Copyright and Digital Cultural Heritage: Licences and Licensing Agreements

In this commentary we provide you with an overview of licences and licensing agreements, including what they are, how they relate to copyright exceptions and crucially how they relate to the work of information professionals and others in the cultural heritage sector. We discuss a variety of licence types, including e-resource licences, open licences as well as collective licences available to the sector. We also briefly look at the relationship between copyright and contract law. We finish by reviewing the new provisions in UK law which allow Collective Management Organisations (CMOs) to offer Extended Collective Licensing (ECL) schemes, and how this might increase access to difficult-to-find works, such as those that are out of commerce.
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1 Definition and purpose of a licence

Licences are widely used as a means to govern access and use of electronic products such as software, computer games, online film and music and databases. This means that most electronic material purchased by libraries and cultural heritage institutions (CHIs) is subject to a licence.

The term licence (or license which is the US spelling of the word) is used broadly in this chapter to mean any agreement between two parties permitting intellectual property to be used or exploited in a specified way. Licences are usually written agreements, drafted as formal legal contracts between two parties that give an individual or an organisation official permission to do, use or own something. There are instances where licences can be less formal, including unwritten agreements and implied licences based on the conduct of both parties to the agreement (i.e. both parties behave as if a licence is in place even if no such agreement has taken place). However, in the context of this chapter the licences which cultural heritage organisations rely on will be formal legal contracts providing ‘express’ (i.e. explicit written) permission to use specific, or certain types of copyright work. They are granted by one party (the licensor) to another party (the licensee) and they constitute a formal agreement between those two parties to provide benefit to each other for the term (duration) of the contract and potentially beyond.

Under intellectual property laws, licences authorise a use which otherwise might be considered an infringement, whilst allowing the owner of the intellectual property to retain ownership and to benefit financially from it. For example, they may allow a licensee to copy specified quantities of a copyright work, or to make multiple copies of it. They are typically valid for a specific length of time (the term) and will also have provisions for how the licence is to be renewed, if at all. Licences will also be clear about the territory of exploitation (most licences concerning online content provide worldwide permission) and under which law the contract has been written. This last provision will clarify the country in which any legal action concerning dispute over the licence will take place.

In the digital world, licences and licensing agreements are a crucial part of governing access to cultural products. They allow organisations in the ‘creative industries’ such as publishing and film production to protect, exploit or use intellectual property, and reinvest profits in the future production of cultural goods. Licences can also be used by cultural institutions to protect and exploit their own intellectual content. For example, for some libraries and museums, selling rights to content in their collections, such as photographs, can provide them with an important source of revenue. Meanwhile, many libraries, galleries and museums have also developed licence agreements (or terms of use) to indicate what users can do with digitised content made available on their website without charge. From the users’ perspective, provided the terms are adhered to, these terms enable use without fear of a claim of infringement. Chapter 15 provides more details about the digitisation of public domain works by CHIs and the ethical and legal issues associated with licensing and generating revenue from these works.
2 Contract law and its relationship to copyright

Licence contracts are regulated by a separate body of law from copyright. Contract law has a particular relationship with copyright law and they both provide ways of regulating use of copyright works in ways that interact with each other. As previously stated licences are used increasingly in the digital environment to protect and regulate the use of cultural products (e.g. e-books, digital services such as music and film) which means that contract law is often as important as copyright law when considering the use of information goods. For those wanting additional detail there is a useful section in the eIFL Handbook for Libraries on the relationship between copyright and contract law.

Another more academic paper by Kretschmer et al. (2010) also outlines the relationship between copyright and contract law. From the users’ perspective, a key difference is that contracts can govern your use of a product after the initial purchase has taken place. So, for example, the terms of use of an e-book that you might purchase through the Kindle store continue to apply after you have purchased it. In the pre-digital world, the legitimate purchase of something like a book or CD meant that the legal relationship with the rights owner largely ended and the reader could read, play, lend, modify, or potentially even copy a work. The purchased product could also be sold on under the doctrines of ‘first sale’ (US), or ‘exhaustion of rights’ (EU). However, under contract law the relationship between buyer and seller may persist, and conditions of use can be imposed on the consumer that have no source in copyright law. This matter has been particularly controversial for libraries over the issue of the lending of e-books and was the subject of a judgment in the Court of Justice of the European Union (CJEU) in 2016 which found that library lending of e-books may, under certain conditions, be treated in the same way as library lending of paper books.

3 Relationship with exceptions

Licences have a complex relationship with copyright law and specifically with copyright exceptions, however there are a number of reasons why they might well be the first port of call for libraries and other CHIs. Firstly, in many instances, licences are unavoidable when purchasing electronic products and so institutions may well have negotiated licence agreements to suit their needs. Additionally, institutions may well have already paid up front for some collective licences, so, before considering whether copyright exceptions might apply, the terms of existing licences should be consulted. Finally, licences will usually provide greater clarity than exceptions and will allow uses beyond those that copyright exceptions might allow. For example, a licence is likely to specify greater quantities of material that can be copied or permit the work to be used for additional purposes not covered by an existing copyright exception. However, some exceptions explicitly provide that they apply if licences offer less favourable terms.

