

A Brief Guide to Copyright

August 2016



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This document provides a brief introduction to copyright, as well as suggestions for useful resources to explore the subject further. Copyright, and the area of intellectual property rights in general, is a complex area of the law and the information contained here should not be construed as 'legal advice', for which specialist advice should always be sought. However, we hope that this material will provide some useful pointers for those who are new to the subject.

The guide is produced as part of a series of copyright learning resources which are available on Tate's website. These resources were created to help deliver copyright workshops for Tate Learning Partners as part of the Heritage Lottery Funded Archives and Access project.

Tate is committed to delivering helpful guidance and any feedback on this document is welcome.

Tate Legal
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What is copyright?

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What is copyright

Introduction

Copyright is a member of the family of 'Intellectual Property Rights' (IPRs). Other IPRs include trade marks, designs, patents and confidential information. This overview will focus on copyright.

Copyright is the exclusive legal right by the copyright holder to control the copying of certain kinds of work for a set period of time. The right arises automatically in the UK¹ and is granted to the original creator of a literary, dramatic, musical or artistic work, enabling them to control the way in which their works are used or reproduced irrespective of who owns the physical work itself.

Copyright is a property right and just like any other property right it can be sold, assigned or bequeathed from one person to another for the duration that copyright subsists. Because of this the copyright holder may not be the original creator of the work. Identifying and locating the copyright holder(s) is one of the challenges of licensing copyright works, particularly as time progresses. Where the copyright holder cannot be traced the work is regarded as an 'orphan work' – an issue which will be discussed later in this document.

Infringement

All the following things done to a work potentially constitute infringement and can lead to civil or criminal proceedings:-

- Copying it
- Issuing copies of it
- Renting or lending it
- Performing, showing or playing it
- Communicating it to the public
- Adapting it²
- It can also be an infringement to authorise another person to do any or all of these things

¹ Therefore, whilst it is always useful to identify copyright work with the © symbol, this is not actually required for the creator/copyright owner to protect their rights. Copyright arises from the moment of creation of the original work, without the need to register it.

² s21 Copyright, Designs and Patents Act 1988. Adaptation in UK law applies to literary, dramatic and musical works

What legislation governs UK copyright?

The core piece of legislation governing copyright in the UK currently is the Copyright, Designs and Patents Act 1988 (CDPA 1988), but there is additional secondary legislation (Statutory Instruments) covering this area, as well as EU legislation and international agreements³.

2014 changes to copyright exceptions

A number of changes to copyright law came into force in 2014. Some of these specifically concern museums, libraries and archives whilst others affect education and research.

Notable alterations include the extension of fair dealing exceptions to include parody, pastiche and quotation, whilst others particularly benefit the educational and cultural heritage sectors such as the making of preservation copies, the use of dedicated terminals and research and teaching.

Further information: 2014 changes

- The IPO has issued information and guidance regarding the 2014 changes: <https://www.gov.uk/government/publications/changes-to-copyright-law>

Changes to copyright of mass produced artistic works (s52 CDPA repeal)

On 28th July 2016 UK copyright law changed so that designers of mass-produced artistic works (50 or more copies) would benefit in the same way as creators of unique artistic works in terms of the duration of copyright protection⁴. This change applies to replicas of such works as well as images of such works. At the time of writing, the law is in the transition period, which ends on 28 January 2017. After this date, copyright in mass produced artistic works will subsist for life + 70 years after the death of the creator. What qualifies as an 'artistic work' / work of 'artistic craftsmanship' in this context is, as yet, unclear. It may include furniture, jewellery, wallpaper and homeware for example. The IPO has issued very helpful guidance (please see link below). This guidance will likely be refined over the coming year so please continue to check the IPO website for any updates and notices.

³ National copyright laws are derived from international framework treaties, negotiated by members of the World Intellectual Property Organisation (WIPO). The main treaty is the Berne Convention, which establishes the core standard principles relative to the scope and nature of rights and limitations to those rights. For EU member states, European legislation is also a significant layer of governance.

⁴ Prior to repeal, s52 of the Copyright, Designs and Patents Act 1988 limited the term of copyright protection for industrially exploited artistic works to 25 years.

Further information: s52 repeal

- *Repeal of section 52 of the Copyright, Designs and Patents Act 1988: Guidance for affected individuals, organisations and businesses*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515332/160408_guidance_s52_final_web_accessible.pdf

Key elements of copyright: ownership, duration, originality, subject matter and exceptions

1. Ownership

Copyright is a property right and can be sold, assigned or bequeathed from one person to another for the duration that copyright subsists. Because of this, the copyright holder may not be the original creator of the work, though they are usually the first owner of the copyright.

Whilst the creator is usually the first owner, there are key exceptions to this general rule:-

- **Employees (contract of service):** if the work is created as part of the employee's usual role, copyright usually rests with the employer
- **Non-employees (contract for services):** The copyright rests with the creator unless otherwise stipulated in the contract. Examples of non-employees may include: freelancers, consultants, volunteers, placement staff and interns

2. Duration: copyright terms

- **The general rule is that copyright lasts for the lifetime of the creator plus 70 years**

The 70 years is calculated until midnight 31 December of the 70th year after their death. There are variations to this however outline below.

- **Variations to copyright durations⁵**

⁵Different territories can also have different copyright durations. For example in the US, works of corporate authorship can retain exclusive rights to original characters and content for 120 years after creation or 95 years after publication, whichever endpoint is earlier. Copyright protection for works published prior to 1st January 1978 in the US lasts for 95 years from their publication date. The US legislation which extended the period of copyright for corporations in this regard is the Sonny Bono Copyright Term Extension Act 1998 aka 'the Mickey Mouse Protection Act' because it meant that works such as the early Mickey Mouse cartoons will remain under copyright until at least 2023 (rather than 2003 prior to the CTEA).

It should be noted that there are a few variations governing durations depending on the type of work. For example:

- **Photographs:** Copyright can be complicated with respect to photographs taken before 1 January 1996. Tim Padfield has provided a useful flow chart regarding photographic copyright – see ‘Further Information’ below
- **Unpublished works and Crown copyright works:** Unpublished works and Crown copyright works have different copyright terms. Unpublished works can be affected by what is colloquially known as the ‘**2039 Rule**’ (see next section)
- **Broadcasts:** Copyright in a broadcast expires 50 years from the end of the year of making of the broadcast
- **Films:** are protected for 70 years from the death of the last of the following people to die: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work
- **Sound recordings⁶:** The length of term of copyright in these rights depends on whether or not it has been published or communicated to the public. The IPO has written a useful guide outlining the rules - ee ‘Further Information’ below
- **Typographical arrangements:** the layout of a published edition of written, dramatic and musical works is also protected for a period of 25 years from when first published
- **Other rights: Performers’ rights⁷:** Performers’ rights are a ‘neighbouring’ right and, where a performance has been recorded, durations of those rights depend on whether the recording of a performance has been communicated or made available to the public. Note that individual’s providing oral histories would also be classified as holding performers’ rights. Literary copyright may also be engaged⁸
- **Territorial differences:** Different territories can also have different durations, although within the EU European legislation has largely harmonized copyright durations⁹

⁶ s13A Copyright, Designs and Patents Act 1988

⁷ s180, s191 Copyright Designs and Patents Act 1988. s191 outlines durations for performers rights.

⁸ See s3 and s169 Copyright, Designs and Patents Act 1988.

⁹ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version). For the link to the Directive, please see http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm Accessed: 22 January 2014

Variations to copyright duration: unpublished works and the '2039 Rule'

Some kinds of unpublished¹⁰ works (literary, dramatic, musical, photographic, engravings) may remain in copyright until midnight 31 December 2039. This is known colloquially as the '2039 Rule'. Any literary, dramatic or musical work which was unpublished on 1 August 1989 and whose author died before 1 January 1970 will be in copyright until 31 December 2039, no matter how long ago it was created or when its author died¹¹. Again, Tim Padfield's flow chart illustrates how work may be affected. See 'Further Information' below.

It is important to remember that a work that has simply been made available to the public via access in an archive does not constitute publication; neither would a letter sent from one person to another equal publication in this context.

Variations to copyright duration: Crown copyright

Crown copyright is copyright material that is produced by *employees* of, or under the instruction of, the Crown in the course of their duties. Its main significance for copyright is that different duration rules apply.

- Crown copyright work that has been published will have copyright protection for 50 years from the end of the year in which the work was published
- Where work has been commissioned from people who are not civil servants, and whose author's rights have not been assigned to the Crown, then the usual rules apply – the lifetime of the artist/author plus 70 years
- Where copyright in a work has been assigned to the Crown, copyright lasts 70 years after the death of the person who created it
- Unpublished Crown works have a period of protection of 125 years from the end of the year in which the work was made or until 31 December 2039

Whilst Crown copyright is typically thought of in terms of literary work (ministerial papers, government publications etc), it is also applicable to other works, for instance those of Official War Artists.

