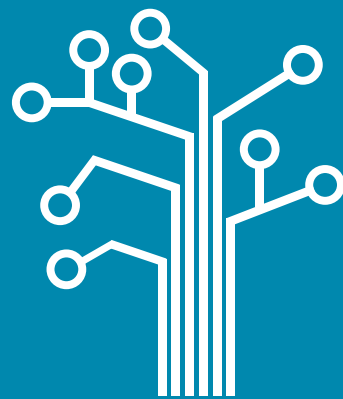
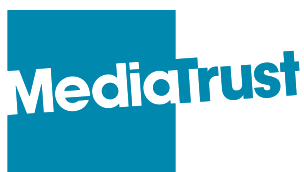


HERITAGE DIGITAL



The
Heritage
Alliance



naomi korn
ASSOCIATES



Brexit, Intellectual Property Rights and Heritage: What you need to know

March 2021



Funded by the National Lottery Heritage Fund as part of the Digital Skills for Heritage initiative



The aim of this guide will be to help heritage organisations:

- ▶ Ensure that they understand the changes to the management of Intellectual Property Rights (IPR) following Brexit;
- ▶ Consider their IPR compliance obligations following Brexit;
- ▶ Understand what to do next, including changes to organisational practices, policies and procedures.

1 Introduction

Following the UK's departure from the EU, UK heritage organisations need to familiarise themselves with the impact this will have upon their activities. This guide provides an overview of the Intellectual Property Rights (IPR) management issues for heritage organisations relating to Brexit. Drawing upon the latest advice from the UK's Intellectual Property Office www.ipo.gov.uk, this guide will focus on the following aspects:

- Setting the scene;
- Intellectual Property Rights and why they are important to heritage organisations;
- Copyright changes;
- The management of orphan works (works in copyright where the rights holders are either unknown or cannot be traced);
- Other IPR related issues, including:
 - The relevance of judgements from the EU Court of Justice (CJEU)
 - The database right
 - Trade marks



2 Setting the scene

The UK left the EU on the 1 January 2021. As a result of this, the registration, protection and management of IPR has changed. Many heritage organisations have been uncertain about the impact that Brexit will have on them. At the start of a [webinar that took place on 2 February 2021](#), heritage organisations were asked if they thought that Brexit would affect their organisation's IPR related activities.

Yes – 54%

The remainder thought:

No – 5%

Maybe – 21%

Don't know – 20%

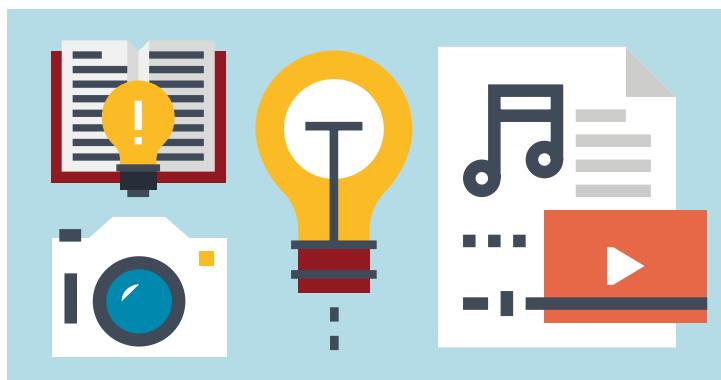
Over half of those who attended the webinar, thought that Brexit would have an impact on their activities.

Heritage organisations were asked if they thought that Brexit would affect their organisation's IPR related activities.



3 What is Intellectual Property?

Intellectual Property (IP) refers to the protection given to certain creations of the human mind such as inventions; creative works, logos, symbols, shapes and product or service names. Intellectual Property Rights (IPR), some of which arise automatically, whilst others require registration, provide an incentive for innovation and include copyright, trade marks, designs and patents.



4 Why Intellectual Property is important to heritage

IP is prevalent across the heritage sector. It will often underpin a broad range of heritage related activities. These include:

- Loans in and loans out;
- Touring exhibitions;
- Collections management;
- Interpretation and education activities;
- Publishing, licensing and other commercial activities;
- Online activities (including collections online);
- Webinars and developing online learning resources;
- Communications, press and marketing.

This means that any type of content acquisition, lending, depositing, commissioning, creation and sharing will involve copyright and sometimes other rights too.

Heritage organisations will need to understand IP to ensure that they are compliant with the use of other's IP, as well as to protect and make the most of their own IP. The management, protection and licensing of IP owned by heritage organisations can underpin their commercial activities and therefore provide opportunities for income generation.



