or permitted by law. This legislation was transposed into articles 6 and 7 of the 2001 EU Copyright Directive (see *section 2.2*). This EU directive made it an offence to attempt to circumvent TPM and to produce and market technologies designed primarily at enabling acts of circumvention of such measures. DRM technologies are eligible for the protection granted by the mentioned EU anti-circumvention laws since, from a technical point of view, they may be programmed to work as both TPM (cf. article 6 of the 2001 EU Directive) and rights management information technologies (cf. article 7). However, it

remains to be seen whether the national case law in the EU will uphold an enforcement of anti-circumvention laws which might allow devisers and users of DRM systems to technically impair activities falling under applicable copyright exceptions.

5.2.9 DRM Limitations

Many experts consider DRM to be a net negative, with more problems than benefits. There is a strong perception that the legislation which supports DRM reflects the priorities of the media and entertainment industries in an unbalanced manner, with negative impact on society as a whole. Analysis of DRM systems by cryptography and security experts indicates that DRM is inherently insecure and that no DRM system can expect to remain unbroken for extended periods of time. Overall DRM systems are seen to be poor at preventing determined copying, but good at restricting the valid activities of consumers ('Fair Dealing'). The net result is that serious pirates, who derive significant revenue from overcoming DRM, will continue to do so, while end-user consumers will be inconvenienced, without there being any great benefit to the content owners. The enforcement provisions do not differentiate between commercial piracy and consumer archiving/personal use copying.

DRM appears to be losing ground

- Apple, the dominant player in the online music market, has begun to offer music without DRM, as an alternative to DRM-protected content.
- No major music company now includes DRM on its CDs
- Region-specific DVDs have been circumvented by the fact that the large majority of DVD players now sold are 'multi-region'.
- DRM systems are popular targets for security attacks; most major DRM solutions have been cracked in the past, and it is reasonable to expect them to be cracked again in the future.

DRM has some important negatives

- DRM prevents the use of assistive technologies to enable visually impaired persons to access content; screen-readers are seen as a form of duplication.
- DRM undermines interoperability; again the most obvious example is Apple, whose iTunes format works only on Apple iPod hardware.
- DRM may impede the legitimate copying of content for digital preservation purposes, or as permitted under certain copyright exceptions.

Guidance

The **Electronic Frontier Foundation** looks at some limitations of DRM at <http://www.eff.org/issues/drm>

5.2.10 Business Models & DRM

DRM enables business models which rely on restricting the consumption of digital material. DRM-managed content is typically encrypted in some manner; to utilise the encrypted content, the user must have access to hardware or software which can extract the content and play it. The hardware or software will also then enforce the digital rights embedded in the content. For example, Apple's iTunes software must be installed if a user wishes to play some content bought from the iTunes store. The software then enforces the digital rights management policies of Apple and its content providers.

DRM can be used to implement a range of business models:

- DRM rules can include time periods, so that content can be accessed only for a limited time, after which further payment is required. Thus, DRM enables subscription-based business models.
- DRM rules can restrict access to content on a limited number of other devices (e.g. one PC and two portable music players). This enables business models where users have sufficient freedom for legitimate copying and use of content they have acquired, without offering free-for-all reproduction.
- DRM rules can enforce geographical limits, by, for example, restricting where a DVD can be played by restricting DVD players to play DVDs only from a particular region.
- DRM can also implement pay-per-view business models, where only a single consumption of the item is enabled.

Guidance

An ongoing DRM business observatory is provided by the commercial site <http://www.drmwatch.com/>

Extensive links and discussion are available on **Wikipedia** at http://en.wikipedia.org/wiki/Digital_rights_management

5.2.11 The DRM 'Triple Lock'

The use of DRM technologies gives content owners (and their publishers, who include global media companies such as Sony, Disney, etc.) a 'triple lock' over content. The three elements of the 'lock' are

- The use of DRM technology
- The protection of DRM under the 2001 EU Copyright Directive and WIPO Treaty

- Copyright law

Consumer representatives, digital rights activists and analysts see this 'triple lock' as bad news for society as a whole, for the consumer and ultimately for the content industry itself. The triple lock places constraints on digital libraries and online culture projects by preventing the duplication of content for research and preservation purposes, as well as by undermining the applicable copyright exceptions which are fundamental to the relationship between cultural bodies and content owners.

5.2.12 DRM and Digital Preservation

The technical constraints imposed by DRM can cause problems for digital preservation. Digital preservation relies on migrating content from one medium to another, in order to ensure that the content remains accessible. This is discussed above, in *section 3.2*.

While Fair Dealing arguments may be made for the reproduction of digital materials for preservation purposes, and while copyright law may allow reproduction by libraries and archives, these legal exceptions are often ignored by DRM technology. DRM-protected content is thus vulnerable to being lost due to the obsolescence of the media and the technology used to store it and to access it.

Guidance

A **good presentation** on the impact of DRM on Digital Preservation is at www.dcc.ac.uk/docs/publications/DPC_CILIP45NoNotes.ppt

A rather **anti-DRM**, but well argued paper on the impact of DRM from Electronic Frontier Foundation is at <http://www.eff.org/wp/digital-rights-management-failure-developed-world-danger-developing-world>

The UK's Institute for Public Policy Research (**IPPR**) has a detailed report (*Preservation, Access and Intellectual Property Rights Challenges for Libraries in the Digital Environment*) on DRM, Digital Preservation and related topics at <http://www.ippr.org.uk/members/download.asp?f=%2Fecomm%2Ffiles%2Fpreservation%5Faccess%5Fip%2Epdf>

5.2.13 DRM for Cultural Web Sites

Most cultural web sites will not implement commercial DRM measures, due to the cost and complexity of doing so. Some discussion of measures which can be taken to protect content against unauthorised exploitation and use are discussed in this section (5.2), the combination of technical and legal measures as outlined here can lead to a DRM effect.

