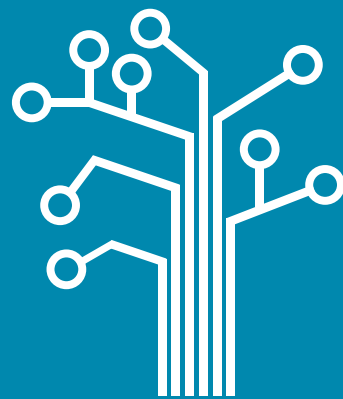
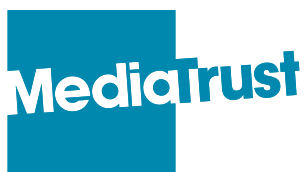


HERITAGE DIGITAL



The
Heritage
Alliance




naomi korn
ASSOCIATES



A guide to copyright and working with suppliers to create digital content

October 2020



This guide provides an overview of the copyright issues when working with suppliers. It introduces copyright within the context of the commissioning of digital content and why copyright is a crucial factor. Suggesting best practice steps and guidance, the aim of this guide is to help heritage organisations navigate copyright properly so that they know and understand what they can do with the content that is commissioned.

1 Introduction to the Guide and setting the context

Working with suppliers, and harnessing the benefits of their specialist expertise, is fundamental to the effective operation of organisations within the heritage sector.

Suppliers will offer a range of specialist support in a digital context, which includes:

- Photography taken by freelancers
- Digital communications run by media companies
- Website designs and animations created by media companies
- Software by web developers
- Logos by designers
- Marketing materials by creative industries
- Art works made by commissioned artists

The commissioning of digital content will always raise copyright issues. However, copyright can be a complicated and unwanted issue to address and therefore it can be easily overlooked and forgotten when working with suppliers. This is particularly easy when heritage organisations are using suppliers with whom they have a close working relationship, perhaps for a long time. In this guide we will provide practical steps to help

you consider these issues when working with suppliers as well as top tips regarding how to make sure you are negotiating the best deal for your organisation when commissioning digital content.



Good copyright management enables us to better track where and how our digital content (videos, films etc.) is being used. Not only is this valuable in terms of reporting impact to our funders, but it builds trust with those we work with and feature within our digital content. If photographers, filmmakers and designers know that you try your best to protect and fully acknowledge their work, they are more likely to want to continue producing high-quality content for you, which ultimately benefits your organisation in the long-term.”

**ANDREW HENDERSON,
HERITAGE OPEN DAYS**



Image: © HeritageOpenDays/RahilAhmad

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Copyright overview



In the UK, copyright is outlined in the Copyright Designs and Patents Act 1988. Copyright is part of the family of 'Intellectual Property Rights'.

WHAT IS INTELLECTUAL PROPERTY?

Intellectual Property refers to the protection given to certain creations of the human mind such as creative works, including images, as well as logos, symbols and names used in commerce.

Intellectual Property Rights (some of which arise automatically, whilst other require registration) include copyright, trade marks, designs and patents. The part of Government responsible for them in the UK is called the [Intellectual Property Office](#).

The brilliant thing about copyright is that it simply arises automatically when an original piece of work is created. Copyright protection does not require registration and copyright ownership comes with the exclusive rights to:

- Copy the work, for example you can manually copy it out or scan it;
- Issue copies of the work to the public;
- Licence the work to the public;
- Perform, show or play the work in public;
- Communicate the work to the public, for example, by sharing it online;
- Make an adaptation of the work.

Moral rights are also important to consider when commissioning digital content. They will relate to the creator's honour or reputation and go hand in hand with copyright. They include the rights of the creator of a work to:

- Object to derogatory treatment of the work;
- Be identified as the author (or director) of their work (the "Paternity Right") and object if someone claims that they created a work instead of them.

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Suppliers, copyright and ownership of rights

CASE STUDY:

Working with a photographer but who owns the copyright?

