



Seeking Permission and Due Diligence for OER Projects¹

1. Clearance of Rights: What is It and Why is It Important?

The clearance of third party rights for the use of works protected by copyright and other related rights for OER can often be a complex and time consuming exercise. Nevertheless, it is essential to get such clearance before you start using the material and/or let others use the material as you might be infringing copyright if you or your users perform any restricted act without permission. It is important to note that some, if not many of the resources that you are likely to want to use will be compiled from a variety of materials with different copyright holders. In these circumstances, each part will need to be considered separately in terms of rights clearances.

More information about the types of rights that you may encounter can be found here:

<https://openeducationalresources.pbworks.com/Legal-Aspects-of-OER>

2. Rights Clearance Checklist

The following check list provides a rights clearance framework for OER Project Teams. If the answer to any of the following is YES, it is likely that rights will need to be sought using the OER IPR Support template permissions letter and/or consent form.

- Does the content that you wish to create include third party rights? YES/NO
- If so, is the work that you want to reproduce still in copyright? YES/NO
- Is the material created by (or in conjunction with) an individual who is not a paid member of staff, such as a student, volunteer or a freelancer? YES/NO

3. What Permissions To Ask For?

Assuming you have located the bona fide rights owner (or their agent) you should have the following information to hand when approaching them:

- Context: Description of your project and its aims and objectives;
- Exact details of the material you want to use and for how long;
- How you want to use the material (this will need to be compatible with the Creative Commons Licence that you have selected).

Remember that repeatedly going back to the rights holder for additional permission will add to the cost of the project and could seriously frustrate the progress of the project. It is therefore essential

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This resource is based upon the *IPR Toolkit* created by the JISC funded Web2Rights Project www.web2rights.org.uk and adapted for the Strategic Content Alliance <http://sca.jiscinvolve.org/wp/>. This resource is therefore published under a Creative Commons Attribution-Non-Commercial 2.0 UK: England & Wales Licence which is the original licence under which this resource appeared.

that before you contact the rights holder you have a clear picture of the long term aims and objectives of the project.

4. What Approach Should You Take?

When you approach the rights holder, different approaches can be taken depending on the nature of the content – i.e. is it low, medium or high risk content, as well as other factors such as the nature of the rights holder and the purpose of the use (i.e. educational, non commercial or commercial). There may be some circumstances in which even though the material might be low risk, the purpose of use may be such that it is advisable to use a formal detailed licence. Understanding third party content for release as OER in terms of risk, is also helpful for assessing the risk and your likely actions if you are unable to trace the rights holders or the rights holders are unknown. See the OER IPR Support Risk Management Wizard for further help.

Low risk content

Low risk material is likely to include content such as documentary photographs, sound recordings of members of the public and amateur films. The initial contact can always be done by phone or e-mail, but make sure that the content of each and every telephone call is confirmed by you in writing to the rights holder and every email and letter is saved, printed and the information subsequently stored electronically. Allow plenty of time for approval, as the process is usually fairly slow. This is the type of content which you are likely to encounter for which the rights holders may be unknown or cannot be found (so called “orphan works”).

Medium risk material

Medium risk material is likely to include art works created by less well known artists, certain types of archival material such as letters and diaries as well as semi professional photographs. In these instances, a letter might be sufficient in ensuring that permissions to reproduce the material in which third parties own the rights has been secured. In instances where it is not 100% certain who the rights holder is, or the work is being used in a high risk environment, such as commercial use – then it is advisable that the material is treated as if it were high risk and a more formal detailed licence is used (as in the case of high risk content below).

High risk material

For high risk material, such as music, commercial films, art works created by high profile artists, broadcasts etc, it is better to opt for a formal detailed licence rather than a letter or an email. This should not come as a surprise as a licence creates a clear and controllable environment for the parties involved. Licences are governed by contract law. The basic notion of contract law is contractual freedom. This means that parties to a contract are free to negotiate the terms and use of copyright material or indeed waive rights that the copyright law grants them. The level of access and use of copyrighted material heavily depends on the terms and conditions of the licence. Since the negotiation of a formal licence can be a very time consuming process, it will be important to consider this issue within project time lines and budgets accordingly. Template licences for this type of material can be found here: www.web2rights.org.uk

For all types of material it is important that all agreements regarding copyright and associated rights are put in writing. Everything agreed by you for your project must be recorded with evidence of the acceptance of the terms by the rights holder. You must at least keep all agreements for the life of the project or as long as permission is granted for, so that you have proof of such permission, as well as storing the information electronically about the rights and permissions.

