Getting Rights Right! - The University of Sheffield Library Experience of Legal Issues and Digitisation.

by Clare Scott

Citation


Abstract

The University of Sheffield Library has implemented a new Digital Asset Management System (DAMS). This paper draws on our experience in tackling rights either side of the point of digitisation. The paper will be an example of developing best practice for navigating rights issues in the dissemination and management of archival materials as digital humanities resources.

Archive material often embodies different types of ephemera and multi-modal media alongside composite items (for instance annotated maps and plans). It is not easily predictable in terms of the complexities of its format and content. At the same time legislation concerning intellectual property (IP) can also be complex. We have also had to think about contracts and terms of donation, as this has implications for making online versions available where we own the object but not the intellectual property.

One approach to getting rights right is to develop a structured policy using alert stages and risk assessment in the lifecycle of the asset: Is the physical item legal? Can we digitise it for preservation? Can we host it on the DAMS? Can a reader make a copy? Can staff make a copy on behalf of a reader? How do we proceed with commercial re-use of material?
After outlining our approach to IP policy this paper touches briefly on a parallel procedure to navigate other areas of legal concern such as privacy and data protection.

Finally, this paper examines issues on the ‘other side’ of digitisation. Making digital assets accessible must be balanced against protecting our own rights, and also allowing their exploitation both commercially and non-commercially. Digital assets can quickly multiply unattributed through social networks, and we have considered the pros and cons of watermarking technologies and other preventive measures. This paper asks if misuse can be prevented whilst engaging with, and benefiting from, contemporary evolving social media platforms.
Getting Rights Right! - The University of Sheffield Library Experience of Legal Issues and Digitisation.

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1. Introduction

This paper is an example of developing best practice at University of Sheffield Library for navigating rights issues in the management and dissemination of digitised archival materials. The University of Sheffield has implemented a new Digital Assets Management System and this paper draws on our experience in tackling rights either side of the point of digitisation in Special Collections and the National Fairground Archive. Archive material can often embody different types of ephemera and multi-modal media alongside composite items. It is not easily predictable in terms of the complexities of format and content. At the same time legislation concerning intellectual property can also be complex. It has been important to think about contracts and terms of donations, as there can be implications for making online versions available where we own the object but not the intellectual property. Our approach to navigating these rights issues is to develop a structural policy using alert stages. This paper explains why we decided to take this approach looking at the management of archival materials and the elements of copyright risk. There are some example case studies to demonstrate some of our key queries during the process. This considers the rights issues either side of the point of digitisation, both our side for issues with regard to digitisation of third party materials and the other side for issues where others wish to use our materials. Making digital assets accessible must be balanced against protecting our own rights, and also allowing their exploitation both commercially and non-commercially. Digital assets can quickly multiply unattributed through social networks and we have considered the pros and cons of watermarking technologies and other preventive measures. The paper touches briefly on a parallel procedure to navigate other areas of legal concern such as privacy and data protection.
2. Archives and Collections

Archiving material in a repository constitutes reproduction and this could constitute copyright infringement. As Charles Oppenheim states “Copyright law says no-one may copy a work – and copying as has already been noted includes the process of digitisation. If someone copies without permission this is infringement...”¹

In addition to this we have to cope with rapidly developing and changing technological formats. Material arrives in a variety of formats; those formats might include magnetic formats, digital and other electronic formats. Sometimes these formats are redundant or prone to redundancy due to changes in proprietary file formats associated with commercially competing companies e.g. VHS videotape or Betamax. There is often a built-in obsolescence where companies compete.

For material that arrives in a paper format digitising it can become a complex exercise when that material is made up of a number of composite items. Some examples of this type of material that we have in our collections include published scores with conductor’s annotations and annotated and altered maps and plans. To establish copyright ownership of an item is vital and this means we have had to refer carefully to our terms of donation. It is good practice in an archive to ask for assignment of copyright along with the item in order to format-shift items whether for preservation or access.