Rightsholders and commercial publishers typically have a different perspective on the relationship between licence and exceptions than libraries and the cultural heritage sector.
The commercial publishing industry would argue that relying on licences over copyright exceptions provides the user with a greater level of certainty over what activities are permitted. If organisations and people rely on copyright exceptions this will involve interpreting specific aspects of copyright law, for example, whether the copying constitutes ‘fair dealing.’ In making this judgement there will always be an element of uncertainty and risk which is not the case when licences directly address a licensee’s requirements. If the licence is negotiated directly with a publisher, specific terms can be agreed to suit the needs of the licensee, all of which leads commercial rights holding organisations to downplay the value of exceptions in favour of licensing solutions. However, professional bodies representing the cultural heritage and library sector (e.g. IFLA, the International Federation of Library Associations) are often keen to ensure that copyright exceptions are not eroded or undermined by licence agreements and so may well encourage their members to rely on copyright exceptions.

Since the Hargreaves Review of Intellectual Property and Growth in 2011, and the changes to UK copyright law that followed in 2014, an important principle in UK law is ‘no contract override’ meaning that licence agreements cannot override many statutory copyright exceptions. The wording in the law now specifies that if the term of a licence seeks to limit acts permitted under a copyright exception, then that term is not valid and can be ignored. Examples of this might be a clause that prohibits copying short extracts of a work for non-commercial research or private study, or states that text and data mining is not permitted. However current practice suggests that even despite these provisions many librarians and cultural heritage professionals feel uncomfortable disregarding licence agreements due to the power of contract law. Secker et al. (2016) wrote a blog post about this in relation to the new exception that permits text and data mining.

Further information is available in Chapter 7 on Copyright Exceptions which sets out the exceptions to the CDPA covered by the ‘no contract override’ provisions.

4 Types of Licence

4.1. Licensing In vs Licensing Out

This chapter largely concerns licences available from third parties, but it is worth clarifying that there are two main ways that cultural heritage professionals will interact with licences: ‘Licensing In’ and ‘Licensing Out’. Licensing In covers the third-party licences primarily discussed in this chapter: ones that the organisation will typically sign with either content providers such as publishers, or with collective rights organisations to access and make use of their content.

Licensing Out however refers to the types of licences that a CHI might decide to apply to content they make available to users or partners. An example would be the licences CHI’s apply to digitised versions of their own collection items in order to generate revenue from further publication. The challenges associated with this type of activity are touched on only briefly here and covered in more detail in Chapter 15.
4.2. Collective licences vs other types of licences

Due to the increasing number of electronic resources that libraries and CHIs require access to, they could easily end up managing a large number of licences with individual publishers, other rightsholders and licensing organisations. Some of this work is simplified through subscriptions to databases, content aggregators or the use of subscription agents (see ‘Primary e-resource licences’ below). These allow institutions to gain access to resources containing copyright material produced by a range of providers, but still do not provide comprehensive coverage of certain classes of copyright work.

However, the collective management of rights, through licensing bodies or Collective Management Organisations (CMO) is a solution aimed at simplifying the process so that entire categories of copyright works can be licensed for specific purposes by specific organisations. CMOs can agree licences with users on behalf of owners and collect any fees due to the owners. CMOs are a type of licensing body which grants rights on behalf of multiple rightsholders in a single (‘blanket’) licence for a single payment. Rightsholders will typically join a CMO, which are member organisations, and instruct it to license rights on their behalf. The CMO charges a fee for the licence, from which it deducts an administrative charge before distributing the remainder as royalties. They are typically not for profit organisations and are owned and controlled by their members, the rightsholders.

The main benefit of licences from CMOs is the broad coverage of the licence which benefits all parties in the transaction. The fees negotiated will typically be more favourable than relying on individual licence agreements with a large number of bodies. Collective licensing also benefits rightsholders as they are often able to secure income from organisations who might otherwise not take out a licence with them individually. In the cultural heritage sector there are a host of possible things that an organisation might want to get access to which are not included in blanket CMO schemes such as the use of musical sound recordings in downloadable material, or the performance of an independent documentary film at an exhibition or event. Specific licences offered by CMOs in the cultural heritage and education sector are discussed later in this chapter.

4.3. Primary e-resource licences

Libraries and other organisations purchase an increasing number of resources in digital format, and these products are sold with specific licence agreements or terms of use. As licence agreements can vary enormously from one another in terms of what they permit, there have been attempts over the years to try to streamline and standardise these licences in the higher education sector, through organisations such as Jisc Collections. Using standardised agreements for the resources they license gives libraries a greater sense of clarity over what they can do with the content they purchase.