Photo by Plann on Unsplash

5 Copyright changes and Brexit

Photo by Fabrizio Verrecchia on Unsplash



COPYRIGHT REMINDER

Copyright is an important issue for heritage organisations. It arises automatically when an original creative 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;
- 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 REMINDER

Moral rights are important to consider when commissioning 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.



Find out more about copyright and moral rights when working with suppliers.



EXCEPTIONS TO COPYRIGHT REMINDER

Within copyright law there are a number of fair dealing exceptions to copyright that specifically benefit heritage organisations. These exceptions to copyright are crucial to the heritage sector by enabling the use of third party copyright works in certain situations without the need to seek permission. Changes to the copyright legislation in 2014, have resulted in a more progressive regime for users, cultural heritage and educational organisations. This means that heritage organisations are more likely to consider and use the exceptions to copyright to support their activities.

To find out more about what exceptions your organisation might be able to use, [click here](#).



Will Brexit affect the protection of copyright works?

Most UK copyright works (such as books, films and music) are still protected in the EU as well as the UK. This is because of the UK's continued participation in the international treaties on copyright. For the same reason, EU copyright works continue to be protected in the UK. This applies to works made before and after 1 January 2021. The relationship between UK heritage organisations and those across the EU, including projects like Europeana, will remain unaffected by Brexit.



What is the EU Copyright Directive?

The EU Copyright Directive came into force 7 June 2019 requiring member states to either implement the reforms within the framework of their existing laws, or adopt the directive as law within 2 years. The reforms include new enhanced exceptions to copyright for cultural heritage organisations across the EU as well as out-of-commerce works provisions enabling them to publish orphan works online (see below). The EU Copyright Directive also targets Internet giants, such as Facebook, Google and YouTube, forcing them to take stricter measures to manage online content and prevent copyright breaches.

[To see the full directive click here](#)



Will the UK implement the EU Copyright Directive?

The EU Copyright Directive includes important provisions and exceptions for cultural heritage organisations, libraries and archives that will enable them to use copyright works to support their activities, without the need to seek permission. There are also important provisions which enable the online reproduction of out-of-commerce works, which includes orphan works. Countries across the EU will implement the Copyright Directive in 2021. The UK Government has stated that it has no plans to bring in the EU Copyright Directive or to make changes to the UK's exceptions to copyright.

What is the impact of the UK not implementing the EU Copyright Directive?

The UK will not benefit from the exceptions to copyright that heritage organisations across the EU will gain through the implementation of the EU Copyright Directive, nor the out-of-commerce provisions. It will also mean that the UK will be quickly out of synch with countries in the EU, potentially impacting on collaborative heritage activities such as touring exhibitions. For example, an activity involving the reproduction of a copyright work, which might be possible in the UK under the exceptions to copyright, might not be possible in the EU and vice versa.

Heritage organisations should evaluate the use of the UK exceptions to copyright to make the most of their collection items and other content they wish to reproduce. If they are involved in collaborations with partners across the EU, UK heritage organisations should refer to the UK copyright exceptions when managing activities that take place in the UK. Heritage activities that take place across the EU from Spring 2021 can refer to the copyright exceptions in the EU Copyright Directive.

“

The UK copyright exceptions regime had been cutting edge in 2014. But the EU have enhanced their exceptions to copyright which are now more extensive than those in the UK. From Spring 2021, when countries across the EU will benefit from the new exceptions to copyright in the EU Copyright Directive, heritage organisations in the UK will only have access to the UK exceptions to copyright”.

NAOMI KORN



Photo by Dimitry Ljasuk on Unsplash

6 The management of orphan works

Photo by Nathan Anderson on Unsplash



ORPHAN WORKS REMINDER

Orphan works are works in copyright where the rights holders are either unknown or cannot be traced. Across UK heritage organisations, there are millions of orphan works, sometimes representing up to 40-50% of collection items. These include photographs, letters, prints, films, sound recordings, plays, broadcasts, drawings and other collection items. Orphan works represent a massive issue for the digitisation and publication (including online) of heritage.

Until the UK left the EU, UK heritage organisations could use an Orphan Works Exception to publish some of their orphan works online. The Orphan Works Exception derived from an EU Directive, required reasonable searches to establish if rights

holders could be located and if not, heritage organisations could register details of their orphan works on an EU Orphan Works database. Once this was done, they could reproduce their orphan works online with little risk. Until the UK left the EU, 14 UK heritage organisations had used the Orphan Works Exception to publish their orphan works online.



