

## IIC Professional Development Seminar #1: Copyright for Conservation Professionals

The first of IIC professional development seminars was held at the Society of Antiquaries, London, on the afternoon of 7 March 2016. Four speakers gave short talks, one presented by Skype from Los Angeles, USA, followed by an extensive discussion session, chaired by IIC's Director of Publications, Joyce Townsend, with input from almost all of the 50-strong audience. The speakers have all provided summaries, aided by notes taken by IIC Secretary-General Jo Kirby Atkinson. We thank Bernard Horrocks for permission to include his text '©opybites'.

### ***Copyright and academic journals: A Routledge perspective, with special emphasis on museum studies, heritage and conservation.***

**George Cooper**

Managing Editor for Arts & Humanities Journals, Taylor & Francis Routledge, publisher of IIC's journal *Studies in Conservation*

There are two principal issues:

- Common copyright issues with respect to third party material
- Sharing policies, which vary from publisher to publisher

Firstly, to define copyright: copyright gives the copyright holder exclusive rights over the work for a time-limited period. This period is the lifetime of the copyright holder, plus affixed number of years, varying from 50 or 70 years in different countries. In EU countries including the UK, it is 70 years. In the USA it is also 70 years. This is recognised and protected almost everywhere in the world.

As an author, copyright allows you to protect your material and to make sure that it is accurately credited whenever it is cited, or excerpts of text or illustrations from it are re-used by other authors, or an institution or publisher seeks to republish it in another format in the future. For example, a society such as IIC might seek to make out-of-print printed journals available online.

Routledge offers two options for copyright assignment, and this is typical of all major publishers of journals.

- copyright assignment by the author(s) to, for example Routledge and its society partner IIC, in the case of *Studies in Conservation*); this is the most common option
- licence the entire text and its illustrations to Routledge but the author(s) retain(s) the copyright.

If any of the authors are employed by a government body in the USA, Canada, and some other countries, or an international corporation, the employer may insist that the licensing option must be used. This is why copyright agreements should be signed by all authors: the main author, if not working e.g. for the US government, might not be aware of US government policy for licensing texts.

If the paper includes images from third party rights holders such as museums, collectors, living artists, or artists deceased less than 70 years ago, these rights holders will probably grant a licence only for the use of their image that has been requested by the author. For example, when the author has requested permission to include an image of an artwork in a printed paper, and might have paid a fee for this, it is not the case that the author also has permission for the paper to be digitised and published online – because this was never requested or agreed.

To assign copyright, you as the main author, have to sign a publishing agreement, and warrant that all co-authors are in agreement with it too. Why would you assign copyright?

- It allows the publisher to protect the work from infringement (and if all texts produced by that publisher have the same copyright status, the publisher's job is more easily done)
- It allows them to organise permissions for translation, reprinting, etc., according to standard guidelines and law.
- It also signifies an agreement to store the work electronically. Taylor & Francis guarantee storage of the text as if licensed to them.

So, a publisher like Routledge will ask that you have cleared third party material before using it, be it text, audio material, illustrative material, etc. etc.

Short extracts from third party material are acceptable for use without explicit permission from the original author, on the basis of scholarly criticism or review. You should quote the extract accurately, either in quotation marks or indented to distinguish it from your own writing, and attribute the quotation with sufficient clarity that an editor or reader could find and check it. Selective, relevant quotations from a chapter, for example, may be quoted with each original section separated by ' ... '. How long is a short extract? 1-10% of third party material is a reasonable working limit. For example, one might choose to quote 10% of a short newspaper article about an artist or exhibition, whereas even 1% of a 50,000 word book would make rather a long excerpt in the context of a 3,500 word text.

If you are quoting a poem, a story or similar, which is to say a short text that is nonetheless the creative output of an author who derived an income from writing, then you *need permission* to do so from whoever represents the creator (his/her publisher and the author's estate, for example) and you *must give the source*, styled like a reference.

Third party material must be attributed even if it is in the public domain. Images of artworks, and books on GoogleBooks, are in the public domain, but their rights holders gave permission only for that online use. The credit line with an image found online should give a clue as to who to approach.

How to request permission: ask for non-exclusive rights, and expect to have to provide information on journal readership, circulation in terms of the print run and whether the publication is produced for profit or for educational and scholarly use. In general, authors should request print and electronic rights for full term with extensions, and should ask for worldwide as well as UK distribution rights. Within the cultural heritage sector, a good case can often be made that the majority of journals, textbooks and the like are essentially not (mass) produced for profit, which means that any reproduction fees might well be waived or at least reduced.

