

Paper Three

Diligence and Proposed Intellectual Property Guidelines: a Report for KULTUR

This paper is the third in a series of four tasks defined as part of the Intellectual Property (IP) Work-Package of the KULTUR Institutional Repository Project. Paper One reviewed the current state of IP processes and documentation at the three participating Kultur institutions, and made a series of recommendations for repository staffing, IP monitoring and reporting. Paper Two, Fair Dealing in an Institutional Repository carried out an examination of Fair Dealing as it is commonly applied in UK educational institutions and examined its applicability in the repository context. In part one of this paper we are picking up some of the themes of the Fair Dealing discussion as regards the need for managed diligence and transparent IP decision making within the institution and making some recommendations to help achieve this. In part two the paper goes on to propose a set of Repository IP Guidelines for Depositors and provides some potential content for these.

In its test phase the Kultur Repository has accumulated three broad categories of intellectual content¹:

1. textual documents ranging from authored and edited books, to book chapters and journal articles;
2. artefacts including born digital work and digital versions of paintings, sculpture, photography and design work etc.;
3. records of installations, performances screenings and exhibitions.

This tells us usefully the broad areas where effort should be concentrated now, at the time of writing, when developing IP guidelines and putting in place plans to manage digital rights of this content effectively. The test phase content also highlights the pioneering aspect of the project's remit in the context of UK Institutional Repositories, which to date for understandable reasons of content availability and software limitations, have concentrated on text based material, and not collected the relatively more complex digital content generated and used by researchers in the Arts.

1. Diligence and Decision Making

As pointed out in the aforementioned papers that accompany this series, the IP that relates to Institutional Repositories can be complex and confusing. While ideally Institutions would keep their repositories free from any illegal material, due to the complexity of IP, the potential numbers of users, the apparent inapplicability of 'fair dealing' in the repository setting, and the existence of 'orphan works' whose copyright holders cannot be traced, HEIs are likely to decide to go ahead and publish some un-cleared, and therefore potentially litigious, content which has gone through a process of comprehensive risk assessment.

For that reason the demonstration of diligence is paramount in the repository work flow. The institution must

¹ There are a variety of sources of information on what is in the repository and the content each institution produces, including the Kultur User Survey, UAL and WSA internal assessments and other evidence provided by the Kultur project team.

be able to demonstrate adherence by all parties to, and show transparency in, the University's IP policies and decision making processes.

In the context of proving diligence in IP in the courts the institution would be required to produce evidence that it has made every possible effort that is prudent or reasonable to avoid harm to the other party. One aspect of being able to prove diligence is likely to be documentary evidence and paper trails that clarify the clearance and / or the decision making processes. However, paper evidence is only one side of the coin. The institution's IP Policies, its IP staffing and reporting structures, and its user guidelines and advice are likely to also come under scrutiny. This could for example include providing evidence of:

1. the basis by which the institution makes IP decisions over the content that it allows over its networks;
2. what departments, services and staff roles the institution has that deal with IP;
3. what expertise is available in the above;
4. how the institution facilitates communication between IP expert and non-expert staff;
5. how the institution monitors the content it is providing over its networks.

Proving diligence is therefore a more substantial task than determining the course of action of a particular academic or indeed one piece of potentially illegal content. It is about providing evidence of professional responsibility in the entire institution's rights management framework and thus being able to clearly substantiate the IP decisions made by its staff. Moreover, the driver for having transparent and robust decision making processes is not only about corroborating decisions made at a last resort court appearance. By being able to prove diligence in IP the institution will:

1. Provide an environment where the repository and its staff can increase advocacy and usage of their services by showing explicitly that the institution respects and protects the rights of individual creators both within the institution and beyond;
2. Enable staff to make managed and informed decisions about the IPRs in particular content and to gauge the applicability or not of potential 'fair dealing' exemptions;
3. Enable the institution as a whole to use its IP policies and management as examples of its professional standing and adherence to good practice within the sector.

In practical terms, the key aims of the diligence process, which should be carried out for each and every item placed in a digital repository are to²:

2 University of Manchester Intellectual Property Ltd.: http://www.umip.com/commercial_process_question_and_answers/?id=17

1. Establish who is the legal owner of the IP in question;
2. Establish who has rights over the IP in question;
3. Identify and resolve any potential obstacles to the exploitation of the IP in question;
4. Gather documentation to support each and every element of the above.

