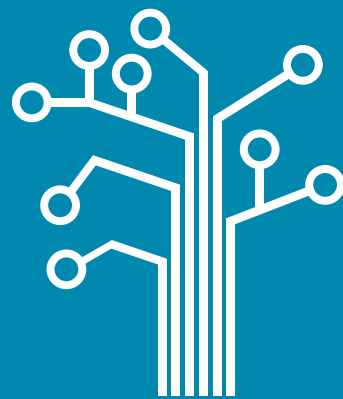
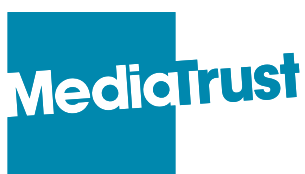


HERITAGE DIGITAL



The
Heritage
Alliance



naomi korn
ASSOCIATES




Heritage Organisations & Exceptions to Copyright

May 2021



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

- ▶ Understand the most relevant exceptions to copyright for the heritage sector;
- ▶ Identify what exceptions to copyright could be utilised to support their digital strategies;
- ▶ Learn from heritage examples where the exceptions to copyright have been successfully used.



Introduction

Within copyright law there are a number of fair dealing exceptions (find an explanation of fair dealing below) to copyright that specifically benefit heritage organisations. This guide provides an essential overview of the various copyright exceptions that can be used by heritage organisations to support their digital strategies by drawing on specific examples. Based on guidance from the UK's Intellectual Property Office www.ipo.gov.uk, this guide will focus on the following aspects:

Copyright and heritage reminder

Why the exceptions to copyright are important for heritage organisations

Copyright exceptions: What you need to know

Top tips

At the start of a webinar that took place during [#HeritageDigitalNow: Engaging Digital Audiences on 1 April 2021](#) heritage organisations were asked how often they use the exceptions to copyright:

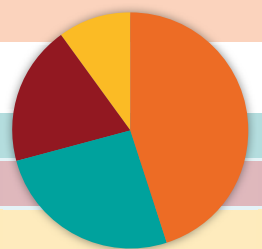
Never – 45%

The remainder thought:

Infrequently – 26%

Sometimes – 19%

A lot – 10%



Over 70% of those who responded during the webinar either do not or infrequently use the exceptions to copyright. This shows that these exceptions are underused.



COPYRIGHT REMINDER

Copyright is an important issue for heritage organisations. It arises automatically when an original piece of work is created. In the UK, copyright is outlined in the Copyright, Designs and Patents Act 1988. 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.

Unless heritage organisations own the copyright or the work is not in copyright, they will need to seek permission from any rights holders prior to use or find an exception to copyright they can use. The management and potential use of orphan works, which are works in copyright where the rights holders are either unknown or cannot be traced, need to be considered carefully.

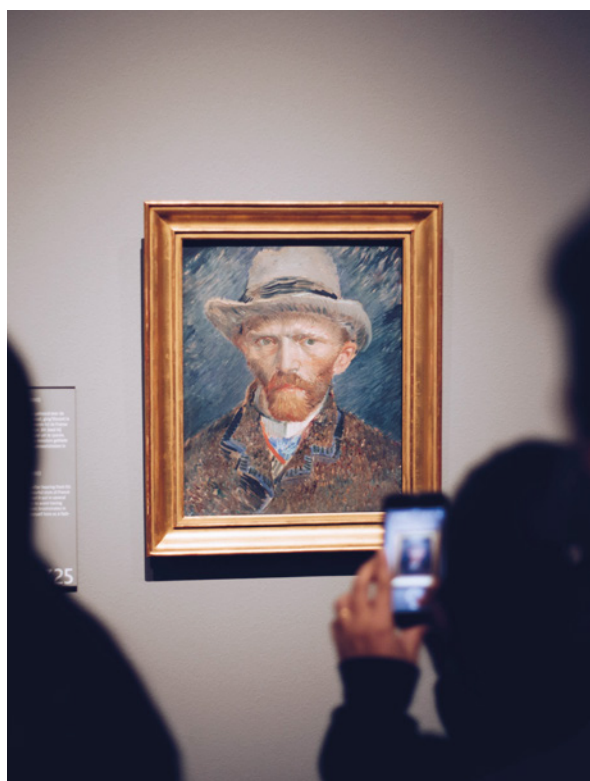


Photo by Ståle Grut on Unsplash



Why is copyright an important issue for heritage organisations?

Across heritage organisations, any type of content acquisition, lending, depositing, commissioning, creation and sharing will involve copyright and sometimes other rights too. Copyright issues will therefore 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.



EXCEPTIONS TO COPYRIGHT REMINDER

The exceptions to copyright outlined in the Copyright, Designs and Patents Act 1988, enable the use of copyright protected works without the need to seek permission from the rights holder. They are important in helping to achieve the balance between rights holders exclusive rights, whilst enabling the use of copyright works to support specific public interest activities, such as education, culture and personal uses.