> “An assignment should preferably take the form of a binding and enforceable contract, which requires the making and acceptance of an offer and an intention to create a legal relationship.”²

Without this further copying including digitisation is impossible. Libraries and archives can make copies for preservation or replacement under section 42 of Copyright Designs and Patents Act, 1988. However, this only applies to literary, dramatic or musical works, not artistic works, which includes photographs. Digital copies available on the internet are potentially multiple copies, as many people can access them and download them, so this exception would not apply. So ensuring that we get our contracts right at the point of donation can be helpful. We need to be aware the donor may not have the right to assign copyright or IP to us. For example copyright will not belong to the donor of a collection of letters if they are the recipient rather than the letter writer. Copyrights often belong to the majority of the estate if
they have been specifically assigned.

3. Orphan Works

All libraries and archives will contain ‘orphan works’. The British Library has estimated that 40% of all published works are ‘orphan works’. These are works which are still in copyright but where it is not possible to identify the owner, either because they are dead and we do not know who inherited their estate, or because the works are anonymous. The Government has announced that:

“It would introduce schemes to allow lawful use of orphan works and extended collective licensing by collecting societies under appropriate conditions, and to regulate collecting societies through codes of conduct. Measures to enable this form part of the Enterprise and Regulatory Reform Bill.”

As this Bill is still being debated we will have to wait and see if it provides us with a solution or partial solution to these issues.

As Tim Padfield has said there is “nothing in the Act providing a defence against an infringement action on the basis that ‘reasonable efforts’ were taken to identify and trace the copyright owner and secure permission.”

Therefore the management of orphan works within an archive or library comes down to taking a risk management approach. We need to balance the risk of infringement against the benefits of proceeding and the effort needed to try and identify and contact a rights holder. If we decide to go ahead without permission we need to decide whether we are prepared to take that risk and whether we need a disclaimer showing we have taken steps to contact rights holders. We also need a robust notice and take down policy. The benefits are greater use of our archival materials.

As Kate Thiemer points out in her book Web 2.0 Tools and Strategies for Archives and Local History Collections:

“Archives are for use, and the way people want to use them is changing every day. The challenge of more people wanting to use
our materials is a wonderful one to have...”

These are the challenges we face and which become greater when making our digital assets available online.

*Figure 1: The Copyright Risk Matrix.*

In an age of technological progress where digitisation of assets becomes common practice and an expected norm we quickly move across the risk matrix from left to right. The impact of the digital environment moves risk of infringement to high risk and high probability. The risks associated with the matrix for copyright infringement might include a fine, imprisonment, or, more likely, a loss of institutional reputation. This latter situation might affect our ability as an institution to attract material. For funded digitisation projects there could be repercussions for project funders. Hosting material including digital objects on our DAMS (Digital Assets Management System) makes that material more open to the world than simply holding the original items in print in a Special Collection. The need to format-shift archival material is an increasing and an emerging problem in the face of changing formats; particularly immediately before and during the onset of electronic media. These items are modern enough to still be in copyright but old
enough to become rapidly inaccessible to all if the format is not rendered readable, for instance a redundant word processing file. Digitisation is the single solution for preservation, format control and access.

4. IP Policy

The first step in the plan of action is to define your material. Archives are driven by collections and their collection development policies define the intellectual and thematic scope of that collection.

“It is important that a collecting archive define clearly its acquisition remit and that the document that articulates this is made publicly available. As a public statement of intent, the policy gives notice that the repository intends proactively to develop its holdings in a specific way.”

This collection development policy should also address the format collecting decisions that the archive applies for incoming and potential materials. Awareness of our formats allowed us to develop a systematic IP policy. A bonus to this format focused approach is the workflow running more smoothly and faster as dictated by the format types. It makes sense to digitise similar formats in a single dedicated work session rather than moving from format to format as dictated by the natural collection order. For example if we were to digitising a glass slide followed by a large handbill it would necessitate the complete re-figuration of equipment mid-session.