The National Electronic Site Licence Initiative (NESLI) agreement was launched in the late 1990s, with the aim of promoting the widespread delivery and use of electronic journals in the UK Higher Education and research sectors. Licences were negotiated...
with publishers on behalf of academic libraries with the intention of obtaining value for money for the sector and to encourage the use of a Model Licence which was originally agreed between Jisc and the Publishers Association. This has subsequently been replaced by the Jisc Model Licence which, in the higher education sector, provides a starting point for negotiations for any licence. The benefit of this model licence is that it includes specific terms and conditions that facilitate teaching and research practices, such as copying extracts of works for teaching purposes, sharing on a virtual learning environment, and sharing between researchers. There are also clear benefits to the higher education sector as there is consistency between institutions, and individual universities do not need to negotiate licence terms with each publisher. However, not all publishers adopt model licences and some of the more generous provisions in the Jisc Model Licence have not as yet made their way into licences issued by CMOs. These provisions include the broad definition of extracts as ‘parts of a work’ and the ability for researchers to share content with colleagues.

In other sectors licences are negotiated through a range of different routes potentially with the support of Jisc, or through different bodies such as Scran in Scotland and subscription agents such as JCS Online who negotiate licences for electronic resources in the school sector, some further education colleges and public libraries. However, in the absence of these consortium arrangements or subscription agents, institutions will have to liaise directly with suppliers of electronic resources or acquire them through local authority procurement processes.

4.4. Creative Commons and other open licences

First adopted in 2001, Creative Commons Licences are used to signify when content is ‘openly’ available for re-use under certain terms and conditions. These licences allow individuals and institutions to indicate the ways in which they are happy for their creative outputs to be re-used without needing to be contacted for permission.

The use of open licences such as those created by Creative Commons, originated with the ‘Open Source Software’ movement and the development of the ‘GNU General Public License’ in the 1980s (and in the US, hence the spelling). The GNU licence is part of the ‘copyleft’ movement, a form of licensing where the author gives everyone who receives a copy of the work permission to reproduce, adapt, or distribute it, with the accompanying requirement that any resulting copies or adaptations are also bound by the same licensing agreement.

Creative Commons and other open licences are valid legal agreements that are designed to be understood and used by non-lawyers to support the sharing of copyright protected material. The licences are also machine readable which allows search engines and other automated tools to identify the appropriate reuse terms.

There are six types of Creative Commons Licence and these are comprised of four licence components: Attribution (BY), Non-commercial (NC) No Derivatives (ND) and ShareAlike (SA). A summary of the six licences and their constituent components can be found at [https://creativecommons.org/licenses/](https://creativecommons.org/licenses/) but is also listed in the table on the next page.
<table>
<thead>
<tr>
<th>Licence type</th>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>Attribution</td>
<td>CC-BY</td>
<td>This licence lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licences offered. Recommended for maximum dissemination and use of licensed materials.</td>
</tr>
<tr>
<td>Attribution-ShareAlike</td>
<td>CC-BY-SA</td>
<td>This licence lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This licence is aligned with the &quot;copyleft&quot; free and open source software licences which ensure that derivative works can never be put under more restrictive licensing terms than the original. All new works based on yours will carry the same licence, so any derivatives will also allow commercial use. This is the license used by Wikipedia, and is recommended for work that incorporates content from Wikipedia and similarly licensed projects.</td>
</tr>
<tr>
<td>Attribution-NonCommercial</td>
<td>CC-BY-NC</td>
<td>This licence lets others remix, tweak, and build upon your work for non-commercial purposes, and although their new works must also acknowledge you and be non-commercial, they don’t have to license their derivative works on the same terms.</td>
</tr>
<tr>
<td>Attribution-No Derivatives</td>
<td>CC-BY-ND</td>
<td>This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.</td>
</tr>
<tr>
<td>Attribution-NonCommercial-ShareAlike</td>
<td>CC-BY-NC-SA</td>
<td>This licence lets others remix, tweak, and build upon your work for non-commercial purposes, as long as they credit you and license their new creations under the identical terms.</td>
</tr>
<tr>
<td>Attribution-NonCommercial-NoDerivatives</td>
<td>CC-BY-NC-ND</td>
<td>This licence is the most restrictive of the six licenses, only allowing others to download your works and share them with others as long as they credit you, but they can’t change them in any way or use them commercially.</td>
</tr>
</tbody>
</table>

Table 1
An overview of the six types of Creative Commons Licences
Note: the table is reproduced from this website with a UK spelling of the word licence.