There are, however, commercial products which can be added to a web server environment and used to implement DRM. Some examples are LockLizard, HaiHai DRM-X and Vidlock

Guidance

Examples of commercial DRM software, aimed at organisations and companies who distribute non-public content on the internet, include

DRM-X from HaiHaisoft, at www.drm-x.com

Vidlock from Vidlock, at www.vidlock.com

Lizard Protector from LockLizard at www.locklizard.com

None of these is suggested as being authoritative or standard, but they provide examples of current offerings in the sector.

5.3 Documentary and Legal Protection measures

5.3.1 Statement of Intellectual Property

The first step in the protection of the intellectual property on an online culture project website is to state that the material on the site is protected by copyright and related laws. The key issue here is to state the rights which are in force, and to link those statements to the digital material to which they apply.

Intellectual property rights information is a form of data about data, or **metadata**. Metadata can be created and associated with content in a number of different ways.

- On a **project level**, metadata can be presented in the same environment as the material being protected, for example as a copyright statement covering a website, or terms and conditions for users.
- On a **web-page level**, metadata can be included in the meta tags (see *section 5.1.1.6*) for the web pages, or visible on each screen (e.g. in a footer).
- On a **per-item level**, metadata can be linked to the item by embedding it in the digital file itself.

These are explored here

5.3.2 Copyright Metadata

One possible approach is to define a set of metadata terms which focus on copyright, and which would be associated with digital materials, in order to make the user of the digital materials aware of the copyright status of the digital item. This copyright metadata would typically be included in the meta tags for each web page.

The copyright metadata could include fields such as

- Copyright status
- Publication status
- Dates of creation of copyright, renewal of copyright
- Copyright Statement
- Country of publication
- Creator
- Copyright Holder
- Publisher
- Administrative data
 - Source of information
 - Contact information

Such copyright metadata is still being suggested, no standardised approach exists at this time.

Guidance

A suggested **copyright metadata schema** is provided at http://www.firstmonday.org/issues/issue10_10/coyle/index.html

The California Digital Library outlines a copyright metadata schema at <http://www.cdlib.org/inside/projects/rights/schema/faq.html>

5.3.3 Copyright Metadata for Images

While the use of copyright metadata can easily be implemented for web pages, using meta tags, other technologies are involved in the addition of such metadata to digital items such as photos, scanned images, etc. The EXIF metadata stored by many devices when an image is created includes fields for copyright information. These can be used to add specific copyright information to the image. EXIF is most commonly used in JPEG and TIFF images; EXIF is not supported in PNG or GIF images. The EXIF data can be edited to add copyright information (of course, it can also be edited to remove this information maliciously!)

Guidance

The **EXIF** standards for image metadata are available at www.exif.org

A process for **embedding copyright information** in image metadata is presented at <http://www.wap.org/journal/protectingimages/default.html> (requires an Apple computer)

Wikipedia's coverage of EXIF is at <http://en.wikipedia.org/wiki/Exif>

5.3.4 Rights Expression Languages

Several initiatives have been carried out (and/or are underway) which aim to express rights, rights management and intellectual property constraints in an unambiguous, machine-readable manner. The overall aim is to enable computer applications to establish rights statuses for digital objects, and to use this information to enforce the rights constraints which are imposed by rights holders. Rights are expressed in *rights expression languages (REs)*.

The rights management statements expressed in these languages could be provided with the digital material being protected (e.g. within meta tags or EXIF fields), or could be made available on an internet server, indexed by the digital object identifier (see *the next paragraph*) for the item being protected.

The area of rights management using computers (Digital Rights Management means the Digital Management of *Rights*, not the Management of *Digital Rights*) is of particular interest to large content industries where the end product is digital in nature (music and film are excellent examples)

There are two main rights expression languages at present – XrML, on which the MPEG21 Rights Expression Language is based, and ODRL.

- XrML (Extensible Rights Markup Language) is a proprietary technology of ContentGuard, Inc. ContentGuard is a spin-off of Xerox Corporation; the early work on XrML was carried out under the name DPRL (Digital Property Rights Language). The MPEG21 REL (see *section 5.3.6* below) is based on XrML.
- Open Digital Rights Language (ODRL) is a grammar for describing digital rights, promoted by the Open Mobile Alliance, a group of major actors in the mobile technologies sector.

While the two languages are independently developed, their common application environment and XML expression means that it possible to convert rights statements in one language into the other.

Guidance

The **xrml** rights management language is described at www.xrml.org

The **odrl** grammar is described at www.odrl.net

Rights expression languages are described succinctly in the paper at <http://dmag.upf.edu/papers/jpjpjododrl2004.pdf>

5.3.5 Standard Identifiers – Digital Object Identifier (DOI)

The digital object identifier (DOI) is a unique value which identifies a digital object. Unlike a URL, which states the address of an object (where it is to be found on the internet), the DOI is linked to the object, regardless of where it is stored online. A DOI can be used to find the location (URL) of the object, using a 'resolution' service or 'Handle System'.

The key value of a DOI is that it persists, remaining linked to the digital object regardless of where it is stored. This means that it is possible to state intellectual property and rights management assertions about a digital object, and to link them permanently, via the DOI, to the work to which they apply. Indeed, much of the focus in the DOI area has been on its applications in the Intellectual Property context.