A small heritage maritime charity commissions a photographer to take photographs of its ships for an agreed fee. There is no discussion about copyright. After the charity uses the images online, the photographer comes forward and asks for more money on the basis that the use online was not discussed and she still owns the copyright in the images.

When original creative content is created, the person creating it will automatically own the copyright. This means that the supplier will enjoy all the exclusive rights that copyright ownership brings. No one else, including the heritage organisation that commissioned the content, can reproduce the content, or change and adapt it, without the supplier's permission.



Image by Andy Falconer on Unsplash

The following poll of 146 heritage sector participants who attended a webinar about suppliers and copyright shows that 65% of those that attended believe that suppliers will solely own the copyright in what they produce for heritage organisations.

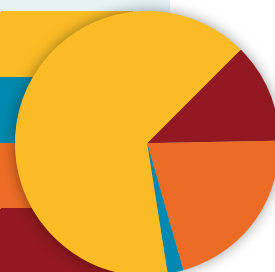
When you commission a supplier to produce content, who do you think owns the copyright?

The supplier = 65%

You = 2%

It is shared = 21%

No one = 12%



Even if payment is made to a supplier by a heritage organisation, the supplier will automatically own the copyright in the content they have created and the heritage organisation will not be able to use the content. If the heritage organisation uses content without permission from the supplier, or without the use of a specific exception to copyright, they will be infringing copyright, which is illegal.

Find out more about the exceptions to copyright by visiting the [Copyright User](#) website.

WHAT ABOUT VOLUNTEERS AND STAFF?

The status of volunteers in terms of copyright ownership will be the same as suppliers, unless the volunteer transfers their copyright in writing. However, content produced by staff as part of their work, will be owned by their employer under UK law.

Naomi Korn Associates has published more about the copyright (and data protection) issues regarding volunteers [here](#).

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The commissioning of digital content and the need for agreements in writing

It is really important that copyright (and moral rights) are dealt with in writing when working with suppliers. A written agreement will set out expectations about how the resulting content can be used, and creates a framework for a transparent and up front working relationship. It will help a heritage organisation outline what it expects from the suppliers it works with in terms of rights to use the commissioned content, whilst it will reassure suppliers about the content being created and who can use what and for which purposes.

In terms of moral rights, they can be waived by the supplier or alternatively, consent sought from the supplier for the heritage organisation to change or alter the content that is created or commissioned as well as any crediting requirements. No matter what, like copyright, they should be dealt with in writing.

Alex Brook, Arcade (VR/AR specialists for the heritage sector):

“

We make sure that [our clients] own – and are free to use however they see fit – as much of the output of a given project as possible. Not only do we feel that is the right way to go about our business with the heritage sector, ensuring we are there to support its work and do our small bit in safeguarding its future, but it is also a prudent measure to protect heritage clients from situations where technology suppliers go out of business (or they no longer wish to work with them). Its never happened to us, but it does happen and we have seen far too many instances of organisations having sunk unrecoverable resources into a project which is then not delivered because the relationship breaks down or the supplier goes bust, and the client does not own the rights in the work – so cannot carry on with a new partner.”



Image: © HeritageOpenDays/ChrisLacey

The following poll of 146 participants who attended a webinar about suppliers and copyright shows that less than half of them always use an agreement in writing when working with suppliers.

When you work with a supplier, do you have an agreement in writing?



The terms under which suppliers are commissioned to create content for heritage organisations can range from a verbal agreement or an email to more detailed terms and conditions. A written agreement is always a good idea when working with suppliers.

As well as clarifying copyright ownership and use, an agreement in writing can also help:

- Ensure that responsibilities are clearly referenced;
- Describe tasks and timescales;
- Specify the projects deliverables and required delivery format;
- Confirm fees and payment terms;
- Cover other legal responsibilities such as data privacy and confidentiality as well as tax and insurance obligations;
- Outline any termination clauses and specify the country's laws which are in force.