*Images* should be supplied at a sufficiently good quality for production at half-page and full-page size, which means they should be at 300 dpi resolution. (For images online, 76dpi is deemed acceptable, because they are viewed on a bright screen.)

Here are some questions that crop up regularly. In general, if you have any doubts about copyright, then ask the likely owner! If the owner is a large public body, the very act of asking demonstrates 'due diligence' and provides the opportunity for permission to be withheld – even if it was neither given nor withheld, because no reply was forthcoming.

Do I need permission if I use an image from the internet?

*Yes; almost always, and use caution because the rights have to be checked.*

What if I found the image on Wikicommons? (Wikipedia Commons)?

*You may still need permission to use it – check! The original source must be credited.*

Do I need permission if the figures have been redrawn from the original?

*Derivative copyright: you still have to ask permission if you adapt the image, and the third party must see and approve your adaptation(s).*

Do I need permission if I have reused information, including information from a published table?

*If this a straightforward copy of the table, then yes. If you have used (some of) the information in the table and this is not simply a copy, because you have added data and calculation and interpretation and so forth, then no, you don't need permission, but you do need to credit the original work.*

Do I need permission if I work for the company generating the image?

*Probably. Ask your employer for permission before submission.*

What if people are in an image photographed for the article: do I need to ask their permission to use the image?

Generally, yes; if taken at a public event, where photography is permitted then no. If the people are clearly aged under 17–18 it is always better to obtain permission from their parents or accompanying adults, ideally by a checked or signed paper form.

What about images of very old paintings, decorative and archaeological objects?

Probably, yes: see <https://www.dacs.org.uk/>. If the work is in a public gallery, yes for that reason alone. If it belongs to a private individual, it should additionally be ascertained whether the owner prefers to remain unidentified, by crediting the owner as 'Private collection, UK', for example.

What about an image of graffiti?

Sometimes. The copyright is owned by the artist and the artist may allow reproduction, or may not. However, the image is not subject to copyright if it was done on a building without the consent of the building's owner. The photographer of the image may well own copyright in the photograph.

What about writing text to be published by a professional or membership body such as IIC?

If you are not sure then ask the publishing arm or its publishing partner. For IIC and Studies in Conservation, email [authorqueries@tandf.co.uk](mailto:authorqueries@tandf.co.uk) if you have any queries relating to copyright, third party permissions and Routledge's article sharing policies – or visit the Routledge [Author Services](#) site.

What if I use material from my own work? Do I need permission to reuse it?

Probably: you may have assigned the copyright to a publisher. However, usually they will allow reuse free of charge.

As an author, the creator of a literary work, your rights depend on the status/version of your text. For sharing your article:

- Original manuscript as submitted for publication – *You can share this as much as you like*
- A manuscript accepted for publication: *you can post this on your departmental or personal website, including social media. Embargos apply if you are posting to an academic social media site or institutional repository; policies vary here. At Routledge, you must wait 18 months before uploading to e.g. Academia.edu or a repository, although you are encouraged to archive your metadata on acceptance, in line with [HEFCE guidelines](#). For [Studies in Conservation](#) articles, the author receives guidance on this aspect when the manuscript is accepted.*
- Version of record: this is the article as it finally appears on the publisher's website, in PDF format. If the article is assigned later to a particular printed issue of *Studies in Conservation*, precisely the same version will be used (including any mistakes that slipped past the proofing stage). *You cannot post this PDF on your website or elsewhere (such as your employer's website) unless you have chosen to publish it through open access (OA). For Studies in Conservation (and most other journals) this involves a payment made at the same time that the copyright is assigned. For those papers that are not OA, every Routledge author and therefore every Studies in Conservation author receives 50 free e-prints of his/ her article to share with colleagues.*

### **How images are licensed, the Artimage website, and copyright exceptions**

**Elizabeth Walley**

Licensing Manager, The Design and Artists Copyright Society (DACS)

#### *About DACS*

DACS ([www.dacs.org.uk](http://www.dacs.org.uk)) is the largest visual arts collecting society in the UK, with 90,000 individual creative members, this is made up of 900 direct members and also the members of a global network of collecting societies in 31 countries, whose members DACS represents on exactly the same terms as its own direct members. DACS issues licences to clients based within the UK, and its licence agreements pertain to English law, but it can grant permissions on a worldwide basis. DACS is a not-for-profit organisation, with 75% of each copyright fee going back to the artist or estate.

