



Gowers Review of Intellectual Property  
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April 21, 2006

## **Gowers Review of Intellectual Property**

### **Submission on behalf of MDA**

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#### **1. Introduction**

- 1.1 Museums, stately homes and other heritage collections (hereafter 'museums') are responsible for managing large amounts of often fragile material both on display and in storage. Keeping effective records of all known information about this material - such as its provenance or information about its ownership - is a fundamental and important part of fulfilling our responsibility to our shared cultural heritage.
- 1.2 This responsibility is addressed through a set of professional practices which together are known as documentation. Documentation and related activity accounts for a significant proportion of the annual investment in caring for historical collections, and is also the focus of the cultural sector's approach to ongoing Rights Management.
- 1.3 For over 25 years, MDA (formerly the *Museum Documentation Association*) has been the lead body for documentation of museum and related collections. We are responsible for the maintenance and publication of SPECTRUM, recognized nationally and internationally as the industry standard for documentation practice.
- 1.4 MDA is an independent body responsible for providing advice, training and guidance to hundreds of museum professionals working towards best practice in the management of their collections. We also receive support from the Department for Culture, Media and Sport through the Museums, Libraries and Archives Council.
- 1.5 MDA directly represents over 600 museums, ranging from National museums to small independent and regional collections who have signed up as MDA Members as well as many more who are making use of our free products and services and attending our training sessions, events and seminars.
- 1.6 One of MDA's key missions is to promote a greater awareness of copyright, licensing and other associated legal issues as they affect collections and the documentation of collections in order to enhance access, research, education and ultimately economic growth.
- 1.7 MDA is now the lead organization in the provision of copyright training, copyright resources and advice to the sector. MDA has also established a dedicated Intellectual Property Officer post to serve the community, as well as creating an IP Advisory Committee for Collections which will be creating a strategic vision for collections and their management and use of IP.

## **2. How is IP awarded?**

2.1 Museums are the automatic copyright holders of a vast array of content, ranging from:

- Images of the works in their collections
- Text written by staff
- Website content
- Material that is commissioned
- Reports, policy statements, educational resources
- Online and offline publications.

2.2 Museums are also likely to be the owners of rights in both the information contained within their in-house databases, as well as the database rights in some of the collections management systems and/or the databases that drive their online catalogues often available via their websites.

2.3 However this fact exemplifies the difficult balance that many museums are facing: the desire to provide free access to their collections, whilst at the same time maintaining a level of access that allows them to charge for access to value added content (such as high resolution images, educational resources, books and exhibition guides) as a means to fund their core services and sustain their activities.

2.4 Larger museums, often the nationals, can take advantage of the wealth of their collections, images of which are likely to be immensely exploitable because of their public appeal. These museums often operate robust and profitable publishing and picture library arms as well as investing in the registration of trademarks which may provide the foundations for retail and sponsorship activities. Overall, the costs of running such services are likely to provide sufficient funds for nationals to continue to provide the operational services which ensure that works are suitably cared for, preserved, documented, understood, and displayed.

2.5 However, the collections of smaller regional museums may not lend themselves so readily to commercial exploitation because of insufficient resources and strains on already stretched staff time. Unlike the nationals who may have dedicated staff to drive commercial activities, invest in often expensive legal advice and have the resources to operate a task-oriented framework, smaller museums do not have these resources available, and many lack experience and skills in running business-like operations. They may often rely on relationships built on trust with bigger commercial companies and media players sometimes to their commercial disadvantage and/or resulting in delays in providing content to them. These delays can reduce the use of this type of museum content in broader commercial contexts and ultimately have a detrimental impact upon the advancement of society and culture.

2.6 MDA is keen to work with museums, government and private/public partnerships to find and develop commercially beneficial solutions which enhance the efficient interaction of cultural heritage organisations with business, commerce, schools, colleges and universities and other sectors in the UK and abroad in order to make cultural content more readily available.

## **3. How IP is used**

3.1 Museums will use a range of IP within their daily activities and many are embarking upon digitising their collections in order to provide online access via their websites. Museums are conscious of the importance of providing this type of public access, however in order to protect their collections from unauthorised use, will often display the works at a low resolution.

3.2 Funding for much digitisation in the sector has been provided by the New Opportunities Fund (NOF) Digitisation Programme as well as Culture Online, and these sources of funding have provided immensely important and valuable contributions to online accessibility to images. Despite this, many museums were unaware of the onerous copyright clauses which existed within the funding conditions and found themselves unable to use these specific funds to clear copyright. As a result, despite generous funding, not all images

have been digitised due to the additional costs of clearing rights that some organisations have incurred. The implication of this is that difficulties presented to smaller cultural institutions by the current arrangements for copyright have led to patchy or incomplete digitisation of cultural heritage, and thereby limited overall access.

