

# **Guide to Intellectual Property Rights and Other Legal Issues**

Version 1.0

by Naomi Korn

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# 1. Overview and Key Issues

## Introduction

Rights issues are prevalent within pretty much anything to do with digital content, from its formation, reproduction, adaptation, negotiation, dissemination and repackaging. In order to limit risks of infringement and take advantage of the benefits that the digital environment presents, it is essential that museums, libraries and archives familiarize themselves with copyright and other issues, as well as train staff in good practice procedures.

This guide is based upon the Legal Workpackage component of the EMII-DCF Report<sup>1</sup> published by the EMII consortium [led by MDA] in 2003. This Report explored the legal issues and processes surrounding the creation and licensing of digital content and specifically issues surrounding copyright. The information contained within the guide will be beneficial to a broad spectrum of users from the cultural heritage fields across Europe. It should particularly appeal to those involved in on-going digitisation projects which need to embed an appropriate attitude towards rights management into their ethos and culture as well as organisations who have inherited rights conditions from funding bodies as part of specific project funding. Typical digitisation projects might include the development of websites and CD/DVD's, or the creation of digital material for mobile phones, pda's and other devices for the following purposes:

- eLearning and virtual learning environments (VLE's)
- Managed learning environments (MLE's)
- Digital repositories
- Digital preservation
- Digital asset exploitation
- Online publishing and the promotion of access to collection works.

The guide recommends good practices and mechanisms that can be employed to minimise risks and maximise the exploitation of assets housed in the sector. It also acknowledges that many organisations are

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<sup>1</sup> <<http://www.emii-dcf.org/dokument/frame.pdf>>.

positioned in the dual roles of digital content consumers as well as holders of digital assets and so need to understand the issues from a broad dual perspective. As well as providing clear processes for handling rights effectively, the guide offers an insight into the importance of licensing to facilitate rights transactions, good practice suggestions for rights clearance and solutions offered by rights management systems. It is hoped that this guide addresses the key issues of concern and flags up relevant resources if further information is required.

## **Rights within the digital environment**

Over the last few years, the shifting tensions between rights holders and rights users, together with developments in new technology and pressures from music and software companies, have succeeded in strengthening the copyright legislation. The impact of these new measures has been viewed by many as restricting the creation and use of digital content because they include the development of technical measures to prevent the abuse of copyright, tying in users to licence arrangements to restrict potential abuse, as well as stricter punishments for infringements. Focus on these measures and their negative impact has been such that the term “digital rights management” (DRM) has become synonymous with some user groups with constraining access to content and linking digital rights to proprietary ideologies.

In response, there is increasing interest in ways of making content more widely available for educational use by implementing initiatives such as the Copyleft and Open Source licensing schemes, including the licences offered by Creative Commons<sup>2</sup>. Cultural heritage organisations can also help themselves to understand the changes to the copyright law and the advantages that DRM offers them by developing a thorough knowledge about the key issues and in particular the scope of rights issues in the life-cycle of their digital content.

## **The digitisation life-cycle**

This life-cycle (below) defines the various stages in the creation, acquisition and use of the object and in particular the extent that rights issues need to be considered along each stage. It is a useful tool for navigating around the layers of rights issues prevalent within the lifecycle of any piece of digital content and determining a rough guide about what needs to be done and when.

### **STAGE 1: Acquisition of the object (Chapters 2, 4, 6 & 7)**

A digital object can be created from an existing work - “digital surrogate” - which includes scanned images or alternatively created afresh - “born digital” - such as websites, metadata, databases and pieces of net art. In

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<sup>2</sup> <<http://www.creativecommons.org>>.

each circumstance, it is crucial that compliance is sought for a number of rights issues. In the case of digital surrogates, this may be prior to the creation of the digital object and at the point that the real object enters a collection. Key issues which are discussed in more detail within this guide that need to be established include:

- 1) Identifying any rights issues
- 2) Identifying who owns the rights
- 3) Negotiating the appropriate rights for the creation and use of the digital object
- 4) Ensuring that rights issues and/or terms and conditions in third party contracts, (such as those with software suppliers, digitisation companies and third party funding bodies) are resolved and /or can be complied with.

#### **STAGE 2: Management of the object and associated rights (Chapter 8)**

Once an object is created or acquired, it is important to find solutions to manage the rights appropriately. A digital object cannot be reproduced or disseminated, unless it is clear whether it can be used. Rights issues to be resolved include:

- 1) Documentation of rights<sup>3</sup>
- 2) Establishment of rights management systems
- 3) Development of ecommerce applications to assist transactions and licensing.

#### **STAGE 3: Access to the digital object (Chapters 7 & 8)**

Before a digital object can be disseminated more widely, mechanisms to control access need to be activated in order to ensure that the digital object is not used inappropriately. These would include:

- 4) Deciding who should be granted access to the digital object and under what terms
- 5) Formulation and implementation of the appropriate licences/permissions to support the delivery/harvesting of the image in an appropriate medium
- 6) If necessary, the activation of technical measures to protect content from unauthorised access.

#### **STAGE 4: Re-use of the digital content (Chapters 6, 7 & 8)**

Digital objects can be repackaged as learning materials (eLearning), harvested to other projects and reused in other contexts. In these cases, it is unlikely that the original rights that have been negotiated will be sufficient for these additional purposes. At the same time, organisations in the cultural heritage sector should consider how they might benefit from

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<sup>3</sup> For more detailed information, please refer to the procedures outlined in SPECTRUM <<http://www.mda.org.uk/spectrum-html/righ.htm>>.

material that they supply to third parties. Rights issues to be considered might include:

- 7) Renegotiation of rights for repackaged material from rights holders
- 8) Securing rights to access content generated from third party licencees.

## **How to use this Guide**

This guide is intended as a short introduction to the key issues. It is meant as a first-step user-friendly guide to approaching and understanding the core rights issues within the context of digitisation issues. It is not intended as an alternative to professional legal advice nor can address the varied legislation existing across Europe and in these cases, if necessary further advice might be necessary. However, the main principles and issues have been addressed and, as long as the appropriate good practice processes are embedded within core daily activities by all staff, risks can be minimised and legal advice only sought when absolutely necessary.

The guide contains a number of navigation tools to help professionals in the sector identify and understand the key issues:

- Written in a user-friendly language
- Chapters broken down into digestible sections
- Relevant examples
- Charts, illustrations and decision trees
- Index referencing the key terms used throughout the guide
- References to web links for further information.

## 2. Introduction to Intellectual Property Rights

### Context and background

*Intellectual Property Rights* (IPR) is the collective name for new and unique ideas, products and creations resulting from human creativity and innovation. Copyright, Trademarks, Patents, Database Rights and Performance Rights are the most relevant rights with regards to those that may apply to digital content. In most cases, once a creative endeavour or innovation is protected, like property, the associated rights can be traded, bought and sold, bequeathed and licensed.

Over the years, there has been a long tradition of international IPR harmonisation in order to ensure that material protected by IPR is respected globally. The internet and digitisation possibilities mean that national rules do not necessarily provide satisfactory protection, when, for example, material can be created in one country, held on a server located in another country and downloaded across the globe. In this case, based upon national legislation alone, it is hard to deal with the misuse of material or the creation of inappropriate content. Internationally-based legislation can help clarify cross-border issues, as well as develop global IPR standards. The most important international treaties include: The Berne Convention<sup>4</sup>, administered by the World Intellectual Property Organisation (WIPO)); the Universal Copyright Convention (UCC)<sup>5</sup> and the TRIPS Agreement<sup>6</sup> (Trade Related Intellectual Property Rights) under the patronage of the World Trade Organisation.

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<sup>4</sup> The Berne Convention for the protection of Literary and Artistic Works, September 9<sup>th</sup> 1886. The convention has been amended several times during the last 125 years, the last time on September 29<sup>th</sup> 1979.

<sup>5</sup> The Universal Copyright Convention of September 6<sup>th</sup> 1952 as revised at Paris on July 24<sup>th</sup> 1971.

<sup>6</sup> "The Agreement on Trade Related Aspects of Intellectual Property Rights" is part of the final act of the Uruguay Round of multilateral trade negotiations in 1994. According to the TRIPS Agreement, all WTO countries are obliged to adhere to the rules and principles of the Berne Convention and the fundamental rules of the Rome Convention (The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organisations, signed at Rome on October 26<sup>th</sup> 1961). More about the TRIPS Agreement can be found at <[http://www.wto.org/english/tratop\\_e/trips/intel2\\_e/htm](http://www.wto.org/english/tratop_e/trips/intel2_e/htm)>.

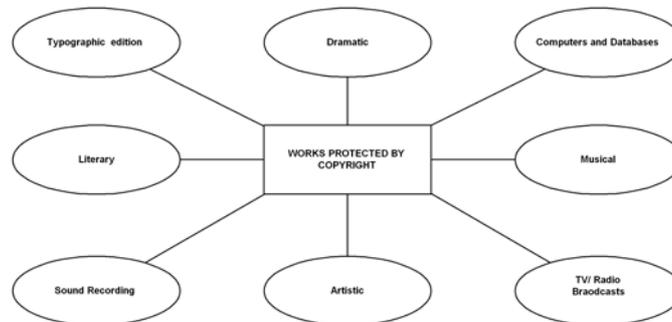
The Berne Convention provides the means for reciprocal protection to foreign works according to the same rules as national content, no matter to what level of protection exists in that country.

