

# Novice to Know-How Module Text

## Course 7: Providing Access to Preserved Digital Content

# Module 7: Managing Intellectual Property Rights

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## 1. Introduction.

In this module, we address some of the key legal issues relating to Intellectual Property Rights. We will mainly focus on those concerning copyright, licensing, terms and conditions of use, and how they may impact users' access to preserved digital content at your organization.

The module is written from a UK perspective with references to relevant UK legislation. It will also address commonalities with other legislation to offer general guidance for managing rights and responsibilities. The Novice to Know-How course list of Additional Resources will also include relevant legislation mentioned in this module.

Please note that the information and guidance offered in the module do not constitute legal advice. The module aims to provide general summaries and guidance for legal issues. We strongly recommend that you seek legal counsel for your specific circumstances and guidance for individual requirements.

## 2. What are Intellectual Property Rights?

Intellectual Property Rights (IPR) are rights given to the creators and owners of Intellectual Property (IP), or 'works of the mind'. IP can include a range of literary, scientific, and artistic works, including (but not limited to) musical works, sound recordings, films, architecture, software, databases, patents and trademarks.

IPR laws allow creators and owners to benefit from their work or investment in a work, giving them economic and moral rights to control how their IP is used. Those who hold IPR can include a range of different kinds of creators and owners, from authors, designers, directors, producers, employers, publishers, to other contributors or designated owners. This will

depend on the type of work, relevant legislation, and what has been agreed upon by various parties (in some cases, IPR may be sold, exchanged, or bequeathed to someone or a body).

### 3. IPR and Digital Content.

Intellectual Property Rights impact how we acquire, preserve and provide access to digital content.

It is therefore essential to understand the ownership of any content being transferred and ingested to your repository to understand and acquire all the rights or permissions needed to manage, use, or provide access to content; otherwise, your organization is at risk of breaking the law and receiving fines or other penalties.

Understanding which IPR rules or restrictions apply can be challenging, even when ownership of collection as a whole is well understood. There can be third-party content within a collection with IPR separate from those of the donor or body, for example, third-party copyright ownership of photographs part of a document or archived web page in the collection.

But before we discuss IPR legislation, let's look at some of the different challenges with managing the IPR of digital versus analogue.

### 4. Legal Issues with Digital Content.

The legal issues surrounding digital content are more complex than those for analogue materials for a few reasons.

As we know, analogue materials are relatively stable compared to digital. In contrast to analogue preservation, which typically involves conservation and repair, digital preservation requires replicating or reproducing content and continuous bit-level actions to ensure long-term access and usability. This raises issues as most IPR legislation covers the protection of unauthorized reproduction of intellectual property.

Most IPR law was based on traditional analogue materials, and legal and organizational frameworks for analogue preservation have become more established over time. The legal and organizational frameworks for digital content, on the other hand, are less developed. Good practice in digital preservation is not always recognized or permitted by existing provisions in current legislation.

To tackle these issues, the management of IPR for digital content and collections often involves a range of strategies that are complex and require risk-based assessments.

### 5. Some Relevant IPR Legislation.

Relevant IPR legislation varies for different kinds of content in different contexts. Legislation is also frequently amended, so it is best to visit government websites to make sure you are accessing the most up-to-date versions. Some of the relevant legislation is provided below, but they will also be included in the course's Additional Resources along with links to resources for guidance.

- **In the United Kingdom** there is
  - The Copyright, Design and Patents Act 1988, as amended by the Copyright (Librarians and Archivists) (Copying of Copyrighted Material) Regulation 1989.
  - The Legal Deposit Libraries Act 2003.
  - The Legal Deposit Libraries (Non-Print Works) Regulations 2013.
- **In the United States** there is
  - The US Copyright Act 1976, particularly sections 108 and 117.
  - The Copyright Term Extension Act of 1998.
  - The Digital Millennium Copyright Act of 1998.
  - Library of Congress Mandatory Deposit Rules.
- **In Europe and Internationally** there is
  - The European Union Orphan Works Directive 2012/28/EU.
  - The Berne Convention for the Protection of Literary and Artistic Works.
  - World Intellectual Property Organization 1996 Copyright Treaty.

