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# Intellectual Property and Copyright

IMPACT Best Practice Guide

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## Table of Contents

Risk Management in Intellectual Property .....	1
Project Management and Intellectual Property .....	2
Permissions Request .....	3
Legal Requirements .....	3
International situation .....	4

A Best Practice Guide to Intellectual Property and Copyright

## Risk Management in Intellectual Property

It may not be possible or practical to find certain rights owners and so gain their permissions. If their material is still required for the project, it is important therefore to be able to identify and manage the risks involved in using a third party's material where no permission has been received.

In such instances it will be necessary to weigh up the risk of using the material, and having to respond to any rights holder who subsequently approaches, with the benefit that using the material brings to the project.

To assess the level of risk involved a useful formula can be used:

$$R = A * B * C * D$$

Where **R** is the financial risk,

**A** = chance of infringement

**B** = chance of awareness

**C** = chance of action

**D** = is the financial cost

**A** is 1 (i.e. 100%) – there can be little doubt that using someone else's copyright material for a commercial purpose can be seen as an infringement.

**B** will vary depending on the use the material is used for. For this example we are assuming a 10% chance or 0.1.

**C** is also likely to vary depending on any commercial aspect the material is used for and whom the right holder is. For this example we will again assume a 10% chance or 0.1.

D is potentially a high number. There is a strong argument that no case should ever go to court, but that if sued, an offer to make amends and should be made and a contingency fund set aside for these circumstances. Nonetheless, even in this scenario, some legal fees may have to be incurred. So let us say the typical legal costs would be €12,000.

Please note that no calculation can be realistically made for loss of reputation to the institution digitising the material if copyright has been infringed in the process. This is also very much a project management concern.

## Project Management and Intellectual Property

Because establishing rights holders and their location can be difficult, clearing rights can be a very time consuming process. Writing and receiving permissions can also be a long and complicated task.

Any clearance of copyright / trademarks etc needs to be scoped in advance of physical digitisation to establish the time needed for the process, and therefore the costs. This work needs to be factored into any project timetable as well as budgeting for the project - whether internally funded, or funded by a third party. For mass digitisation it is desirable to use an automated clearance system if a robust process that provides due diligence is able to be devised – there are currently two pilots being run by OCLC<sup>1</sup> and the Arrow Project<sup>2</sup> to provide a copyright evidence collaborative database which may help with this in future.

In scoping the project in advance the following questions need to be incorporated in any project plan:

- How long will the process take?
- How many rights holders and types of rights will permission need to be sought for?
- How much will this cost and therefore how much time/money will have to be budgeted for?
- Is this work best handled internally by members of staff or in cooperation with an external permissions company?
- Does the funder want to put terms and conditions relating to IPR in the funding agreement? Are these terms and conditions acceptable to the institution?

During the permission process, the following information must be logged methodically on file by the project manager:

- Time spent on the whole process of permissions from identifying rights holders to writing to them, sending a chase-up letter, etc.
- All costings associated with the permissions process – actual outlay as well as staff time and associated cost.
- All correspondence to and from rights holders, including dates.
- Sources used to track and find rights holders, e.g. directories, newspaper adverts, Births, Deaths and Marriages, Google etc.
- Permissions received

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<sup>1</sup>Worldcat Copyright Evidence Registry: <http://www.worldcat.org/copyrightevidence> Retrieved 13.03.2011

<sup>2</sup> Arrow Project homepage: <http://www.arrow-net.eu/> Retrieved 13.03.2011. The Arrow Project aims to “help identify copyright holders of out-of-print works, to create European registers of orphan works and also to develop models for integrated access to charged and free digital content. Effort is being made to ensure that the project results are interoperable European”. It will take in the expertise and needs of rights-holders, collective management organisations, and libraries and archives.

- Permissions awaiting claim/rights holder who cannot be found
- Total number of permissions identified
- Total number of unidentifiable rights holders
- Permissions identified, replied for, but whence no permissions were given or forthcoming (no response etc).
- Rights holders identified, contact details etc.
- Permissions refusals

## Permissions Request

The details of each project are likely to be different, though it is very much worth stating in any request for permission that the projects are non-commercial and educational in nature.