To carry out these tasks a high level of expertise is required, underpinned by a potentially complex administrative resource. In addition to these aims, which deal primarily with the process of identifying and clearing IP and administering the resultant documentation, the repository will also have the job of:

1. Providing University policy documentation, including Disclaimers, Acceptable use, Take down Policy;
2. Providing IP advice, both in written form and in person;
3. Monitoring repository content;
4. Managing licenses and contact details;
5. Updating all forms of advice and policy.

Given these series of Diligence aims and IP related tasks in the repository the question of roles and responsibilities emerges. The key question is: to what extent do the repository and its staff centrally manage the IP process and what level of responsibility is devolved to the academic depositor of content. At this stage in repository development, it would seem that the central management and clearance of all copyright is too onerous, resource intensive and thence unworkable for one department. For that reason, depositors should be responsible for carrying out diligence checks on the work they wish to deposit, supported by comprehensive guidelines, policies and frameworks, and ratified by the declarations of compliance, agreements and disclaimers.

Such a devolved strategy for IPR clearance makes clear written advice, guidelines and accessible policy statements imperative.

However with responsibility for IP clearance being devolved to the academic depositor, the task of collecting, administering and looking after the documentation that result from the process must be managed efficiently, and preferably centrally, be that by a particular department, or through an automated electronic process. The institution will have to decide whether it is happy for its academic staff to declare compliance to copyright and record and store their own documentation effectively, making it easily retrievable for if and when the need arises, or if the records and licenses would be better kept centrally by the University Library or a similar department.

Recommendations

My recommendations for each participating Institution in managing the diligence process are as follows;

- a. To assign responsibility for the IP framework to some department, committee or structure within the University, so that clear accountability and lines of enquiry are apparent;
- b. To produce a robust and enforceable IP Policy Framework, including disclaimer, take down policy, terms of use, and acceptable use of content;
- c. To produce detailed written IP guidelines and advice that reflect University IP Policy for depositors of content;
- d. To provide personal advice when it is required by providing named contacts on all documentation;
- e. To monitor repository content regularly.

2. The Guidelines

As outlined in the recommendations from Paper one in this series, the Institutional Repository Guidelines required by the Kultur Project should be:

1. easy to follow and understand for non-IPR expert depositors;
2. accurate and detailed but to not overly wordy or use convoluted legal language;
3. visually appealing;
4. based around scenarios and content familiar to arts based academics.

The 4th part of the IP work-package – the actual guidelines themselves - will concentrate on the visual appearance and the language and tone used to impart the guidelines. Here our intention is to:

- agree the format of the guidelines;
- create information that the guidelines will contain in broad terms;
- test the accuracy of the advice being imparted.

2.1 Recommendation for IP Guidance

1. A Copyright Fact Sheet
2. A Scenario Set that is meaningful to Arts based institutions and academics

3. A Flow Chart that highlights common IP issues and leads the user to specific contacts and advice.

2.1.1 Copyright Fact Sheet

In terms of content this fact sheet is not unique in that the information is widely available to the community. However the fact sheet provided here will put more emphasis on a visually appealing layout. For an example of the fact sheet's contents – but not its visual appearance - see Appendix 1.

2.1.2 Scenario Set

Scenarios seem to be a good way of raising issues and providing digestible advice to users in a way that delivers the information in a context that is meaningful and familiar to them. Many academics will be working to varying degrees with film and moving image, sound recordings, image works, installations and exhibitions, and the scenarios should reflect this. However, while specifically mindful of the creative arts audience at which it is aimed, the advice provided is independent of its context and will be accurate and informative for any discipline that is dealing with the same electronic formats. For example, a biological scientist wishing to deposit a sound file or an anthropologist wishing to deposit an image will glean the information they need from the scenarios. At this stage we are principally interested in the broad content of the scenarios and the advice they cover. The visual appearance and the language used will be refined in the next phase of the work-package. See Appendix 2 for some example scenarios.

2.1.3 Flow Chart

The Flow Chart will be a useful visual means of explaining IP issues in things like collaborative works, works created as part of employment and to make recommendation about how to clear copyright when it exists outside the institution or is unknown. A basic layout and some example content is provided in Appendix 3, with the same caveats regarding design as those above.