## 6. Copyright

Copyright is an IPR that gives owners the right to control the use of original literary, scientific and artistic works (e.g. dramatic, musical, artistic, films, sound recordings, typographical arrangements) which are the result of the author's skill or which have involved an investment of time, effort and/or money by the owner.

Copyright protection grants economic rights guaranteeing control over work and remuneration for its use through selling or licensing.

Copyright can be sold, exchanged, or bequeathed to someone or a body (e.g. business or institution), adding to its complexity and potential complications.

Furthermore, copyright protection also grants moral rights that protect authorship (right of attribution) and the ability to refuse modification of the work without permission (right of integrity).

## 7. What does Copyright Cover?

Copyright distinguishes the ownership of a work's manifestation (e.g. owner of artistic work) and the separate right to reproduce it (the right to copy).

With the right to copy, it is easy to see how copyright can become complicated when looking at the deliberate or inadvertent creation of copies of digital content needed for routine preservation activities and providing access to users.

In general, copyright covers the rights of the creator or owner to control certain uses of the work, such as:

- issuing copies to the public (e.g. making access copies for users),
- communicating to the public (e.g. making content available via the internet),
- performance (e.g. a play, exhibition, or event),
- rental and lending (e.g. library lending),
- adaptation (e.g. translating, converting to another language).

For these actions, licensing or permission will likely be required.

In the UK, the creation and sharing of access copies count as publication; therefore, these copyright and related rights must be considered before opening access to make sure you and the organization are complying.

## 8. Copyright Rules and Restrictions.

Copyright rules and restrictions will depend on the legislative context and the kind of work being protected, so it is important to make sure that you identify which law applies to the type of content you wish to make accessible to users.

For example, in the UK, the maker of a database as creator (i.e. a person or body who has initiated its creation and invested in it) is entitled to a database right that prevents unauthorized copying and publication of a substantial part of its contents. But there are rules relating to what constitutes a substantial part of a database and what is protected. Within current UK legislation, database rights protect the investment in databases only where the investment is in actually collecting, verifying or presenting the contents of the database. So, before making any decisions about access, make sure to revisit legislation to check for any updates and seek legal advice where possible.

## 9. Copyright Durations.

Different types of copyrighted works may have different kinds of durations or licenses required. The length of copyright can range from 25, 50, 70, to even 100 years or more from the time of publication or following the death of the authors. The question of how long will again depend on the type of the work, who was involved in its creation, when (or if) it was published, who holds ownership, and the organizational and legislative contexts.

A great resource for information and guidance on copyright in the UK is the Copyright and Creative Economy Centre, based at the University of Glasgow (CREATe)

<https://www.create.ac.uk/blog/category/about/>

## 10. Legal Deposit and Statutory Requirements.

Depending on the context, there may also be legal deposit and statutory requirements to consider.

Legal deposit requires publishers to provide a copy of every work they publish, and may also include electronic legal deposit as well as web archives. In the UK, legal deposit has existed since 1662, and in 2013 the regulations expanded to digital as well as print publications.

With access permissions, some governments may restrict access solely to reading rooms. For others, there may be no legal deposit legislation, with collections either built solely on a selective and permissions basis or held in 'dark archives' inaccessible to the public.

For organizations based in the UK or the US, brief summaries on legal deposit are provided below.

- **Legal Deposit in the UK.**
  - Legal deposit requires publishers to provide a copy of every work they publish in the UK to the British Library. There are six legal deposit libraries under UK law, including the British Library, which work together on the preservation of deposited publications both in analogue and digital form. The legal deposit libraries also have the right to gather and provide access to copies of all websites published in the UK domain but with access restricted to on-site reading rooms. The UK Government Web Archive maintained by The National Archives (UK) operates with a smaller scope relating to government publications and clearer statutory powers derived from public records legislation.
- **Legal deposit in the USA.**
  - In the US, deposit and copyright registration are separate legal requirements, although the former may satisfy the latter. Any copyrighted and published work must be submitted in two copies to the United States Copyright Office at the Library of Congress. The legal requirement also includes 1,250 federal depository libraries that must receive a copy of all of the Government Publishing Office publications to help with preservation and access. While the Internet Archive web archive is based in the US, it has no explicit legislative permission to harvest websites or publish them. In contrast, the Library of Congress operates on a permission basis, meaning that they have to seek explicit approval from copyright holders before harvesting or publishing their content.