5. Progress of Material

Our second step in the plan of action is to ask various questions to determine how material might be used. The answers to these questions thus determine the sequence of alert stages in the IP policy.

- Alert Stage 1 - Is the item legal?
- Alert Stage 2 - Can we digitise the item for preservation?
- Alert Stage 3 - Can we host the item on the Digital Asset Management System?
- Alert Stage 4 - Can a reader make a copy?
- Alert Stage 5 - Can we make a copy on behalf of a reader?

Examples of illegal items (Alert Stage 1) might involve an item illegally
obtained or compiled by the donor (creator or estate of creator) such as a video tape of televised clips, a collection of second generation copies (copies of copies of articles) or copyright photographs copied from a second party (not the copyright holder). If the object is not legal but is essential to the coherency of the collection - in that it gives a clue to the nature of the donor - it may be necessary to keep it.

Alert Stage 2 is driven by the need to digitise items for preservation, primarily if the article concerned is fragile or for access if the original item is in an inaccessible format e.g. a negative, a PAL tape, a 5.25 inch floppy disk or a defunct word processor file format. Our ‘dark archive’ might allow us to keep digitised items in the hope that the legal framework shifts in time to allow us to make items available.

Material digitised for preservation cannot be assumed to go directly on to DAMS as this constitutes publishing – thus material that is not copyright cleared cannot progress to this stage (Alert Stage 3).

A copy created by a reader (Alert Stage 4) may involve photocopying a physical item, digitising a physical item (scanner or camera), or taking a copy of an item already in digital form where a preservation reference copy has been made. A copy would be made by the reader with a defence of fair dealing for purposes of non-commercial research.

We can copy on behalf of the reader (Alert Stage 5), as we are a ‘prescribed library’, if we do so under the Copyright, Designs and Patents Act 1988, s.38-39 using the statutory declaration form.

6. Case Studies

Figures 2
Figure 3

Figure 4
The first example is a site plan, which shows how complex individual items can be and the importance of keep a systematic approach through the matrix. This is a composite item that appears simple, the copyright being given from the original holders (Ordnance Survey) to the drawing company for a specific purpose.

Even with permission from the drawing company to the National Fairground Archive to reproduce the item we cannot because of the ‘rooted’ original copyright.

*Figures 5 and 6: A postcard from 1912.*
Postcards may contain valuable information front and back, or archives may wish to record both sides for completeness. The front is a published image and may belong to the originating company or commissioned photographer. The back is composite - partly published typographical layout, partly unpublished manuscript in letter form. The author of the words owns the copyright not the recipient. In archival situations the latter is more likely to be the donor than the author and, therefore, cannot assign the rights!

*Figures 7 and 8: A postcard from 2012.*
Scott, Clare. ‘Getting Rights Right! – The University of Sheffield Library Experience of Legal Issues and Digitisation.’. Source: https://www.hrionline.ac.uk/openbook/chapter/dhc-scott
This is a hybrid item. As with case study 2 the front is a published image and the back an unpublished written manuscript. The inclusion of the stamp is a common occurrence and may be thought of as seemingly trivial. The copyright in the stamp, which is an ‘artistic work’, will either be owned or licensed to Royal Mail. In order to reproduce a stamp you need a licence.

“If you are an individual you may use images of the stamps for critique, review, private study and non-commercial research; an educational establishment, you may use images of the stamps for critique, review, non-commercial research and inclusion in an examination; a news organisation, you may use images of the stamps for critique, review and news reporting of current events.”

Figure 9: Oral history resource.
There are potentially two or three levels of copyright to clear in an oral history resource:

1. The sound recording.
2. The speaker/singer.
3. If they are reciting a published literary work e.g. A poem or singing a song (from a score) there could be a third copyright in this single item.