*For example, a painting created by a contemporary French artist is granted the same protection and treatment in Germany as a German artist would receive in Germany. This will also mean that if this artist's work is reproduced without authorisation in Germany, German copyright legislation will be used to determine whether this use is a copyright infringement.*<sup>7</sup>

## What is copyright?

Whilst a number of other rights may exist in digital content, the most common right that exists is copyright. Copyright protects the following categories of published and unpublished works for specified periods of time.

The eight categories of works protected by copyright and relevant examples include:



- Literary Works – (for example, emails and newspaper articles)
- Dramatic Works – (for example, plays)
- Musical Works – (for example, songs, musical scores and soundtracks)
- Artistic Works – (for example, paintings, photographs and images)
- Films – (for example, videos and cinematic performances)
- Sound Recordings – (for example, oral history tapes and recorded lectures)
- Broadcasts – (for example, TV and radio)
- Typographic Works – (for example, the arrangement of websites and translations).

Whilst copyright does not protect ideas, it will protect them once they are fixed in material or tangible form.

*For example, whilst an idea for a story will not be protected by copyright, once the idea is transferred into writing, then it will be protected by copyright. Likewise, the concept for a website will not be protected by copyright, but as soon as the concept is noted down and/or the code for the website is written – then both the written concept an/or the website itself will be protected by copyright.*

Copyright is granted to the author of any of these categories of works who is entitled to freely and exclusively exploit their work, whilst granting or refusing permission for others to copy their work in these ways. These activities are called the *Restricted Acts* and include:

- Copying the work (for example, photocopying, photographing, scanning)
- Distributing copies of the work to the public
- Renting or lending copies of the work to the public
- Communicating the work to the public (for example, display on the internet or internal intranet)
- Adapting the work, (for example, translating, adapting or abridging a work)
- Performing, playing or showing the work in public
- Broadcasting the work (which can also include electronic transmission)

Many countries in Europe, such as France, Denmark and the UK, will give copyright protection automatically as soon as a work is created, without the need to register it.

If a work does not belong to one of the eight categories (above) it will not be protected by copyright, although it may be protected by some other right. Also notable is the ability for works to belong to more than one category. This is useful to understand because it illustrates that content can be created by more than one author and so permission to reproduce content can be subject to permission from a number of different people.

*For example, a web site is likely to be protected under the following categories, all the authors of which will need to be contacted should permission be required to reproduce every element:*

*Composition of the web pages - Typographic arrangement*

*Written content of pages – Literary copyright*

*Images or graphics – Artistic copyright*

*Any sound/music element – Sound Recordings and or Music Copyright*

## Ownership of copyright

In most cases, copyright is owned exclusively by the first author/s of the new work<sup>8</sup> however, in the cases of works by employees, although they are acknowledged as the first author of the new work, the owner of the copyright will be the organisation for whom they are employed. Likewise, freelance staff commissioned to carry out a piece of work on behalf of an organisation, will own the copyright in the work, unless they have assigned their copyright to the organisation they are working for. It is therefore crucial that rights in all work carried by people who are not employed staff (i.e. freelancers, contractors, volunteers, interns etc) are assigned back to the organisation by means of a suitable contract or licence agreement.

*For example, a museum develops a website using the content and skills provided by a number of sources such as external developers, consultants or internal employees. The museum will need to make sure that all the rights in the development of the content and work have been assigned to the museum else the third parties will have to claim to rights that they should not be entitled to utilise.*

Once a work is created, ownership of copyright can remain quite separate from the ownership of the physical work. This means that organisations owning works still remaining in copyright need to be aware that there is likely to be dual aspect to almost all these works.

*For example, although a library may own thousands of photographs, documents and books, unless they created them or have written proof that they have been assigned the rights in them, copyright will vest with the rights holders. Any permission to reproduce this written content cannot be given by the library, but instead by the relevant rights holders.*

Copyright can be passed on (bequeathed, sold etc) from one person to another, until the duration of copyright has elapsed. If the person owns rights in works but is not the original owner, they are referred to as the *Rights Holder* and often are not related to the original author.

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<sup>8</sup> In the case of films, the first author/s will be the producer and the principal director and in certain countries in Europe, the authors may be more broadly recognised, such as the music composer, screenplay writer etc. In the case of films created before 1 July 1994, the producer is recognised as the author. With regards to sound recordings, the producer is regarded as the author and thus first copyright owner, whilst the broadcaster is generally regarded as the first author of the copyright in a broadcast.

## Originality

It is important to note that all works protected by copyright must be original<sup>9</sup>. Whilst there is no definition of *Originality*, to be considered original, a work has to be more than a mechanical reproduction of a previous work. This definition can sometimes be difficult to determine, i.e. particularly in cases of works that are comprised of other works in copyright – such as collages and montages. Therefore, some countries in Europe, such as the UK have also relied upon works that demonstrate some kind of skill or judgement, rather than creativity alone<sup>10</sup>, as a means to determine how far any new works are afforded their own copyright protection. Despite a recent case in the US<sup>11</sup>, most countries will also follow the principle that significant skill and judgement have been employed in order for photographs of art works to be afforded their own copyright protection.

*For example, a museum in the Netherlands can claim copyright and licence photographs of art works by Van Gogh that they own, despite the artist passing out of copyright many years ago, based upon an additional copyright that has been created in the photographs taken of the original paintings. The museum ensured that the copyright of the photographer was assigned to the museum in the contract with the photographer.*

## Duration

Copyright protection is not perpetual and in most countries, the standard term for copyright protection is lifetime + 70 years after the end of the calendar year in which the author died<sup>12</sup>.

*For example, the French artist Pablo Picasso died in 1973, his works will only pass out of copyright on 1<sup>st</sup> January 2044.*

However, the duration of copyright may vary according to a number of other criteria which include:

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<sup>9</sup> Apart from sound recordings, as long as the recording is not a copy or duplicate of an existing sound recording.

<sup>10</sup> Although this may gradually change since the Term Directive (Directive 93/98/EEC) states that “photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1.”

<sup>11</sup> *Bridgeman Art Library Ltd v Corel Corp.* [2000] 5 Ent LR 104. For a thorough commentary on the case and its implications on US and UK law as well the concept of originality, please see: <[http://www.law.cornell.edu/copyright/cases/36\\_FSupp2d\\_191.htm](http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm)>.

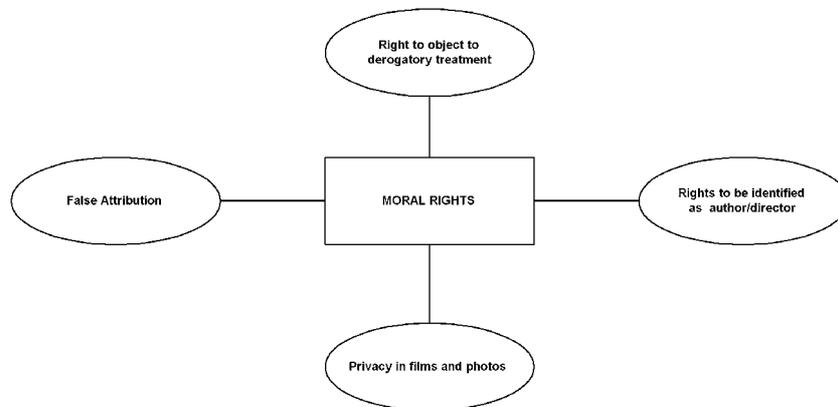
<sup>12</sup> This was amended in Europe from 50 years + lifetime in accordance with the provisions outlined in the Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights.

- The category of work
- If the author is known
- When the author died
- When the work was created
- When the work was first published
- When the work was first made available to the public

Once the above have been established, it is possible to calculate the duration of copyright. It is important to check national legislation in each case.

### Moral Rights

In relation to IPR, *Moral Rights* can be defined as the set of privileges granted to authors in order to allow them the right to have the quality and authorship of their work respected. Moral rights cannot be assigned<sup>13</sup>, however it is possible for the author of a work to waive their moral rights. An infringement of an author's moral rights can be taken to court and where appropriate, damages can be awarded to the author.



There are four main rights:

- 1) Right to object to derogatory treatment

*For example, during the course of a project to create an information website, a national library requests permission from the author of an article to reproduce an extract of the text online, without selecting which part of the text they want to reproduce. The author grants permission based upon his understanding that permission is for the reproduction of the whole article. When the website goes live, the author feels that the particular extract that has been used is disparaging to his work and so files a complaint that the reproduction is derogatory treatment.*

<sup>13</sup> Although in some EU countries, Moral rights can be transferred posthumously to the author's heirs.