Copyright licensing was the first service established by DACS in 1984, and was set up by visual artists to protect the copyright of visual artists.

There are also two other management schemes:

- Payback – A collective licensing scheme covering secondary uses: for example, photocopying
- Artist's Resale Right: a royalty due when a work by an artist who is in copyright sells for over 1,000 euros on the secondary market

#### *Licensing of images*

Copyright applies to any artwork by a living artist, and for 70 years after the death of the artist, when it passes to the artist's estate. This gives artists (and authors, playwrights, composers, etc.) the right to control the ways in which their material may be used and it applies to all art works. Artworks are helpfully defined in copyright law and include:

- a graphic work, photograph, sculpture or collage, irrespective of artistic quality
- a work of architecture being a building or a model for a building, or
- a work of artistic craftsmanship.

For more information please see: <http://www.legislation.gov.uk/ukpga/1988/48/section/4>.

Reproductions of artworks varies enormously, and DACS receives a wide range of requests. Frequently licensed industry sectors include auction houses, book publishers, television companies, feature films, museums and advertising. There are 7 specialists in the licensing team at DACS with 4 account managers specialising in specific industry sectors.

#### *DACS members*

The 90,000 DACS members include lots of familiar names from the UK such as Damien Hirst, Tracey Emin and Francis Bacon, well known international Estates such as the Picasso Administration, the Henri Matisse Estate, and the Andy Warhol Foundation, but also include a really diverse array of visual artists from across the globe.

The DACS website has a search function so you can find out which artists are represented by DACS. If they aren't currently DACS Copyright Licensing members, DACS may well know who does represent them, so it is always worth dropping them an email or calling one of the team.

The fees charged for reproduction of the work vary depending on how commercial the proposed use of the image is, striking a balance between user's and the rights holder's needs. For use in advertising the fees are much higher, commensurate with the commerciality and high profile nature of the request; whereas for a museum or academic publication they are much lower. DACS' tariffs can be found on the DACS website here: <https://www.dacs.org.uk/licensing-works/price-lists>. These standard fees are a good guideline, but DACS' members do reserve the right to alter the fee if they feel it is appropriate.

Most DACS Copyright Licensing members have mandated DACS to clear certain non-contentious uses on their behalf, such as a work shown in full inside a publication. A handful of members are full consultation, so require a layout and ask to be consulted for each request.

If a consultation with the member is required before reproduction is agreed, this may take several days depending on the member and use; some have copyright teams, or it may simply be one person managing the raft of enquires of which copyright is one small part. Some members are predominantly concerned with the quality of the image, others with the context that the work will be used in. The Licensing team at DACS will be able to advise how long it is likely to take and whether changes are likely to be required based on their expertise.

For some non-standard uses, the front cover of a book, for example, it will be necessary to supply a layout. Another example which will always require consultation is when the artwork is redrawn. X-radiographs of an artwork may need permission as some members may need to see the context the

work is used in. It always helps to reproduce the X-radiograph of the whole artwork as well as a detail, then the context is clear.

Once permission to use an artwork is granted, a licence agreement is issued which sets out the terms of the permission. The duration of each licence is based on the type of use so digital uses often have a shorter duration as this area is evolving so quickly. The book publishing licence lasts for 10 years, and is restricted to the stated print run or the number of downloads or online users. If you are putting the publication containing the image of the work on an open access site the agreement will be for less than 10 years. It is recognised that many online journals are now stipulating that permission must be granted in perpetuity, so a perpetuity option is now available for the archiving of online journals, however this is up to the rights holder.

Permissions should always be requested in advance, but in instances where this is overlooked, DACS will contact the member, informing them of the use and asking how they would like to proceed. Occasionally this may mean an increased fee for the use.

#### *DACS' digital image resource - Artimage*

The Artimage website was launched in 2014 and it grew out of an existing demand both from DACS' members, and clients who wanted to clear the copyright and obtain the high resolution image from the same source.

All image files have been pre-approved by the artists and estates, with correct titles, and correct colour profile. DACS can now send an approved file, with the copyright permission for over 100 members, speeding the whole process up significantly. They have 12,000 images from artists, estates, collections and galleries and if they do not have it they can often source it.

#### *When is copying permitted?*

There are a number of provisions set out in the Copyright, Designs and Patents Act 1988 which enable the copying of an artwork without the permission of the copyright holder. These are known as exceptions to copyright. They are also sometimes referred to as 'exemptions' and 'limitations'.