¹⁰'Published' has both a narrower and broader meaning legally than generally understood. A work is 'published' if, with the approval of the copyright owner, multiple copies of it have been issued to the public or it has been made available to the public online. A work has been 'made available to the public' for the purposes of duration if, with the copyright owner's approval, it has been given exposure to the public eg by being performed, made available online, exhibited or played in public or is published. It's important to remember that, for instance, just because a work such as a private letter is available to see in an archive, it has not been published. The National Archives Copyright and Related Rights (2013) 4 <http://www.nationalarchives.gov.uk/documents/information-management/copyright-related-rights.pdf> Accessed: 16 November 2015. Available under an Open Government Licence

⁸ <http://www.archives.org.uk/publications/copyright-issues-for-archivists.html> Accessed: 18 January 2014

Further information

- A useful flow chart detailing copyright durations (other than crown copyright) can be found via this link: <http://www.bl.uk/reshelp/pdfs/copyrightflowchart.pdf>
- The appendices in this document also include a breakdown of copyright durations
- IPO guide to Copyright in sound recordings
<https://www.gov.uk/government/publications/copyright-in-sound-recordings/copyright-in-sound-recordings>

3. Originality

Originality is needed for something to be protected by copyright

In most cases, a work has to be considered 'original' and fixed in material form to qualify for copyright protection. It is important to remember that copyright does not protect an idea, only the expression of the idea. In copyright terms, 'original' doesn't have to mean new, novel or unique – just that the work 'originated' with the creator and they used their knowledge, judgement and labour to produce it¹². It does, of course, also protect new work that arises from the creator's 'intellectual spirit'.

What is meant by 'originality'?

'Originality' is not legally defined, but one thing it is not is simply slavish copying – it must be sufficiently different to make it a new work¹³. Where a derivative work does qualify for copyright protection then it is a new work and thus itself has its own creator and owner and the author/owner of the source work will have no rights in the new work (though copyright may still subsist where copyright work is included – for example in collages¹⁴). Beware, though, the creation of the derivative work could infringe copyright in the source work, unless the use was authorised - it is a very fine line sometimes between 'inspiration' and 'plagiarism'. An illustrative example is the case bought by estate of Guy Bourdin against Madonna concerning her video 'Hollywood'. Whilst the case was settled out of court, it captures how tricky 'originality' can be¹⁵.

¹² Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010) 20

¹³ It does not follow "that that which is an exact and literal reproduction in two-dimensional form of an existing two-dimensional work becomes an original work simply because the process of copying it involves the application of skill and labour... Whether it does so or not is a question of degree having regard to the quality rather than the quantity of the addition" *Interlego v Tyco* [1988] RPC 343 PC per Lord Oliver @ 371-2

¹⁴ The issue of insubstantial use may come into play here.

¹⁵ Madonna sued for Hollywood pose '<http://news.bbc.co.uk/1/hi/entertainment/3154534.stm> Accessed: 18 January 2014. See also <http://www.thesmokinggun.com/documents/crime/madonna-accused-picture-piracy>. The estate's complaint can be found here: <http://www.thesmokinggun.com/file/bourdin-complaint?page=0> For a comparison of images <http://www.thesmokinggun.com/file/madonna-accused-picture-piracy> Accessed: 18 January 2014

4. Substantiality vs triviality

Key Points

1. **Substantial:** Copyright protects only the whole or substantial part of a work. There is no legal definition of what 'substantial' is – *it's not a 'merely] trivial extract[]' but 'anything of any serious value would no doubt fall within in [it]'*¹⁶
2. **Quality:** Quality is the primary test, as is the proportion taken from the source work. Remember that copyright is concerned with originality and protecting creativity – even certain isolated sentences or certain parts of sentences can be considered suitably original
3. **Context:** Context is key – it's not simply about quantity – the circumstances and purpose of use must be taken into account ¹⁷

Some works may simply be too trivial to qualify for copyright. These might include the name of a company, the title of a book, magazine or song, an advertising slogan and a simple form¹⁸. Equally, personal names are not protected by copyright (they do not count as a literary work). However, they might be registered as a trade mark eg Lowry, Picasso, or qualify as artistic work if they are more distinctive than simply cursive writing¹⁹. Here it is not the name itself that is protected, it is the *appearance* of the signature that may attract copyright.

It must be remembered, however, that copyright is concerned with protecting creative endeavour – even a few words may attract copyright protection. The issue of 'substantiality' is significant when considering not only if copyright applies at all²⁰ but also with respect to defences against alleged copyright infringement²¹. What qualifies as substantial remains undefined; rather it rests on two considerations both qualitative (something of real importance and value) and quantitative (the amount taken from the original work). There has been significant recent case law in this area both domestically and at EU level, with an increasing shift in emphasis to the quality of the copyright work rather than simply quantity²².

¹⁶ Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010)121 .

¹⁷ Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010) 121.

¹⁸ A form which has taken a lot of skill to design, however, might be protected, as might a collection of relatively simple forms. Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010) 24. An example might be the line drawing by Picasso of his beloved dachshund 'Lump'.

¹⁹ Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010)40

²⁰ s16(3)(a) CDPA 1988 states that infringement involves the copying of a work as a whole or *substantial* part of it.

²¹ ss29-30 CDPA 1988 Fair dealing provisions

²² *Public Relations Consultants Association Limited (Appellant) v The Newspaper Licensing Agency Limited and others (Respondents)* [2013] UKSC 18 <http://www.bailii.org/uk/cases/UKSC/2013/18.html> Accessed 22 January 2014. This is the decision of the

Recent developments: Emphasis on 'quality'

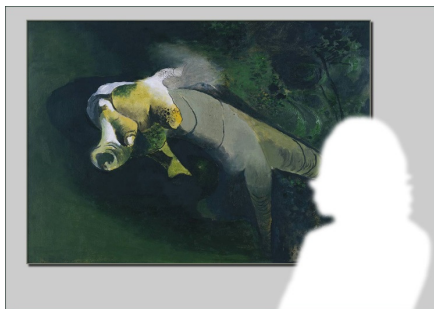
The example of newspaper headlines captures the shift in emphasis. Historically, newspaper headlines were considered simply 'too insubstantial and too short to qualify for copyright protection as literary works'²³. However, following the CJEU²⁴ decision in *Infopaq*²⁵ (which held that originality may subsist in eleven consecutive words in certain circumstances, notably where **commercial** usage was at issue) the weight of the test has moved to place more emphasis on 'originality' rather than 'substantiality'.

The question of 'substantiality' is a complex, context-driven area of the law on copyright. Because of this complexity this overview cannot provide definitive guidance but the decision in *Infopaq*²⁶ does serve to remind us that this is a rapidly developing area of the law that one must be mindful of.

5. Incidental use

Sometimes you will see, for example, a person being interviewed or a picture where there is copyright material in the background. Where copyright works are *not* the focus then clearance is unlikely to be required as this is likely to be regarded as incidental. Where the work *was* the focus then clearances would be required, unless falling under the fair dealing exceptions. A useful question to ask is 'would this picture make sense without the copyright work?'. An installation shot of an exhibition, even if lots of different images are included in focus, would arguably not make sense without the artworks and so incidental use may not apply.

Example of the image being the focus



Graham Sutherland
Green Tree Form: Interior of Woods 1940
© Tate

Supreme Court following the appeal from the Court of Appeal decision in the *Meltwater* case [2011] EWCA Civ 890 <http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html> Accessed: 22 January 2014 . At EU level, see C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECDR 16

²³"[H]eadlines are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works" *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984

²⁴ Court of Justice of the European Union

²⁵ C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECDR 16

²⁶ C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECDR 16

Example of incidental use – the image is not the focus



5. Subject matter: Only certain work is protected by copyright

Only if a work falls into one of the following categories can it enjoy protection under UK copyright law:-

- Original literary work (this can include computer programmes)
- Original dramatic work
- Original musical work
- Original artistic work
- Films
- Sound recordings
- Broadcasts
- Typographical arrangements (for example shape poems)
- Databases (these can fall under literary copyright as well as specific database rights²⁷)

If it isn't one of these, it cannot be protected.

²⁷For more information, see http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm and <http://www.ipo.gov.uk/types/copy/c-otherprotect/c-databaseright.htm> Accessed: 18 January 2014

Exceptions to copyright: 'fair dealing'

Defences to the unlicensed use of copyright material – 'fair dealing' exceptions	<ul style="list-style-type: none"> • Criticism and review • Reporting of current events • Quotation • Parody, caricature and pastiche • Non-commercial research or private study 	16
How do you define 'fair' in relation to the 'fair dealing' exceptions to copyright?	<ul style="list-style-type: none"> • Factors to consider <ul style="list-style-type: none"> - Commercial use - Quantity - Proportionality - Other uses - Context 	16
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Attribution		20
New exceptions to copyright 2014 benefitting museums, libraries and archives specifically	<ul style="list-style-type: none"> • Preservation copies • Dedicated terminals • Research and teaching • Disabled access 	21

Defences to the unlicensed use of copyrighted material – ‘fair dealing’ exceptions

A number of exceptions exist under UK law regarding copyright infringements (ss28 – 30 CDPA 1988). ‘Fair dealing’ in UK law permits the use of copyright material to be used without consent from the copyright owner for the purposes of:-

- Criticism and review
- The reporting of current events
- Non-commercial research or private study
- Quotation
- Parody, caricature and pastiche

Different countries have different rules governing the precise terms of exceptions, for example the United States has the doctrine of ‘Fair Use’.