This is an important right to observe when reproducing digital images. If images are altered or manipulated, shown in detail or reproduced in a way other than fully without the rights holder consent, this could be viewed as derogatory treatment.

2) Right to be identified as the author

3) Rights to object to false attribution

*For example, if a quotation is used from a book that appears in a report or in a multimedia work, the author of the book from where the quotation is taken has the right to be identified. If the author is not mentioned or someone else is attributed instead, the author's Moral rights have been violated.*

4) Right to privacy in films and photographs

This relates specifically to works that have been commissioned for domestic or private purposes and is awarded to the persons who appear in them (such as wedding photographs and private portraits). In these cases, permission must be sought if the works are issued or shown to the public, exhibited or broadcast.

## **What can legally be done with a work?**

Copies of works can be reproduced without the need to seek the rights holder's permission for a number of specified purposes only, and these are generally referred to as *Fair Dealing or Permitted Acts*. In this context, fair dealing means that the copying must not be prejudicial to the interests of the rights holders. These exceptions will vary from country to country<sup>14</sup>, however the main ones, are as follows:

### **1) Non-commercial research and private study**

Copying for research or private study must be non-commercial only. In this case, the emphasis is upon the nature/purpose of the copying itself, rather the nature of the organisation carrying out the copying. As long as is practical, copies must include an acknowledgement. It is also worth noting that this exception does not include the copying of films or making of sound recordings.

*For example, a museum curator in Greece needs to copy a few pages from a book for the purposes of research into online text that will accompany images of works hanging in the permanent collection. As long as this purpose is non-commercial, then the curator can legitimately make the copies that they need without the requirement to request permission.*

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<sup>14</sup> The implementation of the Exceptions listed in the Directive, have not been mandatory, so their inclusion in National legislation is likely to vary from state to state.

*However, if the museum curator needs to copy a few pages from a book for the purposes of research into an exhibition catalogue which will be sold in the shop, this type of copying will be viewed as commercial and the curator will need to seek the appropriate permission from the relevant rights holders<sup>15</sup>.*

## **2) Criticism and review**

A lawful copy of a work can be made under this exception for the purposes of criticising or reviewing a work or the work of another. In this case, the work must be sufficiently acknowledged as well as lawfully been made available to the public, i.e. the copying of unpublished works will benefit from this exception.

*For example, for the purposes of reviewing the work of a contemporary Italian artist which will appear in a weekly newspaper supplement, the whole work or an extract may be reproduced as long as it is acknowledged.*

## **3) Making temporary copies**

Temporary electronic copies of works (apart from databases or computer programmes) held in a cache will not infringe copyright. This is upon the condition that:

- The copies are transient or incidental to an integral and essential part of a technological process
- The sole purpose of the copies is enable the transmission of the copies in a network between third parties by an intermediary
- There is no economic benefit to the creation of these temporary copies.

## **4) Copies for visually impaired users**

Recent changes to national legislation<sup>16</sup> have secured particular rights for visually impaired persons (VIPs) by permitting the creation of “accessible” copies of copyright material without requiring permission from the rights holders. These are dependent upon the satisfaction of the following criteria:

- Single accessible copies may be used by a VIP for their own use
- They own or have lawful access to a master copy (this includes having a library copy)
- An accessible copy is not available commercially

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<sup>15</sup> For more relevant examples, please refer to: <<http://www.cla.co.uk/licensing/BL-CLA-FAQ.doc>>.

<sup>16</sup> In the UK, the provisions in the EU Directive have been implemented as the Copyright (Visually Impaired Persons) Act 2002. More information about this can be found at: <<http://www.cla.org.uk/directive/vip.html>>.

In some countries such as the UK, there are also specific provisions which allow libraries and archives to create copies of works in order to fulfil their duties *Library Privileges* as well as provisions for educational establishments.<sup>17</sup>

## **Checklist for determining whether a work is protected by copyright?**

- Is the work fixed in a tangible form, not just an idea?
- Is the work original or displays skill and judgement?
- Is there an attributed author?
- Is the work still in copyright?
- Does the work fall within one of the eight categories of works protected by copyright?
- Does the copying of the work fall within Fair Dealing or one of the Permitted Acts?

## **Other types of Intellectual Property Rights**

Within the scope of digitisation projects or the creation of online material, although copyright stands as the most relevant, other types of Intellectual Property Rights also need to be identified and measures implemented in order to make sure that the rights of third parties are not infringed and, where appropriate to maximise their full exploitation.

### ***Trademarks***

Trademarks, like patents, are national in nature. They comprise of any sign distinguishing the goods and services of one trader from those of another. A sign includes, for example, pictures, words, logos or a combination of these. A trademark can be registered if it has satisfied three main criteria:

- 1) It is distinctive for the goods or services for which an application is made to register;
- 2) It is not deceptive, or contrary to law or morality;
- 3) It is not similar or identical to any earlier marks for the same or similar goods or services.

Logos and brands that are reproduced either without permission or associated with goods for which they were not registered (*Passing Off*) could infringe the trademark of a third party. In the cases of logos/brands etc which are not formally registered as trademarks, unauthorized use may infringe the creator's copyright.

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<sup>17</sup> For more information about these Exceptions please see: <http://www.museumscopyright.org.uk/copyreg.htm>.

Organizations wishing to register their brands or logos etc as trademarks need to be aware that if these appear online with reference to goods or services, since the internet is published globally, they may need to consider global trademark registration.

### **Patents**

While copyright protects the material expression of ideas, the patent system protects the ideas themselves.

*For example, if you produce a new system for the management of digitised material, it may be worth considering patenting the idea and in that way, preventing others from using your idea without you benefiting economically from that exploitation.*

A patent gives the patent owner a monopoly for a fixed period of time in the use of the inventive idea, although to gain protection, a patent must be new and the invention has not been made available to the public before the patent application. Patent application is a national issue, so international registration will require application through various national agencies and offices.

### **Database Rights**

In addition to protection as a literary work for the contents of a database, Database right is granted to the person who funds, selects and arranges the content into a database. Although Database right does not require registration, there needs to be substantial investment in obtaining, verifying and presentation of the contents of the database. Database right lasts for 15 years from the end of the calendar year of completing the database or making it available to the public (whichever is longer). It will apply retrospectively to databases created between 1 January 1983 and 31 December 1997, which will be protected for 15 years from 1 January 1998. Any substantial changes to databases protected by this right will benefit from 15 years additional protection from the date that the changes are made. Databases which are continually updated in this way may benefit from almost continual protection.

### **Performance Rights**

Performing rights are related to copyright and should be treated with similar consideration for those wishing to use material protected by performer's rights and to performers wishing to enforce their rights. Performing rights are granted to performers of artistic works and last for 50 years in relation to:

- Broadcasting and recording live performances;
- Copying, distribution, renting and lending of recordings of performances;

- Broadcasting, and other communication to the public by electronic transmission; (including in on demand services) of sound recordings of performances;
- Playing in public sound recordings of performances.

*For example, a cultural heritage organization commissions a live performance of a piece of music which will simultaneously be broadcast over the web. In this case, both the copyright in the musical composition and permission from each of the performers will need to be secured before the music can be broadcast.*





### 3. Why is Copyright Important?

#### Legal responsibilities

Regardless of their position or where they work, everyone has a legal obligation to respect the provisions of the copyright legislation. Carrying out a restricted act, ignoring Moral rights, circumnavigating technological measures, or removing rights management information (such as the copyright credit line) and/or the communication of works where the rights management information has been removed (discussed in Chapter 8), are known as an *Infringements*, and subject to the firm arm of the law. Whilst civil proceedings such as the awarding of damages, injunctions preventing further unauthorised use and the destruction of infringing copies provide the copyright holders with some readdress, the law has recently tightened and certain unauthorised acts are now viewed as criminal offences. These include:

- Unauthorised performances of films, sound recordings, literary, dramatic and musical works;
- Circumvention of technological measures;
- Communication of copyright works to the public during the course of business or in ways that are prejudicial to the copyright holder.

Museums, libraries and archives need also be aware that making a known infringing copy available to the public, whether by exhibition, sale, distribution, or providing the means for an infringing copy to take place are also infringements and in these circumstances known as *Secondary Infringements*.

*For example, a museum in the UK purchases a piece of video art containing appropriated music whose inclusion has not been cleared with the rights holder. Although they have cleared permission with the rights holder to reproduce the final work, they will be liable for secondary copyright infringement unless they can retrospectively secure the relevant permissions in the appropriated music prior to the display or communication of the work to the public.*

Apart from the legal penalties, infringements of copyright can led to extremely bad press and discredit reputations. Professionals working in the cultural heritage sector can compromise positive press coverage,

media relations and jeopardise dealings with the public and those with rights holders by ignoring the legal requirements of copyright. Although rights holders may want their works communicated extensively, many will be offended if their permission is not sought. In some situations, rights holders are extremely influential and testing their good faith can endanger future loans of works that they may own or detrimentally affecting other important relationships that they have built with the organisation.