These provisions are very detailed: before any exception can be relied upon, there are a number of rules to satisfy. For this reason it is important to seek legal advice before relying on an exception or assuming an exception applies and an artistic work has therefore not been infringed.

Some exceptions which will be most relevant to IIC members are:

- fair dealing for non-professional research and private study
- fair dealing for criticism and review
- fair dealing for reporting on current events
- quotation
- making graphic representations, photographs, films or broadcasts of *buildings* and sculptures if they are permanently situated in a *public place or in premises open to the public*, or issuing copies of such representations to the public or further broadcasting them
- Incidental inclusion of an artistic work in another artistic work.

The above exceptions are limited to the UK only, and may not exist in another country. For example an exception for works permanently on public display does not exist in France, and although an exception relating to criticism and review exists in many jurisdictions, the scope and wording will differ, so the user must always seek advice when reproducing a work in other territories. The general rule is that unless you are certain your use is covered by an exception it is best to check.

#### ***Filming events and in galleries, publishing on living artists, and reviewing exhibitions***

**Bernard Horrocks**

Intellectual Property Manager, Tate Gallery Legal Department, and Chair, Museums IP Network

<b>©copyBites: A brief summary of UK copyright law</b>		
<b>C</b>	CDPA	Current legislation in the UK is the Copyright, Designs and Patents Act, 1988 (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.
<b>O</b>	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.
<b>P</b>	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.
<b>Y</b>	Your responsibility	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>B</b>	Beware the 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 trademarks or design rights. Content with a Creative Commons licence can be copied in limited ways.
<b>I</b>	Infringement	All the following things done to a work potentially constitute infringement: 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!
<b>T</b>	Term	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, as do sound recordings and broadcasts. If in doubt seek specialist advice!
<b>E</b>	Exceptions	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, 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.
<b>S</b>	Subject matter	Only if a work falls into one of the following nine categories can it enjoy protection under UK copyright law: original literary, dramatic, musical and artistic works; films, sound recordings, broadcasts, typographical arrangements and databases. If it isn't one of these, it cannot be protected!

Use of copyright material arises surprisingly frequently. From the radio broadcast we listen to in the morning, to the newspaper we read on the way to work, to the websites we check at lunchtime, to the films we watch in the evenings and the galleries we enjoy at weekends, all involve copyright in some way.

*Filming events, e.g. within a gallery.*

Why is the filming taking place? At both Tate and the National Portrait Gallery, London (where he used to work) there was a clear division between who looked after the filming depending on the purpose: a press team covered filming in the gallery for the gallery's own promotional purposes, while a commercial team looked after filming for commercial purposes.

The need to have written filming agreements in place to determine ownership and use of IP created is essential. Gentlemen's agreements are a thing of the past: now it is better to have some sort of contract, whether the filming is for publicity or commercial. The contracts can share some wording but each would need to be tailored for a specific purpose.

When filming in public places, such as galleries, museums, or perhaps publicly accessible conservation sites, it is also essential to display clear signs that filming is taking place. This is for data protection (someone's 'likeness' is their personal data, and 'processing' it without their consent is an offence).

Tate uses signage that contains this wording or similar: *'Photography and / or filming is taking place at this event to publicise Tate's activities. If you do not want to be photographed or filmed, please inform a member of Tate staff. Thank you.'*

If further use is going to be made of the footage, model releases are desirable (although the practical considerations of this need to be taken into account for large numbers of people in public spaces). Model releases are essential if using close-up shots of individuals and especially of under-18s.

Any third-party IP also needs to be addressed. For example, artworks or music might be included in the footage, and there are performers' rights also to consider. DACS ([www.dacs.org.uk](http://www.dacs.org.uk)) and PRS ([www.prsformusic.com](http://www.prsformusic.com)) are extremely useful contacts.

*Filming in a gallery whose works are in copyright*

Sometimes filming in the gallery involves the incorporation incidentally of works in copyright in the film. As an 'incidental' use, it is all right for the work to be included, but it may be hard to decide whether this use is incidental or not: did it just happen to be there or has it been deliberately incorporated as a background? This depends on the primary purpose of the film: there are some copyright 'exceptions' that could help institutions in terms of not having to clear copyright in certain cases. These include criticism and review of a work or themes behind it; quotation and news reporting.