Clearing rights can be time consuming and demands good negotiating skills, but setting up a good system of recording early on will save valuable time in the long run.

5. Where Might You Look to Trace Rights Holders?

Tracing rights holders can be the most time consuming part of any rights clearance project and there are a number of sources which might be explored. Even if all possible avenues are explored

for tracing rights holders and these efforts are documented, release of OER will present risks. *The more open your Creative Commons Licence, the greater the risks if you have not sought third party permissions.*

The types of places that might be explored for rights holders include:

- Examining the material itself for any provenance information. This might be found, for example on the back of a photograph, in the metadata and/or credit lines associated with digital material.
- Referring to information which might be held about the material, such as acquisition forms and registers, contracts and catalogue files
- Checking with staff, including information professionals for any further information
- Liaising with colleagues in other organisations who might own works by the same author and/or related works
- Checking with collecting societies who administer the rights for a wide range of creators dependent upon the type of media, such as:

Visual works

Design and Artist Copyright Society (DACS) <http://www.dacs.co.uk>

Bridgeman Art Library <http://www.bridgeman.co.uk>

Text Based Works

The Publishers Association <http://www.publishers.org.uk/en/home>

the Authors Licensing and Collecting Society <http://www.alcs.co.uk/>

The Society of Authors <http://www.societyofauthors.org/>

Sound Recordings and Music

The Performing Rights Society – collecting society representing song writers, performers and musicians <http://www.mcps-prs-alliance.co.uk/Pages/default.aspx>

The Phonographic Performance Ltd (PPL) – representing the interests of music performers and record companies <http://www.ppluk.com/>

- Check the WATCH File Database (Writers and Artists And Their Copyright Holders) <http://tyler.hrc.utexas.edu/>
- Search on the internet
- Check trade journals, exhibition catalogues and other relevant publications
- Listing the names/titles of works on your website where you are unable to trace the rights holders or the rights holders are unknown together with your contact details should the rights holders come forward.

6. What Happens if You Cannot Trace the Rights Holder?

It is vital that you document all efforts to trace rights holders (due diligence), to use as a possible defence in cases where you choose to use works, but where the rights holders are unknown or cannot be traced. Such documentation, which ideally should be kept in a separate file (as well as noted in any digital rights management system) might include:

- Taking notes about any phone calls that you make, including to whom, when, and what was said
- Keeping copies of all letters that are sent
- Keeping copies of any letters which are returned
- Sending letters by recorded delivery or registered post
- Printing emails that you sent and those that you receive, even if the response is negative
- Putting money to one side in case the rights holder does come forward
- Use of a statement if you do decide to take the risk and reproduce the works.

The following statement below is an example used by National Portrait Gallery².

Every effort has been made to obtain permission from copyright holders to reproduce this material. Owing to the age of some of this content, and given the resources available to us, this hasn't always been possible or practicable. We have acted in good faith at all times, and any queries relating to copyright in this content should be referred to XXXX for immediate attention.

REMEMBER – EVEN IF YOU HAVE CARRIED OUT REASONABLE EFFORTS TO TRACE RIGHTS HOLDERS, KEPT A DUE DILIGENCE FILE OF THE ATTEMPTS THAT YOU HAVE MADE AND USED A STATEMENT IN ASSOCIATED WITH THE USE – THIS IS STILL UNAUTHORISED USE AND YOU CAN BE CHALLENGED BY THE RIGHTS HOLDERS.³

In circumstances where you cannot trace the rights holders or the rights are unknown and you choose to release the content as OER, you will need to consider putting in measures to mitigate your potential risks. Further information is available in the Risk Management paper developed by Web2Rights <http://www.web2rights.org.uk/documents.html>

² <http://www.npg.org.uk/research/archive/private-papers/handlist/disclaimer.php?sourced=copyright&highlight=searchHighlight+searchHighlight1>

³ Please refer to the template Notice and Take Down Policy and Procedures produced by JORUM and Web2Rights