## **Duty of care**

The moral obligations to respect copyright can be aligned with the role of museums, libraries and archives as the guardians of the physical works and in many cases their role as charitable trusts. As part of their responsibilities to take the necessary precautions to store, handle and display works, it is also their duty to safeguard how works are treated. This includes restricting and monitoring the creation of copies of the work and preventing unauthorised and derogatory uses of the work (see Moral Rights). This can be achieved by:

- Controlling access to high quality images
- Restricting public photography and filming in the galleries
- Limiting reproduction of collection images on the internet to low resolution.

In this way whilst providing access to their collections, limits can be placed on the numbers of unauthorised copies of works that are created, by whom and how the copies are treated, both within an internal and external context. Duty of care extends to making sure that they museums, libraries and archives themselves have secured the necessary rights to use and promote their collections in order to fulfil their public access remit.

*For example, an archive in Milan wants to promote its collection to children. It has devised some curriculum-based online teachers' packs containing images of collection works. However, these can only be created and disseminated electronically if the necessary rights in the content have been cleared.*

As owners of rights, organisations within the cultural heritage sector are wise to set the same standards for care of material in which they do not own the rights, as they would expect users to treat their own works.

## **Financial implications**

There are generous commercial benefits for cultural heritage organisations which respect third party copyrights as well as secure, protect and exploit their own IPR. Valuable assets are likely to include:

- Photographs of items in their collection
- Copyright in text and material written by staff
- Databases, software and computer generated material

External requests for high quality digital images and transparencies of items in their collection, has encouraged many cultural heritage organisations to establish trading arms and commercial Picture Libraries. The additional copyright that they can claim in photographs taken of out of copyright works means that they can exclusively supply images of all their works and generate much relied upon income. In some situations, third party image suppliers are licensed to also represent certain collections, and for a share of the income, will market and supply images to clients. This can work well for bigger organisations with large collections who may wish to break into new markets, but also for smaller bodies which may not have the necessary staffing or infrastructure to support this kind of commercial activity.

Other income generating options resulting from copyright and other forms of IPR include:

- Providing access to works for commercial filming and photography
- Locations shots for films and commercials
- Developing exclusive licensing deals based around collection works with merchandising companies
- Registration of a trademark/brand
- Establishing publishing activities (based around content written by staff and collection works)

## 4. Other Legal Issues

### Legal Landscape

Apart from IPR, there are many ways in which the law determines how content may be exploited such as the right to privacy, freedom of expression, Data Protection, obscenity and indecency. These legal issues are enshrined under various EC principles of law and international conventions, and so their implementations will vary from country to country. It is therefore important that cultural heritage organisations refer to their own legislations relating to these issues and then take them into account when working with digital content. Such legal restrictions (which may be criminal or civil in nature) may prevent the owner and the user from fully exploiting the content by placing controls on the way in which the work may be displayed. Because the internet is far-reaching and cuts across legal and geographical boundaries, this is bound to cause some issues, as moral and cultural values can vary from place to place: what is acceptable in one nation may well be unacceptable in another.

#### ***Right to Privacy***

The European Convention on Human Rights from 1950 aims at both protecting and liberating individuals by enshrining various freedoms into law. Amongst these is the right to privacy: everyone has the right for respect in their private and family life, as well as for home and correspondence<sup>18</sup>. Already this provision has been interpreted widely by the courts and care must be taken not to breach another person's right to privacy when placing digital content on the internet. Moreover, it is a violation of an individual's right of privacy to use their likeness for advertising or trade purposes without their authorisation.

*For example, a picture of a member of the public visiting a museum or gallery could not be used in museum promotional literature without the individual's permission, and images depicting individuals attending a museum or gallery should only be placed on the internet, where permission has been obtained from the persons shown. However, if the image depicts a large crowd, the right to privacy should not apply. Where models are hired for the purpose of using their image for promotional purposes, their written permission should be obtained. Similarly,*

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<sup>18</sup> The European Convention on Human Rights Article 8.

*employees of the museum or gallery should sign statements (which can be included in their employment contracts) that waive such rights for any photographs taken by the museum for inclusion on the internet (and in any promotional literature in general).*

### **Freedom of expression**

However, the right to privacy clearly conflicts with the principle of freedom of expression<sup>19</sup>. This is an important development in relation to the internet and it remains to be seen how far this will go. However, the exercise of such freedom is subject to legal restrictions which are necessary in a democratic society for the protection of health and morals.

*For example, an artist creates a work which includes the filming of members of the public entering and leaving a public building. The expression of the art work rests in the fact that members of the public are not aware that they are being filmed.*

Quite clearly there is a conflict between the freedoms offered by the Convention, as it is easy to see how one person's freedom of expression could be a breach of another person's right to privacy.

### **Data Protection**

Data protection law based on the EC legislation<sup>20</sup>, sets the rules surrounding the processing of personal information. The law prohibits personal information such as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life being used by any institution in any way other than the use for which the information was obtained. Any such personal information held on any living individual must not be placed on the internet without first getting the consent of that individual.

*For example, a number of people respond to an online survey commissioned by a major publishing company wanting to gather information about the reading habits of adults aged 25-35.. As part of the questionnaire, they are asked to provide personal information. Without their content, this information is shared with other companies and they are in turn, contacted by other organisations. Since they have not agreed to their information being shared, this will constitute a breach of the Data Protection Act.*

### **Obscenity and indecency**

Whilst the exhibition and display of photographs and paintings can be interpreted as obscene, so too can the dissemination of content over the internet. The laws governing obscenity of content published on the internet are complex. Not only must the nature of the content itself be

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<sup>19</sup> The European Convention on Human Rights Article 10.

<sup>20</sup> Data Protection Directive (95/46/EC)

considered, but also the fact that there is a chance that the digitised material may be considered obscene in another jurisdiction<sup>21</sup>. Within the context of the internet, which provides a forum through which the exchange of ideas, cultures and beliefs can occur, cultural institutions need to be aware of the potential legal implications resulting from the digitisation of content and the placing of such content on the internet.

*For example, a recent decision of the German courts held that German national laws which prohibited the denial of the holocaust and Nazi propaganda, also applied to the internet. This decision has an impact on internet content, since it was decided that the national laws applied to web site content which originated from outside of Germany. As such, care must be taken where content is to be digitised and licensed for use on the Web.*

Since there is particular concern about displaying images of children on the internet, professionals working within the sector should be satisfied that they have obtained all the necessary permissions from the adult responsible for acting on behalf of the child depicted and they are in turn happy that the pictures cannot be wrongly used.

### ***Personality rights***<sup>22</sup>

Some jurisdictions, such as France and the US offer well-known people additional protection to their right to privacy. This prevents anybody from using the image of a well-known person in advertisements or to promote business without the authorisation of the person himself. It is not necessary for the person to be famous: he or she must simply be recognisable to the audience to which the advertisement is presented.

Therefore, a cultural institution does not have the right to photograph a well-known person, or use any such photographs without first obtaining permission from the subject of the photograph.

*For example, in a jurisdiction where personality rights exist, a museum wants to develop an online learning module focussing upon the weather and may wish to include photographs of well-known weather presenters. Before such material can be disseminated over the internet, permission needs to be secured from the weather presenter themselves, or the broadcasting company that represents them.*

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<sup>21</sup> It is worth noting that US laws on obscenity tend to be stricter than those in Europe.

<sup>22</sup> In UK law, there is not the concept of Personality rights however, material that is produced in the UK and distributed globally, particularly to jurisdictions that recognize these rights, will need to ensure that it does not breach these rights or any other.

***Freedom of Information***

This relates to the general right of access to information held by public bodies. The legislation, which has been implemented in some countries in Europe, is intended to create an environment of openness by granting individuals the right to request information that is held within public bodies. There are a number of exceptions to the types of information that can be released (such as those connected to national security or those that might compromise Data protection), however, it is important to acknowledge that within the context of creating and using digital content, this may be subject to the provisions of any this type of legislation.

*For example, under the Freedom of Information legislation, an individual requests specific information relating to a museum's website activities. Unless the museum can point to a legitimate exception, they must provide the individual making the request with the information within a specified amount of time.*

## 5. Step by Step Guide to Clearing and Managing Digital Rights

This section summarises the key points relating to rights clearance and digital rights management as a step by step guide and series of action points. These are discussed in more detail in the following three chapters.

1. Documentation and raising staff awareness (Chapter 6)
  - Do your staff understand their responsibilities?
  - Have you embedded rights management within all your documentation procedures?
2. Checking legal requirements (Chapter 6)
  - Is your organisation in a legal position to enter into licence agreements?
  - Are there any legal issues which might prevent the licensing of content?
3. Project planning (Chapter 6)
  - Have you considered rights issues as part of your overall project planning?
  - Have you left enough time and money to clear rights?
4. Auditing rights (Chapter 6)
  - Do you know what rights you need to clear?
5. Finalising the context of use (Chapter 6)
  - How are you planning to use the content?
  - Are you intending to reproduce the content in any way other than its entirety or original state?
6. Locating rights holders (Chapter 6)
  - Are you keeping hard copy records of all your attempts to trace rights holders?
  - Have you tried the WATCH file?