During the Covid crisis, it is even more important to ensure that written agreements with suppliers contain clauses that cover both parties in the case of situations which are beyond the control of either party. These are called Force Majeure clauses.

More about the importance of Force Majeure clauses during Covid [can be found here](#).



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How can copyright be dealt with in agreements?

There are different options that a heritage organisation can consider when working with suppliers. In particular, the choice of whether an assignment of copyright is requested by the heritage organisation from the supplier or a licence (and what type of licence) can depend on a heritage organisation balancing the following factors:

- ✓ The value of the digital content and how long the heritage organisation may want to use it for: the greater the value, the more an assignment is preferable;
- ✓ The cost of the contract and budgetary considerations: a licence is often cheaper than an assignment;
- ✓ How intrinsic the digital content is to the running of the organisation: an assignment will be important if the digital content becomes a long term organisational asset;
- ✓ If the supplier has already produced the content and is using their existing content as a basis for new work, a licence to use what they have created before and a possible assignment in newly produced content should be explored;
- ✓ Confidentiality issues associated with the digital content that is produced will certainly require an assignment.

Depending upon what is required, the choices can include:

An assignment (or transfer) of copyright from the supplier to the heritage organisation

- This can be made with a non-exclusive licence back to the supplier for their non-commercial use

OR

- An exclusive licence granted by the supplier to the heritage organisation enabling permission to use the newly created digital content specifically for the heritage organisation's purposes. These purposes should be clearly listed and would only allow the heritage organisation to use the digital content in this way, excluding anyone else being granted the same rights (even the supplier);

OR

- A non-exclusive licence in the new digital content produced by the supplier for the heritage organisation (and anyone else they want). This type of licence would enable the supplier and anyone else they want, to reproduce the digital content in the same way. This type of licence can also be used for requesting permission to reproduce content that the supplier has already created.

'Assignment' in England and Wales, **'Assignment'** in Scotland means that the intellectual property rights (IPR) are transferred from one person to another. An assignment **MUST** be in writing to take legal effect.

A **'licence'** is a formal authority to do something that would otherwise be unlawful. In this context, it refers to a licence by the owner of intellectual property rights (IPR) to copy, adapt, etc., content or technology even though copyright law prohibits such copying without authorisation. Unlike assignment, the owner of the IPR remains its owner and, depending on the terms of the licence, may be able to continue to do whatever they like with the IPR.

“

Beaford owns an archive of over 80,000 historical photographs of rural north Devon. Over the past three years 10,000 of these images have been digitised through a project supported by the National Lottery Heritage Fund. This increase in our organisation's digital assets has provided an opportunity for a greater sustainable revenue stream from our photographic archive. We have in place a template Licence of Copyright document for use of any Beaford Archive images that can be adapted to suit the request of the licensee.

Licensing images for illustration in for example, commercial magazines, provides valuable revenue for Beaford. It is important that any use of our images has been documented and agreed upon whether for commercial or not-for-profit purposes through our Copyright Licence, in order that we retain control of where and how the photographs will be distributed. By protecting Beaford Archive images under the law of copyright, we prevent other persons from taking income away from our charitable organisation.”

**KATHRYN BURRELL, ARCHIVE MANAGER,
BEAFORD ARCHIVE**

GET STARTED

What to think about when contracting suppliers

- Decide what you want to use the content for and therefore what ‘permissions’ or ‘rights’ you need to seek from the supplier;
- Remember to discuss with your supplier if they are contributing any content they have already created and the terms under which you can reuse it;
- You can set the duration and territory of an assignment of copyright and any licences so they don't have to be forever;
- If the supplier reuses the content, make sure that your organisation is credited. If this includes your organisation's logo, set the parameters for reuse in accordance with your brand guidelines (if you have them).