Certain broadcasts may be seen as fair dealing: an example would be Will Gompertz on the BBC news discussing an exhibition at the Royal Academy; the work and the themes behind it can be discussed. Otherwise it needs a copyright licence. But this is UK law; it may be different elsewhere. The point is that it must be fair. It is important to champion the artists and make sure that they receive a reasonable income from reproduction fees, as well as to be able to avail oneself of exceptions.

News reporting – reporting on a current event – is also a copyright exception. It doesn't apply to photographs, however, so the copyright exception would not be used in such a case.

The moral rights of the creator include the right of attribution. Copyright is an economic right; the moral right concerns more the artist's intellectual spirit, the right to be acknowledged as the creator of the work. The integrity right protects against so-called 'derogatory treatment' of a work. This is connected to the reputation of the artist, so one should not film the work in such a way that it calls into question the artist's reputation or interferes with the fidelity of the work.

*Publishing on living artists*

It is likely there will be a need for copyright licences for works that are focused on; however, the copyright exceptions may hold to some extent (i.e. institutions may not have to clear copyright in certain cases). Criticism or review may hold, also quotation: if you want to quote to make a point this should be all right: if you say 'This is the first work artist X ever produced', and acknowledge it properly, this will probably be all right. Tate has a bold but judicious approach to exploring how the exceptions can be used in the public interest but without, of course, prejudicing artists' legitimate interests.

There is a need to balance creators' rights and freedom of speech (i.e. publishing freely but avoiding copyright infringement, breach of data protection, defamation etc.). Also, public institutions have a statutory duty to further public knowledge of their collections.

To sum up: Filming and writing about contemporary art – the points to bear in mind are:

- Risk – consider the licensing opportunities; consider the artwork itself
- Relationships – communicate with artists' estates, and rights holder bodies
- Reputation – that of the institution or whoever is doing the filming or writing, and of course that of the artist.

### ***Copyright considerations for institutional publishers and authors***

**Mikka Gee Conway**

Assistant General Counsel/Registered In-House Counsel, The J. Paul Getty Trust, Los Angeles, USA

*\* This information is provided for informational purposes only and not for purposes of providing legal advice. For legal advice on any particular situation, readers should consult an attorney properly licensed in their jurisdiction.*

The J. Paul Getty Trust has an active publishing division, Getty Publications, which supports the work of the Trust's four operating programs:

- the Getty Conservation Institute
- the Getty Research Institute
- the Getty Foundation
- the J. Paul Getty Museum

and also publishes books in the visual arts that are not specifically related to a particular Getty program or initiative, e.g., children's books. Beyond the formal Getty Publications program, the Getty publishes significant amounts of content on its web site and through third party web platforms. Although many of our publications are marketed and sold through traditional channels with all copyrights reserved, the Getty is increasingly trying to make its content open access, where the rights situation permits. (By open access we mean available online, free of charge, and free of most copyright restrictions, e.g., available under a Creative Commons license.)

These remarks are intended to give some guidelines from the author and institutional publisher perspective on copyright and how to build an open access publication.

#### *Primary considerations*

The author or institutional publisher putting together a publication must consider three main issues:

- What are the constituent parts of the publication that may be protected by copyright?
  - o E.g., text, images, video, music
  - o Assume that everything is covered by copyright
- What is the source of those parts and who owns the rights?
  - o Did you find it on the internet? Was it produced by an employee? By a consultant? By an entirely unrelated third party?
- How do you intend to make the finished product available?
  - o Do you want the publication to be available as open access?

## General Copyright Rules

What is protected by copyright?

*Copyright protection is generally available for original works of authorship, which can be literary, dramatic, musical, or artistic. Thus nearly any kind of original content that is produced for, or included in, a publication, regardless of its format, qualifies for copyright protection and needs to be taken into account when assessing copyright status.*

What rights does a copyright holder have?

*Generally a copyright holder has the exclusive right to reproduce, distribute, display, perform, and modify the copyrighted work. In the UK you also have to consider moral rights, the right of the author to be attributed and exercise certain other rights of integrity with respect to the work.*

How long does copyright protection last?

*Generally copyright lasts from creation until 70 years after the death of the author. In some countries it is longer, some shorter.*

## Copyright Ownership

Who is the owner?

*Under US law, the rule is that copyright initially vests in the author of a work, and copyright lasts until 70 years after the death of the author, if the author is a natural person. For works with institutional authors, i.e., no natural person identified as the author, copyright lasts for 120 years from the date of creation.*

Who is the author?