*Figure 10: A photograph of a fairground ride held to infringe a trademark.*

Should we consider this as acceptable for hosting on our DAMS?
Figures 11 and 12: Inside and outside the boundaries of a theme park e.g. Alton Towers.
The first photograph is taken outside the boundary of Alton Towers and so is taken in a public place. The rides can be seen in the distance. The second photograph is taken inside the gates and so is on private property owned by Alton Towers. They could, in theory, restrict photography within the boundaries of the park but it seems unlikely that they do so given the nature of their industry. People are generally to be seen taking photographs of each other.

7. Protecting Our Own Rights

So we come to managing rights on the other side or managing demands for re-use of material, commercial and non-commercial. In most cases, but not all, we are digitising material in which copyright has been assigned. As Kate Thiemer points out:

“Posting digital material on the Web often means it is available to anyone to copy, as well as to access, and this raises issues for many cultural heritage organisations.”

We wish to digitise to promote and improve access to our distinctive collections. Increasingly we find we are combating the increase of unauthorised file-sharing via expansion of social media. Commercial & non-educational re-use is not covered by copyright exceptions. Images can be taken out of your hosting context, stripped of metadata and re-hosted. Then it is possible for others to re-cycle the process without your metadata. For example we have experienced photos being taken from our website and redistributed on Pinterest, and this site apparently strips metadata. Fairground fans have posted our pictures on their own Facebook pages without acknowledgement. We have also had some single web re-use in an inappropriate way e.g. a “Fat Lady Show” image was used by a diet website.

In addition we are aware of the potential for breach of other rights. Buildings and architecture can be protected as ‘artistic works’ and architectural drawings as ‘graphic works’. This is known as ‘2D to 3D’ copying. A plan for a fairground ride can be said to be a ‘graphic work’. In constructing the ride in accordance with a ride designer’s plans a ‘copy’ is being made. As Gillian Davies points out:
“It is not necessary for the original to be replicated in every respect. What matters is whether the copy is of the work as a whole or any substantial part of it...”

So if we make this type of material available can we also allow the ride to be built?

8. Rights Protection and Social Media

We considered various options for protecting our material that is added to our Digital Assets Management System. As many of our digital assets are photographs we considered technical protection software in the form of watermarking. Watermarking does two things: it will dissuade copying through making it clear that copying is not allowed and it can also make it difficult to physically achieve copying. However, a watermark can be removed if a user feels determined to take a digital object from your resource for purposes not allowed under your terms of use.

There are problems with this approach. The first problem is the less discreet a watermark in terms of size and position the easier it is to remove. The converse approach of using a large and centrally based watermark in an image has a downside. The ambience of the digital object is disrupted and you could say the photograph is ruined. The second problem is that some digital archiving software will specify that the user assigns a watermark as the object is uploaded rather than creating a watermark ‘on the fly’ as it is viewed. We wanted to be careful not to watermark the archival preservation copies. So after much discussion we rejected the idea of using watermarks.

We also considered using creative commons licences. The advantages of using them include clarity, flexibility and the sharing of ideas. Creative commons licences are machine readable and can be embedded in your digital objects. They are globally recognised and you can combine different elements of the symbols:

<table>
<thead>
<tr>
<th>CC</th>
<th>Creative Commons</th>
</tr>
</thead>
<tbody>
<tr>
<td>BY</td>
<td>Attribution</td>
</tr>
<tr>
<td>SA</td>
<td>Share Alike</td>
</tr>
<tr>
<td>NC</td>
<td>Non Commercial</td>
</tr>
</tbody>
</table>
For example you can have a CC-BY licence, which allows anyone to use your digital object as long as the creator is credited. You can have a CC-BY-SA licence, which allows adaptation or building upon the digital object for any purpose, commercial and non-commercial, as long as the creator is credited and any output is shared under exactly the same licence. You can have a CC-BY-NC licence, which allows you to redistribute the digital object for any purpose as long as it is non-commercial. CC-BY-ND allows you to use the digital object as long as you don’t make any changes. A CC-BY-NC-ND licence is the most restrictive licence. It allows downloading and sharing as long as the creator is credited but the digital object may not be changed or used commercially. You cannot combine SA (share alike) with NC (non-commercial use) in one licence though, as these two are contradictory. SA assumes you are allowing a commercial re-use.