## 11. IPR and Technological Dependency Issues.

Technological dependencies create further complications for managing IPR issues. The duration of IPR in digital content extends beyond both commercial 'shelf life' and, in almost every case, the technology on which they depend. This forms a three-fold issue in procuring licenses to replicate content, licences for software to access content, and rights clearance of 'abandoned' digital objects.

Without appropriate rights clearance, licences or statutory exceptions, these copies may constitute copyright infringements. However, there remains the urgency and necessity of making several copies, shifting formats or making derivative works, circumventing technical protection measures, and finding appropriate exceptions and limitations in copyright law to undertake the preservation actions with a risk-based approach.

## 12. Some Approaches for Managing IPR.

IPR can seem very complicated, but it can become less daunting when looking at what you already know about your collections from acquisition and preservation activities, which will help you identify and narrow down which legislation, rules or exceptions apply.

The next slides offer some approaches to help with managing IPR. They offer general guidance, but your organization should consult with a legal advisor to address your specific circumstances and approaches for individual requirements.

## 13. Copyright Limitations and Exceptions for Preservation

Some copyright limitations and exceptions that may help with digital preservation activities are summarized below.

- **Copyright is not forever.**
  - Understanding copyright durations for unpublished works is especially important in archives where most material is classified as unpublished. All works eventually fall out of copyright. Copyright law provides for a period of time, a duration, during which the copyright owner's rights exist. However, for digital content, this will likely not be within our lifetimes so it is important to document relevant IPR information for others to preserve and open access to the content in the future.
- **Exceptions for Libraries and Archives.**
  - In many countries, including the UK and US, there are some exceptions allowing archives, libraries and museums to address the unique requirements for preserving digital content. From a preservation perspective, the most important provision is the right to produce any number of copies required for preserving digital material. There may also be exemptions to hold copies of material in various file formats and thereby adhere to what is considered good preservation practice while staying within the law.
- **Exceptions for Orphan Works.**
  - There can be special provisions for works where the author is unknown or untraceable. An orphan work refers to a work in which its rights holders have not been traced following a 'diligent search'. Orphan works most impact decisions about the digitization of analogue content, allowing digitization as a form of copying to proceed so long as an appropriate diligent search has occurred.

## 14. Rights Management and Permissions.

Something you should do as early as possible, ideally when you are negotiating deposit agreements with rights holders, is identify and manage rights and permissions before undertaking preservation activities.

Early negotiations with identified owners can result in transferred rights or 'bespoke' permissions allowing for certain preservation or access activities.

Obtaining rights clearance can take a long time and can be expensive, so allow plenty of time. You may also find that the rights owner imposes conditions and charges a fee, says no, or you are unable to find and trace the current owner following a diligent search.

In many cases, rights clearance is handled by central licensing and rights organizations. These organizations represent the rights owners, issue licences and collect fees on their behalf, and distribute the income to them. You will need to plan and budget for the renewal of such licenses.

In the UK, you can obtain licenses through the Copyright Licensing Agency, Authors Licensing and Collecting Society, Design and Artists Copyright Society, Newspaper Licensing Agency, PRS for Music, and others listed by the British Copyright Council.

## 15. IPR Policy and Documentation of Rights and Permissions.

Additionally, if you have not already, you should write a rights management policy as a standalone document or part of a larger policy.

Along with policy, there should be accompanying rights management documents, such as model letters for staff clearing rights, model deposit agreements, and model licences and clauses covering preservation-related activities to streamline negotiations.

Having the appropriate corresponding templates for documents can ensure that the proper IPR licenses and permissions are obtained following negotiation, and can help mitigate questions about access permissions later on. Treat these documents as institutional records to be retained and protected in fireproof and secure environments.

It is highly advised that you seek assistance from a legal advisor for developing policy, procedures, documents, and guidance for staff for implementation or permissible variations in negotiations with rights holders.