7. Negotiating rights (Chapter 6)
  - Are you using your own contracts?
  - Have you ensured that you can comply with any third party terms and conditions?
8. Clearing rights (Chapter 7)
  - Have you checked out all the options regarding the type of licence you can use?
9. Setting up basic systems to manage your rights (Chapter 8)
  - Have you downloaded SPECTRUM?
10. Protecting content (Chapter 8)
  - Have you considered all the options?
11. Reuse of content (Chapters 6,7 & 8)  
Do you know that you will need to reclear rights for any use of content which is in addition to the permission already granted?

## 6. Rights Clearance

### Documentation and raising staff awareness

Establishing appropriate clauses within documentation procedures is an essential element to ensuring that rights can be considered as an embedded element within the work ethos. This issue is more complex because it places the responsibility for handling the documentation with a wide range of staff, such as curators, registrars and administrative staff. Staff should familiarize themselves not only with these documentation procedures, the reasons and implications for such practices as well as their responsibilities if they are clearing rights. Staff and their respective organisations are therefore likely to benefit from in-house copyright training or the option of attending seminars and courses on specific rights issues.

SPECTRUM<sup>23</sup>, the core standard for collections in the UK, is one of the primary sets of documentation standards in Europe which recognises key documentation areas within the work of collections management where rights management issues will arise. Within the scope of this guide digital rights issues are likely to arise in the following procedures:

**Pre-entry** –rights, normally in the physical object will need to be negotiated and documented in order to ensure that a work can be reproduced on collection management systems whilst under consideration for acquisition.

**Loans in** – digital rights need to be secured from the lender of the work as well as the owner of any copyrights in the work to ensure that a work can be reproduced on the web, CD Rom or within similar digital contexts.

**Acquisition** – ideally, all rights will be identified, negotiated and secured (by licence agreements) during the acquisition process. In some circumstances, it may be relevant to ask for the rights to be given, (*Assignment* of rights), although many organisations will prefer to ask for a non-exclusive licence.

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<sup>23</sup> <<http://www.mda.org.uk/spectrum-html/righ.htm>>.

**Use of collections** – the documentation and negotiation for the use of digital rights, such as within online teacher’s packs, online collections or internal use will need to be secured before collections can be fully used.

**Loans out** – third parties borrowing works will need to be alerted to any issues arising from digital reproduction and dissemination of the works. In many cases, lenders of works will want to impose limits on the use of works in this way by specifying the terms of use and requesting the implementation of mechanisms to protect the rights on the internet.

## **Legal requirements**

There are several issues which need to be resolved before rights can be cleared:

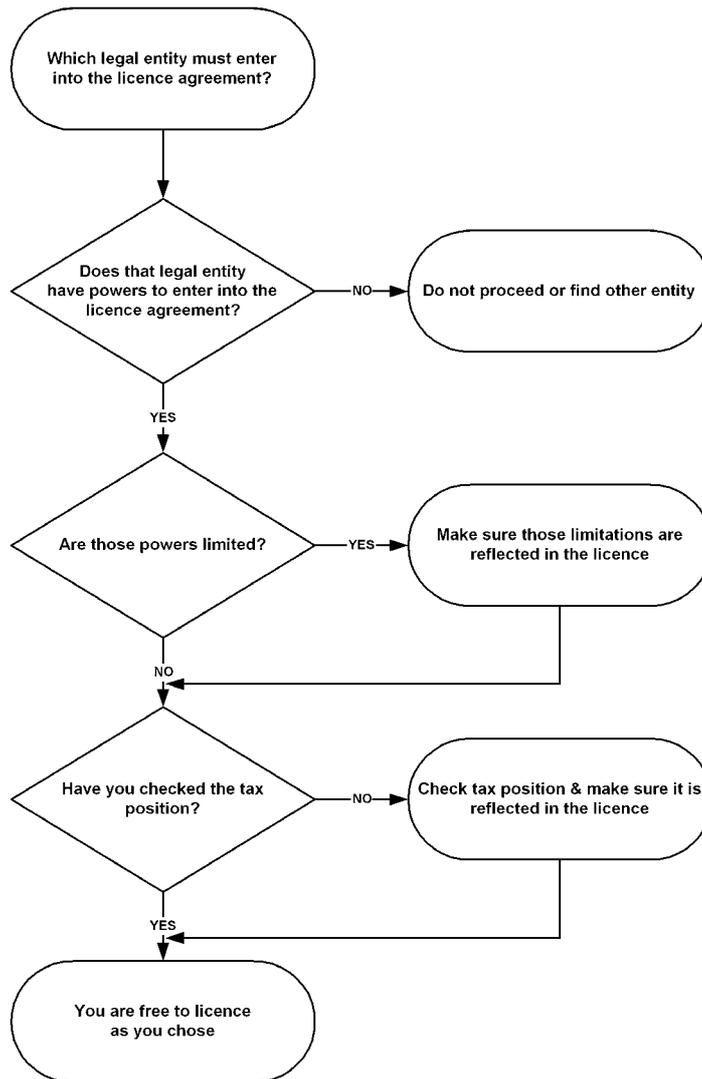
1. Are there any conditions or stipulations linked to rights issues that funding bodies have made conditional on their award of grants? If so, these need to be identified and if they restrict the aims and objectives of the project or conflict with the workings of organisation itself, they will need to be renegotiated with the funding body.

*For example, third party funding bodies may often require rights to be cleared for their own use as well as the organisation whom they are funding. In some situations, they may also require the parties that they are funding request that rights holder waive their moral rights. This would enable the funding bodies the right to reproduce content in what ever ways they wish, however, at the same time, this may be something difficult to negotiate and contrary to ethos of the museums, library or archive.*

2. Does the make-up of the organisation restrict it from negotiating rights?

*For example, depending upon national legislation, cultural heritage organisations run by government or state, may be restricted from requesting licences for purposes other than for their own educational uses.*

The chart below illustrates some of the key legal issues which may prevent an organisation from entering into a licence arrangement.



3. What is the identity of the organisation wanting to licence digital content?

*For example, the full legal name of the organisation must appear on the licence. In some cases, museums in particular have established trading companies to handle the licensing of content.*

4. Is the project collaborative reliant upon harvested digital content from various sources?

*For example, each organisation needs to be aware of its legal responsibilities with regards to the digital content. If material is harvested, all contributors will need to ensure that they have cleared the relevant rights.*

## **Project planning**

The most effective way to handle rights issues within a project is to integrate this activity within the planning stage. This can ensure that there is both sufficient time and finances to clear rights, but also enable rights to become integrated within all aspects of the project, including documentation (as above). Possible results of leaving rights issues as a last minute after-thought include:

- Running out of time - rights can take a long time to clear and depending upon the scale of the project, they may need to be cleared before the rest of the work is completed. If rights cannot be cleared for any reason or permission is with-held, new material may need to be selected.
- Running out of money – if creative artists are represented by collecting societies, agents, or the film or music industries, rights will cost money. If project funding has not been put aside in advance for this purpose or, staffing issues have not been considered with regards to who might carry out the rights clearances and the cost of staffing, then this can have serious implications for the project as a whole.

## **Rights audit**

Carrying an analysis of the rights and legal issues within all the content likely to be used or created as part of a digital project can be useful in flagging up potential problems, areas which may need more time to address or issues to be outsourced to legal experts. These in turn can affect the amount of time and money that rights clearance may require, as well as highlighting content that may prove to be too problematic to use.

The types of areas which an assessment or *Rights Audit* may address, include:

- What are the rights issues

*For example, is the work still in copyright or is the rights holder notoriously protective of their rights in the digital environment?*

- Are there any other legal issues
- Is the appropriate documentation/licence agreement in place
- If rights need to be negotiated, can the rights holder be identified

- Is the rights holder represented by a collecting society or other organisation likely to charge for digital rights
- Is the digital content likely to be subject to unauthorised uses?
- If so, is it cost effective to implement the necessary measures to protect the content?

*For example, high quality images online can look very effective, however without the proper protective measures, they can be easily downloaded and the images pirated for commercial purposes.*

## **Context of use**

It is important to start thinking about how the digital content will be used and whether users will be invited to interact with the works. Licence agreements already in place need to be examined to make sure that the context of use is covered and those that need to be negotiated must include all the ways in which the content is presented.

*For example, a museum is working with a university to produce an online learning module based around early 21<sup>st</sup> Century Art. Many of the images will be displayed as details. Requests to rights holders for the use of this content should include requests to reproduce the details for both parties.*

Remember that permission to use content is based upon rights being granted for the use of the whole work. Specific permission will be required for the following:

- Any user interaction with the work
- Cropping or overprinting the image
- Manipulation or bleeding the edges
- Details, sections, or stills

## **Locating rights holders**

This aspect of the process can prove to be the most time consuming because rights may no longer belong to the original author of the work particularly if they are deceased. It is often difficult to trace rights holders and despite online databases of rights holders such as the WATCH file<sup>24</sup>, these can be limited in scope and will only provide the details of a small fraction of the possible rights holders that there are. Other suggestions for tracing rights holders include:

- Contacting the national organisation representing rights holders, such as a collecting society (see below) or artist's group

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<sup>24</sup> <<http://www.watch-file.com/>>.