? What is the impact of Brexit on orphan works?

The cross-border copyright arrangements unique to EU member states stopped when the UK left the EU. This included the Orphan Works Exception. This means that the UK heritage organisations who had already used the Orphan Works Exception could no longer use it as a basis for their online reproduction of orphan works. All UK heritage organisations can no longer consider its use for any future online publication of their orphan works.

When asked at a webinar on 2 February 2021, over 300 heritage organisations thought the following about if the removal of the EU Orphan Works Exception would impact their digitisation and online publication of Orphan Works.

Yes – 44%

No – 18%

Maybe – 27%

Don't know – 10%



? What is the UK Orphan Works Licence and how can it support the use of orphan works by UK heritage organisations?

In 2014, the UK Government launched an Orphan Works Licence. The intention of this scheme is to provide a means for the use of all types of orphan works for any purpose by a wide variety of users, by issuing a UK-based licence for up to 7 years. The licence:

- applies only for use in the UK
- can be for [commercial or non-commercial use](#)
- is non-exclusive (not restricted to a single licensee)
- will be able to be renewed

More about orphan works and the Orphan Works Licence can be found here: <https://www.gov.uk/guidance/copyright-orphan-works>

? Will the UK Government be bringing in an exception for orphan works to replace the EU Orphan Works Exception?

The UK Government has no plans to make any changes.

? What options do heritage organisations now have regarding their use of orphan works?

Following Brexit, heritage organisations have options to consider regarding their digitisation and use of orphan works (including online publication). The choice/s that are made, will need to take into account organisational resources, capacity, appetite for risk, benefits and also any funders' requirements. These choices include:

1. Not to use orphan works;
2. Risk manage the use of orphan works, which would include evaluating the risk, carrying out reasonable searches and implementing a notice and take down procedure;
3. Using the UK Government's orphan works licensing scheme that is limited to UK use only;
4. Considering the use of the exceptions to copyright.

? What exceptions to copyright might enable the use of orphan works by heritage organisations?

It may be possible to use an extract of an orphan work under the quotation exception. In this case, the work must be sufficiently acknowledged, have already been made available to the public and the amount reproduced fair i.e. justifiable within the context of its use.

The dedicated terminal exception enables a copy of a work to be made available by heritage organisations to individual members of the public via a dedicated terminal on their premises. This is possible as long as the work has been lawfully acquired, it is for the public's research or private study and there are not any licensing/purchase terms that prevent this. More about the exceptions to copyright can be found here: <https://www.copyrightuser.org/understand/exceptions/>

Other IPR related issues



EU COURT OF JUSTICE (CJEU) REMINDER

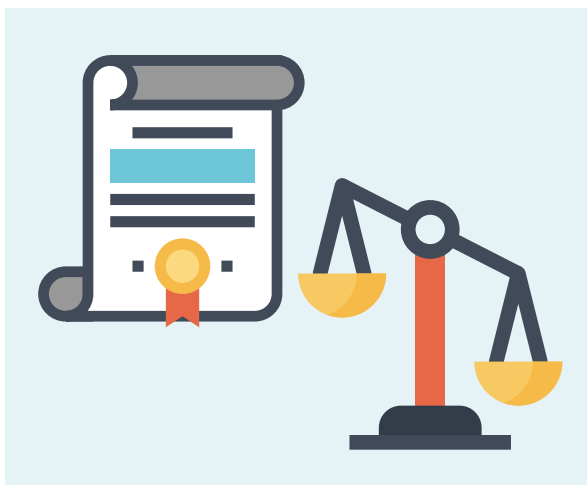
The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions. It can also be used by individuals, companies or organisations to take action against an EU institution, if they feel the institution has infringed their rights.



Will judgements from the EU Court of Justice (CJEU) still be relevant to the interpretation of UK copyright law?

Whilst CJEU judgements made before the 1 January 2021 will still be relevant to the interpretation of UK law, judgements made after this date will no longer directly influence the interpretation of UK law. Instead, they may only be persuasive in UK court cases.

Heritage organisations still need to be mindful of the use of case law pre 1 January 2021 from the CJEU in the interpretation of copyright law in the UK.



DATABASE RIGHTS REMINDER

The database right is an automatic right granted to an organisation which identifies, obtains and presents data. Heritage organisations will hold data in a range of systems:

- Collections management systems
- Library systems
- Archival systems
- Digital asset management systems
- Library catalogue records
- Client relationship management systems
- Manual filing systems

The database right provides heritage organisations with the rights to prevent the reproduction of a substantial amount of the data by others, without the consent of the heritage organisation.