Image: Roman Kraft on Unsplash



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Suppliers, copyright and dealing with third party rights

CASE STUDY:

Dealing with copyright, but not considering third party rights

A cathedral commissions a media company to create a digital installation in its exhibition space using images, sound and music. Whilst the ownership of rights is dealt with in the contract, the clearance of any third party rights is not. Without these permission in place, the cathedral is unable to display the installation.

Using third party content to substantiate the creation of digital content is commonplace amongst heritage organisations. Content is often sourced from commercial picture libraries, online sites and/or other heritage organisations.

REUSING DIGITAL CONTENT

Not all content is clearly labelled for reuse, nor provided from an authoritative source. In these instances, it is important that heritage organisations and the suppliers that work with them agree about who will take responsibility for clearing any third party rights. Any permissions to reuse the content will then need to be documented. Risks of breaching copyright are as much about not negotiating permissions, as letting permissions lapse due to ineffective methods of retaining and sharing licence information.

If you want to make sure a resource you create can be reused by others easily, Creative Commons licences can provide the means to do. [Find out more here.](#)

Top tips when working with suppliers to clear third party rights

1. Set budgets for clearing the copyright in content you want to use that is owned by third parties, this is called 'rights clearance';
2. Clearly communicate to the supplier what third party rights are needed as part of the commissioned work;
3. Agree the process of rights clearance, including who is responsible for what;
4. Discuss the extent of searches for rights holders that are necessary and ask for evidence once these have been carried out;
5. Sign off any template permission letters/communications to third party rights holders that might be sent by the supplier;
6. Ask the supplier to provide the documentation associated with the third party permissions if they have been granted;
7. Don't forget other permissions and consent, like privacy rights;
8. Document and record any third party permissions.



Image: Sajjad Zabini on Unsplash

7 Working with commissioned artists

“ We work closely with our creative partners and contractors to ensure we can use commissioned content in the long-term across all our platforms as widely as possible. Setting out clear rights ownership, transference, and licensing is crucial to the long-term management of our content.”

DR CHRISTY HENSHAW, DIGITAL PRODUCTION MANAGER – WELLCOME COLLECTION

Working with commissioned artists can take many forms. A museum may commission photography of a new exhibition or a new logo design; an art gallery may commission a new artwork or new digital interpretive content; or an archaeological service may commission a film about its recent excavation. However, if the creator of the content is not a member of staff, they will automatically own the copyright in the resulting work. This means that a heritage organisation will need to decide whether it wants to own the copyright itself in the commission, or whether a licence will be satisfactory.



Image: Belinda Fewings on Unsplash

Commissioning artists and the resulting copyright issues may not be as straightforward as it may seem. Unlike other work contracted from suppliers, art commissions, for example, may be for the **temporary** duration of an exhibition or to enable a new work to be added to a **permanent** collection. Deciding what rights are appropriate to ask for from the commissioned party, such as copyright assignment or a licence, will be dependent on a number of factors. For example, requesting an assignment of copyright might not be appropriate and a licence is better if:

- The creator is renowned in their field and may not even entertain an assignment of copyright;
- The commissioned art work may be just a temporary loan and not acquired as part of a heritage organisation's permanent collection.

CASE STUDY:

Working fairly with commissioned artists

An artist is commissioned create a sculpture for a historic garden. The sculpture will be on temporary display then returned to the artist. The garden insists that the copyright in the sculpture is transferred to them. The artist does not think that this is fair, and the project is shelved.

When working with artists, heritage organisations should reflect upon whether they need to ask for a 'waiver of [moral rights](#)' which they might do ordinarily with freelancers, as this removes the relationship of the artist from the artwork that they have made. When working with artists, requesting consent to change or alter an image of the work and the inclusion of a credit to the artist, can often be more appropriate and cause the artist less alarm.