- Liaising with the owners of the works themselves, such as other museums, libraries and archives
- Checking in-house documentation and records
- Researching using the internet
- Contacting commercial image providers, such as Picture Libraries and stock photography suppliers
- Checking dictionaries, compilations, exhibition catalogues and other source material
- Working with family history societies and genealogical groups

It is always a good idea to keep records of all searches, telephone calls and correspondence in the instance that the rights holders cannot be found. This *Due Diligence File* can then be used in the instance if it is decided that content will be used without rights being cleared. Although this is still an infringement of rights and subject to the same penalties as any other unauthorised use, it is important to stress that some organisations will weigh the risks of infringement against the purpose of the use by making a detailed risk assessment. In these instances, the due diligence file, together with a prominent disclaimer, and usually some money put aside to cover the costs of the rights clearance should the rights holder come forward, would be used in legal proceedings (if they were to arise) to show that everything had been done to try and clear rights. This is a very risky area when digital content has the potential to reach a global audience and any organisation considering this type of activity should think long and hard about the potential risks.

## **Negotiating rights**

Various techniques can be employed to assist the acceptance of a suitable licence (see below) and hopefully reduce the costs of rights clearance. These include:

- Compose your licence as a friendly letter outlining the aims of the project
- If the project is non-commercial and educational, stress this in your letter
- Flag up ways that you are employing to protect the content (see chapter below)
- Enclose a stamped addressed envelope or set up a freepost account so any agreement so it is easy for the right holder to send the signed licence back
- Make sure that you ask the rights holder for their credit line so that you do not need to inconvenience again

- When dealing with commercial organisations or the media, if possible offer them a link or credit on your site (this can be used to off-set or reduce any fees)<sup>25</sup>
- Always negotiate terms that are fair to you.
- Do not feel intimidated to accept unfavourable terms or accept conditions which conflict with your organisation's ethos
- Leave yourself plenty of time to negotiate rights.

## **Reuse of content**

Remember, if content is reused for a purpose which has not been specified in the original licence, rights must be renegotiated.

*For example, a national library develops a digital repository for journals and newspapers that can be accessed by various groups of users. Permission has been granted by the various rights holders and publishers for this purpose. However, if they decide to harvest out the digital records to a European wide initiative, before they can do so, they will need to renegotiate the rights again with all the rights holders.*

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<sup>25</sup> It is important to check that if the project is receiving specific funding, this type of activity does not conflict with any of the funding conditions.



## 7. Licensing

### What is licensing?

Licensing is the tool used to control rights transactions. Licensing implies that you are either want to use content whose rights are owned by third parties, *Licencee*, or alternatively, you have the rights to grant others permission to use your content *Licensor*. Licences can take various forms, but generally fall into two distinct categories:

*Non-exclusive licences* – These relate to agreements which do not restrict the rights holder from granting the same or similar licences to as many parties as they choose. This is the preferred licence type used by organisations in the cultural heritage sector when requesting rights, because they can be granted the rights that they need without taking any rights away from the rights holder.

*For example, the web department of a library needs to request permission to use an image whose rights are held by a graphic artist. By requesting a non-exclusive licence, the museum will not prevent the graphic artist from continuing to licence the image to other parties who may be interested in using it.*

*Exclusive licences* – Exclusive licences are more restricted. They authorise the parties requesting the rights to control any other permissions that are granted relating to these specific rights *to the exclusion of all other persons including the rights owner*. This means that the rights holder cannot grant any other identical licences and cannot exploit the content themselves. This type of licence is likely to be more expensive than a non-exclusive licence because it restricts the rights holder earning capacity on these rights. Although organisations should be wary about granting access to their content based upon this type of agreement, in certain circumstances, it should be considered.

*For example, a photographer is commissioned to take photographs for inclusion in an online project. Since the photographer is unwilling to give up their copyright, an exclusive licence will ensure that only the organisation commissioning the photographs retains the rights to reproduce the photographs, which they paid to have taken.*

## Licensing models

In their dual roles as consumers of third party rights and content creators, organisations in the cultural heritage sector are likely to encounter different types of licensing agreements. Although they may have little choice to select the type of licence that they would prefer to use if using third party content, according to the types of users (if they are known or not), the quality and value of the material, and any limitations on rights etc, they are well positioned to choose from a variety of licences for the delivery of their own digital content.

### **1) Written contracts**

These are the standard types of licensing agreements and most common when the user requests rights directly from the rights holder.

In most jurisdictions several elements should always appear in a licence agreement in order for it to be considered a legally binding contract. These will vary from country to country so the specifics will need to be checked, however, should a contractual licence be breached, the licensor can sue for breach of copyright and breach of contract. Written licensing contracts can be long documents, or alternatively take the form of a letter which the second party is requested to sign and return. The key components needed for a contract are likely to include:

- Offer (such as the offer to supply software on certain terms)
- Acceptance of an offer by conduct or agreement (a signature)
- Consideration (usually money, but could be non-monetary)

*For example, a small museum wishes to request permission to reproduce an image of an artwork for which the rights are held by an artist's agent. The museum sends the artist's agent two copies of a letter in which they include all the information about the project together with the terms and conditions in which the image will appear. In return for permission and an appropriate credit, the artist's representative is requested to sign and return one copy of the letter to the museum. Since all the key elements of a contract appear, if this licence is broken, the museum will be in breach of contract.*

In most cases, any written contract will need to specify the following:

- 1) Who are the parties?
- 2) What rights are being granted?
- 3) What are the rights to be used for?

Specific uses should be specified to avoid unnecessary disputes. Generally, uses will be for commercial, non-commercial or educational purposes and in each case, it is wise to be specific.

*For example, permission for non-commercial teachers packs which will freely be available on the web or reproduction of images of collection works used solely for non-commercial purposes.*

- 4) Is the contract exclusive or non-exclusive?
- 5) How long will the licence last?

This will depend upon the nature of the organisation granting the rights. In many cases, individuals are likely to grant rights in perpetuity, whilst companies and artists agents etc are likely to be more restrictive and will only permit permission for a number of years. Museums, libraries and archives should be careful about not permitting access to their content without thought about the duration of the licence.

A licensing contract should always contain terms which set out a mechanism or circumstance upon which a licence must terminate. Contracts dealing with IPR, are often tied to the length of protection given by law.

- 6) Where will the rights be used?

The internet is globally accessible, so world-wide rights will be required if access to material is non-restricted. If access to a website is limited to specific countries, or content is being distributed via a mobile carrier (such as a CD-Rom) then particular territories can be specified.

- 7) The cost of consideration of permission?
- 8) Does the licensor have the rights to licence the rights?

Licences should contain the following statements:

- The rights holder is the owner of the rights
- They are able to grant the rights contained in the licence
- That the licencees use of the content according to the terms in the contract will not infringe the rights of any third party.

These statements are called *Warranties* and together with these, the licence should include *Undertakings* which are promises that the licensee agrees to do (i.e. not to do anything that infringes the rights of the rights holder and to ensure that users only access the content in accordance with the terms set out in the licence agreement). In order to secure these clauses, *Indemnities* in the contract provide insurance or compensation from one party to another.

## **2) Shrink wrap licences**

These types of licences are frequently included in software that is purchased "off the shelf". They are a set of pre-determined conditions included in the packaging. Once the purchaser has broken the seal of the box, he/she would have deemed to have accepted the licensing terms.

### **3) Click wrap licences**

In these cases, as a condition of use, an on-screen message is presented to the user. In order to proceed, the user has to click an "I agree" or similar button.

*For example, an online heritage site sets up a webpage where users can submit photographs of their family. In order to comply with rights and other issues, prior to submitting content, a screen appears stating a number of terms and conditions of use. The user will only be permitted to proceed, if they click the "I agree" button. The terms and conditions can be printed off so a record of the contract can be kept by the user.*

### **4) Browse wrap licences**

These licences are implied rather than specifically brought to the attention of the user. So, prior to the downloading of material, a user may be aware of licence, but there is no explicit mechanism whereby consent can be given. Abuse of content arising from material licensed in this way, is less likely to be viewed as legally binding than the other types of licences.

### **5) Implied licences<sup>26</sup>**

Many website will not contain licensing terms at all, but instead copyright notices, statements and credit lines. Although these may not constitute a legally binding contract, unauthorised use of content will be still be viewed by the courts as an infringement of copyright. Similarly, removing or circumventing technological mechanisms employed to protect the content, such as the removal of copyright credit lines, is now a criminal offence.<sup>27</sup>

## **Open Source, Copyleft and Free Software**

Licences can vary enormously and organisations in the cultural heritage sector should be aware that alternative forms of licensing are both relevant and available for consideration within their role as licensors and licensees. In contrast to traditional digital content suppliers who have limited the terms under which digital content can be accessed, the Open Source, Copyleft and Free Software movements encourage rights holders to share content under more open terms. The ethos behind this is to promote collaboration, dispel with licensing agreements reliant upon payment and provide the means to disseminate digital content and software more broadly.