There were other problems with this approach as the SA element of a CC licence restricts how you can control re-use of digital items. The more limiting your licence the less interoperable the licence is. There are commercial disadvantages to using these licences if you want to exploit your own IP and once an item is released on the Internet it is available to all. There is also the issue of third party rights i.e. in order to licence the material we need to be sure we own all the rights or that we have permission from third parties.

As the National Fairground Archive, in particular, needs to be self-funding and does a lot of work with journalists and television companies there is a need to commercially exploit the IP that they own. Therefore our solution was to use a rights statement, along with a copyright statement and a declaration form. In other words it is a reproduction of the paper experience of visitors to Special Collections and National Fairground Archive.

9. Other Legal Considerations

Besides the main focus of this paper, copyright, we have other legal considerations such as Data Protection, Freedom of Information (FOI), defamation, obscene publications as well as issues of privacy, confidentiality and archive ethics. We need to think about these issues from our perspective. If the content or substance of something may create a problem in any of these areas we are cautious and do not host the material. In order
for the Data Protection Act to apply a data subject needs to be still alive. The National Archives policy on Data Protection suggests that where this is not known the following working assumptions may be used.

“Assume a lifespan of 100 years. If the age of an adult data subject is not known, assume that he was 16 at the time of the records. If the age of a child data subject is not known, assume he was less than 1 at the time of the records”\(^\text{11}\)

The Data Protection act allows data processing for the purposes of archival preservation through the research exemptions set out in section 33. Personal data may be stored indefinitely as archives for research purposes provided that data is not processed to support measures or decisions relating to individuals or in such a way that substantial damage or distress is caused to any data subject\(^\text{12}\).

10. Archives and Professional Ethics

As Paul Pedley points out “Library and information service professionals find themselves in a difficult situation playing the role of ‘piggy in the middle’, acting as guardians of intellectual property whilst at the same time being committed to supporting their users’ needs to gain access to copyright works and the idea that they contain.”\(^\text{13}\)

Library and information professionals follow the CILIP Code of Professional Practice\(^\text{14}\) which states at point 10:

“Defend the legitimate needs and interests of information users, while upholding the moral and legal rights of the creators and distributors of intellectual property.”

However there are also broader ethical concerns for archivists and librarians. We need to balance an impartial provision of information versus the desire for censorship of some types of information. The CILIP Statement on Intellectual Freedom, Access to Information and Censorship states:
Access should not be restricted on any grounds except that of the law. If publicly available material has not incurred legal penalties then it should not be excluded on moral, political, religious, and racial or gender grounds, to satisfy the demands of sectional interest.\(^{15}\)

For instance material from the National Fairground Archive could be used to create an image that fairs and showmen are untidy and dangerous. As well as being detrimental to showmen it is likely this would then deter people from donating material. If there are legal issues we might have outright censorship of material. What happens when there might be a valid argument around potentially sensitive material in a collection? For instance the NFA has material on animal exploitation and freak shows. Can we control the use of this material in an attempt to control the arguments? In fact it would not be appropriate for us as information professionals to do so. We need to balance out censorship with intellectual freedom. Censored information usually falls into political, social, sexual or religious areas and there are laws defining what is permissible. As Charles Oppenheim has stated:

\[\text{\textquotedblleft The role of the librarian is to facilitate access to information, be that controversial or not, and not to obstruct or hinder that access.\textquotedblright}\^{16}\]

Real examples in our Special Collections and the National Fairground Archive include children or people being photographed. In a couple of instances there is nudity. We also have photographs usually from the 1960s-1970s of show families standing next to their private home, a living wagon. So although these photographs may have been taken in a public place and outside there are potential issues of privacy. Other examples include showmen’s lorries and yards. We also have photographs of ‘racy’ fairground artwork and we are not sure if this may constitute indecency or obscenity. “It appears that ‘indecency’ relates to material that is considered ‘shocking and disgusting’, but less ‘shocking and disgusting’ than material that is considered obscene.”\(^{17}\) However, according to the Obscene Publications Acts s.1 states:

\[\text{\textquotedblleft an article shall be deemed to be obscene if its effect is, if taken as a whole, such as to tend to deprave and corrupt persons who\textquotedblright}\]
are likely ... to read, see or hear the matter contained or embodied in it.”

