

IPR Advice Sheet 12

Advanced Copyright Questions and Advice by Naomi Korn - February 2018

Following are a number of common questions which have arisen when dealing with the practicalities of dealing with Intellectual Property Rights (IPR) in museums. These compliment the series of IPR Advice Sheets which are available in the Tools and Reports Section of the Museum Development Yorkshire website.

1. Our museum has received funding from Heritage Lottery Fund (HLF) to digitise its collection – what do we need to consider in terms of rights and permissions?

When the HLF grant was applied for, your institution will have received the HLF standard terms and conditions. Within this document there is reference to the “Digital Outputs” of the project and what the HLF expects in regards to rights and permissions. Digital Outputs are defined as any heritage content that is copied into a digital format which includes all the digital image files created during the photography and digitisation process.

Under your contractual obligations to HLF, you will need to ensure that you will:

- Obtain and maintain all rights permissions and licences for you to use, copy, keep and disseminate the Digital Outputs and to grant the same licence to them.
- Grant the HLF an irrevocable, perpetual and royalty-free licence which they can sub-licence if they wish.
- Use a Creative Commons licence of Attribution Non-Commercial (CC BY-NC 2.0 UK) when you put your Digital Outputs online.
- Not be able to exploit the images commercially nor use any other type of licence without prior written consent from the HLF.
- Keep the digital files secure and must make them available to the HLF and to the public on request.

2. Our museum wants to reproduce items on its website but can't trace the rights holders – what are my options and what should I do next?

Items with no traceable rights holder are referred to as Orphan Works and the museum is able to use one or more of the following options:

- **Use the EU Orphan Works Exception** - This non-commercial exception allows museums and other cultural and heritage organisations to reproduce their orphan works by digitising them and making them available online, by carrying out self-certified reasonable searches



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and then completing the necessary fields on the EU IPO Orphan Works Database¹. The exception is limited because it does not include standalone artistic works such as a photograph or painting, although it does include text-based works, audio visual works and embedded orphan artistic works.

- **Use the UK Orphan Works Licensing Scheme** - The intention of this scheme was to provide a means for the use of all types of orphan works for any purpose by a wide variety of users, by issuing a UK-based licence for up to 7 years. Usage of the licence by museums has been to date extremely low due to the high admin costs of the scheme, its limited coverage (it only covers the UK so anything published online would not be covered), and the relative lack of benefit in relation to costs and proportionate risks.
- **Publish using a risk managed approach.** Using this approach, you record all your attempts to find the rights holder (see the Orphan Works checklist below for advice on how to determine an Orphan Work) and if the rights holder can still not be found and there is a general low risk you can decide to publish the items online with the inclusion of a copyright disclaimer and a takedown policy should the rights holder come forward and object.

The following can be used by a museum to search for a rights holder:

- ❖ Image Recognition Software – free sites such as Tin Eye² and Google Advanced Search³
- ❖ Acknowledgements and notes of published works/exhibition catalogues about the author
- ❖ Searching the Internet
- ❖ Checking the WATCH file⁴ on the Internet for information about artists and writers
- ❖ Liaising with organisations/image libraries which might hold works by that artist/creator and contact them to see whether they can provide any information about the rights holder
- ❖ Checking with the British Library (bl.uk). To find the copyright holder of a book (still in copyright) published by a now defunct publishing house, send a query to the British Library through their website (<http://www.bl.uk/index.html>)
- ❖ DACS⁵ (Design and Artists Copyright Society), Publishers Association⁶, ALCS⁷ (Rights Management Society for Authors)

¹ <https://euipo.europa.eu/ohimportal/en/web/observatory/orphan-works-database>

² <https://www.tineye.com/>

³ https://www.google.co.uk/advanced_search

⁴ <http://www.hrc.utexas.edu/research/watch/about/>

⁵ <https://www.dacs.org.uk/>

⁶ <https://www.publishers.org.uk/>

⁷ <https://www.alcs.co.uk/>



- ❖ Establishing whether the work has been lent/bequeathed/given by the rights holder. If so, can the person who gave the material provide any contact information for the rights holder?
- ❖ Online directory enquiries
- ❖ Placing an advert in a relevant trade journal or magazine in order to trace the rights holder

3. Our museum would like to reproduce digital copies of collection items in its gallery space on dedicated terminals – what do we need to know about copyright? What other exceptions to copyright might help us in our work in his area?

A copy of a collection item can be made available to individual members of the public via a dedicated terminal on the premises. This is permissible as long as the work has been lawfully acquired by the institution, it is for the public's research or private study and there are not any licensing/purchase terms which prevent this. Museums are already experimenting with touch screen terminals, audio and/or film booths, and single use terminals to enable public one-on-one access to digital images of works in their collections, under this exception.

Other exceptions that the museums can take advantage of are:

Fair Dealing for non-commercial research or private study - This exception applies to all copyright works. It means that copying of in-copyright items is permitted as long as it is within 'fair dealing' and for non-commercial purposes. However, the emphasis is on the nature/purpose of the copying itself and not the nature of the person/organisation carrying out the copying. This exception cannot be restricted by a contract.