By relinquishing certain rights in software code, the Open Source movement encourages software code to be shared amongst users, allowing for problems to be fixed more easily and technological progress.

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<sup>26</sup> See Chapter 8.

<sup>27</sup> Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the Information Society (June 2001), implemented in the UK as the Copyright and Related Rights Regulations 2003.

In this case, it is important to read any agreements thoroughly to make sure that there are no other obligations or limitations to use.

In their position as licensors, museums, libraries and archives may choose to licence their content to users under the Copyleft model. There are a number of options available, including the licences developed by the Creative Commons movement<sup>28</sup> which provide free access to content under flexible terms and retaining only some of the rights that rights holders normally assert. In this case, licensors can select to what degree that they want their content available, under what terms, where (unrestricted access in some countries and controlled access in others) and how, by choosing the most appropriate licensing terms.

Creative Commons also provides organisations needing to use third party content with the means to access appropriate free digital content which according to the type of licence, can allow user interaction.

*For example, through the licensing environment offered by Creative Commons, a pupil in a school can access and reuse an image of a work housed in a museum. Under the flexible terms of the licence, they create a digital project which shows how the work might look if the colours are altered or shadows are removed.*

### **Collective Licensing Schemes**

Collective licensing bodies, such as VEGAP in Spain, BILDKUNST in Germany and DACS in the UK represent the interests of a number of visual artists, and there are similar bodies for other types of creative works, such as music and literary works. This means that for the owners of large repositories of material, collective licensing schemes can provide the means for securing digital rights in much of the content that they own. Whilst these schemes can reduce the number of rights holders that need to be approached for clearance by offering *Blanket Licensing Schemes*<sup>29</sup> there are a number of issues that that need to be flagged.

- The types of rights that are granted are normally under contractual licences
- The terms and conditions need to be adhered to closely by the licensee, subsequent users and funding bodies etc
- If the terms and conditions are difficult to comply with, they should be re-negotiated
- The granting of digital rights may require certain levels of online content protection, the implementation of rights management systems and strict limits about how the work is reproduced

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<sup>28</sup> <<http://www.creativecommons.org>>.

<sup>29</sup> These are based around a limited number of licences covering a lot of different works for a number of uses

- Any user-interaction with the work or alteration of the work needs to be incorporated within the licence agreement
- Mock ups and digital proofs can required as conditions of any licences
- Contracts will normally be time limited and a strategy needs to be put in place about what to do once the terms of the licence expire
- Permission to use rights will be charged at a fee and the rights only activated once the fee is paid
- Digital licences need to include scanning, digitisation, dissemination on the internet and intranet
- Reuse of digital material, should be incorporated within the licence or negotiated again
- Finally, unless a blanket licensing agreement already exists for the sector, negotiating terms can be extremely time consuming.

## 8. Managing and Protecting Rights

### Benefits of establishing rights management systems

The key to good practice is to record on suitable systems all the rights information about digital content that is collected from rights documentation and rights clearance. Since the ownership of digital content and the rights associated with it are likely to be separate, without detailed rights information, digital content quickly becomes unusable because it will be unclear about any permissions or restrictions relating to the content. Digital content can also take many forms and comprise of different elements and so any one piece of digital content may include many layers of rights issues and therefore a number of rights holders. As the licensing of the digital content may be granted to a number of different uses for a variety of purposes, it is increasingly important to use suitable systems to handle intricate details relating to rights.

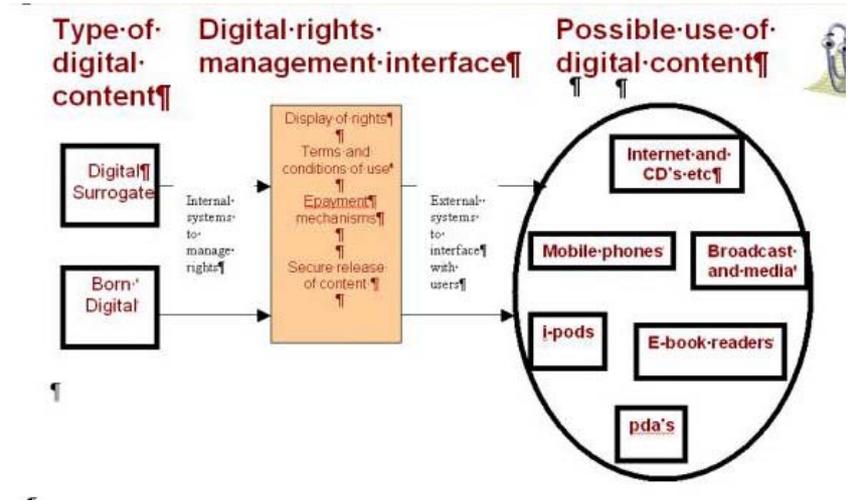
*Digital Rights Management* systems (DRM) can provide museums, libraries and archives across Europe with the mechanisms to control their own rights as well as record the rights granted by third parties. These systems do not need to be complicated in order to be effective. In many situations, a simple spreadsheet created from licensed software that may already be owned, will be sufficient to record the necessary rights.

*For example, a small regional museum in Switzerland owns a large collection of clocks and watches, many of which have been designed as one-offs. The rights belong mainly to third parties, however, in some cases these have been assigned to the museum when the works were given by the designers. The museum creates a simple database recording which rights it owns; those owned by third parties; the presence of any licensing agreements to use third party content and how long rights in licences may last. With this information, it knows what rights exist and so can decide how it might wish to use the content in the future.*

However, there is also huge potential for DRM to be developed to exploit the rights in digital content, for e-commerce and other purposes. In these instances, large investments may need to be made in tailor-made systems which can, for example, provide an interface with online users, display to them specific terms and conditions relating to the content use,

accept payment online and when payment has been cleared, securely deliver the digital content.

*For example, the commercial arm of a cultural heritage organisation wants to licence sound recordings in which they own the rights to mobile phone users across the globe via the internet. They decide to develop DRM to record the rights that they own, display to potential customers these provisions according to the customers requirements (such as duration of use and specific legislative issues) receive the appropriate fees by online payment and then once payment had been verified, deliver the sound recording to the customers PC by email attachment from which they can be downloaded.*



## Recording and managing rights information

There are a number of records relating to rights management that should be created within DRM and subsequently reflected within any licensing agreements with third parties. This ensures that when, for example, numerous rights are granted by a number of different rights holders for a variety of time durations, there are suitable records to hold the information. In some instances, rights may not have been granted yet although it will be important to create the records so that so that information can be stored at any later date. The types of records below that may be considered are based upon SPECTRUM<sup>30</sup> and have been adapted for the purposes of this guide:

<sup>30</sup> <http://www.mda.org.uk/spectrum-html/righ/htm>.

- The reference number of the licence;
- The reference number(s) of the digital content (s) covered by the licence;
- Rights and any legal issues related to the content (including multiple records for digital content consisting of multiple rights);
- Who is the licensee and who is the licensor?
- An outline of the rights granted by the licence (for example, uses of the rights, where they can be used etc);
- Details of sub-licences granted to third parties;
- Notes relating to warranties and indemnities;
- Past history, date of any previous licences;
- The duration of the licence;
- The start date of the licence;
- The end date of the licence;
- Details of the negotiator of the licence;
- Details about when this record was created, by whom and any subsequent amendments;
- Credit lines.

Internal standards relating to the way in which data is recorded may need to be developed in order to retain the integrity of the data and reduce the risk of misunderstanding. However, the information contained within rights management systems should be held centrally and accessible to all staff, particularly those working across a number of locations (whilst conforming to any Data Protection provisions). It is crucial that all staff are kept up to date and aware of the rights issues in connection to digital content so that they can legally content and not mistakenly give rights away in content for which their organisation owns the rights.

## **Why do you need to protect content?**

Protecting digital assets from illegal or inappropriate reuse and re-purposing is a crucial component of any online activity for cultural organisations. In this way, they can securely deliver digital content, protect third party rights and create income generating opportunities.

However, the degree of protection required for any digital content can vary according to a variety of factors, which may include some of the following:

- Type of content displayed (i.e. image, audio, visual or text);
- What the content is used for?
- Budgetary allowances for investment in protecting online content;
- The value of the digital content;
- Who owns the rights in the content ;
- Conditions in third party licence agreements;
- Whether the users are known or random?

Museums, archives and libraries also need to take into account the recent changes in national law resulting from European Directives which criminalise activities where rights management information (such as the copyright credit line) and/or the communication of works where the rights management information has been removed. This means that they are duty bound to respect the protective measures that third parties have placed in their content, as well as providing extra protection for their digital assets.