3. Design of the Guidelines

At this stage in the development of the guidelines it would be useful to decide on a consistent style for fonts and colours that can be followed throughout the design process. The project group may wish to provide a steer on what is expected here. There are potentially four choices from current Institutional website designs, outlined in figure 1 below:

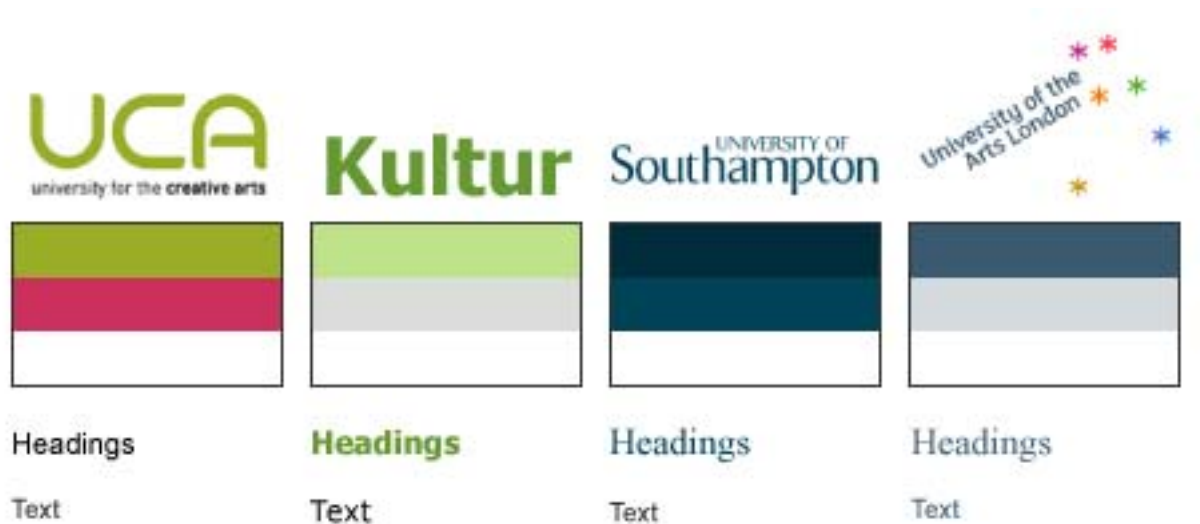


Figure 1: the project's and the three institutions' website colours, logos and fonts

The fundamental question at this stage in the process is:

- Is there to be one overall design that will be used by all institutions?
- If the answer to this question is 'yes', are there opinions within the project group on what this should be?

An alternative approach would be to design three separate forms of IP Guidelines each incorporating the host institutions varying colours, fonts and logos, but using the same underlying content. This may be preferable for a number of reasons involving user familiarity, institutional ownership and political expediency – but will take slightly longer to produce!

APPENDIX 1

COPYRIGHT FACT SHEET DRAFT CONTENT³

- In UK Law copyright exists automatically in all original works.
- Copyright does not need to be asserted or registered but is assigned automatically the moment an original work is created, published or recorded.
- Copyright does not exist in an idea, but in the expression of the idea.
- Copyright prohibits the following acts without the copyright owner's permission:
(1) Copying, (2) Issuing copies to the public, (3) Renting or Lending to the public, (4) Performing, showing or displaying to the public, (5) Broadcasting, adapting or amending.

There are some exceptions to copyright, the main one of which is fair dealing⁴. The permitted acts of fair dealing are copying original work for, (1) non commercial research or private study, (2) criticism and review, (3) news reporting. However, fair dealing only applies to literary, dramatic, musical and artistic works, and to the typographical arrangements of other editions: therefore sound recordings, films, broadcasts or cable programmes, as defined under section 1b) of the Act, are not included in the fair dealing exemption.

- Moral Rights are also associated with copyright, and they exist to protect the reputation of the creator. The 4 Moral Rights are: (1) Paternity, the right to be asserted as the creator, (2) Integrity the right to prevent derogatory treatment, (3) False Attribution and (4) Disclosure the right to prevent films or photographs being published.
- Note that even when a work is used under the exception of fair dealing, the moral rights of the rights holder will still apply.
- Normally the individual or group of individuals who authored the work will exclusively own the work. However, if a work is produced as part of employment then it will normally belong to the employer or the person who commissioned the work.
- The main types of work protected under copyright are:
 1. Literary including song lyrics, manuscripts, manuals, computer programs, commercial documents, leaflets, articles and newsletters.
 2. Dramatic including plays, dance

³ the information presented here is a composite of advice provided by three primary sources: Copyright Service (www.copyrightservice.co.uk) and JISC Legal (www.jisclegal.ac.uk/), Middlesex University Copyright Regulations <http://lr.mdx.ac.uk/copyright/>

⁴ the other exemptions defined under sections 37 – 44 of the act, are for Libraries and Archives, commonly termed as 'library privileges'

3. Musical including recordings and score
 4. Artistic including photography, painting, sculpture, architecture, technical drawing/diagrams, maps and logos.
 5. Typographical arrangements of published editions including books, magazines, journals and periodicals
 6. Sound recording which can be recordings of other copyright works, e.g. musical and literary.
 7. Film including broadcasts and cable programmes
- Each of these types of original work has different durations of copyright:

1. For literary, dramatic, musical or artistic works

70 years from the end of the calendar year in which the last remaining author of the work dies.