Guidance

Digital Object Identifiers are the subject of the website at www.doi.org

5.3.6 MPEG21 Rights Data Dictionary

The MPEG21 Rights Data Dictionary (RDD) is an initiative of the Motion Pictures Expert Group within the ISO standards body (Working Group 11 of the ISO/IEC Joint Technical Committee, Sub-committee 29). It consists of a dictionary of standard rights management terms, which can be used to describe the rights which apply to an object. Other ways of describing these rights can be mapped in a consistent manner to the MPEG21 RDD; this means that the MPEG dictionary can be used as a 'lingua franca' or common model for describing rights, across domains and across linguistic boundaries.

The 'words' in the RDD are combined using the MPEG21 Rights Expression Language (REL). This provides a standard model to represent the granting of *rights* to a *principal* (the user) over a *resource*, subject to *conditions*.

Both the RDD and the REL are designed to be used programmatically, rather than by human users.

The area of digital rights metadata and digital rights expression languages is one which is in active development. Projects **may** wish to monitor this topic, and to periodically ensure that they are reflecting best practice.

Guidance

The **MPEG Industry Forum** is at <http://www.mpegif.org/resources.php#section42>

A **detailed overview** of MPEG-21 is to be found at <http://www.chiariglione.org/mpeg/standards/mpeg-21/mpeg-21.htm>

5.4 Digital Preservation and Legal Deposit

Digital preservation is an issue which must be addressed by any digitisation project, if its efforts are not to become obsolete in the short to medium term. This is not an issue which is specific to Intellectual Property; instead it applies to every online culture project.

Digital preservation relies on the migration of digital content from older media to more modern media, and/or on the emulation of older systems by newer ones, as the old ones become obsolete. These processes are known as migration and emulation, respectively. Intellectual Property law (especially Copyright Law) and Digital Rights Management can impact on digital preservation, by restricting the freedom of cultural heritage institutions to copy material for preservation purposes. The 2001 EU Copyright Directive does make allowances for this purpose, but the applicable exception under article 5(2)(c) of the directive is rather narrow, weak and, most unfortunately, *optional* for EU Member States.

Another aspect of digital preservation is the extension of legal deposit to the digital domain. Where publishers have had to distribute copies of their output to deposit libraries in the past, this has been in the form of books and other (primarily) paper materials. The inclusion of digital publications in the scope of legal deposit is treated differently from country to country. In several countries, automated harvesting of the national internet domains is allowed under the legislation.

Guidance

The **Danish** approach, which includes harvesting of the Danish part of the internet, is explained by the Danish Royal Library at <http://liber-maps.kb.nl/articles/dupont11.htm>

IFLA has a publication covering 15 National Libraries at <http://www.ifla.org/V/pr/saur119.htm>

6 Publication Guidelines

Once the website of an online culture project is available online, the project team must continue to manage the rights of the project, and of the rights holders who have authorised the use of their items. There are two key elements to this process:

1. Protecting intellectual property by **legal and documentary** means
2. Protecting intellectual property by **technological** means.

Each of these is explored here.

6.1 Summary

Before placing a digitised work online, a cultural heritage institution **should** carry out at least the following steps

1. Agree with the rights holder the manner in which the item will be published, and how the rights will be protected. This will typically be a combination of legal/documentary steps and of technical measures. This applies even where the cultural heritage institution is the rights holder.
2. Establish a policy and process which addresses technology issues such as deep linking, framing, etc.
3. Apply legal and documentary measures as appropriate. These may include copyright statements, disclaimers, etc.
4. Apply technology measures as appropriate and agreed with the rights holders. These may include watermarking, low-resolution images, digital rights management, etc.
5. Test a sample of digitised items with a user focus group, to ensure that the end result retains user value. A website which protects its content but is unusable has little value.
6. Note that metadata and website/database design are automatically covered by copyright, and that this copyright is vested in the creator of the metadata and/or database.

Pragmatically, cultural heritage institutions may decide never to publish top-quality, unprotected material online without any terms or conditions of use. Low-resolution images, watermarks, copyright statements and site terms and conditions may be used by the majority of cultural heritage institutions.

6.2 Protecting IP by Legal and Documentary Means

Having stated the intellectual property rights which apply to the online culture project, the project may now create a collection of documents that provide guidance and information to users and partners which inform them in more detail of the intellectual property arrangements, and which protect the project from unauthorised exploitation and from rights holders who feel that their rights have been infringed.

The advantage of creating and publishing an intellectual property document set of this nature is that such documents explicitly establish a legal framework for the project, particularly in terms of its relationships with end users, with third parties and with copyright holders in the material being published. Where disputes or other issues arise, the project can point to these documents as the basis on which decisions were taken.

These documents reflect several of the requirements and issues explored earlier in this topic. They include

- A project-wide copyright notice
- A disclaimer
- A links policy
- A privacy policy
- Terms and conditions of use
- Credits

6.2.1 Copyright Notice

Any online culture project **should** have a clear copyright notice which is prominently displayed (or at least prominently linked to) on the project homepage.

The copyright notice **should** as a minimum assert

- The database rights of the project itself
- The copyright, related rights and moral rights of the cultural heritage institution – as well as its possible reproduction rights over out-of-copyright cultural assets such as works of art and archaeological findings it owns or safeguards - in all the text and other elements of the site which have been created by the institution
- The copyright, related rights and moral rights of the rights holders of any item displayed on the site.

These assertions **should** make clear, in simple language, what is allowed and what is not allowed to be done with the content of the site.

It **should** also state that all reasonable efforts have been made to identify rights holders and secure authorisation for the inclusion of items on the site, and it

should provide a contact person for rights holders who believe their rights may have been compromised.