Regardless of whether the digitisation project is non-commercial and educational in nature, or if it has a for-profit element, any permissions letter should contain the following information, and any response should make clear the details of the permitted use:

1. Project manager's name and contact details.
2. The organisation requesting the permission.
3. How the institution wishes to use the material e.g. online free access to the public.
4. What format it will be reproduced in e.g. online, print, etc.
5. Where it is to be published or made available online (institutions main website, or new website)
6. Whether use is non-commercial/educational purposes only.
7. Why the institution want to use the material e.g. good example of research, illustrates hypothesis, etc.
8. Duration of request
9. If changes are to be made to the material, an explanation of why those changes are important. Alternatively a statement that no changes will be made and the material will be reproduced in full.
10. That full credit for the source will be given and the acknowledgement will be in the form that the copyright owner requires.
11. What functionality will the website have e.g. full text search post-OCRing, free to end users etc.
12. That the permission will effectively extend rights enjoyed by the institution under national copyright law.

## Legal Requirements

Many of the rights holders may be individuals with no interest, knowledge or awareness of the law and therefore this needs to be borne in mind when a permission letter is received. However any response must cover explicitly what the Library is requesting.

In all responses from rights holders the following must be kept in mind:

- Any reference to law must be to the law of the country in which the digitising institution resides, not that of which the rights owner might reside;
- Where a fee is paid to either a company or a collecting society for permission, the institution must receive an explicit indemnity and warranty from the company/collecting society;
- It must explicitly state that the permission does not undermine/extends certain rights enjoyed by the institution under national copyright law.

## International situation

The most comprehensive single survey of international copyright law and its implications for digitisation was published in July 2008 by the Library of Congress National Digital Information Infrastructure and Preservation Program, The Joint Information Systems Committee, The Open Access to Knowledge (OAK) Law Project, and The SURFfoundation. It gives a statement of copyright laws throughout Europe, the United States of America and Australia, along with recommendations as to how a better international copyright system might be developed.<sup>3</sup>

The survey looks at copyright from the point of view of institutions with digital collection, but also references Creative Commons Licensing, a system by which rights holders can release their works into the public domain while retaining control of both ownership and use. Creative Commons was created with the American legal system in mind, but as of February 2008, there are 43 jurisdiction-specific licenses, with 8 more jurisdictions in drafting process. Institutions wishing to digitise in-copyright material should make themselves aware of the protection afforded both to copyright holders and digitising institutions by the Creative Commons framework.<sup>4</sup>

The UK Strategic Content Alliance has produced a briefing paper about the costs and benefits of the Creative Commons framework.<sup>5</sup>

The global situation with regard to copyright of digital materials has been complicated rather than clarified by the Google Books settlement of 2009. The Google Books project has digitised many millions of pages from leading research and public libraries, mostly in the United States and Europe, making those digitised pages available on the web for free – as far as copyright will allow it. A large number of publishers and authors complained about this practice, on the grounds that creating a digital copy of a work without permission still has an ambiguous status in law, that certain books had been misidentified as being out-of-copyright when they were in fact still in copyright, and that Google's actions effectively stymied any attempt by the publishers or authors themselves to create digital editions of their own work. A class action suit was taken against Google in the United States, and after prolonged negotiations the plaintiffs and Google reached a settlement.<sup>6</sup> (This settlement has been adjusted several times since its original statement.) However, Google remains under investigation by the US Department of Justice and by the European Union for anti-competitive practices, a number of which relate directly to Google Books.<sup>7</sup> It is difficult in this situation to make recommendations based on the experience of Google and the libraries with which it has partnered during the creation of Google Books.

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<sup>3</sup> International Study on the Impact of Copyright Law on Digital Preservation, 2008, Library of Congress: [http://www.digitalpreservation.gov/library/resources/pubs/docs/digital\\_preservation\\_final\\_report2008.pdf](http://www.digitalpreservation.gov/library/resources/pubs/docs/digital_preservation_final_report2008.pdf) Retrieved 13.03.2011

<sup>4</sup> Creative Commons Licensing, 2008, Digital Curation Centre: <http://www.dcc.ac.uk/resource/legal-watch/creative-commons-licensing/> Retrieved 13.03.2011

<sup>5</sup> Creative Commons Licences – Briefing Paper, 2009, Strategic Content Alliance: [http://sca.jiscinvolve.org/files/2008/10/sca\\_ipr\\_creative\\_commons\\_licences\\_briefing\\_paper-02.pdf](http://sca.jiscinvolve.org/files/2008/10/sca_ipr_creative_commons_licences_briefing_paper-02.pdf) Retrieved 13.03.2011

<sup>6</sup> Frequently Asked Questions; Google Books Settlement; 2009-2011: <http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704#q2> Retrieved 14.03.2011

<sup>7</sup> *Antitrust and the Google Books Settlement*; Fraser, E.M.; Stanford Technology Law Review; 2010: <http://str.stanford.edu/2010/09/antitrust-and-the-google-books-settlement/> Retrieved 14.03.2011