Copyright and Digital Cultural Heritage: Introduction
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Copyright and Digital Cultural Heritage has been written for librarians, archivists and museum curators. It is intended for practitioners working in memory institutions who preserve, organise, and facilitate access to our shared cultural heritage. It concerns how copyright enables and inhibits the digitisation and use of material held in library, archive and museum collections, material that institutions want to share more meaningfully, more completely with the world online. In short, it concerns copyright and digital cultural heritage.

For those without any prior knowledge, the resource offers an introduction to basic copyright concepts and principles. For those already familiar with these concepts, the resource also explores various areas of controversy or unsettled law specific to memory institutions. When addressing these issues, we offer suggestions about possible interpretations of the law that may be helpful in developing an appropriate and reasonable institutional policy on copyright and the digitisation of collections.
The resource is structured as follows:

1. Introduction
2. A brief history of copyright
3. What copyright protects and protection criteria
4. Authorship and ownership
5. Economic rights and infringement
6. Duration of protection
7. The permitted acts: exceptions to copyright
8. Exceptions for libraries, archives and museums
9. Orphan works
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11. Copyright and use across borders
12. Moral rights and digitisation
13. Oral history and performers’ rights
14. Digitisation and risk
15. Managing copyright assets and the benefits of ‘open’
WHO SHOULD READ THIS RESOURCE

If you work with digital cultural heritage, if you work in the digital humanities, or if you are interested in copyright and digitisation practices, you should read this resource. That said, the resource has been written primarily with memory institutions in mind. We use the term memory institution as a shorthand for all institutions that collect, manage, use and assist others in making use of material deemed worthy of long-term preservation, material important to local, regional and national identities, education and research, culture, political accountability and more. We make no attempt to define cultural heritage or digital cultural heritage. The librarians, archivists and curators for whom this resource is intended are better placed than we are to make those determinations.

Sometimes, copyright rules are specific to certain institutional contexts. For example, some copyright exceptions apply to all memory institutions, whereas others enable use by librarians and archivists only, or indeed just by librarians. Whenever these points of difference arise, we identify them clearly for the reader.

COPYRIGHT ANXIETY AND ACCEPTING UNCERTAINTY

Librarians, archivists and museum curators take copyright law very seriously. They are law-abiding people with strong professional ethics. But often they find the copyright regime complicated, confusing and intimidating, and especially within an online and global environment. There is a good reason for this: it is complicated, confusing and intimidating. Moreover, very few people who work at memory institutions enjoy the benefit of formal legal training, and those institutions rarely have the financial resources to pay for specialist legal advice.

Research also indicates that staff in memory institutions worry about copyright. A lot. They worry about whether they are acting lawfully when enabling digital access to existing collections; they worry about the threat of litigation; and they worry about the reputational damage—to their institution and to their profession in general—that might flow from unintended and inadvertent copyright infringement.

And it is easy to understand why they worry: it is because uncertainty is structurally embedded within the copyright regime. The practical implementation
of the law often turns on interpreting concepts that are inherently ambiguous and situational, concepts such as reasonableness, fairness, sufficiency, substantiality and diligence. These are concepts that must be considered in context, and there is rarely a straightforward answer to questions such as: Am I copying a substantial or insubstantial amount? Is what I’m doing fair? Is my search for the copyright owner diligent enough?

Consider, for example, the concept of reasonableness: you will find it scattered throughout the Copyright Designs and Patents Act 1988 (the CDPA). The CDPA refers to making a ‘reasonable inquiry’ concerning the identity of the author of a work (s.9(5)), having ‘reasonable grounds’ for belief (s.25(1)), the ‘reasonable terms’ of a contract (s.31A), giving ‘reasonable notice’ (s.31BB), a ‘reasonable proportion’ of a work (s.42A), making a ‘reasonable’ assumption (s.57), reading a ‘reasonable extract’ (s.59), paying a ‘reasonable royalty’ (s.66), making a determination that is ‘reasonable in the circumstances’ (s.73A), providing a ‘reasonable form of identification’ (s.77(8)), exercising ‘reasonable diligence’ (s.99 and s.113), using such ‘reasonable force as is necessary’ (s.109), waiting a ‘reasonable time’ (s.121) or a ‘reasonable period’ (s.135B), making ‘reasonable payments’ (s.133), the concept of a ‘reasonable condition’ (s.135C), and so on. Is a ‘reasonable term’ the same as a ‘reasonable condition’? Or, is a ‘reasonable proportion’ the same as a ‘reasonable extract’? Considered in the abstract, we cannot know. What constitutes a reasonable condition, amount, time or payment will always depend on the specific facts at hand. Moreover, reasonable people (even within the same institution) may reasonably disagree about whether a specific condition, amount, time or payment is reasonable in the circumstances.

When applying or interpreting provisions such as these, librarians, archivists and museum curators want to know that they are acting within the law. That too is entirely reasonable. But, the desire and search for a black and white answer will often prove illusory, and is likely to frustrate. In other words, when trying to determine solutions to copyright problems, uncertainty must be accepted. And, if tolerating uncertainty is necessary within any institutional approach to copyright management, then so too is tolerating risk. Managing copyright when dealing with digital cultural heritage inevitably involves managing risk.

