2.1: Getting Permissions
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Context

This resource is based upon the IPR Toolkit created by the JISC-funded Web2Rights Project (www.web2rights.org.uk) and adapted for SCA sponsors and other organisations across the public sector. It is intended to form part of a toolkit, which can be further adapted to suit specific requirements and issued to content creators and content users across the public sector who are responsible for rights management and rights clearances. This paper should be read in conjunction with:

- 2.5 Top Tips for Requesting Licences
- 2.7 Model Licence
- 2.8 Template Email Permission Form
- 2.9 Template Permissions Letter

Clearance of Rights

The clearance of rights for the use of works protected by copyright can often be a complex and time-consuming exercise. Nevertheless, it is essential to get such clearance before you start using the material and/or let others use the material, as you might be infringing copyright if you or your users perform any restricted act without permission.

Assuming you have located the bona fide owner (or their agent) you should have the following information to hand when approaching them:

- Exact details of material you want to use and for how long
- How you want to use the material, permitted uses by third parties and for what purpose
- Description of the target audience and the service
- Description of the method of distribution and geographical territories to which the work may be marketed and used

You should also have considered and have answers to the following questions to ensure that there is compatibility between the rights that you need ‘rights in’, and those that you want in order to grant access to users ‘rights out’:

- Will the distribution of the work be restricted to a small group, to anyone within your organisation, to visitors to your organisation, or will be open to anyone in the world?
- Is there an intention to charge for the use of the service – now or at a later stage?

Remember that repeatedly going back to the rights holder for additional permission will add to the cost of the project and could serious frustrate the progress of the project. It is therefore essential that before you contact the rights holder you have a clear picture of the long-term aims and objectives of the project.
Rights Clearance Checklist

The following checklist provides a rights clearance framework for content creators and content users. Before initiating, if the answer to any of the following is YES, it is likely that rights will need to be cleared, by the use of licence or another form of permissions letter.

- Does the content that you wish to create include third-party rights? YES/NO
- If so, is the work that you want to reproduce still in copyright? YES/NO
- Is the material created by (or in conjunction with) an individual who is not a paid member of staff, such as a student, volunteer or a freelancer? YES/NO
- Is the use of material beyond the scope of any of licensing schemes (such as the CLA Licensing Scheme or individual licences entered into) or beyond the scope of any Exceptions and Limitations to copyright? YES/NO
- Will the content be 'communicated' or made available to members of the public, a body of students, staff or other users? YES/NO

Checklist for Rights Clearance

- Make plenty of time to clear rights – it takes longer than you think!
- Allocate resources for rights clearance (staff time and salaries, administration costs and potential rights clearance fees)
- Understand your rights clearance obligations to any third-party funders and other third parties with whom you may be working
- Identify the range of rights that will require clearance, and for how long the rights will be needed
- Record information relating to any rights research on a rights management database
- Carry out an IPR risk assessment, prioritise high risks and incorporate risk-mitigation strategies into project planning
- Finalise how the material will be reproduced and any other treatment (ie interaction, manipulation and alteration)
- Compile a list of the various ways in which the material will be used now and in the future
- Identify rights holders and request permissions to reproduce the material in the ways that you require (including the terms under which you wish to make it accessible). This permission should be requested in writing before the material is reproduced, using the guide below to the type of likely risk associated with material types and specific uses
- Adapt the template email, letter and licence supplied in the SCA IPR Toolkit or draft a licence for your specific purposes
- Carry out reasonable searches and document all your efforts in cases where rights holders are unknown or cannot be traced (‘orphan works’), ie exercise ‘due diligence’
- Update your IPR risk assessment to incorporate rights that have not been cleared or any other issues not determined at the beginning of the project (ie orphan works). Initiate mitigation strategies where appropriate
- Ensure that all permissions, rights which have not been cleared and status of rights clearance (pending, rights holder cannot be found, etc) are recorded on the rights management database. Any funding bodies should be kept closely informed of situations where permissions have not been received

\[1\] It is likely that if the answer is Yes, there are unlikely to any exceptions to copyright that will apply to your specific usage and therefore copyright permission will need to be sought
What approach should you take?

When you approach the rights holder, different approaches can be taken depending on low, medium or high-risk content, as well as other factors such as the purpose of the use (ie educational, non-commercial or commercial), as well as the likelihood that the reputed rights holder is actually the rights holder. There may be some circumstances in which even though the material might be low risk, the purpose of use may be such that it is advisable to use a formal detailed licence.

For all types of material it is important that all agreements regarding copyright and associated rights are put in writing. Everything agreed by you for your project must be recorded with evidence of the acceptance of the terms by the rights holder. You must at least keep all agreements for the life of the project or as long as permission is granted for, so that you have proof of such permission.

Clearing rights can be time consuming and demands good negotiating skills, but setting up a good system of recording early on will save valuable time in the long run.