In order to rely successfully on the fair dealing exception the user must show:-

1. That the copying falls under one of the categories above and
2. That the copying is ‘fair’
3. Sufficient acknowledgement (unless impossible for reasons of practicality or otherwise)

How do you define ‘fair’ in relation to the fair dealing exceptions to copyright?

The exceptions for the ‘permitted acts’ listed above rely on the use being ‘fair’. Again, there is no precise definition of ‘fair’, but there are some factors to consider which can offer useful guidance. A good starting point is to ask “would someone else consider it fair, in all the circumstances, to copy this work without the consent of the copyright holders?”.

Factors to be considered are:-

- **Commercial use:** Just because a use is commercial it does not mean that it is automatically unfair. However, it can sometimes suggest unfair use of the work. Use will not be fair if it deprives the copyright owner of their ‘economic benefit’ in relation to their work. For this reason, use of copyright material where there is a

commercial element to it generally needs to be more restrictive than use where there is not a commercial element.

- **Quantity:** Given the nature of the use, is the amount of copyright material used fair? The more predominant the use of unlicensed copyright material is over other material, the less likely it is to be fair. For example, a leaflet which largely consists of reproductions of copyright works and very little text about them may be less likely to be fair, even if it is criticism and review.
- **Proportionality:** Is the use proportionate and goes no further than is reasonably necessary for the permitted act? It should not go beyond, either in quality or quantity, the level needed for criticism/review, quotation, parody or the news report. Gratuitous use of images not related to the permitted act, for example, will not be fair.

An example of using material from a broadcast would be that the review/critique would be based on the principle of 'say what you see' – if you are discussing the use of lighting to capture a particular emotion then the footage used must show this. Equally, if you were making a programme/video yourself for the purposes of criticism and review guidance suggests that you should not run the selected footage for a period longer than 5 seconds maximum before the voiceover begins to analyse the idea you are seeking to address.

The introduction of the quotation exception, particularly regarding the use of short film clips, outlines the importance of considering the deprivation to the copyright owner of their 'economic benefit' and the need to pay close attention to the proportionality requirement. Whilst the CDPA does not stipulate durational limits, footage libraries derive income from licensing short (under 30 seconds) clips and so an overly long clip could be seen as, again, unfair.

- **Other uses:** If the use, while technically within the scope of the exception is really for another purpose (such as advertising), it may not be fair. For example, a lavishly illustrated book about an exhibition, whilst containing criticism and review, may well not be fair since the principle purpose for which people buy it will not be criticism and review but for the illustrations in it.

Equally, whilst criticism and review can be negative, if a piece is generally unfair – for example simply a vitriolic attack - then this may not be 'fair' in the copyright sense. However, the right to freedom of expression is protected by law²⁸ and a

²⁸Article 10 ECHR, as entered into domestic legislation via the Human Rights Act 1988.

balancing act would always be conducted by the courts in this regard. As a side note to this though, please beware of defamation.

- **Context:** An important point to take from this is that **context is key**.

Examples where uses *may* be regarded as fair under criticism and review are:-

- A free leaflet giving a guide to an exhibition which provides exhibition visitors with details and guidance on the nature or purpose of the artistic works contained within the exhibition (such as the use of light, intended meaning, use of symbolism) and using small and/or low quality reproductions of the works as a guide to these points
- A leaflet in which pieces of work are being commented on or where a work has been reproduced to illustrate particular points – for example a cropped image of one significant portion of an artistic work
- Use of a piece of work in electronic form either in slides or a presentation to illustrate the nature of the works in a collection or the techniques of a particular artist or group of artists of a particular period or style

The reporting of current events and fair dealing

The following *may* be fair dealing:-

- The use of one or two illustrations of artistic works (with the exception of photographic works) in connection with a press release to inform the press of a particular exhibition or new work acquired
- Caution! Use in relation to a newsletter to be sent out to a mailing list may be fair, BUT it is less likely to be fair if it can be construed as being more of an advert for the exhibition than the reporting of a newsworthy event. Great caution should be exercised in using copyright works without permission in relation to publications such as newsletters etc – generally this permitted act is very narrowly construed

Quotation

Prior to the 2014 amendment, whilst criticism and review permitted the use of quotations and extracts it did not permit the general use of quotations elsewhere. An example would have been the use of a quotation in an academic work that was not used in a critical or review context.

Post amendment, quotations and extracts can now be used provided that (a) the use is fair (b) the work has been made available to the public (prior to your use) and (c) there is sufficient acknowledgement. Importantly, the exception covers all types of work, including films, broadcast programmes and recordings and photographs, not simply literary works.

The IPO outlined the types of uses envisaged by the quotation exception in their impact assessment, which provides some insight into what 'fair' might be in relation to different types of work. These are not definitive guidelines but provide some useful context for assessments. Regarding text based works, fair dealing was seen as likely to reflect limits currently set out in publishers' guidelines; non-text based works currently carry greater uncertainty.

Further information

- IPO Impact Assessment Guidelines:
<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ia-exception-quotations.pdf>

Parody, caricature and pastiche

What constitutes parody, caricature and pastiche remains undefined in the CDPA and, because this exception is new to UK law, there is currently no domestic case law to provide guidance. However, looking to Europe and the US provides some useful reference points.

- 'Parody' is to be understood in accordance with its usual meaning in everyday language²⁹
- Originality: A 'bit of originality' is required in the parody, as much because "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination"³⁰
- It does not necessarily have to be funny

²⁹ Case C-201/13 *Johann Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*. See also <http://the1709blog.blogspot.co.uk/2014/09/parody-deckmyn-and-right-to-object-to.html> Accessed: 12 November 2014

³⁰ *Campbell v Acuff-Rose Music Inc* 510 US 569 (1995) <https://supreme.justia.com/cases/federal/us/510/569/case.html> Accessed: 12 November 2014

It is important to emphasise that 'fairness' criteria apply – fair dealing only allows you to make use of a limited amount of someone else's work.

Further information

- IPO Exceptions to Copyright: Guidance for creators and copyright owners
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359250/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf
- A number of good IP blogs have written about the parody exception and the developing case law
 - IPKAT BLOG: <http://ipkitten.blogspot.co.uk/2014/05/o-deckmyn-whats-in-parody-waiting-for.html> ; http://ipkitten.blogspot.co.uk/2014/03/is-uk-parody-exception-parody-of-parody_29.html;
 - 1709 Blog: <http://the1709blog.blogspot.co.uk/2014/09/parody-deckmyn-and-right-to-object-to.html>;
<http://the1709blog.blogspot.co.uk/2014/09/could-ladybird-bring-first-parody.html>

Attribution

The law also requires that, where material is fair dealt, that the work (creator and title) is acknowledged unless it would be impossible for reasons of impracticality or otherwise³¹. Whilst there is no legal requirement to acknowledge the copyright holder, it would be considered best practice.

Examples of such acknowledgement are:-

- Artist Title of artwork Year © Owner of copyright
- Programme clip: Title of programme, year produced © Owner of copyright
Director (if a film)
In this scenario, it is preferable to place this information on screen as soon as the material is being shown and to hold that information on screen for a minimum of 5 seconds. Copyright holders are also acknowledged in the end credits.

Licences also generally require that the copyright owner is acknowledged with the artwork in question.

³¹ ss29(1), 29(1B), 30(1), 30(3) Copyright Designs and Patent Act 1988

This is an example of how Tate attributes artwork on its website:

Paul Nash

The Orchard ?1914

The title of the work, the artist and the date of creation also appears when the mouse hovers over the image



© Tate
[License this image](#)



New exceptions to copyright legislation 2014 benefiting museums, libraries and archives specifically

From the 01 June 2014, UK museums, libraries and archives benefit from a range of new exceptions to copyright law. The key exceptions are as follows:

1. Preservation copies

Copies of works for material held in museum, archives & galleries can now be made for preservation purposes without first having to seek the copyright holder's consent

provided that a) it is held in a permanent collection and b) it is not reasonably practicable to purchase a replacement. These organisations can also format-shift content to preserve it, make copies for study purposes, or carry out large-scale conservation work without having to clear copyright.

2. Dedicated terminals

Copies of all copyright works in museum, archives and galleries can be made available to members of the public on dedicated terminals on the premises without having to first seek permission. 'Dedicated terminals' means that the material can only be accessed on site (ie no internet access).

3. Research and teaching

Fair dealing non-commercial research and private study now extends to all classes of copyright work, not just some as was previously the case. Museums and galleries will also be able to benefit from some of the exceptions that previously only libraries could. Whilst teaching at museums, galleries and archives, staff can reproduce copyright works to illustrate a point as long as the activity is (a) non-commercial (b) there is sufficient acknowledgement and (c) the use is fair and reasonable to the rights holder.

Museums, libraries and archives can make a single copy of a limited amount of all works in copyright for users, for their non-commercial research or private copying purposes (the whole amount if unpublished and the rights holder has not said no). A declaration needs to be given in writing, although a declaration form does not need to be used, and IF a charge is made, this must be on a cost recovery basis. Users can make a copy of a limited amount of all works in copyright in museum collections for their own non-commercial research or private study purposes.