Guidance

A **good example** of a copyright notice comes from the Tate Gallery in London - <http://www.tate.org.uk/about/media/copyright/>

The **Library of Congress** (US) has a detailed set of legal statements, at <http://www.loc.gov/homepage/legal.html>

6.2.2 Disclaimer

A disclaimer aims to protect the project from future disputes or litigation due to problems with the material which it publishes online. A disclaimer **may** take some or all of the following into account:

- While an online culture project will invest as much effort as is feasible in clearing rights for the material which it publishes, there is a real possibility that the project will wish (and decide) to publish material for which it does not have authorisation. Typically, these will be orphan works, where the project has been unable to contact the rights holder, or where the rights holder has not replied to efforts made to contact him. A disclaimer **should** state that all reasonable efforts have been made, and **should** also state that rights holders who believe their rights have been infringed may contact the project.
- There is every possibility that some element of the material on the site will be inaccurate or ambiguous. In order to avoid conflicts in the future, this possibility **should** be stated in the disclaimer.
- Where the content on the project site is collected from multiple sources, it is possible that some content may be contentious or may not reflect the opinion of the project. The disclaimer **should** dissociate the project as a whole from the views of third parties, including those who contribute content to the site.
- It **should** be clear that links to other websites does not imply any endorsement of the sites or their content. Even where the online culture project provides information about a third party website, this should not be interpreted as an association or endorsement. Such a limitation **should** appear on the disclaimer.
- The naming or provision of contacts details for a person or company should similarly not be interpreted as an endorsement. Again, this **should** be covered by the disclaimer.

- The disclaimer **should** explicitly state that no warranty of any sort is provided with the content and that that project will in no way be responsible or liable for any expense or other consequence of the use of any material on the site. This **should** include non-liability for viruses and other malicious computer programs.

Guidance

An example disclaimer is available at the Van Gogh museum
<http://www3.vangoghmuseum.nl/vgm/index.jsp?page=13346&lang=en>

The **Library of Congress** (US) has a detailed set of legal statements, at
<http://www.loc.gov/homepage/legal.html>

6.2.3 Links Policy

An online culture project **may** publish a links policy. This policy **should** state the following

That links from the online culture project website to third party websites do not indicate any endorsement of the third party website, its content or creators.

- That linking of content on the online culture project website by third parties ('deep linking', see *section 5.1.1.1*) is/is not permitted. If deep linking is permitted under certain conditions, a contact person **should** be provided.
- That linking to the home page of the project is permitted.

Guidance

An **example** of a clear, short links policy is available at
http://www.mla.gov.uk/website/links/our_links_policy

6.2.4 Terms and Conditions

An online culture project **may** publish terms and conditions of use for its website and the material on it. The terms and conditions **should** be prominently linked from the project homepage and **may** be linked from every page.

Terms and conditions of use are the primary legal agreement between an online culture project website and its end users. End users may have to actively indicate that they have read, and agreed with, the terms and conditions of use; this provides the project with a legal basis for enforcing its copyright and other policies. Alternatively, the terms and conditions may state that *'by accessing this website, you agree with the terms and conditions – if you not agree, please leave this website now'*.

Terms and conditions **may** reflect the concern of content owners – for example, if material is available to the project on the basis that it will be used only for private study, this can be included as one of the terms and conditions of use.

Guidance

A **good example** is provided by the Guggenheim Museum (http://www.guggenheim.org/terms_conditions.html).

6.2.5 Credits

Projects **may** wish to acknowledge the individuals and organisations who are involved in an online project. This has the practical advantage that other organisations can discover who to contact, if they require advice with their own projects.

Care **should** be taken not to compromise the personal privacy of any individuals, for example by publishing email addresses online.

Where suppliers such as web design companies, graphical artists, etc. are listed, the project **should** take care that there is no unintentional implied sharing of copyright or other rights in the website.

6.2.6 Ownership

In the event that the digitisation project includes material held by multiple cultural heritage institutions, it is important that the ownership of each item is clearly apparent to the end user, so that the contributing institution does not perceive any loss of ownership. Projects **should** ensure that ownership is clear at all times.

6.3 Protecting IP by Technological Means

The choice and application of technology to protect the Intellectual Property assets of a project will vary from one project to another. However, the use of watermarks (especially copyright statements) and lower-resolution images are very common.

6.3.1 Image Resolution Guidelines

A project **may** offer its images in a low-resolution format. Such a format may be suitable for on-screen viewing, but not for commercial-quality printing and/or re-use. A common resolution for on-screen viewing is 72 pixels per inch. Some projects may wish to make higher-resolution images available in a protected area or on a commercial basis.

Closer examination of the images may be supported using a zooming and panning tool such as those at www.zoomify.com or www.brainmaps.org.

Guidance

Access control based on .htaccess may be suitable for many projects which use the Apache web server. Guidance on using **.htaccess** to prevent access to particular files in particular directories of your site is available here: <http://httpd.apache.org/docs/1.3/howto/htaccess.html>

A useful tool for the **display and manipulation of high-resolution images** is available at www.zoomify.com

Another **zooming tool** is provided by the brainmaps project at www.brainmaps.org

6.3.2 Watermarking Guidelines

Low-resolution images and zoomable images are commonly used in online culture projects. Where low-resolution images are used, the project may deliver a higher level of quality using a zooming technology

The use of **watermarks** is particularly suitable for projects which offer low-resolution or watermarked images freely, and which sell higher-resolution images under license to third parties.

