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Content Space

## Risk Management: NTD Policy and Clauses

### Notice and Take Down Policy (NTD policy)

A NTD policy can be used as part of a risk management exercise by organisations when deciding what strategy to adopt when making works available on their websites.

There may be a number of reasons for adopting an NTD policy. These include:

- It is often not possible to find the owners of copyright protected works even after a lengthy search
- It may not be obvious whether a particular work is in the public domain or not (because the author died more than 70/50 years ago)
- On a risk/reward analysis the Institution may decide that it is too costly to carry out exhaustive searches for owners.

In these circumstances, and because it is best practice as part of a risk management exercise, the organisation can adopt a NTD policy. Within Europe this would also be in accordance with the Electronic Commerce (EC Directive) Regulations 2002<sup>1</sup>, Clauses 17-19 for those countries subject to this Directive.

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1. See <http://www.legislation.gov.uk/ukxi/2002/2013/contents/made> or [http://www.legislation.gov.uk/ukxi/2002/2013/pdfs/ukxi\\_20022013\\_en.pdf](http://www.legislation.gov.uk/ukxi/2002/2013/pdfs/ukxi_20022013_en.pdf)

The NTD policy should be published on the organisations' website and provide clear instructions for users on how to serve notice if it is thought that copyright infringement has taken place. These instructions should include contact details for the person responsible for administering the system, and a template that the user can complete. If a complaint is received, then it should be dealt with expeditiously. The longer the organisation has notice of a potential infringement but does not act on it, then the more likely it is to be found liable if it is eventually decided that the presence of the work infringes copyright.

## **Example of a takedown notice to appear on website**

If you are the owner of the copyright in any of the works on this website and you do not agree to your works being appearing on the website, please contact us with the information requested below:

- Your contact details
- Enough information for us to identify the relevant work(s)
- What your complaint is and why you are notifying us
- Confirmation that you are the owner of the copyright in the work or are authorised by the owner to contact us
- When we receive your complaint, we will acknowledge receipt by email
- We will investigate the complaint and depending on our findings may remove the relevant works
- Your complaint can be sent electronically to [here insert email address]

## **Insurance**

Consider taking out insurance if the likelihood of being sued for infringement is very great or the stakes very high.

In terms of getting insurance against being sued for copyright infringement in the areas we are looking at, Companies such as COBRA Legal and IP ([www.ip-insurance.com](http://www.ip-insurance.com))

arrange bespoke IP insurance in addition to more standard products<sup>2</sup>. This kind of company can offer cover for copyright infringement which would include defence costs and any damages awards. They can sometimes include cover which would pay for pursuit and enforcement costs as well, should the content providers wish to sue a third party for infringement. On the defence side they can arrange for limits of indemnity for combined defence costs and damages in excess of £10m, if required. Specialist IP insurance intermediaries (brokers) arrange cover with the different participating insurers that underwrite these types of risk, and have exclusive schemes which they run for insurers. They carry out the initial risk assessments themselves and work with insurers such as Liberty (a large US insurer) and CFC (an underwriting agency which acts for a consortium of Lloyd's of London Syndicates), though they can cover just defence costs more cheaply under exclusive schemes with global insurers such as QBE Europe. They find the most suitable cover at the most competitive premium and are prepared to change cover to assist clients, offering different limits and excesses. Sometimes they arrange cover with several underwriters when one cannot offer everything required. These are "broker only" underwriters, and their FCA authorisations do not allow them to deal directly with clients or the public.

## **Risk Management Guidelines for the use of Text, Images, and Audio-visual Content Online<sup>3</sup>**

The following guidelines provide a step by step approach to managing risk when re-using digital cultural content online. They outline all the necessary considerations that must be taken into account with regard to intellectual property rights.

- It is important to comply with the law in your own jurisdiction.
- Although online publication reaches an international audience and multiple legal systems apply, it is likely that a potential infringement by an image provider will be challenged on the territory of the provider first. If you are in a civil law country, you should consider the moral rights of the author as well as copyright issues. If there are no rights attached to a particular medium of

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2. See the article on the IPO website: <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/news/newsletters/ipinsight/ipinsight-201308/ipinsight-201308-3.htm>.

3. This tool is adapted from the text of "A (Very Brief) Risk Management Guide for Displaying Images on Europeana", which arose out of discussions at the EuropeanaPhotography IPR workshop in Paris, November 14 & 15, 2003 and is contained within the meeting minutes.

creativity such as architecture or fashion design in your country, permissions for these may not be required.

- Try to obtain permissions from as many third parties as possible prior to publishing the content online.
- Participants gathering content from a variety of sources should obtain from those sources permissions or licences similar to the ones they intend to grant the online platform they hope to use for publishing the material. For example, if they wish to publish images on Europeana or within other re-usable datasets such as Flickr Commons, Wikipedia, Open Cultuur Data and so forth, they should seek images that are re-usable under similarly open licences. It is the policy of Europeana that information obtained from the public domain should remain in the public domain.
- Focus on the author's copyright issues, such as their moral rights (paternity, integrity of the work) if appropriate on your territory.
- Depending on the date and type of content used, and the mode of use (editorial or commercial), third party rights are more or less likely to be an issue. An exception or limitation may apply where the content is used for educational, research, journalistic, purposes. Copyright for older content may also have expired if enough time has elapsed since the author's death (generally 70 years after the death of the author).
- Legal issues should be considered when selecting material.
- Always select the content with the greatest historical and informational value based on the project's goals, as this may be taken into consideration in case of a legal dispute. For example, an image showing a wide view of the 1900 world exhibition in Paris (including people and various objects exhibited) is preferable to an individual view of a work of art displayed in the same exhibition.
- Orphan works may be a significant portion of the content displayed and due diligence should be applied in searching for copyright holders (see the FAQ on the Orphan Works Directive).
- While orphan works legislation is now being implemented in the EU, it will take a time for it to bed down. Generally participants should assess their appetite to risk and where applicable undertake and document a diligent search (as defined in the Orphan Works Directive - see FAQ) prior to publishing any such work. Such a search should include posting a notice on their own website to

encourage copyright holders to come forward and should include a notice and take down policy

- When you do not have an author's name, try to determine whether the content is in the public domain. Using your country's demographic tables, it is possible to calculate the statistical chances that a work is in the public domain based on its real or estimated date. In France for example, works until 1895 are likely to be in the public domain as the average life expectancy of a hypothetical 20 year old author is less than 47 years. Their statistical date of death would be prior to 1942. This approach does not give absolute certainty but, when followed consistently, might be useful in challenging an accusation of infringement.
- Anticipate the economic consequences of possible infringements.
- In keeping with the spirit of the Orphan Works directive, but also as good business practice, participants could set up a reserve fund to face proved requests for compensation from copyright holders. This can take the form of a sum kept in escrow, a provision in the company accounts or any other form of financial reserve, with an amount commensurate to the level of risk perceived, especially with regard to anticipated uses of the content (e.g. whether it will be licensed for editorial or commercial use).