4. Disabled access

Disabled users can be provided with an accessible copy of the whole or part of all museum collection items as long as a commercial copy suiting their needs is not available.

Further Information

- The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014:
<http://www.legislation.gov.uk/uksi/2014/1372/contents/made>

- IPO guidelines
<http://www.ipo.gov.uk/copyright-guidance-libraries.pdf> and here
<http://www.ipo.gov.uk/copyright-guidance-research.pdf>.

Orphan works

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What is an orphan work?

Unfortunately, despite best efforts, there are works within collections that may still in copyright but whose creator cannot be identified or the copyright holder traced. Until October 2014, the CDPA 1988 did not provide a defence against infringement of copyright, but two recent changes have now altered that position, one through EU legislation, the other via a UK Government backed Orphan Works licensing scheme. The two approaches offer different levels of permitted use of orphan works and an overview of the differences is provided below and in the appendices of this document.

Each current route carries its own limitations and challenges. If the two legislative routes do not meet an organisation's requirements then publishing an orphan work remains a matter of risk assessment, with due diligence remaining vital in helping to mitigate against any damages should a claim be brought. One scenario where a risk-based approach might still be considered is, for example, if it is judged that it is extremely unlikely for a work's author or copyright holder ever to be traced and the work is a standalone artwork or photograph to be made available on a gallery's website and so published outside the UK. In this scenario it is arguable that, for non-commercial use, resources might be allocated more effectively rather than paying a fee to licence that work formally.

EU Directive on certain permitted uses of orphan works

The EU Directive provides an exception to allow heritage and cultural institutions³² to digitise written, audio-visual or cinematic works and sound recording and display them on their websites for non-commercial use only within the EU.

In order to benefit from the Directive, there are three key elements to consider:-

- Whether you are an institution which can benefit from the Directive
- Whether the material falls within the permitted category of work
- Due diligence requirements

Institutions that benefit from the Directive include public libraries, educational establishments and museums, archives and public service broadcasting institutions. This guide focuses on the rules governing museums, galleries, archives etc as the rules concerning public service broadcasters are slightly different.

³² These include public libraries, educational establishments and museums, archives and public service broadcasting institutions

The Directive covers a number of categories of work:-

- Published written works
- Cinematographic or audio visual works and phonograms (sound recordings)
- Unpublished works of the kind mentioned in (a) and (b) which have been publicly accessible

A key point to remember is that the Directive does not cover standalone artworks /photographs - only embedded photographs and artworks (unlike the UK Orphan Works Licensing scheme). Examples of embedded works are a photograph published in a newspaper seen in the context of the published page or an artwork or illustration published in a book in the context of a page in that book. Embedded works must be treated as having their own standalone copyright so require due diligence searches separate to searches required for the work they are published in.

A diligent search must be conducted a) in the Member State where the work was first published (not where the institution is) or b) other countries if there is evidence to suggest that relevant information on rights holders is to be found in those other countries. What constitutes due diligence is discussed below.

Further information

- Directive 2012/28/EU:
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

UK orphan works licensing scheme

The UK licensing scheme was introduced on 29th October 2014. The scheme has a much broader remit than the EU exceptions, applying to all types of orphan works including standalone photographs and artworks, as well as allowing for commercial uses. The scheme is also not limited to cultural and heritage bodies, but it only applies to the UK.

The scheme charges fees for the use of orphan works, tailored according to usage. There is a flat rate administration charge as well as a variable licensing fee. As with the EU Directive, due diligence must be conducted as part of the licensing application and provided to the licensing body as part of the approval process. A licence issued under the scheme lasts for seven years.

Further information

- Apply for a licence: <https://www.gov.uk/apply-for-a-licence-to-use-an-orphan-work>
- Legislation: The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014
<http://www.legislation.gov.uk/uksi/2014/2863/contents/made>

Due diligence

Both the European and UK orphan works approaches require due diligence to be conducted and evidenced. Should an organisation pursue a risk managed approach instead of the two statutory routes, due diligence records are also vital to demonstrate that best efforts were made to trace the copyright holder and help potentially to mitigate damages should an action for breach of copyright be brought.

Broadly speaking, all reasonable enquiries should be made to trace the copyright holder. To help identify what is 'reasonable', ensure consistency and, importantly, provide evidence that due diligence has been conducted it is good practice to create a 'checklist' of key sources that should be approached. An example of Tate's Orphan Works Checklist is included in the appendices section. Whilst this checklist is not definitive, and should be tailored according to the particular work under investigation and the use being made of the work, it is a useful indicator of the kind of enquiries that should be made.

If a work is identified as orphan, then it is essential that a record be kept of all inquiries made in tracing the copyright holder. If possible, it is good practice to also publicly identify works as orphan. On Tate's website for example, there is a web page which lists those works³³.

Further information

- The IPO has issued guidance for due diligence searches under the UK scheme <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>

³³ Please see: <http://www.tate.org.uk/about/who-we-are/policies-and-procedures/website-terms-use/copyright-and-permissions/copyright-orphan-works> Accessed: 20 January 2014

Moral Rights

What are moral rights?	<ul style="list-style-type: none">• Right of attribution (paternity)• Right to object to false attribution• Right of integrity• Where moral rights don't apply• Performers	29
Duration of moral rights	<ul style="list-style-type: none">• Integrity and paternity• False attribution	30
The integrity right: a detailed overview	<ul style="list-style-type: none">• 'Treatment'• 'Derogatory'	30

What are moral rights?

Moral rights are the “rights that attach to the author’s personality as expressed in his or her work”³⁴ and are concerned with protecting the personality and reputation of artists/authors/film directors. They also protect the integrity of the artwork. In the UK, moral rights have a statutory footing under the CDPA 1988³⁵.

- **Moral rights basically comprise the following:-**
 - Right of attribution (paternity): to be identified as the author of the work/director of the film when a work is copied or communicated [ss 77-79 CDPA 1988]
 - Right to object to false attribution : being named in respect of a work not created by the author [s84 CDPA 1988]
 - Right of integrity: The right to object to derogatory treatment of the work. The idea here is associated with the prejudicial treatment of the honour or reputation of the author or director of the film [ss 80-83 CDPA 1988]

Some moral rights can be waived by consent [s87 CDPA 1988] and some have to be asserted – for example the right to be identified cannot be exercised unless it has been asserted³⁶.

- **Moral rights don’t apply:-**
 - Where the work is a computer program;
 - Where ownership of a work is originally vested in an author's employer;
 - Where the material is being used in newspapers or magazines;
 - Reference works such as encyclopaedias and dictionaries;
 - Typefaces³⁷
- **Performers also have moral rights which include the right:**
 - To be identified as the performer
 - To object to derogatory treatment of performance³⁸

³⁴ Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010) 227

³⁵Up until the introduction of the CDPA 1988, an author’s moral rights had to be enforced through a civil action in tort eg defamation, passing off, malicious falsehood

³⁶Authorship must be asserted in writing

³⁷ ‘Moral Rights’ Intellectual Property Office <http://www.ipo.gov.uk/types/copy/c-otherprotect/c-moralrights.htm> Accessed: 18 January 2014. Please note that, in the UK, typefaces can be protected by copyright, though this is not the case in the US.

³⁸<http://www.ipo.gov.uk/types/copy/c-otherprotect/c-moralrights.htm> Accessed: 18 January 2014

Duration of moral rights

Generally, moral rights last for the duration of copyright³⁹.

- Integrity and paternity rights: life plus 70 years
- False attribution: The right to object to false attribution however is limited to 20 years after the author's death

Unlike copyright, moral rights cannot be sold or assigned to another person. After the creator's death, they are dealt with by his or her personal representatives.

The integrity right: a detailed overview

This overview focuses on the integrity right, since the other moral rights are self-explanatory. For the right of integrity to be infringed there has to be 'derogatory treatment of the work'.

- **'Treatment'** means any 'addition to, deletion from, alteration to or adaptation' of the work. In layman's terms this must involve interference with the internal structure, sequence, organisation or meaning of the work. Examples of likely derogatory treatment are the colourising of black and white film, reproducing a drawing in a reduced size and re-coloured or chopping out a part of a painting. It has been suggested that simply displaying a work in a new or inappropriate context will not be a 'treatment' for these purposes in the UK, whereas it could be in France.
- **'Derogatory'** requires that the 'treatment' be a 'distortion' or 'mutilation' or if it is otherwise prejudicial or dishonours the reputation of the author. There is little case law on these terms, so uncertainty exists as to how these rules will be applied. However, it appears that increasingly an impact on reputation is a precondition for a finding of derogatory treatment (ie there is only a distortion if the reputation of the artist is threatened), even though the two terms were originally meant to be alternatives. This means publication, the circumstances and extent, could all be relevant factors in the test.

³⁹ In some countries, moral rights continue in perpetuity, for example France and Italy. A couple of interesting examples can be read about in the following blogs: (1) <http://ipkitten.blogspot.co.uk/2014/03/exclusive-rights-in-classical-art-works.html> (2) <http://ipkitten.blogspot.co.uk/2007/01/tm-enlightenment-moral-rights-misery.html> Accessed: 19 November 2014

Since the integrity right is tied to reputation, it is triggered only by the publication or communication of the work to the public.