Changes to the UK's copyright legislation in 2014 have resulted in a more progressive regime for users, cultural heritage and educational organisations, which is now better suited to support activities in a contemporary heritage organisation.



FAIR DEALING REMINDER

'Fair dealing' is a legal term used to establish whether a use of copyright material is lawful or whether it infringes copyright. There is no statutory definition of *fair dealing* – it will always be a matter of fact, degree and impression in each case. Fair dealing means that the use of a copyright work, under the exceptions to copyright needs to be both reasonable and justifiable.



How do the exceptions to copyright work internationally?

The exceptions to copyright are country specific. This means that users of copyright works based in the UK are subject to the specific exceptions to copyright outlined in the UK's copyright laws. Since each country will have its own exceptions to copyright, which are likely to vary from one country to another, users in one country will be able to reproduce copyright works under the copyright exceptions, in ways that users in other countries will not. Reproducing copyright works online by relying on the exceptions to copyright is harder to justify and more risky therefore, because of this lack of global harmonisation between the copyright laws in each country. However some exceptions, like the "Quotation" and "Parody, caricature and pastiche" exceptions often do appear internationally, and therefore could be used by heritage organisations to justify the online use of copyright works. Additionally, the "Illustration for Instruction" exception could be used within the context of closed online learning spaces.



The importance of the exceptions to copyright for heritage organisations

UK heritage organisations need to consider the use of a range of exceptions to copyright to support their digital strategies. The benefits of this approach include:

- Opening up their collections
- Saving money and reducing costs in rights clearance
- Increasing their resilience

1 Non-commercial research and private study

This exception enables the copying of an in-copyright work for the purposes of non-commercial research and private study.

It would normally enable downloading of content from the internet. In the past few years, a number of heritage organisations have amended their policy on visitor photography, moving away from prohibiting the practice to allowing photography as long as it is for private use only.

EXAMPLE:

Visitors to a historic castle will be able to take photographs of the items within the property, and use the photographs they take under this exception, for non-commercial research and private study. This could be as part of a scrapbook, or as part of research into a family tree, as long as there is no commercial exploitation.

Photo by K. Mitch Hodge on Unsplash





2 Criticism, review and quotation

An extract or sometimes a copy of a work could be used under this exception if the work itself is being written about, or if use of the work is supporting exploration of a specific theme or subject.

EXAMPLE:

For their 2019 exhibition “Videogames: Design/Play/Disrupt” the V&A were not able to secure clearances for all the imagery they wanted to show on screens within the exhibition. The museum felt that, for some games, it was essential to show YouTube footage of the games being played, so they went ahead relying on the criticism, review and quotation defence. They ensured that exhibition interpretation panels provided the correct context and attributions, supporting use under the exception.

Other uses could include:

- Excerpts of sound recordings within exhibition spaces
- Reproduction of images of art works in corporate plans
- Extracts used in conference slides and presentations

3 Current news reporting

This exception facilitates the use of certain copyright works (photographic works are excluded) for the purpose of reporting newsworthy events.

EXAMPLE:

The National Portrait Gallery regularly uses this exception to promote the unveiling of newly acquired paintings, allowing a copy of the painting to be used in press and marketing materials associated with the acquisition and unveiling of the original work. This exception can also be used to allow press photographers to include their photographs of displayed items in reviews of new exhibitions and displays.

REMEMBER:

- Mostly used by press and marketing teams
- Permits reproduction of certain works within newsworthy contexts
- Must be sufficiently acknowledged
- Does not extend to the copying and distributing of press articles



4 Text and data mining

This allows the electronic analysis of large amounts of copyright works to identify patterns and other interesting information that would not be possible through human reading. This exception is permitted for the sole purpose of non-commercial research, the person carrying out the research must have lawful access to the work and the copy must be accompanied by sufficient acknowledgement.

EXAMPLES:

1. A conservationist working for an environmental organisation could use this to help with research into threatened species. The exception allows the conservationist to query data across a large number of specialist scientific publications to see if there are previously unseen links between the species decline and particular human activities such as use of certain pesticides or other chemicals.
2. Archivists and curators, who wish to analyse a large corpus of copyright material, such as text, recordings, images or films, to ascertain patterns, trends, etc.