As a content creator, a library or cultural heritage institution can apply a Creative Commons Licence to works they own to indicate that they are happy to share their work under certain conditions. For example, they may choose to license a digitised photographic archive or manuscript collection under Creative Commons for non-commercial purposes only. One of the key issues here is to ensure that CC Licences are only used on material where the organisation holds the rights to that collection. Any collection where there are third party rights contained within it cannot have a CC Licence applied without the relevant permissions from those rights owners. Creative Commons licences are also irrevocable, therefore institutions need to think carefully about the licence they wish to use, and if that particular licence is appropriate for how they want to share their content.

Organisations and individuals can also use the Creative Commons search to help them to locate different types of content that is openly licensed. For example, many blog authors will use images or photographs licensed under Creative Commons to illustrate their blog posts and in most cases all that is required is to acknowledge the author or creator.

The most recent version of the suite of six licences, the Creative Commons 4.0 Licence, is international and designed to be used in any territory around the world. You can find out more about the licences from: http://creativecommons.org/

4.5. Bespoke permissions

In some cases, permission to use a resource is obtained by negotiating directly with a rightsholder to obtain bespoke permission. The terms of this licence will be specific to the licensee and licensor, as will the terms of the licence. Bespoke permissions are the most flexible type of agreement, however, they can be time consuming to negotiate and fees can be difficult to predict. For example, many libraries and cultural heritage organisations will hold copyright-protected content in their special collections that they want to preserve and make available online. In some instances they may own the copyright of the collection, however in others it may belong to a third party, such as an archive donated by an author or their estate. If the institution wishes to digitise these materials they will require permission from the rightsholder and in these instances, where records have been kept up to date, bespoke permission could be relatively easy and inexpensive to obtain. Ideally, institutions should try to get permission for digitisation and online access at the point of acquiring collection items, and a licence agreement should be part of the deposit agreement with the author or donor. However, in many cases this is not possible and it will be necessary to trace rightsholders which can be time consuming and inconclusive (see Chapter 9 on Orphan Works.)

It’s also important for libraries and cultural heritage organisations to manage the bespoke permissions they obtain to ensure they have a record of the terms of the licence and when it
will need to be renewed, if at all. In the case of obtaining a licence to digitise the material, the agreement should state clearly if the material will be made available online, or via a dedicated terminal, as well as setting out any subsequent re-use terms that are attached to the work.

4.6. Orphan Works and licences

‘Orphan Work’ is the term used to describe works which are still in copyright, but where the rightsholder cannot be identified or located. The sheer number of orphan works in collections makes it difficult for libraries or cultural heritage organisations to digitise and make material available without fear of a rightsholder coming forward and demanding a fee or asking for the content to be removed. The risks to the institution are both reputational and financial, as rightsholders may serve a take-down notice with associated negative publicity, or request for a fee and potentially even claim for damages.

There are a number of options that CHIs can take when looking to digitise orphan works and make them available in the UK. At one extreme, institutions looking to expose themselves to the smallest level of risk can apply for a licence to use an orphan work under the UK Orphan Works Licensing Scheme. Alternatively, institutions looking for more flexibility might choose to rely on the UK’s orphan works exception (Section 44B) provided under the EU Orphan Works Directive. However, there are many scenarios where neither of these options are practical, and institutions will decide to make works available following an internal assessment of the risk. This risk-managed approach involves taking proportionate steps, and the decision to make content available will usually follow an effort on the part of the CHI to trace relevant rightsholders and publicise their activities to relevant communities. In practice, institutions likely combine all three of these strategies (licence, exception and pure risk management) when addressing their use of orphan works, all dependent on the content and the project at hand.

Provision in UK law for the Orphan Works Licensing Scheme (OWLS) followed the implementation of some of the recommendations from the Hargreaves Review in 2014. The scheme is operated by the UK Intellectual Property Office (IPO) and requires that an individual or organisation carry out a due diligent search to trace the copyright owner before applying for a licence. The evidence of this due diligent search needs to be submitted as part of the licence application process. After the first year of operation, almost 300 orphan works licences had been taken out, the majority being for still images. However, in the government’s review of the scheme in 2015 the evidence suggested that OWLS was not suitable for mass digitisation projects due to the administrative burden of the diligent search. In a study by CREATe, undertaken as part of the Digitising Edwin Morgan Scrapbooks project, a comparison of OWLS with the use of the Orphan Works exception was undertaken. The research concluded that:

the long-term efficacy and relevance of both schemes appears fatally compromised by
the demands of diligent search. The costs and challenges of rights clearance activity are a significant barrier to the digitisation of cultural heritage collections. Deazley (n.d.)

Similar orphan works schemes have been implemented in Canada, Hungary, India, Japan, Saudi Arabia, and South Korea.

For more information about Orphan Works, see Chapter 9.