Further information

- See the brief description on the IPO website <http://www.ipo.gov.uk/types/copy/c-otherprotect/c-moralrights.htm>
- Tate has also published a paper on digitisation and conservation which also contains an overview of moral rights
<http://www.tate.org.uk/download/file/fid/7389>

Trade marks

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Trade marks

What is a trade mark?

As well as something being subject to copyright, certain names, logos or symbols can be protected as trade marks.

The IPO describes a trade mark as “a sign which can distinguish your goods and services from those of your competitors (you may refer to your trade mark as your “brand”⁴⁰). Any distinctive element can be used such as words, letters, shapes, colours, pictures, numerals and drawings, or any combination of these⁴¹, provided that the particular trade mark office in the country which you are seeking to register the mark considers it distinctive enough. Examples of trade marks include the WH Smith logo and the name ‘Snow White’.

Why are trade marks legally protected?

Trade marks carry legal protection because they are understood to convey to consumers certain assurances as to the quality/nature of the product or service they will receive. Think for example of BMW – what comes to mind here? Quality German engineering, reliability etc. Trade marks are not necessarily only ‘logos’, for instance the signatures of Picasso⁴² and LS Lowry are also trademarked, as is ‘Snow White’.

‘™’ indicates an unregistered trade mark and ‘®’ signifies a registered one. It is unlawful to use the ® sign against an unregistered trade mark.

The differences between trade marks and copyright

1. **Registration - trade marks can be registered in certain circumstances:** Unlike copyright, trade marks do not arise automatically but can be registered. The governing statute is the Trade Marks Act 1994. Trademark protection is also territorial. Additionally, the goods or services to which the trade mark is applied must be registered. Not everything can be trademarked – for instance marks that

⁴⁰Intellectual Property Office ‘What is a trade mark (or brand)?’ <http://www.ipo.gov.uk/types/tm/t-about/t-what-is.htm>
Accessed: 15 January 2014

⁴¹ World Intellectual Property Organisation ‘Trademarks in General’ <http://www.wipo.int/madrid/en/faq/trademarks.html>
Accessed: 20 January 2014

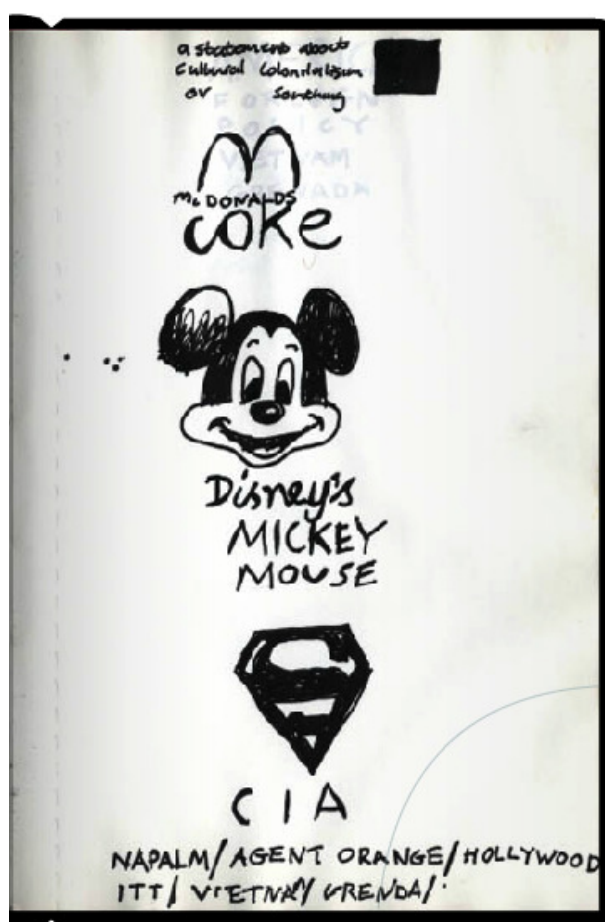
⁴²For an interesting example of how courts consider trademark infringements, see the case brought by the estate of Picasso against Daimler Maley, J ‘Picasso clan fail to airbrush out car name’ The Guardian, 2006
<http://www.theguardian.com/world/2006/jan/13/arts.spain>. For the judgement, please see C-361/04P Picasso v Picaro [2006]

describe the value, quantity or quality of goods/services or undistinctive marks cannot be registered. Equally, flags cannot be trademarked.

2. **Duration:** Unlike copyright, which has a fixed term (life of the artist + 70 years in most cases), protection of trade marks in the UK is renewable perpetually provided that a) the registration of the trademark is renewed (every ten years) b) the mark is actually used⁴³.

Trade marks found in archive works

In the context of an archive, trade marks may appear in drawings, as illustrated in the image below, which is taken from a sketchbook by Donald Rodney.



- © The Estate of Donald Rodney
- © McDonalds Corporation
- © Disney Corporation, Walt Disney (1901-1966)
- © DC Comics (1938)

⁴³ Padfield T Copyright for Archivists and Record Managers (4 ed Facet Publishing, London 2010) 252

In this picture the following are trademarked: the Superman logo, the McDonald's arch, Mickey Mouse (both the name and the image). 'CIA' (standing for the Central Intelligence Agency) is also trademarked in certain circumstances.

However, it would unlikely to be an infringement of a trade mark, for example, to reproduce the entirety of this image in a book or to place it online as part of an archival catalogue since, in such contexts, the images are not indicating the trade origin of goods and neither is there 'passing off' (ie the artist is not misrepresenting themselves to trade on the goodwill in the goods or services of a particular company)⁴⁴. It must be remembered however that copyright could still subsist.

Further information

- The World Intellectual Property Organisation provides a good overview of the subject <http://www.wipo.int/madrid/en/faq/trademarks.html>

⁴⁴ Padfield T Copyright for Archivists and Record Managers (4 ed, Facet Publishing, London 2010)252

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The licensing process

The first thing to remember is that standard licences are often used, as much to simplify rights management across collections as to ensure parity of rights across different rights holders. However, you do not have to accept all the terms of a licence and can negotiate to amend/delete clauses.

What makes a binding agreement?

Each party - the licensor(s) and the licensee(s) to the licence - must sign the agreement for it to be legally binding. This may sound obvious, but it can become complicated when a) dealing with multiple signatories b) dealing with a trust.

Multiple signatories (shared copyright)

Since copyright can be shared between several parties, how do you simplify the procedure? A simple way is to rely on 'counterparts'. This allows that, although each individual licence is signed by a separate party to that licence, the individual counterparts can be read together to form one complete licence.

An example of a counterpart clause is given below, taken from a standard Tate copyright licence:-

6. COUNTERPARTS

- 6.1 *This Agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original of this Agreement, but all the counterparts shall together constitute the one Agreement.*
- 6.2 *Transmission of an executed counterpart of this Agreement or the executed signature page of a counterpart of this Agreement by (a) fax; or (b) e-mail (in PDF, JPEG or other agreed document format) shall take effect as delivery of an executed counterpart of this Agreement.*
- 6.3 *No counterpart shall be effective until each party has executed at least one counterpart.*

Trusts and signatories

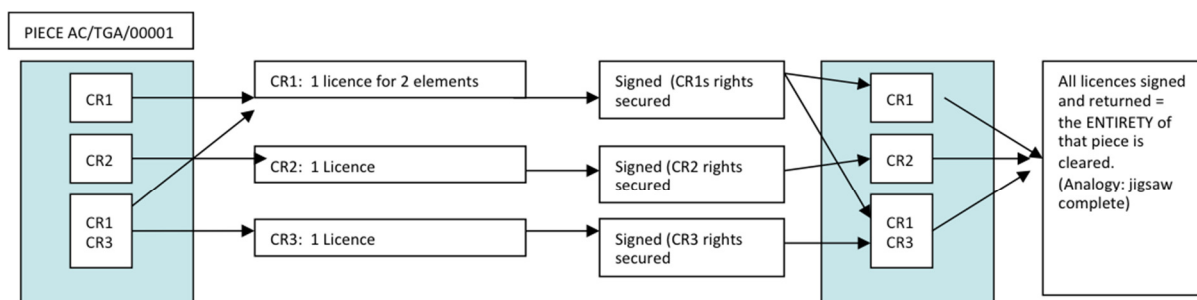
When dealing with the estates of artists you may be dealing with a trust, charities being an example of a specific type of trust. Trusts are legal entities, run by trustees on behalf of the beneficiaries of that trust. A trust can be set up for a sole beneficiary, or multiple beneficiaries, but the trustees in all circumstances have a legal duty to act solely for the benefit of those beneficiaries and can be held liable to those beneficiaries should they fail in their legal and fiduciary duties.

What has this got to do with licensing? As you know, a licence only becomes legally binding when signed by all parties to that agreement. For example, when Tate signs a licence with an artist the agreement requires the signature of the artist (or their legally authorised representative) and Tate's authorised representative. When licensing from a trust the licence must be signed by all of the trustees, unless there is a clause in the trust Deed (the legal instrument which establishes the trust and the terms it operates under), which authorises one trustee to sign on behalf of the others. If such a clause exists, you should ideally ask to see of a copy of the Deed. This may sound convoluted but remember that trustees have a legal duty to the beneficiaries and can be held liable for any losses to the trust – it is therefore for their own protection as well as that of the licensees that the agreement is properly signed.