Museums are able to support public access and re-use of copyright works under this exception. Examples include permissive public photography policies, and enabling the public use of photocopiers, scanners and sometimes their own equipment to make copies of in-copyright works. When a user is copying for this purpose, it is strongly advisable that museums display a copyright notice, setting out the parameters of the copying.

Fair Dealing for the purposes criticism and review, and for the purposes of quotation - A copy of a work can be used by museums for the purposes of criticism, review or quotation. Examples include reproduction of images of art works in corporate plans, conference slides and evening talks.

A lawful extract of a work can also be made for the same purposes. In this case, the work must be 'fair dealing', and sufficiently acknowledged, as well as having lawfully been made available to the public. This exception cannot be overridden with any contract. Examples of use of this exception by museums include extracts of text reproduced in exhibition panels and books, clips of films and excerpts of sound recordings within exhibition spaces.



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Fair Dealing for the purposes of current news reporting - Press and marketing teams working within museums will largely use this exception for the reproduction of certain works within newsworthy contexts. Works can be freely copied under this exception as long as they are sufficiently acknowledged. This does not extend to the copying and distributing of press articles, for which a licence is required or photographs.

Fair Dealing for the purposes of data or text mining - Text and data mining is the electronic analysis of large amounts of copyright works to identify patterns and other interesting information that would not be possible through human reading. This exception is permitted for the sole purpose of non-commercial research, as long as the person carrying it out has lawful access to the work and the copy is accompanied by sufficient acknowledgement. This exception cannot be overridden with any contract.

The likely beneficiaries of this exception in a museum context are likely to be museum archivists and curators, who may wish to analyse a large corpus of copyright material, such as text, recordings, images or films, to ascertain patterns, trends, etc.

Fair Dealing for the purposes of illustration for instruction purposes - A copy of a copyright work can be used for the sole purpose of illustration for instruction as long as the use is for a non-commercial purpose, the person making the copy is giving or receiving instruction and the copy is accompanied by a sufficient acknowledgement. This exception cannot be overridden with any contract.

Educational activities in museums, such as facilitated class room teaching, in-house training and PhD supervision, will all benefit from this exception.

Fair Dealing for the purposes of parody, caricature and pastiche - A fair dealing copy of a copyright work can be used for the purposes of parody, caricature and pastiche. Like many of the other exceptions, contracts restricting the licensee from benefitting from this exception are not enforceable.

Uses of this exception in a museum context include creative approaches to interpretation, such as exhibition panels using existing art works, as well as the display of work which themselves may be based on, or incorporate other works in copyright.

Copying for preservation or replacement - Under UK Copyright Law museums may copy material in their own permanent collection for the purposes of preservation. This exception covers all types of copyright work as long as they are part of the institution's permanent collection, not publicly accessible or available on loan to library or archive users. Some examples of the types of copying that this exception permits are:



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- The digitisation of oral histories recorded on reel to reel tape and backed up in multiple locations
- The digitisation of a fragile pamphlet collection
- Transferring obsolete video formats, such as Betamax, to up-to-date digital file formats
- If it is not reasonably practical to purchase a copy of an item in a collection or if a copy is lost, destroyed or damaged.

This exception cannot be overridden by a contract.

4. We have some disabled visitors coming to our museum and wonder if we can make them accessible copies of our collection items?

New legislation now provides specific exceptions permitting copying for, or by users with a disability. Museums may copy the whole or part of an accessible work for a disabled user. This exception applies if:

- The organisation has lawfully obtained a copy of the work which the user is unable to access
- An accessible copy of the work is not commercially available or is not suitable
- The accessible copy is for the user's personal use

Under this exception, museums have already created tactile versions of items in their collection for visually impaired audiences, subtitled archival films and colour adjusted images of art works for dyslexic users.

5. The museum has been contacted by a production company who wish to film in our museum and also use stills of collection items in their programme. What do we need to know about rights and permissions and what should we do next?

When a production company requests to film within the museum it is best to understand the purpose of their visit before anything is agreed.

- Is it for a fictional drama series or a documentary featuring the museum?
- Where is the filming to take place and what is to be included?
- Are any of the items in copyright? Have the rights been cleared? If not, is it clear that it is the responsibility of the production company to clear copyright any other rights, such as performers rights as well as secure any other necessary consents required for filming.
- Are there any items whose acquisition terms and conditions would restrict their inclusion?
- Have you got your own contract with the production company and if not, if they have issued you with one is there anything you don't understand in the contract and/or are unable to do?
- Does the contract state what they intend to do with the footage/stills now and in the future?



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- Who will own the rights to the footage/stills?
- How will the museum be credited/compensated?
- Will there be any publicity and will the museum benefit from it?
- Does the museum have the right to review the footage/stills before any broadcast?
- Does the museum have the resources to facilitate what has been requested?