4.7. Licensing digitised collections of public domain material

As stated out the outset of this chapter, libraries and other CHIs will often be involved in ‘licensing out’. This involves attaching licence terms to digitised items from their own collection, so that people accessing the material are clear what they can and can’t do with those items. The institution may choose to apply a restrictive licence, or a more permissive Creative Commons licence to a digitised version of a work in which the copyright has expired. However, the appropriateness of attaching any terms and conditions to the use of these digital surrogates is questionable and may in fact be unenforceable, given that this often turns on asserting a fresh copyright in the surrogate itself. Claiming a new copyright in a faithfully digitised version of an out of copyright work has become increasingly controversial within the cultural heritage sector, even when the institution chooses to apply relatively ‘open’ licences to these digital surrogates. For further details see Chapter 15.

4.8. Software licences and other online and digital services

Licences govern our use of many digital services and products that people use in their everyday lives, from the software installed on our computers and smartphones to the online services we use such as Netflix or Spotify. Evidence suggests that very few people read the terms and conditions that they regularly agree to as part of their use of apps and online services. The extent to which these terms and conditions act as binding legal contracts is a subject of debate. The terms ‘click-wrap’ and ‘browse-wrap’ licences originate from the original term ‘shrink-wrap’ licence. This relates to the practice of inserting licence terms inside boxed software products that the consumer would be bound by as soon as they had opened the ‘shrink-wrap’ packaging. This practice is similar to online services where it is argued that users are bound by terms available on the website or digital service even without having been alerted to them (so-called ‘browse-wrap’ licences). It is therefore questionable whether users would be bound by these terms if they were not aware of them. However, ‘click-wrap’ licences are those which the user must click an ‘I agree’ button which is more likely to be legally binding.

As previously mentioned few people read the terms and conditions of use of software and digital services in full even when they are available to view. Some have argued that these may well include unfair terms which would not be legally binding on consumers.
under the Consumer Rights Act 2015. However, if someone agrees to terms of use in their professional capacity they would not be covered by consumer law and instead would be subject to the principle of ‘freedom of contract’. Under this principle there is no equivalent protection if an organisation enters into an unfavourable contract with another party.

5 Collective licences as they pertain to cultural and educational institutions in the UK

As previously discussed, collective licensing works on the basis of rightsholders mandating licensing bodies to manage certain rights on their behalf, usually for the payment of a small administrative fee. As such, those rightsholders actively opt in to collective licensing schemes and usually become members of the body. In the main, collective licences are offered for specific classes of copyright works. There are a variety of different collective management organisations (CMOs) in the UK who offer licences to cultural and educational institutions. The work of CMOs is governed by the Collective Management of Copyright (EU Directive) Regulations 2016 and in the UK the Intellectual Property Office has a complaints procedure in place for monitoring CMOs.

A full list of all the CMOs in the UK is maintained by the IPO, and those relevant to the cultural heritage sector, the class of work they cover and typical activities that they permit are set out in the table on the next two pages.

5.1. A worked example

The following worked example examines how the previously described range of licences might apply to a cultural heritage institution.

Imagine you are the curator at a museum that has recently been gifted the archive of a 20th century polymath—an author, playwright, musician and public figure. Your museum has received funding to put on an exhibition featuring works from her archive as well as to create an online resource making digital versions of exhibition items available through a multimedia website. The archive includes photographs, amateur sound recordings of her solo musical performances of other composers’ music and video recordings of stage performances of her plays by a mixture of famous and lesser known 20th century actors. It also includes VHS recordings of TV programmes in which she and her contemporaries appeared, as well as private correspondence with friends and family, many of whom were public figures.

Although this may seem like an extreme example these are the sorts of materials that those looking to make archival works available online need to address. In some cases, licences will be available to use the works, but in others not. We shall take a look at each of the types of work in the archive to consider implications:

The photographs in the archive are likely to be a mixture of private and professional photographs. It may be possible to get licences from DACS and PICSEL to allow digitisation of some of the photographs and make them
<table>
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<tr>
<th>Licence type</th>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>British Equity Collecting Society (BECS)</td>
<td><a href="http://www.equitycollecting.org.uk">http://www.equitycollecting.org.uk</a></td>
<td>Audiovisual performances Collects royalties for communication to the public (primarily broadcasts) and rental of video and DVDs.</td>
</tr>
<tr>
<td>CLA (Copyright Licensing Agency)</td>
<td><a href="http://www.cla.co.uk">http://www.cla.co.uk</a></td>
<td>Books, journals, some magazines Sector specific licences are available e.g. for schools, further education, higher education, health, public bodies, government, etc. Licences typically cover photocopying, scanning and digital copying of extracts of published content and use on intranets / in a Virtual Learning Environments (VLE) such as Moodle.</td>
</tr>
<tr>
<td>ERA (Educational Recording Agency)</td>
<td><a href="http://www.era.org.uk">http://www.era.org.uk</a></td>
<td>UK TV and radio broadcasts ERA licence schools, further education and higher education institutions to record, perform and store broadcast content within educational establishments and distribution via a secure network within the UK. Also allows use of the Box of Broadcasts (BoB) service <a href="http://bobnational.net/">http://bobnational.net/</a></td>
</tr>
<tr>
<td>DACS (Design and Artists Copyright Society)</td>
<td><a href="http://www.dacs.org.uk">http://www.dacs.org.uk</a></td>
<td>Artistic works / images (including photos) Reproduction of artistic works which includes images, photographs, drawings and a variety of other types of visual art. These may be standalone copyright works, or (more commonly) artistic works are embedded in other copyright works (typically literary works). For this reason DACS have a reciprocal agreement with the CLA.</td>
</tr>
<tr>
<td>Picture Industry Collecting Society for Effective Licensing (PICSEL)</td>
<td><a href="http://www.picsel.org.uk">http://www.picsel.org.uk</a></td>
<td>Artistic works / images (including photos) PICSEL offer licences to visual works rightsholders, who then license their works, and collect secondary income for their repertoire. The same as DACS, they have a reciprocal agreement with CLA for licensing images included in published literary works.</td>
</tr>
<tr>
<td>PRS for Music</td>
<td><a href="http://www.prsformusic.com">http://www.prsformusic.com</a> PPL (Public Performance Limited) <a href="http://www.ppluk.com">http://www.ppluk.com</a></td>
<td>Musical works / musical sound recordings PRS for Music manage the rights of songwriters, composers and publishers while PPL manage the rights of the record producers and performers of musical sound recordings.</td>
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<tr>
<td>Licence type</td>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>Filmbankmedia</td>
<td><a href="http://www.filmbank.co.uk">http://www.filmbank.co.uk</a></td>
<td>Feature films: Filmbankmedia represents prominent Hollywood and independent studios and distributors from around the world. They have over 12,000 titles available, and typically license community cinemas, film societies, hotels, transport and maritime operators, healthcare providers. These licences are required when showing film to the public in a non-educational context.</td>
</tr>
<tr>
<td>Motion Picture Licensing Company (MPLC)</td>
<td><a href="http://www.themplc.co.uk">http://www.themplc.co.uk</a></td>
<td>Feature Films: Similar to Filmbankmedia but with a different repertoire, they represent film studios, international distributors and TV and film producers. They license the showing of films in a non-educational context offering umbrella licences and a single title movie licence.</td>
</tr>
<tr>
<td>Authors’ Licensing and Collecting Society (ALCS)</td>
<td><a href="http://alcs.co.uk">http://alcs.co.uk</a></td>
<td>Published literary works: The Authors’ Licensing and Collecting Society is a not-for-profit membership organisation, with around 90,000 members. They are open to all types of writer, and collect money for ‘secondary uses’ of authors’ work such as photocopies, cable retransmission, digital reproduction and educational recording. CLA collect money on behalf of ALCS in many sectors.</td>
</tr>
<tr>
<td>Publishers Licensing Services</td>
<td><a href="http://www.pls.org.uk">http://www.pls.org.uk</a></td>
<td>Published literary works: PLS use the CLA and the NLA Media Access to manage collective licensing for publishers. PLS distribute the royalties they receive from the CLA and NLA to publishers who have signed up with them. While PLS do not offer any collective licences themselves, they may be able to assist if you are looking to use their members’ works in a way not covered by an existing collective licence.</td>
</tr>
<tr>
<td>Printed Music Licensing Ltd (PMLL)</td>
<td><a href="http://www.printmusiclicensing.co.uk">http://www.printmusiclicensing.co.uk</a></td>
<td>Printed sheet music: You may need a licence from PMLL if you are a school who wishes to copy any sheet music. Licences are currently not available for other sectors for printed sheet music.</td>
</tr>
</tbody>
</table>

Table 2
An overview of the CMOs relevant to the cultural heritage sector
available online. However, determining which of the photographs are covered by the licence is likely to be time consuming particularly if some have no attribution and are likely to be orphan works.

The copyright in the sound and video recordings of the musical and stage performances will be owned by whoever was the producer. Although PPL represent commercial sound recording owners they are unlikely to represent the rights in recordings made on a non-commercial basis. Similarly, organisations like Filmbankmedia and MPLC provide permissions for public screening of commercial films rather than either online streaming or material created on a non-commercial basis.

The musical works performed in the sound recordings are likely to be covered by PRS for music who could license both the venue for the playing of the music in the exhibition, and the use of the music on the exhibition website. Similarly, the performance rights of the actors in the stage plays may be covered by a licence from the British Equity Collecting Society (BECS). However, if the performers aren’t members of BECS then direct permissions would be required to make the recordings available online.