As a side note, if the trust is set up for a sole beneficiary then of course the beneficiary can sign on their own behalf.

How to license artwork which has multiple copyright holders

Sometimes in archives there will be items (eg an individual page, or a collage), which has multiple copyright holders. Remembering that licensors can grant a licence only for the rights that they hold, the suggested approach to licensing would be as follows:-



Typical approach where multiple rights holders

In this example, there are three separate copyright holders, so three licences would be sent out, each asking the licensor to grant the rights that they hold. When all the licences are returned, that 'page' is completely licensed.

What if licensors seek variations in a licence and what is the impact on a piece with multiple copyright holders?

Ideally, all the licences would be identical or contain identical terms. However, licensors can of course seek to vary a licence sent to them or use their own. Where there are different licences being used, the most restrictive licence terms guide the 'whole' in terms of usage of that page in its entirety, though individual elements are guided by the terms of the copyright licence granted.

Keeping track of licences and relationships to works

Linking the copyright item to the licence(s) is crucial for meaningful rights management. At Tate, each licence has its own unique identifying number and the relevant licence is in turn linked to the item(s) which it applies to.

Always keep hard copies of the licence and also create PDFs/electronic copy of the licence. It is incredible how often paperwork can become lost over time, and electronic copies are an invaluable safeguard.

Creative Commons licence

New initiatives in licensing material: Creative Commons

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What are the challenges of Creative Commons?

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New initiatives in licensing material : Creative Commons

Creative Commons is a copyright licensing initiative that aims to provide a simple, standardised way for a copyright owner to license their work on their own terms within an internationally recognised legal framework. There are currently six different Creative Commons licence types available in the latest 4.0 iteration, ranging from the most open type, Attribution 4.0, which allows adaptations to be made of the work and shared and used for commercial purposes provided that the original copyright owner is attributed, through to more restrictive licences where no derivative work is permitted by the licensor and commercial usage is forbidden. The unique thing about Creative Commons licences is the 'chain' effect – ie the licence permits each licensee, in turn, to license the material under the same terms to another without having to license each time from the original licensor.

Creative Commons licensing is increasingly being adopted by museums, galleries and archives as a means of democratising access and encouraging engagement with artistic works and artists held in collections, as well as simplifying the licensing process for both licensors and licensees. For the Tate's Archives and Access project⁴⁵, Tate is asking licensors to grant a **CC BY-NC-ND 3.0 Unported (Attribution, Non-Commercial, No Derivatives)** licence. This licence **only** allows others to download the work and share it with others as long as the copyright holder is credited and the work is not altered or used commercially⁴⁶.

What are the challenges of Creative Commons?

Like any new initiative, particularly one involving licensing, Creative Commons can initially appear unsettling to licensors. A number of elements contribute to this, for example the 'licence chain' can raise concerns about tracking and controlling the use of copyright work, in particular the potential for unlicensed commercial use. It is helpful therefore to provide potential licensors with practical information about Creative Commons licensing, as well as information detailing the resolution of the images that will be made available. In our own work Tate has produced brief overviews to send to licensors covering these areas (please see appendix). Additionally, Tate will provide information to Creative Commons licensees outlining appropriate usage through illustrative scenarios, reiterating what the licence does

⁴⁵ Supported by the Heritage Lottery Fund

⁴⁶ Please see the licence for the specific terms.

and does not permit. Additional safeguards include limiting the resolution size of images available to download and embedding of metadata within licensed work.

Whilst each copyright holder is of course entitled to manage their rights as they see fit, Tate would encourage organisations to find out more about Creative Commons.

Further information

- Creative Commons: <http://creativecommons.org/>
- The Creative Commons licence which Tate uses can be found at:
http://creativecommons.org/licenses/by-nc-nd/3.0/deed.en_GB

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Useful resources

<p>Tate Legal</p>	<p>Tate Legal is very happy to share expertise with our learning partners. If you have any queries, please don't hesitate to contact us and we will try to help:</p> <ul style="list-style-type: none"> • Bernard Horrocks, Intellectual Property Manager E: bernard.horrocks@tate.org.uk • Carrie Bishop, Project Rights Officer, Archives & Access Project (Oct 2013-January 2016), now at: E: Carrie.Bishop@bl.uk
<p>Archives and Records Association</p>	<p>This site has useful information about copyright as it applies to archives</p> <ul style="list-style-type: none"> • http://www.archives.org.uk
<p>Association of Learned and Professional Society Publishers</p>	<p>Training Courses: The ALPSP offer an e-learning course on international copyright – which can be started at any time and lasts for 3 months. Further details can be found at:-</p> <ul style="list-style-type: none"> • www.alpsp.org/Ebusiness/TrainingAndEvents/ALPSPeLearning/10ELICRDetails.aspx. <p>Whilst this course charges a fee, they have an e-learning demo available which gives around 1 hour free access to their International Copyright course.</p> <ul style="list-style-type: none"> • The demo can be found at: www.alpsp.imago3.com The demo covers: What exactly is copyright, who owns it and how long it lasts and other basics.
<p>BBC</p>	<p>The BBC has a really useful basic guide to film making, including related copyright issues</p> <ul style="list-style-type: none"> • http://www.bbc.co.uk/filmnetwork/ • http://www.bbc.co.uk/filmnetwork/filmmaking/guide/
<p>Collections Trust</p>	<p>Some useful guides about dealing with IP as well as other handy information</p> <ul style="list-style-type: none"> • www.collectionstrust.org.uk

Creative Commons	<p>This website has information about Creative Commons, as well as copies of all the licences</p> <ul style="list-style-type: none"> • www.creativecommons.org • Note: Creative commons has just updated its licences to v 4.0. If you are linking to the Creative Commons site for licences, please bear in mind that the licences can be updated, and so you will not only need to identify the version that your organisation is using, but also included the correct link to that version
HMSO (Her Majesty's Stationery Office)	<p>Key primary source for guidance and information about Crown copyright</p> <ul style="list-style-type: none"> • www.hmso.gov.uk
Intellectual Property Office (IPO)	<p>This site contains lots of useful information, definitions and explanations and the information on the site can be used and reused free of charge under the terms of the Open Government Licence. http://www.ipo.gov.uk/copyright.htm</p> <ul style="list-style-type: none"> • www.ipo.gov.uk
National Archives	<p>The National Archives has useful FAQ pages, information and links. For example regarding Crown copyright</p> <ul style="list-style-type: none"> • www.nationalarchives.gov.uk
PRS for Music	<p>PRS for Music, one of the key music rights organisations provides some overviews of music copyright</p> <ul style="list-style-type: none"> • http://www.prsformusic.com/aboutus/FAQs/copyrightfaq/Pages/default.aspx • http://www.prsformusic.com/SiteCollectionDocuments/Copyright/Copyright_Law_Introduction.pdf

Strategic Content Alliance	<ul style="list-style-type: none"> • The Strategic Content Alliance is a great resource for information about IP/Copyright. It's an initiative funded by a number of organisations, including the Heritage Lottery Fund, Arts Council of England, the BBC and the British Library • For a general overview visit: http://www.jisc.ac.uk/whatwedo/programmes/contentalliance.aspx
Strategic Content Alliance (copyright e-learning module)	<ul style="list-style-type: none"> • A new e-learning module from the JISC-led Strategic Content Alliance to help update people dealing with intellectual property rights in universities, colleges, museums, libraries and other public bodies. It is not exhaustive but is a good introduction to copyright and intellectual property, as well as providing, via its toolkit, pro forma licences. • The modules are licensed under Creative Commons Licence (CC-BY-SA) so they can be downloaded by you and shared (under the same terms as the original CCL) by you to others • The IPR toolkit : http://www.jisc.ac.uk/news/confused-by-copyright-in-the-dark-about-ipr-07-apr-2011 • Module links: http://www.web2rights.com/SCAIPRModule/ &http://sca.jiscinvolve.org/wp/allpublications/ipr-publications/
World Intellectual Property Organisation (WIPO)	<p>The World Intellectual Property Organisation site provides a good overview of IPRs from an international perspective</p> <ul style="list-style-type: none"> • www.wipo.int • http://www.wipo.int/about-ip/en/
Blogs	<p>IP blogs can prove a user friendly resource for current case law, statutory changes and general discussions about IP</p> <ul style="list-style-type: none"> • the1709blog http://the1709blog.blogspot.co.uk • IPKAT: http://ipkitten.blogspot.co.uk

Statutes & case law

United Kingdom

Useful Statutes

- Copyright, Design and Patents Act 1988
<http://www.legislation.gov.uk/ukpga/1988/48/contents>
- Data Protection Act 1988
<http://www.legislation.gov.uk/ukpga/1998/29/contents>

Useful Sites

- Legislation.gov.uk: <http://www.legislation.gov.uk>
This site holds all UK government legislation
- Bailli: <http://www.bailii.org/>
You can also find British and Irish case law & legislation, European Union case law, Law Commission reports, and other law-related British and Irish material at Bailli

Europe

Useful Sites

- Europa: http://europa.eu/eu-law/case-law/index_en.htm
You can find EU case law on this site. It's not very user friendly but it holds all current judgements of the EU courts. BAILLI (see 'Useful sites: UK) also links to EU decisions
- Information regarding EU copyright law:
http://ec.europa.eu/internal_market/copyright/index_en.htm
- Information regarding EU terms of protection:
http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm
- European Court of Human Rights (ECtHR):
<http://www.echr.coe.int/Pages/home.aspx?p=home>
You can find Strasbourg decisions on this site.
- The ECtHR is concerned with alleged infringements of the European Convention on Human Rights (ECHR) and is based in Strasbourg. The Court of Justice of the European Union (CJEU) addresses questions of EU law and is based in Luxembourg. It is an institution of the European Union.