8 Making copyright a key organisational issue



Copyright, and more broadly, 'rights management' is an important requirement of organisational culture from business development to collections management. The management of rights is therefore an integral component of the heritage sector's on-going sustainability. Rights management "done right" ensures legal compliance, and as a result, more opportunities for building engaging audience activities and business growth. The integration of a copyright policy, associated procedures and staff training is one of the best ways of ensuring that rights management is dealt with as an organisational issue.

However, heritage organisations with different governance structures also need to understand how their specific governance structures can affect their ability to own any copyright.

For example:

Unincorporated organisations: are not in a position to own any assets, including copyright, which can only be owned by individual members, whilst the Board of Trustees may be the legal owner of any copyright on behalf of a charity.

[Collections Trust](#) has produced further information about museums and governance, which will be relevant for other heritage organisations.

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Copyright code of conduct when working with suppliers

CHECKLIST

The following checklist provides some important points to consider when commissioning suppliers to create digital content:

- ✓ Make sure that copyright (and potentially other intellectual property rights issues) ownership are clarified before you commission the work;
- ✓ Think about your organisation's needs and uses;
- ✓ Decide if you need a transfer of copyright, or whether a licence is enough;
- ✓ Manage expectations with suppliers early on about the ownership of rights and build rights issues into procurement processes;
- ✓ Leave time to discuss and negotiate rights with suppliers;
- ✓ Be respectful and try and find mutually agreeable solutions;
- ✓ Agree about crediting the supplier;
- ✓ Decide who will clear any third party rights;
- ✓ Don't forget moral rights;
- ✓ ALWAYS get an agreement in writing BEFORE the work starts.

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Where to find out more



There are further resources that can provide more information about copyright and working with suppliers:

The UK's [Intellectual Property Office](#) website provides more information about copyright and other types of Intellectual Property Rights.

[Naomi Korn Associates](#) provides information and support about copyright including working with suppliers, volunteers and collections.

[Association of Cultural Enterprises](#) provides support about commercial activities across the arts and heritage sector.

Image: Catarina Carvalho on Unsplash



Who is in the Heritage Digital consortium?

The Heritage Alliance

THE HERITAGE ALLIANCE

The Heritage Alliance unites nearly 150 independent heritage organisations in England as a powerful, effective and independent advocate for heritage. It seeks to inspire, catalyse and support action to enhance the sustainability, resilience and capabilities of independent heritage organisations to achieve their full potential.



MEDIA TRUST

Media Trust works in partnership with the media and creative industry to give charities, under-represented communities and young people a stronger voice, through training and access to free resources and matching them with communications and digital expert volunteers. Digital skills are embedded in and are a crucial element of all of these areas.



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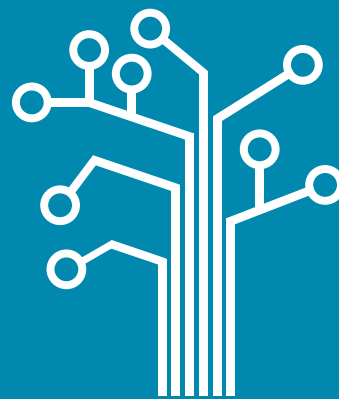
Naomi Korn Associates is one of the UK's leading information management consultancies specialising in intellectual property rights, data protection and licensing, providing support to the heritage and arts sectors. Naomi Korn Associates supports their clients develop better rights and privacy policies and awareness through training and consultancy services.



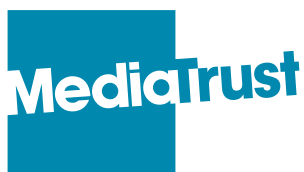
CHARITY DIGITAL

Charity Digital helps organisations #BeMoreDigital through daily content, weekly events and the UK's only discounted and donated software platform. We have helped over 50,000 charities, including heritage organisations, save nearly £260 million on software purchases and supported thousands more on their digital journey with inspiring and educational articles, webinars, podcasts, videos and events.

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the opinion of a suitably legally qualified professional should be sought.



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