Projects **may** utilise visible watermarks in order to discourage the unauthorised re-use of images placed online. However, projects **should** be aware that in order to be effective, watermarks may need to be intrusive and to reduce the value of the image to the end user. Projects **should** use visible watermarks *only* where essential to protect the project and its contributing rights holders.

Projects **may** use invisible watermarks to fingerprint digital items and to prove ownership. However, projects **should** be aware of the ongoing costs involved in monitoring and tracking image use online and **should** make themselves aware of any limitations of the tracking service.

Guidance

The **industry perspective** on digital watermarking can be found at <http://www.digitalwatermarkingalliance.org/>

The **AHDS** touches on digital watermarking at http://vads.ahds.ac.uk/guides/creating_guide/sect63.html

6.3.3 DRM Guidelines

DRM systems have a significant impact on the use of digital material. DRM should be used only where the benefits clearly outweigh the disadvantages. DRM **should** be applied to as few items as possible - DRM **should** not be the default option. Projects **should** be aware that the content industry is in many cases moving away from DRM, having concluded that the negative aspects of the use of DRM outweigh the benefits.

DRM further increases the vulnerability of digital materials to the obsolescence of the technology used to access it. For DRM-managed items, not only must the media and the access software and hardware be available, but a working DRM system must also be maintained, if content is not to be locked away without recourse.

Projects must be aware of the details of any DRM model which applies to content which they are publishing. Cultural heritage institutions should publish DRM-protected material as part of online culture project websites only with the greatest care.

Guidance

A **good presentation** on the impact of DRM on Digital Preservation is at www.dcc.ac.uk/docs/publications/DPC_CILIP45NoNotes.ppt

A rather **anti-DRM**, but well argued paper on the impact of DRM from Electronic Frontier Foundation is at <http://www.eff.org/wp/digital-rights-management-failure-developed-world-danger-developing-world>

The UK's Institute for Public Policy Research (**IPPR**) has a detailed report (*Preservation, Access and Intellectual Property Rights Challenges for Libraries in the Digital Environment*) on DRM, Digital Preservation and related topics at <http://www.ippr.org.uk/members/download.asp?f=%2Fecomm%2Ffiles%2Fpreservation%5Faccess%5Fip%2Epdf>

7 Frequently Asked Questions (FAQs)

This section poses and answers some of the most common questions about copyright and intellectual property, in a brief and user-friendly manner. The questions reflect the material above, and also some topics touched upon by the AHDS (ahds.ac.uk/copyrightfaq.htm). Another good source is TASI: tasi.ac.uk/advice/managing/copyright_faq.html).

7.1.1 What is covered by copyright?

Almost anything created by the exercise of the imagination is protected by copyright. The work must be in a **tangible** form (e.g. a book, a computer program, an image) – copyright does not protect the idea, but the manifestation of the idea.

The work must be **original** – not a copy of some existing work, but new in some way.

7.1.2 How do I know if an item is in copyright?

Unfortunately, there is no short, comprehensive answer to this question; it depends on national legislation as well as EU copyright directives or other law in your country.

However, in the majority of cases, an item is out of copyright if the last main creator (author, film producer, composer) has been dead for at least 70 years. So all the music of Beethoven and Bach is out of copyright, while the songs of John Lennon are still copyrighted.

But note that even with Beethoven and Bach, the actual performance will be protected by copyright law, so that the *related rights* of the conductor, the musicians and the record company or broadcaster are protected. However, you can play the music yourself, and sell recordings of that performance, or collect payment for listening to it.

7.1.3 Can I digitise a photograph of a painting or artwork?

Maybe, if the subject of the photograph is out of copyright. The photo will have copyright of its own, but if you took the picture, then you own the copyright. Most museums and galleries only allow photography under strict conditions, and you may be violating those conditions.

If the subject of the photo (e.g. a painting) is in copyright (e.g. the painter is alive, or has been dead for less than 70 years), then you may not photograph it without the permission of the rights holder.

Additional guidance on this and related questions can be found in the AHDS FAQ at <http://ahds.ac.uk/copyrightfaq.htm>

7.1.4 Can I create and disseminate a podcast of a dance or movie?

No. The movie itself will be copyright. If you created the movie yourself, the performers will have related rights (see section 3.1.5) which must be dealt with, before you can copy and disseminate the material.

7.1.5 What are Copyright Exceptions?

Copyright exceptions (or limitations) are a set of circumstances provided by all copyright systems in various forms under which individuals and (to some degree) libraries and archives can ignore certain elements of copyright. The precise circumstances where such exceptions apply will vary from country to country, and from circumstance to circumstance. However, a general principle is that the enforcement of copyright exceptions should not impact on the legitimate commercial interests of the copyright holder.

7.1.6 Is Copyright Law the same across Europe?

No. Each country has its own legislation. However, many aspects of copyright law have been harmonised under EU copyright directive (see section 2.2), and the underlying Berne Convention has wide international application. So most aspects of copyright are treated in a common manner across the EU (and to a lesser extent, beyond).

7.1.7 How do I identify a copyright holder?

This can be difficult! If the item does not have copyright information embedded in it e.g. a book, a captioned photo), then you must carry out research to discover who is the copyright holder. Collective licensing organisations (see *section 3.5.1*) may be able to help. There are organisations and databases of rights holders in several countries. See, for example, the Copyright Licensing Association in the UK (www.cla.co.uk).

If, after a reasonable amount of research (documented in your diligence file), you cannot identify the rights holder, you may be able to treat the item as an orphan work (see *section 3.1.9*)

7.1.8 If I find an image on the internet, can I use it?

No. Almost everything on the internet is protected by copyright. The fact that something is freely accessible does not mean it is in the public domain.