Useful books

For all legal texts – remember to always choose the most up to date edition.
Depending on the text, editions can be updated annually

- A User's Guide to Copyright (6th ed), eds Flint, Fitzpatrick and Thorne, Tottel, 2006, ISBN 9781845920685
- Art and Copyright (2nd ed), Simon Stokes, Hart Publishing, 2012, ISBN 9781849461627
- Dear Images: Art, Copyright and Culture, ed Daniel McClean and Karsten Schubert, Ridinghouse, 2002, ISBN 0954171020
- Copyright: Interpreting the law for libraries, archives and information services (5th ed), Graham P. Cornish, Facet, 2009, ISBN 9781856046640
- Copyright for Archivists and Records Managers (5th ed), Tim Padfield, Facet, 2015, ISBN 9781856049290
- Copyright: A Practical Guide (2nd ed), Naomi Korn and Gordon McKenna, Collections Trust, 2015, ISBN 9781900642194
- Copinger and Skone James on Copyright (16th ed), Kevin Garnett, Gillian Davies and Gwilym Harbottle, Sweet & Maxwell, 2011, ISBN 978041404331
- Intellectual Property Law (4th Ed) Lionel Bently and Brad Sherman, OUP, 2014, ISBN 9780199645558 (Good undergraduate text)

Terminology

Legal terminology

Licensor	The party who grants another party a licence
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Licensee	The party who is granted the licence
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Statutory Instrument (SI)	A statutory instrument is a form of delegated or secondary legislation. Essentially it is law made by a person or body other than the legislature but with the legislature's authority conferred by primary legislation. If primary legislation can be understood as setting out broad principles / outlines, then SIs can be seen as fleshing out the details to implement the substantive provisions of the statute.
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Trusts

Trust	<p>A trust is a legal entity, created by the settlor(s) which directs property (including 'intellectual' property) to be held on trust for the benefit of one or more persons (the beneficiaries). The trust is administered by trustees – one or more persons who hold the legal title to administer the trust property on behalf of the beneficiaries (who retain the beneficial/equitable ownership of the property). The terms governing the trust are set out in the trust Deed (see below), as well as being governed by overarching legal and fiduciary duties.</p>
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A charity is a specific form of trust, governed by specific legislation.

Trust Deed	A Trust Deed is the legal instrument that details who the beneficiaries of the trust are and the terms under which the trust operates.
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Trustee	A Trustee holds the <i>legal</i> title to the property on behalf of the beneficiaries. A trustee can be an individual or a legal person (a company, a public body).
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Beneficiary	The individual(s) who hold beneficial (equitable) title under a trust. There can be one (sole) beneficiary or multiple beneficiaries.
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Copybites

C	CDPA	Current legislation in the UK is <i>the Copyright, Designs and Patents Act 1988</i> (as amended), known as the 'CDPA 1988'. Copyright is the exclusive right to control copying of certain kinds of work for a limited time. Each country has its own copyright law but there are international agreements to help provide global protection.
O	Originality	In most cases, a work has to be considered 'original' and fixed in material form to qualify for copyright protection. In copyright terms, 'original' doesn't have to mean new, novel or unique – just that the work 'originated' with the creator. Copyright does not protect an idea, only the expression of the idea.
P	Person's Ownership	If you create a work as a non-employee, you usually automatically own copyright. If you create it during the course of your job, your employer will usually own the copyright. The owner of a physical work does not necessarily also own its copyright. The copyright symbol © is not a legal requirement for copyright protection, but using it helps show you are serious about copyright.
Y	Your responsibilities	If you infringe copyright, you could be held personally liable and face civil and criminal proceedings. Think: is this item in copyright? If so, have I got the necessary consent to copy it? There's no harm in double-checking.
B	Beware: Internet!	It's not always the case that material on the internet can be copied freely without permission. Downloading, forwarding or making hard copies could land you in trouble. There may be many different owners of copyright within the same website: the images might belong to one person, the text to another, the music to somebody else. A website itself may be protected as a 'database' and include other intellectual property rights such as trade marks or design rights. Content with Creative Commons licences can be copied in limited ways.

I	Infringement	<p>All the following things done to a work potentially constitute infringement:-</p> <p>Copying it; issuing copies of it; renting or lending it; performing, showing or playing it; communicating it to the public; adapting it. Creators also have moral rights to be identified as a work's creator, plus the right to object to the work's derogatory treatment. It can also be an infringement to authorise another person to do any or all of these things. Both could lead to civil or criminal proceedings</p>
T	Term	<p>Copyright lasts for the creator's lifetime, plus 70 years after the end of the year they die. If the creator is unknown, copyright usually expires 70 years after the work was first published. Unpublished works and Crown copyright works have different copyright terms. If in doubt seek specialist advice.</p>
E	Exceptions	<p>Sometimes copying can be done without permission of the copyright holder, although it's always best to seek specialist advice in this tricky area. Primary exceptions are 'fair dealing' copying for non-commercial research and private study, and also for criticism and review, quotation and news reporting; copying for preservation purposes; use on 'dedicated terminals'; certain educational uses; parody; incidental inclusion of a work within another work; copying an insubstantial part of a work; and reproducing a work by an unknown creator when it's reasonable to assume that copyright has expired.</p>
S	Subject Matter	<p>Only if a work falls into one of the following nine categories can it enjoy protection under UK copyright law: original literary, dramatic, musical & artistic works; films, sound recordings, broadcasts, typographical arrangements and databases. If it isn't one of these, it cannot be protected.</p>
© Bernard Horrocks 2015		

Transforming Tate Britain: Creative Commons licence information sheet

This information sheet is sent out to licensors to provide a basic overview of Creative Commons. Since it is a relatively new concept for many licensors, the aim is to provide information, resources and, importantly, reassurance as to why Tate is adopting this licensing approach and the terms under which the material will be licensed.

Transforming Tate Britain: Creative Commons Licence Information Sheet

Why is Tate introducing the Creative Commons Licence?

One of Tate's core goals is to promote public understanding and enjoyment of British art both within the UK and worldwide, with online engagement central to furthering this aim. Tate Online is already widely recognised as among the best gallery websites in the world, delivering insightful, engaging content. The Archives and Access project aims to further strengthen participation, promote enjoyment of our cultural heritage and foster creativity by engaging Tate audiences wherever they are online. As part of this progression, Tate wishes to open up its digital content for use by others for non-commercial, educational purposes by introducing Creative Commons licensing. Many other international galleries and museums have adopted this approach to facilitate open access whilst protecting the rights of copyright holders.

The aim is to provide a simple, standardized way to grant copyright permission to an artist's creative work for educational and non-commercial purposes, removing the guesswork from licensing images for ordinary people within an internationally recognised framework.

How will Creative Commons work in practice?

Tate has adopted the **CC BY-NC-ND 3.0 Unported (Attribution, Non-Commercial, No Derivatives)** licence for this project. This licence **only** allows others to download the work (as a screen resolution image) and share it with others as long as the copyright holder is credited and the work is not altered or used commercially. To protect the work further, metadata is embedded in the image which carries all required licensing information.

Whilst this is the most restrictive of Creative Commons licences, it enables the twin goals of broadening access to Collection material and promoting knowledge sharing about the artist, whilst ensuring that copyright holders and creators get credit for their work and are protected by law.

What does the BY-NC-ND licence allow?

The BY-NC-ND licence means that the Licensor (you – the copyright holder) licenses Tate:-

- to **SHARE**: to copy, distribute and transmit the work
- **PROVIDED** that:
 - **Attribution (BY)** — licensees must attribute the work in the manner specified by Tate (but not in any way that suggests that Tate endorses you or your use of the work)
The attribution will be: © [Rights Holder], Released under a CC BY-NC-ND licence, [Tate Image Identification Number]
 - **Non-commercial (NC)** — licensees may not use the work for commercial purposes
 - **No Derivative Works (ND)** — licensees may not alter, transform or build upon the work

For more information about Creative Commons licences and the ethos behind open access

- <http://creativecommons.org/>
- http://creativecommons.org/licenses/by-nc-nd/3.0/deed.en_GB

Art and Artists image resolution factsheet

This factsheet shows the two sizes of image that are available on the Tate website, with the Size 9 image being the one that will be made available to download under the Creative Commons Licence. The idea behind this sheet was to be able to show licensors the quality of the images that would be made available

Archives and Access Image Resolution Factsheet

Tate website images set at 300dpi on A4 to demonstrate the potential size at print quality.