What is the impact of Brexit on the database right and what options do heritage organisations have?

As a result of Brexit, UK organisations, including heritage, are not eligible to receive or hold database rights in the European Economic Area (EEA) for databases created on or after 1 January 2021.

Heritage organisations who provide online access to datasets, such as their online collections, can consider alternative means of protection in the EEA.

This includes clear licensing agreements as part of their online terms and conditions as well as a clearer assertion of any copyright that might exist in the online works.



TRADE MARK REMINDER

Trade Marks are typically a symbol, image or word (though can in some circumstances be a shape, a colour or a combination of these) that is associated with particular goods or services provided by the owner. The owner of a Registered Trade Mark has the right to take legal action to prevent third parties from using its Mark (or something deceptively similar) in the course of trade. Many heritage organisations will own the trade mark in their logo, name and/or brand related to the creation or development of new products, services or brands.



What is the impact of Brexit on trade marks?

From 1 January 2021, the IPO created a comparable UK trade mark for every registered EU trade mark amongst other changes. Heritage organisations with existing trade mark portfolios, in the process of applying or consideration any registration are advised to keep updated here <https://www.gov.uk/guidance/eu-trade-mark-protection-and-comparable-uk-trade-marks>



8 Recommendations. What can we do now?

Following Brexit, there are a number of important things that heritage organisations can do in terms of their management of IP Rights.

1.	Carry out health checks & IP audits to understand what rights they have in their collections, including database rights, copyright works, trade marks and orphan works and how best to manage, protect and use them;
2.	Evaluate the use of the exceptions to copyright to make the most of their collection items and other content they wish to reproduce;
3.	Review their approach to orphan works;
4.	Review their risk management procedures to optimise the use of the exceptions to copyright and to provide a possible route to the digitisation and use of their orphan works. This might include: <ul style="list-style-type: none"> a. Risk registers b. Evaluation of risk procedures c. Reasonable search review d. Take down policy and procedures e. Disclaimers
5.	Review existing IP policies and amend according to any necessary changes because of Brexit;
6.	Those that own IP rights (trade marks, patents, or copyright) may wish to seek legal advice if their IP protected goods are exported between the UK and the EEA;
7.	Review any trade mark registration processes and existing portfolios according to any necessary changes because of Brexit;
8.	Update information and training for staff, volunteers and trustees according to any necessary changes because of Brexit.



9

Where to find out more

Photo by Reuben Hustler on Unsplash



Intellectual Property Office website

<https://www.gov.uk/government/organisations/intellectual-property-office>

Written guidance to be published on the Heritage Digital website

<http://heritage-digital.org/>

Heritage Digital Guide: Working with suppliers to create digital content

<https://charitydigital.org.uk/resources/digital-guide-working-with-suppliers-to-create-digital-content>

Naomi Korn Associates

www.naomikorn.com/resources



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.



NAOMI KORN ASSOCIATES

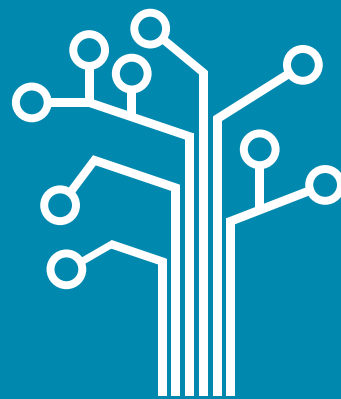
Naomi Korn Associates is one of the UK's leading information management consultancies specialising in intellectual property rights, data protection and licensing, providing support to the heritage and arts sectors. Naomi Korn Associates supports their clients develop better rights and privacy policies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



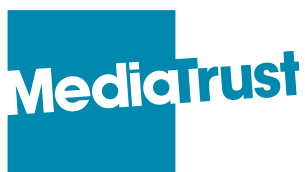
CHARITY DIGITAL

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.

HERITAGE DIGITAL



The
Heritage
Alliance



naomi korn
ASSOCIATES



Except where otherwise noted, this work is available under a
Creative Commons Attribution Non-Commercial 4.0 International licence.

The contents of this guide are based on the assessment of Naomi Korn Associates Ltd
and should not to be considered legal advice. If such legal advice is required,
the opinion of a suitably legally qualified professional should be sought.



Funded by the National Lottery Heritage Fund as part of the Digital Skills for Heritage initiative