7.1.9 Where can copyright-free images be found

There are online resources with images which are in the public domain or which can be re-used under license. Many of the larger ones are in the US. See Wikipedia's page (http://en.wikipedia.org/wiki/Wikipedia:Public_domain_image_resources) for details.

7.1.10 If I don't charge, is it a violation?

If you publish an item online, without copyright clearance, you violate copyright. Whether or not you are paid for access is not the issue.

7.1.11 How can I copyright my work?

Your work is automatically protected by copyright, once it has taken a tangible form. Your ideas are not copyright, but documents, images, movies, etc. are automatically covered.

7.1.12 Is my website protected by copyright?

Yes. If your website is not a simple copy of another website, or derived from some other work, then it is (a) original and (b) tangible, and so protected by copyright. In addition, it may be protected under the database right (see *section 3.1.6*). If your website is a copy of another website, you are probably in breach of copyright yourself.

7.1.13 Is my database protected by copyright?

A database is protected under EU copyright directives (especially Directive 96/9/EC) even if it contains material that is all in the public domain or not subject to copyright. The type of protection depends largely on whether the database for which protection is sought constitutes a mere aggregation of data or its compilation of data can be argued to have involved some originality or creativity in the selection of the material embodied in the database. In the former case, EU grants a so-called *sui generis* exclusive right similar in scope to copyright that lasts 15 years from the date of creation of the database. In the latter case, the database is protected under the usual protection regime applicable to all creative works qualifying for copyright protection (i.e., a different kind of protection which lasts 70 years after the author's death date). In both cases, the existence of a database right implies that an entire or substantial portion of the database cannot be copied legitimately without the authorisation of the copyright (or *sui generis* right) holder.

7.1.14 Are my emails protected by copyright?

Yes. Email copyright belongs to the author of the email (or his employer), not to the recipient.

7.1.15 Can I copyright a name?

No. But names can be protected using trademarks (see Appendix A).

7.1.16 If an item is out of copyright, can I digitise it and put it on the web?

Yes. Once the item is out of copyright, you can duplicate and distribute it any way you wish.

But note that you must ensure that there are no related rights. A book of Shakespeare, printed in 2005, will be protected by the rights of the typographer who printed the book, any illustrator who worked on it, etc. even though the text itself is not protected.

You can, however, type in the text of a Shakespeare play and place it on the internet.

7.1.17 If copyright belongs to a company which no longer exists, does the copyright exist?

Yes. If the company was acquired by another company, then the new company owns the copyright, as an asset it has acquired. If the company has gone bankrupt, then while copyright exists, there is no rights holder. In this situation, it is *probably* safe to ignore copyright.

7.1.18 Does a company own the copyright in the work of its employees?

Yes. Unless contractually agreed otherwise, a company owns the copyright to work carried out in the course of employment. Copyright to work carried out in free time remains with the employee.

7.1.19 Does a University own the Copyright to its Students' Work?

No. Unlike a company-employee relationship, the copyright in a student's work remains his own. If a university wishes to publish examples of student work on its website, it must first receive authorisation from the student.

7.1.20 What if a work has multiple copyright holders?

Where there is more than one rights holder, the permission of **all** holders must be secured.

7.1.21 If I modify a copyright work can I sell the results?

No. Derivative works, which are derived from existing copyright work, cannot be duplicated, sold or distributed without the authorisation of the rights holder. However, you are now a joint copyright holder – the original creator has copyright to the original work, and you have copyright to your changes.

7.1.22 May I copy a digital item, in order to store it in a personal archive?

In general, yes. Private copying falls under the scope of private copying or personal use exceptions.

7.1.23 May I copy a CD onto my iPod?

In general, yes. Private copying onto another device which belongs to you falls under the scope of private copying or personal use exceptions. But you may not

distribute copies of the work, either by placing the CD on the internet or by making copies of the CD and giving them to friends.

7.1.24 Is viewing a file on the internet not a form of copying?

Technically, when a website is viewed, the browser makes a local copy of the material. This is a short-term, temporary copy, solely for the purpose of viewing the material in an authorised manner.

7.1.25 Does deep linking violate copyright?

No. Deep linking (see section 5.1.1.1), even to a copyright item, does not involve copying and does not violate copyright. However, content should not be copied and passed off as your own.

7.1.26 Can I copy text from another website?

Only if you have copyright clearance. Even if you acknowledge the source of the material, you are still violating copyright, unless you have the permission of the rights holder.

7.1.27 I am a library. Can I lend copies of a copyright work?

In general, yes. This assumes that the items you are lending are published copies of a book, a CD or another item. This is the basis of a lending library.

7.1.28 I am a library. Can I make my own copies of a copyright work, and lend them to the public?

In general, no. The rights of libraries and archives vary from country to country and from circumstance to circumstance, but it is safer to assume that you cannot do this unless you have clear legal advice to the contrary.

7.1.29 I am a library. Can I make copies of a copyright work, for archive purposes?

The situation varies from country to country. In general, yes, you can do this under specific copyright exceptions allowing libraries, museums, archives and other cultural or educational institutions to make copies for archive purposes .

7.1.30 I am a library. Can I digitise a copyright work?

This depends on *why* you are digitising it. If you are doing so in order to preserve it, you may be able to justify this as an activity permitted under an applicable copyright exception. If you are digitising it in order to place it on the web as part of an online culture project, you usually cannot do this without the authorisation of the rights holder.

7.1.31 I have a collection of old letters. Can I digitise them and place them online?

This depends on the age of the letters. If the letters are out of copyright (writer dead at least 70 years), then yes. If the letters are still subject to copyright, then you need to check if the copyright is held by you, or by the writer. If the writer or donor assigned the copyright to you, then you can go ahead and publish the letters. If not, authorisation must be received first.