## **Content-protecting solutions**

There are various low cost solutions, as well as more expensive tailor-made remedies, that can be used to protect digital content. In many cases, licences with third parties will require that one or more of these are employed and in turn, museums, libraries and archives can make the implementation of some of these measures, or a combination thereof, a condition of granting digital rights to third parties.

### ***Credit lines***

Credit lines provide acknowledgement of the ownership of rights in digital which can also be linked directly to the URL of the content provider, and this can further emphasise the ownership of any rights in the content. Although the use of the copyright symbol (©), is not a requirement of copyright protection, according to international conventions, if it is used, it should be followed by the name of the rights holder and the year of content publication.

*For example, © The National Gallery, 2004.*

### ***Copyright Notice***

Most web sites providing forms of digital content have copyright notices that outline the following principles these include:

- The commitment of the host organisation to respect the intellectual property rights of third parties;
- The efforts taken to ensure that the reproduction of all content is done with the full consent of the copyright holders;
- The provision of a contact address in the organisation for any queries relating to the reproduction of content featured;
- A breakdown of the activities that are legally permitted, such as freely accessing and downloading the contents on a temporary basis for the sole purposes of viewing, interacting or listening to them or non-commercial research & private study;
- A list of activities that are prohibited in respect of the materials and works such as public performance or display; any rental leasing or lending of any material obtained or derived from the web site; storage in any retrieval system or inclusion in any other

computer program or work as well as any reproduction of details, alterations and adaptations of works.

### ***Controlling the resolution of images***

This is the cheapest and lowest maintenance technique for providing a limited degree of protection to prevent against any inappropriate download of images for offline usage (such as print and products etc). Although this will vary according to the factors listed above, normally, a resolution size of 480 pixels by 600 pixels is sufficient for the image to retain an accurate likeness on screen and not fall within the derogatory treatment of the work however at the same time, low enough to prevent any form of inappropriate reproduction in print. Obviously, if the internet is merely used as a “vehicle” for transporting high quality images to a known and trusted user, high resolution images may require some form of invisible watermarking to provide extra security.

### ***Digital watermarking***

Digital watermarking is one of the devices used to protect content and has been widely adopted by the cultural sector for adding an additional layer of protection, particularly for images. Digital watermarking can also be packaged with other types of encryption devices according to the sophistication of the software provided. These range from the disablement of the right mouse button so that content (and in particular images) can not be copied, to the more sophisticated “time bombing” of content so that the user can only access certain types of pre-requested digital content for a set amount of time after which the content is erased. This last device is particularly useful in cases where the user perhaps requires a preview of content prior to their decision to “buy” more comprehensive rights.

The following outlines the main principles behind digital watermarking:

- It is usually robust enough to prevent deliberate removal and can also be sustained during the reproduction of the image in print media;
- The server can trace the delivery of images and make records of users;
- Subject to any Data Protection provisions, user records can be used for marketing purposes;
- Infringements and abnormal usage can be tracked;
- The watermark itself can be visible or invisible according to individual specifications.

### ***Fingerprinting***

Fingerprinting is another method using digital encryption technology whereby serial numbers or a set of characteristics that tend to distinguish an object from other similar objects are hidden within the digital content. Like digital watermarking, the reuse of content can then be tracked over the internet and logs can be kept about the identity of infringers.

*For example, "acoustic fingerprint" technology has been employed by the music industry to track songs traded on file-swapping applications on the Internet, such as Gnutella and Freenet.*

***Password protection and restrictions on the number of users***

Technological measures can also be implemented which limit access to digital content to known users who have been provided in advance with an access code.

*For example, the press office of a national museum wants to make high quality images of exhibition works available to journalists in a virtual press office. Permission from rights holders has been secured, and known journalists are sent an email in advance which provides them with a password with which they can access images. Once in the virtual press office, users have to read and agree to various terms and conditions of use, before they are permitted to view and access the content. In order to monitor the use of these facilities, the museum has watermarked all the images with an invisible mark and used devices to track the movement of the images online once they are downloaded.*

Any circumnavigation of technological measures used to protect content, such as password protection, digital watermarking and fingerprinting, are now viewed in themselves as infringements and subject to penalties as criminal offences.

## 9. Concluding remarks

### Importance of following good practice

Following pre-determined good copyright practices and implementing the necessary support mechanisms will satisfy the responsibilities to rights holders, users and potential clients. Rights issues need to be handled at an organisational level and therefore approached strategically. The potential benefits of devising a strategic approach to these issues can be summarised as follows:

- Helping to identify the key copyright concerns and issues facing your organisation
- Reducing the risks of infringement
- Helping organisations achieve their public access remit
- Assisting in the full exploitation of assets
- Clarifying the role of staff and raising the general awareness about the importance of copyright
- Preventing rights from being inadvertently given away because they have not been recorded properly
- Pinpointing when copyright should be dealt with for projects
- Cementing the position of the guardianship role of the cultural heritage sector

The evolution and challenges of the digital environment are developing so quickly that the legal rules cannot always keep pace with the new developments. This means that despite recent changes in national legislations, these are soon outdated before they come into force. What may be possible and legal one day, may not be legal the next. Additionally, despite much of national legislation resulting from European Directives, individual countries may vary in their implementation. This is why even though this guide can outline the fundamental issues and mechanisms relating to good practice, it is still crucial to be familiar with the national legislation in operation in your country prior to embarking upon digitisation projects.

Ultimately, implementing good practice is an essential component for working with digital content because rights issues are always embedded within any digital content use. By ensuring that all aspects relating to the

management of rights are entrenched within their ethos and culture, museums, libraries and archives across Europe, can facilitate the secure exchange of digital content and create opportunities for extending public activities in a digital environment.

## 10. Further Information

### Chapter 1

EMII-DCF Legal Workpackage

<<http://www.emii-dcf.org/dokument/frame.pdf>>

CALIMERA European funded project which contains translated good practice guidelines for museums, libraries and archives across Europe

<<http://www.calimera.org>>

The DELOS project, aiming to provide a reference point for digital library projects

<<http://www.education-observatories.net/delos>>

The PULMAN network aims to stimulate and promote the sharing of policies and practices for the digital era, in public libraries and cultural organisations which operate at local and regional levels

<<http://www.pulmanweb.org>>

MINERVA project

<<http://www.minervaeurope.org>>

### Chapter 2

World Intellectual Property Organisation

<<http://www.wipo.org>>

IPR Helpdesk

<<http://www.ipr-helpdesk.org>>

The European Bureau of Library, Information and Documentation Associations (EBLIDA), containing a list of national IPR legislation

<<http://www.eblida.org.uk>>

The IPR international newsflash site

<<http://www.ipnewsflash.com/>>

MDA's factsheets on copyright, digital copyright and copyright for collections  
<<http://www.mda.org.uk/facts.htm>>

#### **Chapter 4**

An extensive site where EU legislation and preparatory papers are available  
<<http://www.europa.eu.int>>

World Trade Organisation  
<<http://wto.org>>

*Licensing Digital Resources: how to avoid the legal pitfalls*, 2001. E. Giavarra.  
<<http://www.eblida.org/ecup/docs>>

#### **Chapter 6**

CORDIS, multimedia rights clearance systems  
<<http://www.cordis.lu/econtent/mmrcs>>

PRISAM project to trace rights holders for audiovisual and multi-media works  
<<http://www.prisam.com>>

The WATCH file facilitating access to contact details for rights holders of artistic and literary works  
<<http://www.watch-file.com>>

#### **Chapter 7**

Creative Commons  
<<http://www.creativecommons.org>>

A report produced in the UK examining the potential for using Creative Commons licences in the public sector  
<<http://www.common-info.org.uk/publications.shtml>>

Open source website promoting the free exchange of media under the Creative Commons and other similar licences  
<<http://www.ourmedia.org>>

International Federation of Reproduction Rights Organisations (IFRRO)  
<<http://www.ifrro.org>>

## Chapter 8

Dublin Core is a metadata element set intended to facilitate discovery of electronic resources. It includes rights metadata  
<<http://uk.dublincore.org/>>

SPECTRUM is a core standard developed for collections. It includes a detailed section on rights management  
<<http://www.spectrum-html/righ/htm>>

An extensive report commissioned about Digital Rights Management  
<<http://www.intrallect.com/drm-study/DRMFinalReportv2.pdf>>

The Open Digital Rights Language (ODRL) initiative is an international effort aimed at developing and promoting an open standard for the Digital Rights Management expression language  
<<http://www.odrl.net>>

The ODRL/DCMI metadata usage profile will document how to make combined use of the rights-related DCMI metadata terms and the ODRL rights expression language  
<<http://odrl.net/Profiles/DCMI/>>

The AMICITIA consortium, proposing an integrated rights management system based upon contracts  
<<http://www.amicitia-project.de/Areas/Rights/solution.shtml>>

## 11. Index

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Fair Dealing and Permitted Acts  
Freedom of expression  
Freedom of Information  
Indemnities  
Infringements  
Intellectual Property Rights  
Moral Rights  
Non-exclusive licence  
Obscenity and Indecency  
Originality  
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