If the author is unknown, copyright will last for 70 years from the end of the calendar year in which the work was created, although if it is made available to the public during that time, then the duration will be 70 years from the end of the year that the work was first made available.

2. Sound Recordings and broadcasts

50 years from the end of the calendar year in which the work was created, or, if the work is released within that time: 50 years from the end of the calendar year in which the work was first released.

3. Films

70 years from the end of the calendar year in which the last principal director, author or composer dies.

If the work is of unknown authorship copyright lasts for 70 years from end of the calendar year of creation, or if made available to the public in that time, 70 years from the end of the year the film was first made available.

4. Typographical arrangement of published editions

25 years from the end of the calendar year in which the work was first published.

5. Broadcasts and cable programmes

50 years from the end of the calendar year in which the broadcast was made.

APPENDIX 2

SCENARIOS DRAFT CONTENT

Scenario A: Video with 3rd party content held within it

Academic A has a video piece that is her/his own copyright with no other input from anyone else. The video has a sound track that includes c. 20 to 40 second of excerpts from 4 songs. Each song has a different composer, lyricist, recording date and publisher.

Rights Issues

Each song is likely to have multiple layers of rights associated with it, depending on when it was published, recorded and written. The composer and writer each hold copyright in their own particular work which last for 70 years after the death of the artist in question. The specific recording has 50 years copyright duration since the date of recording.

Resolution

The song lyrics and/or composer's copyright are likely to remain in copyright and are therefore likely to require clearance to be deposited in the repository as part of the video piece in question. In most cases any song recorded and published on or before 1957 will be free of copyright in the actual recording. Anything recorded after this will require clearance. In the scenario provided here fair dealing may apply given the relatively short nature of the sound clips being used. This is however a grey area and extreme caution should be used when trying to apply fair dealing in an open access repository context. The decision to go ahead and publish via the repository under the terms of 'fair dealing' would need to be taken and ratified by institutional experts and satisfy the demands of the institutional IP policy. This decision cannot be made solely by the person uploading the content to the repository. See Paper 2 for further information.

Scenario B: Video of a sculpture filmed in situ at a group exhibition

Academic B has a video of her own sculpture installation that was created in-situ and shown as part of a group exhibition. The video piece - which was shot on a hand held camera by the academic during the exhibition – was intended to capture only her own sculpture and in the main it does. However in the process of capturing panoramic views of the sculpture various shots of other exhibitors' work also appear, as do the bodies of a few visitors to the exhibition who happened to be in shot at the time.

Rights Issues

Academic B has copyright of her own work and can exploit the work however she sees fit. The work being captured that is not her own has copyright belonging to various other people. The visitors to the exhibition who appear in the video incidentally may also have a moral right not to be shown in the video unless they have given Academic B explicit consent in writing.

Resolution

Much will depend here on how much of the other people's work is shown and for how long the camera lingers on specific pieces. In terms of intent, it seems clear that the academic intends to show only her own work, and if the shots of other people's work are of small duration, and not in the foreground, then she may not be infringing their rights. However this is a subjective decision based on a set of various probabilities /variables?. Equally the works of others may be of a fairly substantial nature and she would have to get written consent from the copyright holders to have their work deposited in the repository and made available to a general audience. If this proves difficult it could be a simple case of editing out a few second of footage to comply with everyone's wishes. It would also be correct here for the academic to cite those other artists who contributed to the exhibition in any rights metadata associated with the film.

In the case of the exhibition visitors who appear in the video, there may be a decision to be made as regards the substantiality of their appearance. If they can be identified in the video then they almost certainly will need to be contacted. Of course the task of doing so may be impossible if there are many of them or if they are not known personally to the academic in question. Away around this may be to edit them out of the video. As a general rule it would have been better for Academic B to shoot the piece when the exhibition was closed to the public, thus avoiding this eventuality.

Scenario C: Short film with multiple creators and other potential co-authors

Academic C has a short film that was directed by him/her, edited by a colleague and the script written by another colleague. A few friends acted in the film, and another friend suggested some ideas for shots and contributed extra fragments of dialogue.