7.1.32 I have created a digital artwork which I would like others to be able to use, but I want everyone to know that I created it. How can I share my work and protect my interests?

This is a common problem for software programmers and graphic artists. A Creative Commons-like licence (see *section 3.5.2*) may be right for you.

7.1.33 Can I digitise a work in the public domain, from a modern printed edition?

No. The typesetting and layout of the modern edition will be protected by copyright, even though the text itself is not. You can, however, digitise an older (out of copyright) edition, or type in the text yourself.

7.1.34 How do I stop others copying my website?

Enforcing copyright will depend on technical and legal measures. There are various technology measures you can deploy, such as disabling the right-click download of images or the delivery of your site using Flash. None of these is infallible. You can also protect your content using copyright law, by providing a prominent terms and conditions of use for your site, and making your copyright explicit for each item on the website. These measures will strengthen your case if you need to take legal action against someone who has copied your work without authorisation.

However, often the best way to protect your work is avoid placing it online, and instead showing only low-resolution and/or watermarked pictures on your site.

7.1.35 What legal statements should my online culture project website have?

An online culture project website should have at least the following:

- A copyright statement, where you make it clear that everything is copyright protected unless stated otherwise
- A disclaimer, where you state that you accept no liability for the use of website content or for the content itself
- A links policy, where you make it clear that you do not endorse the sites to which your website links. You may also state your policy regarding deep linking.
- Terms and conditions, where you state that the user, by accessing the website, has agreed to all of the above.

These may be collected into a single document, or presented as a series of separate documents.

7.1.36 Can I protect my website from being ‘framed’?

Yes. You can prevent your website from being shown within a frame on another site. See *section 5.1.1.2* for details.

7.1.37 Can I prevent deep linking to pages within my website?

Yes, but not very securely. If you prefer all visitors to your website to access it via the front page (e.g. so you can show the terms and conditions of use), you can use HTTP referrer information to protect access to internal pages. This is not secure against determined attack, but offers some level of protection. See *section 5.1.1.1* for details.

7.1.38 Can I prevent the use of images within my website, on another website?

Yes, but not very securely. This process is known as inlining. You can use HTTP referrer information to protect access to internal pages, as for deep linking. This is not secure against determined attack, but offers some level of protection. See *section 5.1.1.1* for details.

7.1.39 Can I copy some material from another website, so long as I attribute it?

No. Websites are subject to copyright. If you wish to cut and paste some material from another website into yours, you must obtain authorisation from the copyright holder.

7.1.40 What is Public Domain?

Works in the public domain have no copyright asserted over them. Anything can be done with them, by anyone, for any purpose – they can be copied, modified, distributed, used by a third party for commercial purposes, etc.

7.1.41 Can an item leave the public domain?

No. Once an item is in the public domain, it cannot be re-copyrighted. However, changes in copyright law, extending the term of copyright, have led to items which were previously copyright-expired once again falling under copyright.

7.1.42 Is a work without a copyright notice in the public domain?

No. A work is by default subject to copyright. A work only enters the public domain after all copyright has expired, or after it has been explicitly placed there by its rights holder.

7.1.43 Can material which is out of copyright in one country be downloaded into another country, where the material is under copyright?

No. This is equivalent to importing the material into the country where the material is protected. This infringes the copyright.

7.1.44 When should I use Creative Commons?

Creative commons licences are useful in the situation where you wish to maintain some rights over your work, but not the full protection of copyright. For example, you might be happy to have people reproduce and distribute your work, and to adapt it in any way they wish, so long as they always attribute the work to you. This is equivalent to the Creative Commons Attribution 2.5 Generic license. A full spectrum of licences is available from Creative Commons at www.creativecommons.org.

8 Appendix A: Background: Industrial Intellectual Property

The discussion above focuses on intellectual property rights which are concerned with the tangible manifestation of an idea. Copyright protects, for example, a painting of a landscape, but not the idea that a landscape may be painted.

A second important category of intellectual property is concerned with the protection of an *idea*, rather than of any single manifestation of that idea. Usually, the idea will be for a new invention of some sort –the most common form of industrial intellectual property is the patent. Others include industrial designs, trademarks, commercial designations and layouts for integrated circuit boards.

8.1 Inventions

Inventions are new solutions to problems. The fact that the solution is *new* is central to its being an invention. A new discovery, such as new type of animal or plant, is not an invention. But the application of a plant product to solve a particular problem is an invention. The invention is the *idea* behind the solution, not a ‘work’

Guidance

The **IPR Helpdesk project** addresses inventions at

http://www.ipr-helpdesk.org/documentos/docsPublicacion/pdf_xml/8_invencionesTecnicasBP%5B0000001055_00%5D.pdf

The **World Intellectual Property Organisation (WIPO)** addresses inventions (and much more) in their publication “Understanding Industrial Property” at http://www.wipo.int/freepublications/en/intproperty/895/wipo_pub_895.pdf

8.2 Patents

Inventions are typically protected by patents. These are rights, granted at national or international level, which allow the inventor to control the use of his invention for a fixed period (typically 20 years). Thus, if a drugs company develops a new treatment, it can apply for a patent, and no other drugs company can make and market the new drug for 20 years (unless, of course, licensed to do so by the inventor).

In order to apply for a patent to protect an invention, the invention must meet certain *conditions* of patentability

- The invention must have some commercial or industrial potential
- The invention must be new – the idea must not have been published prior to the patent being granted.