The broadcasts captured in the VHS recordings could be made available within an educational institution under an ERA licence. However, the licences ERA offer would not allow the recordings to be displayed on a publically accessible museum website. And finally, although the CLA represent published literary works, they would not be able to provide permission to digitise and make available personal correspondence and other unpublished material.

This example shows that despite the wide availability of commercial e-resource and blanket collective licences, coverage of the copyright content that CHIs want to use is partial and fragmented. The later section on Extended Collective Licensing outlines the latest developments in the UK which are intended to improve this situation by making entire classes of copyright work available for use by the cultural heritage sector, regardless of whether the copyright owners are members of CMOs.

6 Practical guidance for managing licences within institutions

One of the biggest challenges for libraries and CHIs can be managing the range of licences they have signed up to and knowing when they might need to license additional activities, such as in the worked example above. The range can include individual resource licences for databases, e-books or e-journal collections, any specific permissions or licences that may be granted, for example to cover the use of specific items for specific purposes and collective licences. In larger organisations a dedicated member of staff may oversee all these licences, however smaller organisations may devolve this to several people and even across several teams. Licence agreements are typically signed by a senior member of staff within an organisation, in some cases the head of the library. However, it is not always the same person who offers support and advice on copyright matters and the terms of licensing agreements. Subscription agents also help with the management of licence agreements.
Libraries, museums and archives typically include items and objects in their collection to which they do not hold the copyright. It is therefore important that catalogue records and metadata include as much rights information as is possible. Rights management is particularly important when new collections are acquired as it may determine whether the collection can be copied, digitised or made available online. This is discussed in further detail in Chapter 15. Finally, it is also important to ensure that licences that have been assigned to your own digital assets are managed, to ensure the organisation knows what rights they have over their digital assets and who has permission to use them. This may include individuals who request permission to include items from your collection in their work, such as an author wanting to include a digital copy of an image in a publication, or organisations who wish to re-use items either for teaching, an exhibition or some other purpose. If you are granting rights to others you will need to retain records of who those individuals are, any fees you may have charged and the term of the licence, so it can be renewed if required. Moreover, public sector institutions are subject to the PSI regulations and need to ensure that licence terms do not vary unfairly between different users.

6.1. Managing licences

Traditionally libraries use subscription agents or intermediaries to manage their journal collections, rather than subscribing individually to each journal title. However, keeping track of journal titles in a large library can be time consuming. Knowledge Base+ (https://www.jisc.ac.uk/kb-plus) is a service available from Jisc, designed for higher education libraries to help manage their electronic resources and the associated licences. Some institutions will maintain an in-house database or spreadsheet of licences to keep track of the agreements they have signed.

Having a system for managing licences is an important aspect of overall management of digital assets. Not only does having a system help to ensure that renewals take place in a timely manner (and therefore avoid getting access cut off), they also help institutions determine what resources they hold and how they can be used. Information such as which users are authorised to access the content under licence, whether there are any restrictions relating to geographical location and whether certain types of activity such as text and data mining are permitted under licence is important to maintain. Having all of this information in an easily accessible system allows institutions to communicate these effectively to their user communities as well as supporting broader organisational decision making.

6.2. Implications of licences to cultural heritage professionals and end users

There are a number of implications caused by the shift from the purchase and outright ownership of tangible information goods by CHIs, towards the leasing of access to resources through subscriptions and licences. One of these is that staff and end users need to be made aware of the implications of signing up to licences and using the licensed services. For example, it is possible that staff may sign up for free trials
that subsequently commit the institution to pay ongoing licence fees. Even in cases where payment is agreed for institutional access, cultural heritage professionals need to make their end users aware of any restrictions on use of the service so that user behaviour doesn’t lead to breach of licence and discontinuation of the service.

7 Cross-border collective licensing

Collective licensing has traditionally been organised on a territorial basis, so typically a collecting society will have a mandate for members within their own country. However, within the EU a 2014 Directive provided for multi-territorial licensing of musical works following criticism of existing arrangements by online music service providers. Additionally, many CMOs will also have reciprocal or multilateral agreements with CMOs in other countries allowing the coverage of international repertoire and distribution of royalties.

For example, in the UK, the CLA license the copying of works by UK publishers. Their licences are available to businesses, educational establishments and other organisations based in the UK. However, they have agreements with other organisations based on their membership of IFRRO, the International Federation of Reproduction Rights Organisations. IFRRO is the main international network of collective management organisations and creators’ and publishers’ associations in the text and image spheres.

Examples of CMOs which CLA have relationships with include VG WORT in Germany which operates under the supervision of the German Patent and Trademark Office and Polska Ksiazka, the Polish Association of Authors and Publishers, which is the collective management organisation designated by the Ministry for administration of rights in books and other text-based materials.