## 16. Managing IPR and Copyright for Access.

With copyright IPR, there are specific issues to consider before making preserved digital content accessible to users. Access will involve presenting or lending copies of preserved digital content to users. When this access is provided online, it can constitute publication of the works.

Furthermore, when providing access online, you may have little to no direct involvement with users and their interactions with the material. This can limit what can be communicated about the duties to owners of copyright and other intellectual property rights while placing a greater onus on the users to understand how they should engage with them legally and ethically.

## 17. Copyright Limitations and Exceptions for Access.

Just as there are copyright limitations and exceptions for preservation activities, there are potential limitations and exceptions that may apply and help with enabling access to digital content at your organizations. A few of these are summarized below.

- **Exceptions for Libraries and Archives.**
  - In the UK, US, and other countries, there are exceptions for allowing access to digital content in copyrighted materials at archives, libraries, and museums. For example, there is the dedicated terminal exception in the UK, enabling a digital copy (i.e. one of the copies created under the preservation exception)

to be made available on a dedicated terminal accessible to users visiting on site.

- **Fair use or fair dealing.**
  - There may also be statutory defences and exceptions allowing for access and limited use of digital content. Certain acts normally restricted by copyright may, in certain circumstances, be done without the authorization of the copyright owner. Some examples of such exceptions are described as 'fair dealing' (UK) or 'fair use' (US). Fair dealing in the UK can include private study, non-commercial research, criticism or review, or current news reporting. In general, most legislation will allow some degree of copying for access so long as a substantial part of the work has not been taken; this exception and what isn't deemed substantial will depend on the context.
- **Orphan works exceptions.**
  - For access to digitized orphan works, there can be exceptions. For example, the EU Orphan Works Exception allows access to particular kinds of text-based and audio-visual works for museums, libraries, archives, educational establishments and public broadcasters.

Even when there are applicable exceptions and limitations for access, they will likely only extend to items held permanently in the collection. Also, exceptions or limitations do not overrule the moral and related rights of creators, which must still be considered when providing access to users.

## 18. Access Levels and Restrictions.

Make sure that the identified permissions or restrictions for digital content you've collected are documented with the preserved digital content to apply appropriate access restrictions and processes.

You can use existing access models to assign levels of access using the recommended terms in the Levels of Born-Digital Access (and mentioned in the previous module for protecting confidential or sensitive materials), which are

- **Open:** the content is made available to users with no known restrictions.
- **Conditional:** some of the content is made available to users. For example, there are collections with both open content and content with restrictions, including those deemed sensitive or under copyright.
- **Closed:** the content not made available to researchers based on legal or ethical reasons.

## 19. Managing Licenses for Use and Reuse.

Along with licenses for access and use, there are content licensing regimes developed to facilitate sharing and reuse of open access content. The most well-known being the Creative Commons (CC) licenses, which are based on four conditions of permissions for use and reuse of the content contained in Open Access materials. You can apply the four conditions to various permutations or arrangements of content made freely accessible at your organization. The following is a summary of the four conditions, but you should read the full



information about the different license types and guidance at the Creative Commons website before applying them: <https://creativecommons.org/>.

- **Attribution (BY):** attribution means any sharing or reuse must give appropriate credit in the manner specified by the author or licensor.
- **Non-commercial (NC):** relates to how the content will be shared and reused. It lets users remix, adapt, and build upon the work non-commercially but the new works must also give attribution and be non-commercial.
- **No derivative works (ND):** lets users download works and share them with others so long as they credit authors, but they cannot change them in any way or use them commercially.
- **Share-alike (SA):** lets users copy and redistribute the material in any medium or format but must distribute under the same license as the original.

## 20. Four Actions for Managing Intellectual Property Rights.

Now that the main IPR issues have been highlighted, we will now focus on basic actions you can take at your organization to address them:

1. Analyze your content and assess basic compliance
2. Document critical IPR information
3. Apply access or use restrictions accordingly
4. Provide information about the IPR of content to users

These actions bring together guidance for IPR provided in the Levels of Born-Digital Access, DPC RAM, and the TNA Access Workflow.