We offer one example, drawing on our own experience. In April 2016, two of the contributors to this resource launched Display At Your Own Risk, an exhibition experiment concerned with the use and reuse of digital surrogates of public domain works of art produced by cultural heritage institutions of international repute. We were interested in exploring how institutions mediate access to and control of public domain works in their collections, through technological, legal and social norms. The exhibition featured digital surrogates made available online by 52 institutions from 26 countries. Some institutions made their surrogates freely available for anyone to reuse. Others did not. Indeed, some institutions expressly prohibited the reuse of the surrogate without permission.
We did not seek permission to make use of any of the surrogates included in the exhibition, or in the accompanying materials. Instead, we relied on the copyright regime, specifically the exception permitting use for non-commercial research purposes. Not everyone will agree with our approach. For example, one could argue that our use does not fall within the scope of the exception at all; perhaps, it is not the right kind of research, or the exception was never intended to enable our type of use. Alternatively, even if it is the right kind of research or the right kind of use, one might argue that our use is not fair; and, if our use is not fair the exception will not apply. We have considered these (and other) arguments but on balance we believe we can avail of the exception. However, we do not know that we can. In this respect, the best we can say is that we have a high level of confidence that the project is probably lawful. We cannot make any stronger claim than that. Nor should we need to. But, inevitably, this means we must assume a certain amount of risk in making our project available online. We have considered the risk, and we are comfortable with it.

We encourage others to take a similar approach to copyright management. Don’t ask: who do I need to ask for permission? Ask: do I need to ask anyone for permission? Don’t ask: can I be sure that this activity is lawful? Ask: how confident am I that this activity is probably lawful? Ask: what is the nature of the risk involved in this activity, and am I comfortable with it? Ask: is this an appropriate risk to take so that I can deliver on my institution’s public mission? Ask: how are my colleagues in other similar institutions managing these issues?

Incidentally, since launching Display At Your Own Risk, we have received no complaints from any institutions that feature in the exhibition, only compliments, thanks and encouragement. Some institutions have even been prompted to revisit and revise their policies and practices in response to the exhibition. You can view Display At Your Own Risk [here](http://www.displayatyourownrisk.org).
This is Guidance (not legal advice)

We hope this resource has a meaningful role to play in helping memory institutions become more comfortable with managing the necessary relationship between copyright, uncertainty and risk. But, it is important to stress that our commentary does not constitute legal advice, and is not a substitute for legal or other professional advice. We discuss the law and legal principles in general terms, not in relation to any specific digitisation initiative or project. We provide a framework to help you develop and navigate your own professional practice as it is shaped by copyright norms and challenges. In this way, we hope to help you better understand the law, to become more confident in your own assessment of the legal issues that impact your work, and to know when it might be advisable to seek legal advice. But, we do not provide legal advice.

While securing professional legal advice may be a costly option, a solicitor owes a professional duty of care to their client to provide appropriate advice on a specific fact-situation. If the solicitor gives poor quality or incorrect advice, they may be liable for their errors or negligence. Typically, they will have indemnity insurance in place to cover the cost of any claims their clients may take against them for any consequences that may flow from that advice. When the uncertainty or risk involved in any specific project or initiative appears to be too great, seeking professional legal advice may be the most prudent course of action.

Thanks

This text was not written in a vacuum. We would like to acknowledge and thank the contribution that others have made to the preparation and writing of this resource. In writing it we have benefitted from discussion and dialogue with numerous friends and colleagues. Often the feedback was critical, challenging our interpretation of the law on a given point. However, it was always offered with the intention of improving the text, and enhancing the relevance and value of the resource for all memory institutions and the cultural heritage sector at large; it was gratefully received in the same spirit.

We would like to thank: Lionel Bently (University of Cambridge); Peter Jaszi (American University); Bartolomeo Meletti (Worth Knowing Productions); Fred Saunderson (National Library of Scotland); Annie Shaw (BFI); and,
Ben White (British Library). We would like to give special thanks to Tim Padfield who kindly agreed to review every commentary included within the resource. Tim was forensic in his interrogation of the text, and we are very appreciative of his time and effort. For the most part, we incorporated and addressed Tim’s comments, criticisms and suggestions for improvement. However, inevitably perhaps, we did not always see eye to eye. Where we disagree, we offer different plausible interpretations of the law and leave it for the reader to make their own determination. And of course, this is consistent with our general worldview about the need to accept uncertainty as inherent within the practical implementation of the copyright regime.

Finally, we would like to offer thanks in advance to any readers who might choose to get in touch with comments and criticisms, or with other suggestions about how to improve the resource. We would be particularly interested in examples of how you manage copyright, uncertainty and risk—illustrations of real life practice that may be helpful to others working in the sector. We strongly believe in the value and power of disseminating evidence of best practice across the sector, of sharing experiences, anxieties, problems and potential solutions. Where there is uncertainty, the sector should feel able to develop reasonable legal interpretations and norms of behaviour that can help manage that uncertainty. That requires collaboration and courage. From time to time, it may even involve admitting that copyright infringement is sometimes inevitable in the pursuit of your public interest mission. Whatever it entails, we hope that Copyright and Digital Cultural Heritage has a role to play in facilitating that conversation within institutions and across the sector.
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