However, the collective management of rights operates differently in the US where the Copyright Clearance Center primarily act as a channel allowing their members to provide individual clearances for literary works published in the US. As a result, a CMO based in another country will have to make separate agreements with publishers on a case by case basis for rights to online usage. Changes were made to CLA Licences several years ago to reflect the fact that US publishers need to opt into agreements and can do this at title level. Wherever possible in the UK CLA are attempting to get blanket mandates from international publishers, but it does mean that the most reliable way of establishing if US titles are covered is by using the CLA’s Check Permissions tool.

8 Extended collective licensing

8.1. Historical context

Extended collective licensing (ECL) arrangements are collective copyright and related rights solutions underpinned by national laws. ECL agreements by law apply to all rightsholders in a class, whether they are members of the collecting society or not, and establish terms of licences with users or classes of users. The first ECL laws and agreements were established in the Nordic countries in the 1960s for television and radio broadcasting.
The advantage of an ECL scheme is that it enables CMOs to manage the rights for an entire category of copyright works, covering both members and non-members. CMOs collect royalties on behalf of all rightsholders (whether they are members or not) and any non-members’ royalties are distributed if and when they join.

8.2. ECL and Out-of-Commerce works in Europe

Out-of-commerce works are works that are still protected by copyright but are no longer commercially available because the authors and publishers have decided neither to publish new editions nor to sell copies through the customary channels of commerce. In the past works such as books were referred to as being ‘out-of-print’. However, with the advent of digital publishing, the term ‘out-of-commerce’ is used (with electronic publishing a book will be ‘in commerce’ even if only available in electronic form).

The findings of a US study comparing books and music DVDs (Heald, 2013) suggested that, while there might be differences depending on the genre or type of publication, many books are out-of-commerce within 10-20 years after publication. This is because it makes little financial sense for publishers to make older and less commercially successful books available. However, libraries may want to digitise these books and make them available online as the content can have scholarly or historical value and would otherwise be difficult to obtain.

The European Commission has set up a Memorandum of Understanding (MoU) in relation to ECL that deals specifically with out-of-commerce books and learned journals. The key principles contained in the MoU will encourage and underpin voluntary licensing agreements to allow CHIs to digitise and make available online these type of works, while fully respecting copyright. However, in 2016 the case of Soulier and Doke (C 301/15) which was referred to the Court of Justice of the European Union, but originated in France, cast some doubt on the viability of such a scheme, finding it in conflict with the InfoSoc Directive.

In the light of the ongoing efforts to modernise the EU copyright framework, this means that any legislative solution to the issue of out-of-commerce works needs to be based on a clearly defined exception to the exclusive rights of authors and other creators. The most obvious way to achieve this would be for the EU legislator to introduce a mandatory exception that allows CHIs to make out-of-commerce works in their collections available online, which is what CHIs had been arguing for in the run up to the Commission’s proposals.

8.3 Extended collective licensing in the UK

ECL was introduced into UK copyright law in 2013 via the Enterprise and Regulatory Reform Act in order to address the difficulties CHIs faced when trying to clear rights for mass digitisation. The UK has introduced a general and flexible right for collecting societies to operate extended collective licences for many different purposes, as long as they can prove to government they are sufficiently representative of the sector they operate in. They also need to provide evidence of their fitness to run schemes as set out in
the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, when submitting an ECL application. To date, no ECL scheme has been introduced in the UK, and the Copyright Licensing Agency who had been actively exploring the viability of using ECL for out-of-commerce works withdrew their application in May 2018 due to uncertainty in the European legislative environment.

9 Conclusion

This chapter has provided an overview of licences and licensing agreements, specifically how they relate to the work of libraries, museums and other organisations in the cultural heritage sector. It has become increasingly important for institutions to manage the licences they have agreed to, as these govern the use of many third party electronic resources. Licences are also used by institutions to manage access to their own digital collections. Additionally, collective licences can provide a valuable way of offering coverage for a broad category of works and with ECL now theoretically available in the UK, we may see a greater number of CMOs looking to provide access to categories of works in the future. This will provide significant value to the cultural heritage sector if it increases the numbers of copyright works available for mass digitisation projects, although it is important to acknowledge that progress is slow in this area.

Finally, it is worth reiterating, that while this chapter does not specifically address copyright exceptions, anyone working in this sector needs to understand the relationship between copyright exceptions and licences, and to recognise the valuable role that they both play in helping provide access to cultural heritage.
10 Further reading

Copyrightuser.org. Available at: http://www.copyrightuser.org/understand/rights-permissions/licensing-exploiting/


Secker, J., Morrison, C., Stewart, N and Horton, L. (2016) 'To boldly go… the librarian’s role in text and data mining'. Available at: https://archive.cilip.org.uk/blog/boldly-go-librarians-role-text-data-mining
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