- 3.3 MDA would welcome further government funding for the enhancement of public access to collections and would be happy to work with funding bodies to ensure that conditions of funding take into account the limitations (ethical, financial, legal and administrative) under which some museums operate. MDA would be happy to offer its dissemination and outreach channels via contact with its broad membership, advisory services, training and awareness raising seminars and events in issues relating to funding and IPR. Working with funding bodies, this will help to ensure that museum professionals can overcome any copyright obstacles which may reduce the impact of government funding to the provision of greater public access to collections.

#### **4. How IP is licensed and exchanged**

- 4.1 The cultural heritage sector occupies an important position both as creators of copyright material and users of 3<sup>rd</sup> party rights. The ability to negotiate this position is vital to the ability of cultural organisations to play their part in the Creative Industries. MDA believes that a professional and informed approach to licensing, including the ability to negotiate effectively with collecting societies such as the Design and Artists Copyright Society (DACS), will have a profound impact on the sustainability of the sector.
- 4.2 Over recent months, the Creative Commons licensing framework has been flagged as a possible solution for improving the way in which cultural heritage organisations license out the use of their content. However, this is only one possible mechanism for addressing the situation and MDA is leading the way in ensuring that collections in the cultural heritage sector have the tools at their disposal to understand the importance of copyright, respect third party rights and are empowered to enter into negotiations for the use of these rights.
- 4.3 MDA's provisions include low cost Copyright and Licensing training aimed specifically at museums, libraries and archives<sup>1</sup>, the development of free, downloadable fact sheets on copyright<sup>2</sup>, specific rights management sections in SPECTRUM<sup>3</sup> as well as the development of online model licences.
- 4.4 MDA was also recently commissioned by Becta to examine the use of Creative Commons in removing IP barriers in the supply of digital cultural content to schools. MDA will be running events on Creative Commons and welcomes the opportunity to debate issues raised with the educational and cultural sectors. In addition, MDA makes the following recommendations:

##### **Recommendation One – BBC Creative Archive**

MDA recommends a further investigation into the possible creation of a Creative Archive (<http://creativearchive.bbc.co.uk>) variant or similar model license to support educational reuse of digital cultural content.

##### **Recommendation Two – Standard Conditions**

Cultural organisations require straightforward and effective solutions which they can be confident are legal and fit-for-purpose. To address this requirement, MDA recommends the creation of a boilerplate set of Terms & Conditions for cultural institutions publishing content for educational use.

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<sup>1</sup> [www.mda.org.uk/training](http://www.mda.org.uk/training)

<sup>2</sup> [www.mda.org.uk/stand](http://www.mda.org.uk/stand)

<sup>3</sup> [www.mda.org.uk/stand](http://www.mda.org.uk/stand)

### **Recommendation Three – Defining ‘non-commercial’**

One of the most significant challenges highlighted in the use of Creative Commons licences is that of the lack of clarity around the concepts of ‘non-commercial’ and ‘educational’. MDA recommends the investigation of a standard licensing framework for culture-sector bodies which includes an agreed definition of ‘non-commercial’ and is supported by training and development materials.

### **Recommendation Four – 3<sup>rd</sup> Party Rights holders and Representatives**

The interests of 3rd party rights holders and their negotiating bodies are the main barrier for cultural institutions wishing to apply the Creative Commons model to their digital content. MDA recommends a programme of work with these agencies to reach a cost-effective compromise position.

- 4.5 In addition to the issues faced by museums in licensing out their own IP, there also remain several significant difficulties for museums in their use of IP belonging to third parties:
- Many works and in particular photographs, retain little information if any at all about the original photographer, creating so called “orphan works” and thus making it impossible for museums to clear rights.
  - Collecting societies and rights holders are charging copyright fees which make it prohibitive for museums to reproduce the works that they own. Unaffordable fees are charged on a transactional basis often per image (rather than per work) and as a result museums may have to select which images can be viewed on their websites. This has broad repercussions for society, education, business and culture as it acts as a financial censor to online accessibility to the UK’s cultural heritage.
- 4.6 MDA’s IP Advisory Committee for Collections will comprise of representatives from museums, libraries and archives, collecting societies, commercial companies, public corporations and other interested parties. The committee will draw together shared views and ideas on how we all might work more effectively so that the interests of the cultural heritage sector, the public and content creators are suitably represented. MDA would also welcome any other opportunities to contribute towards finding an appropriate solution.
- ## **5. How is IP challenged and enforced**
- 5.1 Through its comprehensive training and advice, MDA encourages museums to explore non-litigious methods of dealing with unauthorised uses of museum images. The belief in the sector is that first of all, many infringements are a result of users being unaware that rights in content are owned by museums and other third party rights holders.
- 5.2 MDA works closely with museums to help them develop their copyright statements to effectively “educate their users”. Secondly, if infringements are deliberate, MDA advocates the use of notice and take down notices in the first place. MDA helps the museum community by offering advice and support and recommending legal advice when suitable alternatives have been tried or are not suitable.
- 5.3 MDA welcomes the Patent Office’s consultation on the role of the Copyright Tribunal and new mediation service as possible additional paths that might be explored to ensure that museums are not paying expensive and possibly inappropriate and expensive legal fees which can place an avoidable strain on publicly funded organisations.

Yours sincerely

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