Remember that if the museum does not agree to any of terms, the request can always be denied. Moreover, the more that the production company wants to do with the footage, the more you might consider charging them. Make sure you do not enter into any exclusive arrangements which could jeopardise relationships with future clients and in some cases, be unlawful under the Public Sector Information Regulations (PSI) Further tips about contracts and licensing can be found in this blog post by Naomi Korn - <https://www.townswebarchiving.com/2017/12/digitisation-contract-negotiation-rights-management/>

6. Our museum wants to explore ways that we can commercially exploit our images – can you advise?

- To begin with carry out an image audit. Which rights do you own? Which items are out of copyright? Which items have images? Which can be exploited?
- Consider bringing in a licensing agent to help you understand the potential of your image/digital assets and introduce you to potential commercial partners such as a commercial image library.
- Consider hiring/contracting a professional photographer to increase the quality and quantity of the museum's images.
- Speak to contacts in other institutions who are already commercially exploiting their images.
- Consider the different ways in which the museum might want to exploit its images -
 - ❖ Image licensing
 - ❖ Print-on-Demand
 - ❖ Retail products
 - ❖ Publishing
- Develop your collection management policies and procedures to reflect what you want to do with your images.
- Develop a clear business plan outlining the costs and benefits, timescales, resources and possible pricing models.
- Develop a marketing strategy.

There are also some more operational considerations before a commercial venture could begin.



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- Check that your museum has a governance structure to fully facilitate commercial activities. For example, if your museum is an unincorporated body it will not have the necessary legal status to enter into legal agreements. You can seek further advice from the Charity Commission⁸. Similarly, if your museum is local authority funded, you should discuss your plans with them.
- Make sure the museum complies with the Public Sector Information Regulations⁹
- The museum may be required to charge VAT and there may be other tax issues that will need to be considered. Contact HMRC¹⁰ for further information.
- Understand the costs of servicing an image licensing operation, i.e. staff costs, administration, infrastructure and digitisation. If the costs outweigh any commercial benefit, you will not make any profit and you should consider alternatives, like using a commercial picture library e.g. the Bridgeman Art Library or Art UK.

7. We have contacted a rights holder for permission to reproduce some music in our museum, but they propose to charge us an enormous amount of money. What can we do?

The rights holder has a right to charge whatever they want to provide permission to copy their work. What the museum can do is contact the rights holder and emphasise the following:

- Clearly articulate who you are, your aims and the context of your use, particularly if you are not-for-profit, carrying out activities for non-commercial purposes etc.
- Familiarise yourself with the other party and what their aims and objectives are and try and pitch your request accordingly.
- Set a clear amount that you will pay in your mind, go in at a lower level and push until they give way.
- If you feel that you are being asked to compromise or give too much, walk away and reconsider your position.

8. We work with volunteers who regularly produce content for our museum. What are the rights issues and what should we do?

The copyright in any content that volunteers create on behalf of the museum will not belong to the museum, which will restrict enormously a museum's ability to reuse such content.

Ideally museums who work with volunteers should seek a transfer copyright to the museum via a deed of copyright assignment, which is an appropriate device to prevent a possible employee/employer relationship.

⁸ <https://www.gov.uk/government/organisations/charity-commission>

⁹ <http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/>

¹⁰ <https://www.gov.uk/business-tax/vat>



Like any assignment of copyright, this will not be possible unless the museum is a legally incorporated body, such as a charitable trust. Museums which are unincorporated and run by volunteers will need to discuss a mechanism whereby they grant each other permissions to reproduce any content that is created, or consider perhaps appointing a third party who can hold any copyright for them on their behalf.

9. The museum is thinking of commissioning work on museum objects including photography, how do we preserve the museum's interests?

- It is important to protect the museum's interests (including the copyright in any new content created as a result of the relationship) when working with commissioned parties.
- This means that the relationship is underpinned with a legally binding contract setting out clearly terms and conditions, including the ownership and/or use if any arising copyright.
- If the photographer refuses to transfer the copyright then an agreement that provides the museum with permissions to use the created content now and ideally in the future without limitation should be drawn up and agreed.
- The agreement could also detail what the photographer is able to do with the created content even if the museum is transferred the copyright.
- In the event that an agreement about copyright is not forthcoming, there is always the option of commissioning a different photographer who will transfer the copyright.

10. Our museum is producing a publication in which we are quoting famous people, is that ok?

- There are a number of points which need to be considered. How old is the quote? If copyright has expired in the content from which the quote originated, and the quote has entered the public domain the museum would be free to include it.
- If the quote is from content that is still in copyright, then a lawful extract of a work can also be made for the purposes of criticism and review or otherwise. In this case, the work must be:
 - within the scope of 'fair dealing'
 - sufficiently acknowledged
 - made lawfully available to the public.
- If the quote is from an unpublished work, like a letter, then a small amount which is insufficient in terms of importance to the whole of the content from which it could also be used, again with full acknowledgement.
- If none of the above apply, or else, then permission would need to be sought. Be aware that catch phrases etc., might be trade-marked and/or copyright enforced rigorously and in these cases, permission should again be sought.



Examples of use of this exception by museums include extracts of text reproduced in exhibition panels and books, clips of films and excerpts of sound recordings within exhibition spaces.



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