*A person working on his or her own behalf will own the copyright in his or her own creations. But under US law, if you are an employee creating the work within the scope of your employment, then the default rule is that the work will be considered a 'work made for hire', and the owner of the copyright will be your employer, though the employee and employer may agree otherwise. The general practice in the US among universities, for example, is to allow faculty to retain copyright in their own work. Employment handbooks or policies should accordingly be clear regarding the intellectual property rights in work product created by employees.*

*A person working as an independent contractor, doing work for a hiring party who is not the employer, owns the copyright in his or her own work, unless there is a signed written agreement providing that the work is a work made for hire owned by the hiring party. Thus, it is important, if the hiring party wants to own the rights, that the contract governing the creation of the work be explicit as to copyright ownership.*

What if there are multiple authors?

- *US copyright law recognizes various types of multi-author works:*
  - o *Collective works and compilations*
    - *A work in which multiple separate and independent works (newly created or pre-existing) are assembled into a collective whole*
  - o *Joint works*
    - *Multiple authors collaborate to create a work with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole*
    - *Note that depending on the jurisdiction, one co-author of a joint work may or may not be able to exploit the work without the consent of all co-authors.*
      - o *In the US – a single co-author may exploit the work unilaterally, subject to a duty to account to co-authors for any profits*
      - o *In the UK – a single co-author may NOT exploit the work without the consent of all co-authors*

- *Because of differences in national laws, collaborations that involve authors of multiple nationalities should clearly address whether and when co-author consent is required to exploit the work*
- *Representing co-authors*
  - o *Publishers often ask one author to represent his or her co-authors in signing publishing agreements or rights assignments, a sort of 'lead author'. This can present special problems if the publisher requires a complete assignment of copyright (i.e., not just a license from the authors) and the applicable copyright law requires such assignments to be in writing. The lead author needs to be authorized to act on behalf of his or her co-authors, and, technically, the co-authors should sign statements to that effect, even if the publisher doesn't require it of the lead author.*

#### *Publication platform*

Institutional publishers should think early on about what format the publication will take, how it will be distributed, and what rights will be reserved. Electronic publications can be tricky when you are licensing content from others, as many licensors still refuse to grant rights in perpetuity for a digital publication.

When all the content is owned by the publisher, however, true open access is possible, for example the Getty's recent publication of *Ancient Terracottas from South Italy and Sicily in the J. Paul Getty Museum*. This is the first born-digital collection catalogue from Getty Publications, and it is available under the terms of a Creative Commons-Attribution (CC-BY) license, meaning that anyone is free to reproduce and modify the work for any purpose, so long as the original work is attributed to the Getty. <http://www.getty.edu/publications/terracottas>

Note though that there are several different flavors of Creative Commons license, CC-BY being one of the least restrictive. Other CC licenses can be used if the licensor wants to restrict commercial use, for example, or wants to prohibit the modification of the work.

Note also that if you intend to make your publication available on third party websites, or to post content on social media sites such as Facebook or YouTube, those sites' terms of use likely require you, as poster, to warrant that you have all rights and to grant a license to the site operator and possibly to other users of the site, to use the content you post. Accordingly you must be sure that you have such rights in the content before you post it.

#### *Open content at the Getty*

Finally, a few words about the Getty's own experience with providing open access to its collections (holdings of the J. Paul Getty Museum and the Getty Research Institute), as an example of the rights assessment that has to happen to create an open access publication. The Getty is just one of several museums that have made this commitment to make at least some of their collections available freely online – including the Victoria & Albert Museum, UK; Rijksmuseum, Netherlands; National Gallery of Art, Washington, Los Angeles County Museum of Art, Metropolitan Museum of Art, Walters Art Museum, and Brooklyn Museum, all USA.

#### The goal:

- Free open access to as much of the Getty Museum's and Getty Research Institute's public domain collections as possible, consistent with the Getty's mission to foster a greater understanding and appreciation of art, and recognizing that the free flow of images fosters creativity and innovation.