## 21. Action One: Analyze your Content and Assess Basic Compliance.

The first action is to analyze your digital content to decide if the work is still in copyright, the present copyright owner has been identified, and if permissions for reuse have been granted. This helps determine the suitability for sharing content through online platforms, considering relevant rules and restrictions.

You may have already completed this analysis at various points prior to deposit or during transfer and ingest. It is useful to check that you have identified:

- Known or unknown copyright or IPR rights holders
- Key legal rights and responsibilities with owners at the organization
- Access restrictions and status of the material in collections
- Ethical considerations

You should conduct an assessment based on this analysis to establish and implement processes for the basic management of legal rights and responsibilities.

Remember that risk assessment and decision-making should be an iterative process, so if you have already completed this action before, you still may benefit from undertaking it again: especially if legislation has undergone any recent changes.

## 22. Action Two: Document Critical IPR Information.

It is critical that you record the information you have gathered about IPR for documentation of compliance and to properly identify content that may require limited or restricted access.

Again, you may have already completed this action at various earlier in your digital preservation work, but it is useful to conduct another review or analysis of the documents you have and make any necessary updates. These documents can include:

- Written policies relating to intellectual property rights, including copyright and licensing, responsibilities, and how rules or restrictions are implemented
- Documentation of the copyright status of content, including the year of creation or publication and any access restrictions
- Documentation of acquired permissions by copyright or IPR rights holders, including where a donor has transferred copyright, where possible
- Documentation of key legal rights and responsibilities of owners, including the extent to which an organization is willing to waive or enforce copyright when distributing materials
- Documentation of relevant ethical considerations

Note that some materials may require an agreement before access, and others may have access removed at the owner's request. The use of templates will help streamline processes and documentation for the above.

## 23. Action Three: Apply Access or Use Restrictions Accordingly.

What you have collected and documented about the IPR of content will guide this third action. If your organization decides to make content accessible online, there must be an access mechanism that accounts for copyright status and access restrictions indicated, making access to the content open, conditional, closed, or sensitive according to permission or restrictions.

Before enabling or restricting access, make sure that you have addressed:

- What restrictions have been placed by the donor, owner or related parties?
- Which materials are subject to copyright or other restrictions?
- What access might still be possible given the above restraints? How can you adapt your access levels or models to facilitate this?

This should include a way for rights holders to request that material accessible online be taken down due to a copyright breach.

Conversely, if access is restricted, the reason or justification for doing so should be clear to those at the organization and clearly communicated to users requesting access.

## 24. Action Four: Provide Information and User Guidance on IPR.

Perhaps one of the most important actions to take for access to digital content is making sure you provide the right information about IPR to users. This information, which should be easy for them to find while searching or requesting digital content, can better ensure that they fully understand their responsibilities and limitations based on copyright and related IPR laws.

For example, administrative metadata elements about IPR and copyright can be made visible to users in the finding aid, catalogue, or other discovery platforms used by the organization.

To accomplish this action, your finding aid or catalogue needs to have an explanatory 'Conditions Governing Use' note at the collection- or higher-level which informs users of copyright restrictions of the content in the collection. You may have already accomplished this as part of providing metadata and documentation for resource discovery

In addition to metadata or notes in your finding aid, catalogue, or other resource discovery platform, it is important to provide information and user guidance on the established terms and conditions for use, with defined parameters, when users initiate access and request material. This informs and guides them on what is permitted or restricted by law and their responsibilities to comply. For example, with moral rights, it is important to make sure that the person knows that any excerpts or reuse of the work should cite and provide the source, including the author's name, and that the extent of the quotation or excerpt is compatible with what is permitted.

## 25. Module Summary.

In this module, we discussed the main issues surrounding Intellectual Property Rights and the access and reuse of preserved digital content.

It is essential to understand the rights holders of any content that is being made discoverable and accessible to users, to acquire permissions or rights, to restrict or enable access, and to effectively communicate permissions or restrictions to users.

Ideally, it is best to acquire rights or leasing licenses as early as possible, allowing your organization to manage the content in a way that respects the rights of rights holders and enables appropriate access for users.

Making preserved digital content accessible online can limit what is directly communicated about duties to owners of copyright and other intellectual property rights. It is important to make this information easily findable and readable to users so that they engage with the content in a legal and ethical manner.