Rights Issues

In the film the director and writer will own copyright in their respective works. The duration of their copyright lasts for 70 years from their deaths. The editor of the film is unlikely to have copyright in the film, as while his role undoubtedly contributes to the creative process he is not – in law- usually deemed autonomous to merit co-authorship rights.⁵ UK law was amended in 1996 to include rights for all performers in film. Therefore for anyone to use the film in the repository all performers must give permission. Performers' rights last for 50 years after the year in which the performance was given. The person who contributed ideas and chipped in with some dialogue may have rights in the work also depending on the extent of their contribution.

Resolution

In order to deposit the film in the repository all the rights holders will have to have agreed in writing. In this case this means the director, writer and performers. The person who contributed some of their time and ideas is less easily defined in terms of rights. He or she may have rights to the work depending on the level of their involvement. To avoid confusion at a later date it is highly recommended that all collaborative content has some form of licence drawn up and signed by all parties at the time of the making of the work, attributing exactly who has what ownership.

⁵ Film Copyright in the European Union By Pascal Kamina, p.149, Cambridge 2002

Scenario D: photography by various photographers and some slides from an unknown source

Academic D wishes to digitise and upload a series of 20 analogue photographic prints, by various photographers, known and unknown, that he obtained some years ago and has used extensively in his teaching of a photography course at the university. He also has 5 slides – taken from magazines – 3 of which he remembers what the publication was, 2 of which he doesn't.

Rights Issues

The photographs are the copyright of their various photographers. There have been a few amendments to the law over the years regarding photography, most notably in 1956 and 1988. Recent photography, taken after 1996 by a known photographer has copyright duration in the work for 70 years from the death of the photographer. If the photographer is unknown then the duration of copyright is 70 years since the photograph was taken, or made public. Generally any photograph taken after 1957 falls under this same rule.⁶ Note here that evidence of diligence in attempting to identify the creator is paramount, in case the copyright owner emerges and claims infringement subsequent to publication in the repository.

In the case of the slides, the images captured from magazines are likely to have a typographical arrangement that is copyright of the publication. Copyright of typographical arrangements lasts for 25 years from the date of publication. The publisher however may not own the copyright of the work or article being depicted, in which case the original creator's copyright comes into effect, which last for 70 years since the date of their death.

Resolution

The photographs with known creators are likely to be in copyright, unless the photographer died on or before 1937. Those of unknown authorship are more difficult to assess. If they are more than 70 years old the repository is likely to be safe in distributing them. Anything more recent will require a decision by the institutional expert based on associated risks. It is unlikely that the repository could legally disseminate the slides of unknown origin. Those where the publication is known would have to go through the process of clearing rights with all relevant parties – which could include the publisher and the original creators of the content being depicted.

Scenario E: Journal article with 3rd party copyright content held within

Academic E has a journal article she wrote last year and wishes to place an electronic copy of it in the repository. The article was published in the journal in October 2007, and as part of the process of publication academic A had to source and buy the right to use some images held within it for illustrative purposes from a commercial image library.

⁶ There are important exceptions to this. Middlesex University has some detailed advice on the complexities of photographic copyright available from <http://www.lr.mdx.ac.uk/copyright/>

Rights Issues

If the article was created as part of her normal employment then her employer will own the copyright in it. If this is the case Academic A still has the moral right to be identified as the author, but she has no right to exploit the work without the consent of the copyright owner (her employer). The publisher may also have rights depending on what sort of terms the article was accepted under. The images used within the article are likely to have been licensed for a sole purpose, i.e. one named publication.

Resolution

Academic A should confirm with her employer who owns the rights to the work in question. Either way – whether it is herself or her employer - there is likely to be no obstacle for publication in the repository. The publisher side of things is probably more difficult to resolve. Traditionally duplicate publishing and dissemination was frowned upon by the publishing world as a threat to their business model. However more recently a growing number of publishers challenge this assumption and do now allow for deposit of published articles in repositories, either immediately or after a set period of embargo, or for a fee.⁷ In most cases though the publisher will have to agree and should be contacted before any deposit is made. The images used in the article almost certainly cannot be used in the repository version without further recompense to the rights owner (the image library). The institutional expert will be able to advise on sources of legally obtainable free images that can perhaps be used instead, or if the particular images are completely necessary, negotiate a further fee with the image library.

⁷ See SHERPA website for lists of publishers: <http://www.sherpa.ac.uk/romeo/>

APPENDIX 3

FLOW CHART DRAFT CONTENT