#### The challenge:

- Determining the rights status of thousands of objects
  - o Copyright
    - Image had to be in the public domain, i.e., copyright expired
  - o Privacy rights (restricting the use of unpublished images of living persons)
    - Image had to have been published, or of a person deceased or likely deceased
  - o Right of publicity (restricting commercial use of images of living persons)

- Image had to be of a non-famous deceased person or more than 70 years
  - Contractual limitations (e.g., mandatory credit lines)
    - Image had to be free of such restrictions
- Using consistent metadata to mark the rights status of each digital asset
- Putting workflows in place to ensure only properly tagged assets were released as open content

The results:

- 4,600 Getty Museum images uploaded August 2013
- + 5,400 Getty Research Institute images added October 2013
- + 77,000 GRI images added April 2014
- + 13,000 Museum images added January 2015, coincided with revamped Museum collections website
- As of January 2016, 101,124 total images in Getty Open Content
- 529,168 total Museum image downloads as of March 31, 2016
  - 16,537 – the monthly average
  - 9,502 downloads of the most downloaded image (Vincent van Gogh's *Iris*)
  - 71% of these downloads are for personal use; 14% for non-commercial use
  - The vast majority of downloaders are private individuals

### Questions from the audience, chaired by Joyce Townsend

**Jonathan Kemp, Editor, *Journal of the Institute of Conservation*:** If an article is received from a conservator restoring a work by a living artist, how much do I need to be concerned?

**Elizabeth Walley, DACS:** This is a question of fair usage again: you might restrict the number of images and consider whether the use affects the viewing of the original work: if it seems detrimental. It also depends where the article is being distributed: within the UK or worldwide.

**Joyce Townsend, Director of Publications, IIC:** How about technical images? The author might want the X-radiograph, an infrared image and 10 details: is that fair use? Is it the number *and* the fact that they are technical images that determines fair use?

**Elizabeth Walley:** If you are using each image very specifically it might be fair, but if it could be done from one image then 10 is not fair. The X-ray: if it is covered by an exception then one would not say this was manipulation of the image.

**Graham Voce, IIC:** Two questions: 1) Fair dealing has been mentioned frequently; is there a succinct definition of fair dealing? 2) DACS: you represent those artists or their estates; what about those not represented by DACS and in the UK?

**Elizabeth Walley:** No, there isn't a succinct definition. It comes down to dealing with each part of the exception individually and fair means fair to a reasonable person. The law is not looking for anything unusual.

**Bernard Horrocks, Intellectual Property Manager, Tate Gallery Legal Department:** Fair dealing is not helpfully defined within the Copyright Act, but see the Intellectual Property Office website (<https://www.gov.uk/government/organisations/intellectual-property-office>): the IPO does describe it very well and helpfully.

The Tate guidelines have very recently been put on the Tate website and for those dealing with copyright only occasionally these are very helpful (<http://www.tate.org.uk/about/who-we-are/policies-and-procedures/website-terms-use/copyright-and-permissions>)

If people want to buy one book then buy Tim Padfield, *Copyright for Archivists and Records Managers*, 5th edition, London: Facet Publishing 2015. Here some cases are described and defined.

**Elizabeth Walley:** Commercial nature affects fairness; a non-commercial use is more likely to be described as fair.

As far as people who are not members of DACS are concerned, DACS may still be able to contact them. They may be represented by ACS: the Artists' Collecting Society (<http://artistscollectingsociety.org/>)

**Bernard Horrocks:** In the case of any artist represented by Tate, Tate can put you in touch with them. There is also the Museums Copyright Group, an online forum run through JISC: anyone can join or post a question (<https://www.jiscmail.ac.uk/cgi-bin/webadmin?A0=MUSEUMS-COPYRIGHT-GROUP>: it is a closed forum so one has to join). Tate may be able to help with the 'known unknowns': 'If you know of anyone who knows ...'

**Joyce Townsend:** Mikka, how about US-born artists and those artists who work in the US?

**Mikka Gee Conway, The J. Paul Getty Trust:** The Artists Rights Society (ARS, <http://www.arsny.com/>) and the Visual Artists and Galleries Society (VAGA) are two organisations that cover them. Even though ARS or the other organisation may be able to help with images, however, they do not handle literary rights so letters may be a challenge. WATCH – Writers Artists and their Copyright Holders, (Harry Ransom Center, University of Texas at Austin and the University of Reading Library, <http://norman.hrc.utexas.edu/watch/>) has a searchable database of publishing firms etc. This can be a challenge, given that copyright is transferrable and you need not mention that you hold it.

**Bernard Horrocks:** WATCH is one of the earliest websites – 1995. FOB, Firms out of Business, is on the same website and also searchable.

**Q Theo Sturge, Private leather conservator:** I restore a chair (old, well out of copyright) and I photograph it. I may make a calendar and use photos as illustrations; can I do this? Sometimes the chair has an owner; sometimes this person does not answer letters when I ask if I may use the photo. What are my rights on the photo? Can I use it, or must I get the permission of the owner of the chair?