- The invention must not be obvious
- The invention must be within an area of patentable subject matter. The types of things that can be patented vary from country to country, but a good example of something that cannot be patented in many countries is anything which would undermine the public good if it were to be patented.

A patent application is typically quite expensive, as existing patents must be searched to ensure that an invention meets the conditions outlined above. Such searches are usually carried out by expert patent attorneys. Since an application must be completed in each country where a patent is applied for, protecting a new idea can be very expensive.

A patent applies only in the countries where it has been granted. However, the patent typically prevents third parties from importing products based on the patented invention from countries where no patent protection has been secured.

Like copyright, patent rights can be bought, sold and inherited. A patent can be over-ridden in exceptional circumstances, by a state authority granting a compulsory license.

Guidance

The **World Intellectual Property Organisation (WIPO)** addresses patents (and much more) in their publication “Understanding Industrial Property” at http://www.wipo.int/freepublications/en/intproperty/895/wipo_pub_895.pdf

The **European Patent Office** provides background information, as well as patent search, at <http://www.epo.org/>

Google has a patent search facility at <http://www.google.com/patents>

The UK government’s **Intellectual Property Office** addresses patents at <http://www.ipo.gov.uk/abroad/abroad-patenteurope.htm>

8.3 Utility Models

A utility model is a ‘simplified patent’, which protects less complex ideas than a patent does, and which has a shorter life span (7 to 10 years). In some countries (e.g. Ireland), the utility model is in fact termed a ‘short term patent’.

The conditions of patentability are usually less stringent for utility models than for full patents; in particular, the invention need not be non-obvious or new to the same degree. Utility models often apply to incremental developments of existing inventions.

Applying for a utility model is typically faster and cheaper than applying for a full patent.

Guidance

The **National Board of Patents and Registration of Finland** addresses utility models here <http://www.prh.fi/en/hyodyllisyysmallit.html>

The **World Intellectual Property Organisation (WIPO)** describes utility models at http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm

Ongoing **EU work** on utility models is presented at http://ec.europa.eu/internal_market/indprop/model/index_en.htm

8.4 Industrial Designs

An industrial design is the aesthetic form of a practical or useful invention. Such an invention will serve a purpose other than simply art. Thus, for example, a chandelier may be subject to an industrial design – it provides light (and so is a practical invention) but also looks beautiful (and so has an aesthetic aspect). The aesthetic form is protected by an industrial design. An industrial design can only protect something that serves a useful (not solely artistic) purpose. Another good example of an industrial design is the design of a dress or other article of clothing.

Industrial designs must be new or original. The duration of an industrial design is typically from 10 to 25 years (varying according to jurisdiction).

Guidance

Wikipedia has a good page on industrial design at http://en.wikipedia.org/wiki/Industrial_design

The **Canadian Intellectual Property Office** has a detailed section at http://strategis.ic.gc.ca/sc_mrksv/cipo/id/id_gd_main-e.html

Of course, **WIPO** has a guide to industrial designs, at <http://www.wipo.int/designs/en/designs.html>

8.5 Trademarks

A trademark is a distinctive (usually visual) mark which is associated with a particular category of product – typically the products of a single supplier. Examples include the Nike ‘Swoosh’, the CocaCola logo, the Adidas three

stripes, etc. Trademarks are very important in consumer purchase decisions, and are the focus of enormous expenditure in advertising and marketing.

In addition to trademarks which identify a company's goods, other classes of marks exist. **Collective marks** are used by members of an organisation, such as an association of accountants or electrical contractors. **Certification marks** are used to indicate that a product meets a defined domain standard, such as the UK 'Kite' Mark, the German DIN Mark or the EU's EC mark.

Trademarks typically distinguish one commercial offering from its competitors, in terms of producer, quality, standards and promotion. Trademarks are registered by the holder with the state authorities; a registered trademark cannot then be used by a competitor in the same domain. Trademarks must be registered to be enforceable, but can be renewed indefinitely –they do not have a fixed lifetime like copyright or patents.

Guidance

The UK government's **Intellectual Property Office** addresses trademarks at <http://www.ipo.gov.uk/tm.htm>

The **International Trademark Association** is an industry group focusing on trademarks at <http://www.inta.org/>

WIPO has a guide to trademarks, at <http://www.wipo.int/trademarks/en/>

8.6 Trade Names

Trade names are a form of trademark that identifies a company or other enterprise. Trade names do not need to be registered, but are automatically protected. As a result a new company cannot operate in the same domain as another company with the same name. Trade names are very common in the pharmaceutical industry, where drugs are typically sold under quite different name to their industrial name.

Guidance

A detailed guide to trade names (in the **US**) is provided at <http://www.dol.wa.gov/forms/700128.pdf>

8.7 Geographical Indications

A geographical indication is a trade mark which indicates the location in which a product originated. Typically, such an indication will be associated with ideas of quality or appeal in the eye of the consumer. For example, 'Champagne' is a geographical indication which is applied to sparkling wines from a certain part of

France. Other sparkling wines, e.g. from Australia, cannot call themselves 'Champagne'. To a greater or lesser degree, some geographical indications reflect unique agricultural or other factors involved in the production of the product. Many agricultural products are labelled 'AOC' (Appellation d'Origine Controllee), indicating that they must come from a particular location.

Geographical indications can also cover non-agricultural products. A good example is Swiss watches, which indicate a tradition of build quality and precision.

Guidance

The **World Trade Organisation** describes geographical indications at http://www.wto.org/english/tratop_e/TRIPS_e/gi_background_e.htm

EU work in this area, focusing on agricultural indications, is outlined here: http://ec.europa.eu/agriculture/foodqual/quali1_en.htm