It should be also noted that many web images show noticeable JPEG compression artifacts (eg image distortion; 'staircase' noise along curving edges, 'blockiness' in busy regions (also known as 'quilting' or 'checkerboarding') which makes them unsuitable for print use.

Image: Joseph Mallord William Turner A Fresh Breeze (After Sheerness and the Isle of Sheppey)

Size 9: 649 x 730 px



Images this size are typically used on artwork detail pages

Size 10: 1365 x 1536 px



Images this size are used, for example, on full screen slide shows

2014 changes: statutory instruments

2014 saw significant changes in the law governing UK copyright, with at least nine new statutory instruments amending legislation being introduced. An overview of the relevant statutory instruments can be found at:

<https://www.gov.uk/government/publications/bis-seventh-statement-of-new-regulation-regulations-covering-january-to-june-2014>

1. The Copyright (Regulation of relevant licensing bodies) Regulations 2014 (Codes of Conduct)
To improve the efficiency, governance and accountability of collecting societies through remedying gaps in self-regulation, and to enable the introduction of extended collective licensing.
2. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Archive & Preservation)
To make it easier to preserve creative content held by libraries, archives, museums and galleries by widening the existing preservation exception – extending it to cover all types of copyright work and to apply to more institutions.
3. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Quotations)
To permit the use of quotations from copyright works for purposes not already covered by existing exception for criticism and review.
4. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Educational Use)
To amend copyright exceptions for education, so that copyright does not unduly restrict education and teaching, without undermining incentives to creators.
5. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Copyright Exceptions for disabled people)
To simplify the law and ensure that as many people as possible who have disabilities that prevent them accessing copyright works in their original format are able to benefit from accessible versions of these works.
6. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Private Study)
To make available, all copyright works, including sounds recordings, films and broadcasts, for reasonable use in genuine research and study, while not unduly infringing the rights of copyright holders in such material.

7. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Text & Data Analytics)

To permit copying where it is for the purpose of applying analytic technologies, in cases where access to articles and/or data has already been gained (e.g. by subscription), and the works have been provided to the user, separately from the publisher or provider's system

8. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Parody)

To introduce an exception into copyright law allowing limited use of copyright works for the purposes of parody, caricature and pastiche.

9. The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2014 (Private Copying)

To permit a consumer who has lawfully bought a copy of a creative work to reproduce that copy for their own private and non-commercial use.

Tate Guide to copyright durations

This is the internal Tate guide to copyright durations

Type of copyright	Duration
<p>Artistic works</p> <p><i>Paintings; drawings; plans; maps; charts; engravings; prints; collage; sculpture; holograms; jewellery; architectural plans/drawings; unique pieces of furniture; photographs - including negatives and prints</i></p>	<p>Lifetime of the artist + 70 years from the end of the calendar year in which the artist died</p>
<p>Literary works (published)</p> <p><i>All works covering the written word - novels; poems; letters; manuals; non-fiction works; tables; compilations; television listings; chronological tables; lyrics for a song; e-mail and WWW pages</i></p> <p>Literary works (unpublished)</p> <p><i>Dramatic or musical works that have not been published, performed broadcast or offered for sale</i></p>	<p>Lifetime of the author + 70 years from the end of the calendar year in which the author died</p> <p>Copyright expires midnight 31 December 2039</p>
<p>Sound recordings</p>	<p>The copyright in a sound recording is separate from any copyright in the words and music contained in the recording.</p> <ul style="list-style-type: none"> • 70 years from the end of the year in which it was published (as of 01/11/2013) • Recent (2013) legislation has altered the copyright duration for sound recordings, from 50 to 70 years.

	<ul style="list-style-type: none"> • The extension of copyright in sound recordings from 50 to 70 years applies only to those sound recordings that were in copyright on 1 November 2013 and to any sound recordings made after that date. The new Regulations do not have the effect of bringing back into copyright those sound recordings where copyright has expired. • If the recording is not published then copyright lasts for 50 years from the end of the year in which it was made. If the recording is not published, but played in public or communicated to the public during that period, then copyright will last for 70 years from the end of the year this happens.
Musical compositions	Lifetime of the author + 70 years from the end of the calendar year in which the author died
Engravings (Unpublished prior as at 1 August 1989)	50 years from 1 January 1990 or 70 years from the end of the year in which the author died, whichever is the later
Engravings (Published prior to 1 August 1989)	Lifetime of the author + 70 years from the end of the calendar year in which the author died, or 50 years from the end of the year in which the engraving was first published, whichever is the later.
Broadcasts	50 years from the first broadcast or delivery

<p>Films</p>	<p>70 years after the death of the survivor of the principal director, the author of the screenplay, the author of the dialogue or the composer of the soundtrack (as long as at least one of them is an EEA national and the country of origin of the film is an EEA member state)</p>
<p>Crown Copyright</p> <p><i>(All works made by Her Majesty or by an officer or servant of the Crown during his or her duties)</i></p>	<p>Published work: 50 years from the end of the year when first published.</p> <p>Unpublished work: 125 years beyond the year it was created.</p>
<p>Parliamentary Copyright</p> <p><i>(All works made by or under the direction or control of the House of Commons or House of Lords)</i></p>	<p>Mostly 50 years beyond year it was created. Exceptions include bills of parliament.</p>
<p>Typographical arrangements</p> <p><i>(the form and layout of a typeset edition of a book/periodical)</i></p>	<p>25 years from the end of the year in which the edition was first published</p>
<p>Computer generated works</p> <p><i>(in the cases where there is no human author)</i></p>	<p>Full term of other relevant copyrights in the material protected. In addition, there is a database right for 15 years (this can roll forward)</p>

Orphan works - EU exception vs UK licensing scheme

This brief overview compares the two Orphan Works regimes (tabular comparison format originally devised by Naomi Korn, <https://naomikorn.com>, with thanks).

	EU Exception	UK Licensing Scheme
Who can use / apply?	Museums, libraries, archives, educational establishments	Anybody
What use can be made?	Non-commercial online use	All uses, commercial and non-commercial
What works are covered?	Text-based works, audio-visual works, and artistic works ONLY when embedded in text (i.e. not standalone artworks)	All works, including standalone artworks
Requirements for the user?	Due diligence and declaration on EU OW database	Due diligence and declaration on UK OW database
How long does the permission to use the work last?	Until copyright expires or until copyright holder comes forward to claim the right, whichever comes first (the licensee is protected if the rights holder comes forward)	For a maximum of 7 years or until the copyright holder comes forward to claim the right, whichever comes first (the licensee is protected if the rights holder comes forward)
Cost?	Free	Licence and administration fee
Territory	EU	UK only

Orphan work checklist

This is the orphan work checklist which Tate has created

ORPHAN WORKS DUE DILIGENCE CHECKLIST

Artist			
Object Ref		Policy	
Description			
Date Completed		BY	
Information			
<ul style="list-style-type: none"> This checklist is not exhaustive but represents the key organisations where inquiries regarding orphan works should be addressed. Research into an orphan work should also be tailored according to the type of work in question 			
Due Diligence Database	<ul style="list-style-type: none"> Please refer to the Due Diligence Database for contact details of organisations which may assist in copyright holder research 		
Where to save the Orphan Works Checklist (OWC) & related correspondence	<ul style="list-style-type: none"> A copy of this checklist should be saved in the Collection Licences folder under the relevant object & policy The following naming convention should be used: eg CL01234_OWC_CollectionName_OrphanWorkArtist Emails relating to orphan work due diligence checks should be saved as .txt files under the relevant policy Eg CL01234_OWC_CollectionName_OrphanWorkArtist_Subject 		
Tate online notification of Orphan Work	<ul style="list-style-type: none"> Works identified as orphan or where an artist or copyright holder of an artist's estate cannot be located, should also be listed on Tate's online orphan works page. Please notify the Intellectual Property Manager of artists/estates being sought. Queries will be uploaded to the Tate page at regular intervals Current orphan work artists can be found at: http://www.tate.org.uk/about/who-we-are/policies-and-procedures/website-terms-use/copyright-and-permissions/copyright-orphan-works 		

Organisation	Checked (Yes/No)	Additional Information
Gallery's own copyright and photographer database (TMS) NB: The Archive Collection also has some paper copies of copyright information held		
Original source from which the work acquired		
The Art Fund		
Ashmolean Museum		
Bridgeman Art Library		
British Council		
British Library		
Courtauld Institute		
DACS (Design & Artists Copyright Society)		
Government Art Collection		
Directory of Photographic Collections		
Museums Copyright Group		
Museum of London		
National Gallery of Ireland		
National Galleries of Scotland		

National Museum of Wales		
National Portrait Gallery		
Public Catalogue Foundation		
Royal Academy		
Ulster Museum		
V&A		
WATCH file		
General Internet search (with most useful results usually coming up within 15 minutes' searching)		
Registry of births, deaths & marriages (to check wills)		

Additional item-specific due diligence contacts		
Organisation	Checked (Yes/No)	Additional Information