**Bernard Horrocks:** Are you dealing with a copyright object? If it is old, then probably not. If it has been produced recently, then it is artistic craftsmanship and copyright may apply. So, if we assume it is not a copyright object:

1. If there is a contract or confidentiality agreement then, no, you cannot photograph it.
2. If there is no contract it is down to your relationship with the owner. If they seem surprised by your request then do not use the image in this way. If they do not answer, this does not give you the right to proceed.

**Elizabeth Walley:** This could be something you decide to write into your contract: you have a small client base and so on ... then you don't have to go back to the owner retrospectively.

**Q Ruth Bubb, Private conservator:** I routinely photograph everything during treatment and some of the photos do not show the painting in the best state. I wanted to show a detail of a Damien Hirst work (not showing it to its best advantage, but to make a point) in a talk given at a university and the university wanted to put the talk on their intranet. I said no, they could not do this, just in case.

**Elizabeth Walley:** An exception might apply if it was just on the university intranet. It would be best to run this problem past DACS, as there may be a fee applicable. It is probably best to err on the side of caution.

**Bernard Horrocks:** An exception may apply in one circumstance but not another. This is important if this is a publication and if it is online: one may need to consider the scale of distribution. For example, somebody photographed some archaeological remains in somebody's garden in Israel. Then the image was put online and it went viral. Images do get reused by other people.

**Q Jane Rutherford, Private conservator:** We are working on medieval wall paintings in a church in Wales, which we are gradually uncovering. Who owns the copyright of the paintings? Who owns the copyright of the images of the work in progress, uncovering the paintings and preserving them? We wish to assert our rights on the work in progress. The conservator's work is in a different category to that of the object. It is in a Welsh church (the status of the painting is different in Welsh

churches to what it would be in an English church). When the conservation work first began, certain details in the painting were described by someone as lost, but this is not the case. In summary, it is our conservation work, but who owns it? There was also the issue of the public taking photos of the work in progress, and sometimes when work was not going on but the church was open, which the conservators thought unacceptable because some images had been used in local news reports criticising the project, to the detriment of the conservators' business and without regard for their own copyright in the conservation processes being applied, or their unsought permission to photograph them at work. There has been no discussion of such images in the contract for the work.

**Bernard Horrocks:** This is indeed very complex. As far as the copyright in the paintings is concerned, the artist is very definitely dead so you are not dealing with a copyright object. However, the Welsh church says that it owns them: this is a different issue and not a copyright one. You are subject to a contract between the church and the public. They can say (to the public) 'You can come in, but you may not photograph', using the contract or some other purpose to prevent this (perhaps they have an ulterior motive, for example).

**Jane Rutherford:** There is an agreement, so they can disallow any photography of work in progress while the work is indeed in progress (i.e. while the scaffolding is in place). There is an agreement saying that while we are there, we have ownership. We need guidelines, rules ...

**Bernard Horrocks:** Your work carried out in the church, and your 'know-how' for the methods you have used, are your intellectual property. Further, you own copyright in your images and in the written reports on your work. There is also a moral issue: you have the right of protection against derogatory treatment if you are halfway through the work. Probably this is more to do with intellectual property and contracts rather than copyright.

**Jane Rutherford:** The work is in the public domain whether we like it or not, if we are not on site. There are other cases and clearly this is a big problem. People who are trouble makers can bring about indiscriminate plagiarism; we are not protected against photography.

**Bernard Horrocks:** A conundrum ...

**Jane Rutherford:** It's a no win situation as the work generates its own funding.

**Bernard Horrocks:** Perhaps you should turn it on its head: you take your own photos of the work in progress and have a blog. You are then forestalling anyone usurping the work as it goes along: instead of trying to protect – what are you trying to protect?

**Q Theo Sturge:** I am an accredited restorer: ACR; I am required to photograph my work. Who owns the copyright of the photo?

**Bernard Horrocks:** You do.

**Elizabeth Walley:** I agree, completely. But if you were dealing with a work that was itself in copyright this might be different.

**Q Suzanne Bosman, National Gallery Company:** Even if you did own the copyright, could the taker of the photo use it as a right to criticise?

**Bernard Horrocks:** It depends on how the photo was obtained. If it was stolen and then criticised, that would not be fair.

**Elizabeth Walley:** If it was used against the contract of the site that would be unfair.

**Joyce Townsend:** I'm afraid I have to draw this discussion to a close. Thank you all very much.