Low-risk content

Low-risk material is likely to include content such as documentary photographs, sound recordings of members of the public and amateur films. The initial contact can always be done by phone or email, but make sure that the content of each and every telephone call is confirmed by you in writing to the rights holder and every email and letter is saved. Allow plenty of time for approval, as the process is usually fairly slow. This is the type of content you are likely to encounter for which the rights holders may be unknown or cannot be found (so called 'orphan works').

Medium-risk material

Medium-risk material is likely to include artworks created by less well known artists, certain types of archival material such as letters and diaries as well as semi-professional photographs. In these instances, a letter might be sufficient in ensuring that permissions to reproduce the material in which third parties own the rights have been secured. In instances where it is not 100% certain who the rights holder is, or the work is being used in a high-risk environment, such as commercial use – then it is advisable that the material is treated as if it were high risk and a more formal detailed licence is used (as below).

High-risk material

For high-risk material, such as music, commercial films, artworks created by high profile artists, broadcasts etc, it is better to opt for a formal detailed licence rather than a letter or an email. This should not come as a surprise, as a licence creates a clear and controllable environment for the parties involved. Licences are governed by contract law. The basic notion of contract law is contractual freedom. This means that parties to a contract are free to negotiate the terms and use of copyright material or indeed waive rights that the copyright law grants them. The level of access and use of copyrighted material heavily depends on the terms and conditions of the licence. Since the negotiation of a formal licence can be a very time-consuming process, it will be important to consider this issue within project timelines and budgets accordingly.
Where might you look to trace rights holders?

Tracing rights holders can be the most time-consuming part of any rights clearance project and there are a number of sources that might be explored. Even if all possible avenues are explored for tracing rights holders and these efforts are documented, any use of the material without consent (apart from the limited uses that can be justified under the Exceptions and Limitations) will present risks. In these instances, further information and guidance about the types of risks and how to assess them can be found in ‘3.2 IPR Risk Assessments’. Further information can also be found in the i2010 Digital Libraries Due Diligence Criteria for Orphan Works.2

The types of places that might be explored for rights holders include:

- Examining the material itself for any provenance information. This might be found, for example on the back of a photograph, the bottom of a sculpture, in the metadata and/or credit lines associated with digital material
- Referring to information that might be held about the material, such as acquisition forms and registers, contracts and catalogue files
- Checking with curatorial staff and/or information professionals for any further information
- Liaising with colleagues in other organisations who might own works by the same author and/or related works
- Checking with collecting societies who administer the rights for a wide range of creators dependent upon the type of media, such as:
  - Visual works
    - Design and Artist Copyright Society (DACS) [www.dacs.co.uk]
    - Bridgeman Art Library [www.bridgeman.co.uk]
  - Text-Based Works
    - The Publishers Association [www.publishers.org.uk/en/home]
    - The Authors Licensing and Collecting Society [www.alcs.co.uk]
    - The Society of Authors [www.societyofauthors.org]
  - Sound Recordings and Music
    - The Performing Rights Society – collecting society representing song writers, performers and musicians [www.mcps-prs-alliance.co.uk/Pages/default.aspx]
    - Phonographic Performance Ltd (PPL) – representing the interests of music performers and record companies [www.ppluk.com]
- Check the WATCH File Database (Writers and Artists And Their Copyright Holders) [http://tyler.hrc.utexas.edu]
- Search on the internet
- Check trade journals, exhibition catalogues and other relevant publications
- Listing the names/titles of works on your website where you are unable to trace the rights holders or the rights holders are unknown, together with your contact details should the rights holders come forward

How to carry out Due Diligence

It is vital that you document all efforts to trace rights holders (due diligence), to use as a possible defence in cases where you choose to use works but where the rights holders are unknown or cannot be traced. Such documentation, which ideally should be kept in a separate file (as well as noted in any digital rights management system), might include:

- Taking notes about any phone calls that you make, including to whom, when, and what was said
- Keeping copies of all letters that are sent
- Keeping copies of any letters that are returned

Section 2. Practical tools

2.1: Getting Permissions

- Sending letters by recorded delivery or registered post
- Printing emails that you sent and those that you receive, even if the response is negative
- Putting money to one side in case the rights holder does come forward
- Use of a statement if you do decide to take the risk and reproduce the works. The following statement below is an example used by National Portrait Gallery:³

> Every effort has been made to obtain permission from copyright holders to reproduce this material. Owing to the age of some of this content, and given the resources available to us, this hasn’t always been possible or practicable. We have acted in good faith at all times, and any queries relating to copyright in this content should be referred to XXXX for immediate attention.

REMEMBER – EVEN IF YOU HAVE CARRIED OUT REASONABLE EFFORTS TO TRACE RIGHTS HOLDERS, KEPT A DUE DILIGENCE FILE AND DOCUMENTED THE ATTEMPTS THAT YOU HAVE MADE– THIS IS STILL UNAUTHORISED USE AND YOU COULD STILL BE CHALLENGED BY THE RIGHTS HOLDERS.⁴

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⁴ See ‘3.2 IPR Risk Assessments’ for further information about risk-mitigation strategies

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