While we would not censor the material in our archives, unless the law requires it, we may exercise considerable caution with material we will digitise and make openly available on the Internet.

11. Conclusion

We work in a legal landscape where the ability of technology, Web 2.0 and social networks to share material made available online is growing at an exponential rate. The law is not changing as fast. We need to consider the risks at either side of the point of digitisation. We need to remain aware of recent and potential changes to the law of copyright, which may be favourable to museums, libraries, archives and other heritage collections. We also need to be aware of other legal issues and constraints and formulate policy and procedures accordingly. One of our biggest challenges remains that of orphan works and until we have a legal solution our only option is make a balanced assessment of risk, backed up by a policy including notice and take down procedures. We can reduce the likelihood of breaching rights by making reasonable efforts to locate rights holders and by not digitising material where the risk is too great.

The University of Sheffield’s Digital Assets Management System offers great opportunities to our Special Collections and Archives to showcase, share and disseminate some of our distinctive collections. There are also great challenges from a number of legal issues in taking this approach. The challenges come from our side of the point of digitisation in that we need to be sure we own the rights or have permission to digitise third party materials. As many archival items embody different types of ephemera and multi-modal media alongside composite items this exercise is not straightforward. There can be a number of complexities of format and content as the examples above show.

Our solution to this challenge is to produce an IP Policy with clear procedures for staff involved in digitisation. Our approach has been format driven, as this allows decisions to be made on material in a complex format item by item. It also allows for careful consideration of individual cases. It is also important to manage the challenges on our side of the point of
digitisation by having clear terms of donation.

On the other side of the point of digitisation making digital assets accessible must be balanced against protecting our own rights, and also allowing their exploitation both commercially and non-commercially. After all we want to make our online archival material available to all, within certain limits.

Our rights statement explains that the University of Sheffield “retains the copyright and publication rights for all images and information in these collections. You must acknowledge the source of these documents wherever they are used. Please read the Rights Statement before downloading or printing any resources. If you wish to use any of the images/documents for a purpose which is not permitted you must contact us for permission”\(^\text{19}\) An alternative to this approach might be to consider the use of Creative Commons licences. However, we have chosen to use a rights statement and a structured policy to support our digitisation programmes.
Footnotes


2 Padfield, Tim., Copyright for Archivists and Record Managers. 3rd edn, Facet, 2007. 85.


5 Padfield, Tim., Copyright for Archivists and Record Managers. 3rd edn, Facet, 2007. 90.

6 Thiemer, Kate Web 2.0 Tools and Strategies for Archives and Local History Collections. Facet, 2010. 224.

7 Williams, Caroline Managing Archives: Foundations, Principles and Practice. Chandos, 2006. 44.


9 Thiemer, Kate Web 2.0 Tools and Strategies for Archives and Local History Collections. Facet, 2010. 223.


12 Data Protection Act 1998


14 CILIP, *Code of Professional Practice*  
(Accessed 25/03/2013) no.10.

(Accessed 02/04/2013).

16 Oppenheim, Charles and Smith, Victoria ‘Censorship in libraries’  
(Accessed 02/04/2013).

17 Charlesworth, Andrew ‘Criminal Law and Liability’, in Armstrong, C. &  

18 The Obscene Publications Act 1959.

19 University of Sheffield *Digital Collections website*. 2013.  
http://cdm15847.contentdm.oclc.org/cdm/  
(Accessed 03/04/2013).