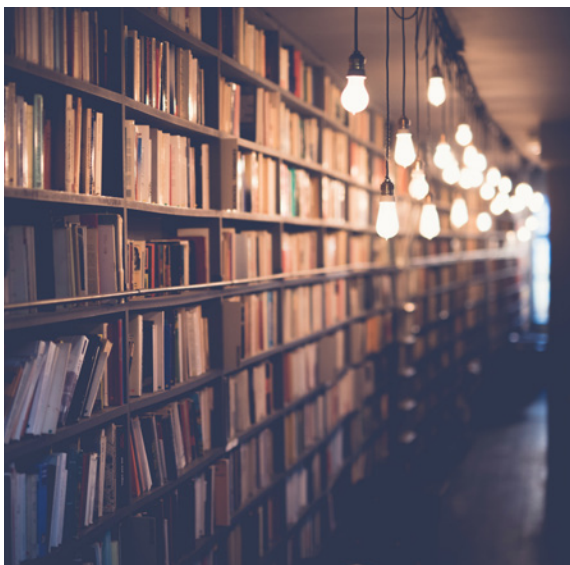


Photo by Janko Ferlič on Unsplash



Photo by Boston Public Library on Unsplash

5 Illustration for instruction purposes

This exception allows use of a copyright work for the sole purpose of illustration for instruction as long as the use is for a non-commercial purpose, the person making the copy is giving or receiving instruction and the copy is accompanied by a sufficient acknowledgement.

EXAMPLES:

1. A local library can include copies of extracts from a poetry book on an interactive whiteboard for use with visiting school groups to help facilitate teaching as part of world poetry day, or a similar themed project.
2. As part of a species conservation project, a conservation charity might organise events at a local wildlife area to encourage engagement with schools and colleges. The charity could print out photographs of species relevant to the project as part of the materials to share with visitors as part of the learning experience.

6 Parody, caricature and pastiche

A fair dealing copy of a copyright work can be used for the purposes of parody, caricature and pastiche.

EXAMPLE:

In the past, the National Portrait Gallery has received submissions to the BP Portrait Award competition where the submitted artworks incorporated a number of other copyright works, including extracts from song lyrics and literary quotes, which would have needed clearance from the copyright holder before the new artwork could be displayed in the exhibition. Under this exception, it is not necessary for the artist to obtain those clearances in order for the gallery to display the artwork in the exhibition, or to reproduce copies of the artwork in interpretative exhibition materials.



Photo by Birmingham Museums Trust on Unsplash



Photo by maybe wisniewski on Unsplash

7 Preservation or replacement

Under UK copyright law, heritage organisations can copy material in their own permanent collection for the purposes of preservation.

EXAMPLE:

An organisation collecting local oral histories might have a large number of these stored on old formats, such as reel to reel tapes, vinyl records and cassette tapes. To avoid obsolescence and ensure the histories are preserved for the future, the organisation is permitted to copy the oral histories onto new, up-to-date formats such as CD, DVD, WAV files and other digital file formats to be stored on hard-drives and servers.

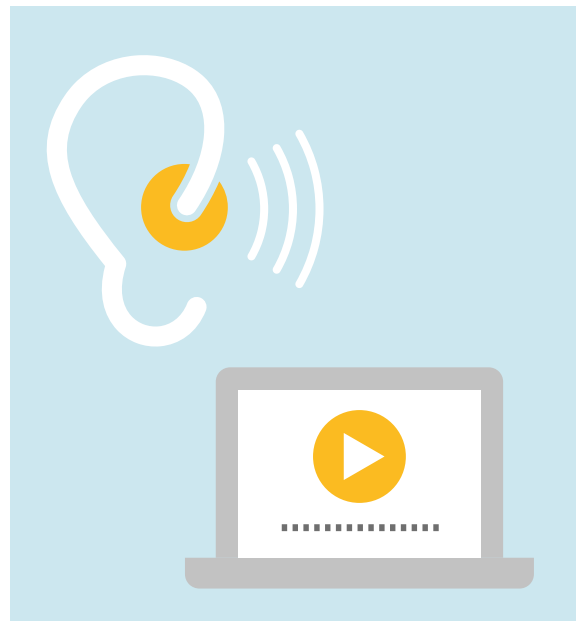


8 Dedicated terminals

A copy of a work can be made available to individual members of the public via a dedicated terminal on the premises of any GLAM (galleries, libraries, archives and museums) or educational establishment. This is permissible as long as the work has been lawfully acquired, it is for the public's research or private study, and there are no licensing terms preventing such use.

EXAMPLES:

1. A botanic garden might make use of the exception to install interactive digital screens in their glasshouses. The screens would allow visitors to search for educational material related to the plants in the glasshouse, such as botanical drawings and species data, enhancing the interpretation and learning potential on-site as part of the display.
2. A historic monument could issue visitors with a tablet, pre-loaded with information related to the monument, including architectural plans and historic photographs, to enhance the visitor experience.
3. The British Library has used this exception for on-site exhibitions to allow sound recording to be included. In those instances the sound recording is made available to visitors via an individual terminal with a single pair of headphones.
4. One way in which a museum could make use of this is on digital touch-screen displays within its exhibition spaces, allowing visitors to view digital copies of items that are not physically on display. The same museum might also make digital screens available in their archives, study rooms or dedicated digital spaces where visitors can view the museum holdings on-screen, and not have to rely on the original works being on display.



9 Access for disabled users

This permits copying for, or by users with a disability, providing that the owner of the work has acquired it lawfully, an accessible copy is not already available, and it is for the users own personal use.

EXAMPLE:

A film archive with holdings of video footage can make use of this exception by creating subtitled versions of films for people with hearing impairments. These versions can be made available to users via digital files sent to them, or on-site at the museum via a film booth, or other device for watching the film.

Educational establishments and not for profit organisations may create an accessible copy of a work for a disabled user as long as:

- The organisation (or the user) has lawfully obtained a copy of the work
- An accessible copy of the work is not commercially available or is not suitable
- The accessible copy is for personal use only.



10 Incidental inclusion

Copyright in a work is not infringed by the incidental inclusion of that work in another work, such as a live action film. An historic building such as a country house or estate, permitting on-site filming for TV or film, might encounter a situation where the film crew is setting up a tracking shot through one of the rooms in the house. If the room includes an in-copyright painting that is just one of a large number of other out of copyright paintings in the background, and that in-copyright painting is not the main focus of the shot, copyright is unlikely to be infringed by including it in the film.

REMEMBER:

A person photographed standing in front of an in-copyright artwork is unlikely to be viewed as fair, and therefore would not benefit from this exception

11 Freedom of panorama

This covers all buildings in the UK, and three-dimensional works, such as sculptures, that are situated in public places or in premises open to the public. The National Portrait Gallery uses freedom of panorama to allow it to photograph and make available online copies of sculptures in the collection. While not all works are permanently on display in the gallery, the entire collection is open to the public by appointment, and considered publicly accessible. Two-dimensional photographs of the sculptures can therefore be displayed on the gallery website collections pages, and in other gallery materials, without infringing the rights of the copyright holder. Since the two dimensional photograph is not an infringing copy, nor is it a faithful reproduction of the three dimensional original, the copyright belongs to the gallery and they can also be licensed to third parties.

EXAMPLE:

A public park might have one or more in-copyright sculptures situated in various places, which are accessible to the public. A visitor can use freedom of panorama to allow the photography of those sculptures without infringing copyright. The photography can be of the sculptures themselves, or of a wider shot such as a group of friends standing in front of the sculptures.

Freedom of Panorama in focus:

- Artistic works permanently located in premises open to the public.
- Artistic works, like sculptures, murals and buildings, can be freely reproduced in the UK, if they are fixed in one spot.
- Since this exception is not evident in legislation globally, putting images of works available under this exception, would encounter some risks.



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 two 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](#). Following Brexit, the UK Government has stated that it has no plans to bring in the EU Copyright Directive or to change 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 from 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. This might have an impact on touring exhibitions, which originate in the EU and travel to the UK. In this case, UK heritage organisations will need to build into their budget planning, extra costs of rights clearances, even if the host organisation have been able to utilise their own exceptions to copyright.



Top tips

- ✓ Familiarise yourself with the exceptions to copyright. They are not rights, but defences and so your use must be fair to the rights holders.
- ✓ Reflect on what is “fair”.
 - What would be fair if it was your work?
 - How much of the work are you using?
 - Would the rights holder normally monetise this use?
- ✓ Consider your heritage uses and which exceptions to copyright might apply. You can always use more than one exception (exception stacking).
- ✓ Always credit the rights holders when using the work.
- ✓ Share your approach internally: document and record your use under the exceptions to copyright and make sure you update your colleagues.



Photo by David Bayliss on Unsplash



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 160 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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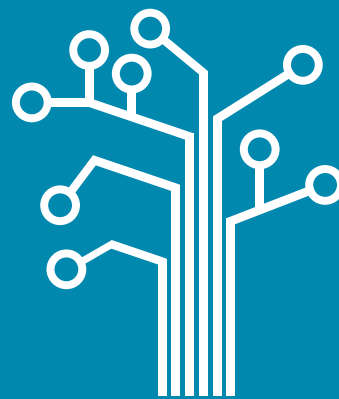
Naomi Korn Associates is one of the UK's leading information management consultancies specialising in intellectual property rights, data protection and licensing, providing support to the heritage and arts sectors. Naomi Korn Associates supports their clients develop better rights and privacy policies and awareness through training and consultancy services.



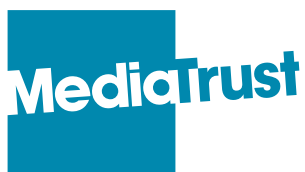
CHARITY DIGITAL

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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