

# Copyright and Cultural Institutions: Short Guidelines for Digitisation

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Image credits are listed on page 14

## Introduction

Many activities performed by museums, galleries and libraries raise copyright issues - particularly those involving digital technologies. A cultural institution risks infringing copyright whenever it **digitises**, or publishes **online**, a copyright work for which it is not the owner of copyright. This has generated concern for cultural institutions in relation to **copyright management**: what sort of items are protected by copyright? What is the duration of copyright protection? What sorts of activities infringe copyright? And when is a copyright licence required?

In Australia, copyright is governed by the *Copyright Act 1968 (Cth)*. The *Copyright Act* is a lengthy and complex piece of legislation, and it can be difficult to know where to start in answering these questions. However, there are

certain **key questions** that can assist institutions in navigating their way through copyright law. These are set out in **FLOWCHART 1**. By working your way through this flowchart, you will be able to determine whether digitisation is likely to **infringe copyright** and, if so, whether digitisation is nevertheless permitted by a **statutory exception** or whether a **copyright licence** is required.

The purpose of these short-form guidelines is to assist staff and volunteers of cultural institutions:

- understand the general structure of copyright law; and
- identify the circumstances in which digitisation may infringe copyright.



These guidelines supplement **long-form guidelines**, in which more detail is given in relation to the content of copyright law as well as rights management. Bound copies of the long-form guidelines are available for purchase from the CMCL, and they can be downloaded from [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl).

Both guidelines result from a research project conducted at the University of Melbourne by the Centre for Media and Communications Law and the Intellectual Property Research Institute of Australia, which was funded by the Australian Research Council and six of Australia's leading cultural institutions.

The short-form guidelines aim to raise awareness of copyright law, while the long-form guidelines seek to assist readers better understand the intricacies of copyright law and develop policies for managing copyright. However, these guidelines are not intended to constitute legal advice, and cultural institutions should obtain the advice of a lawyer in relation to any specific questions regarding their copyright policies and practices.

## What is copyright?

Copyright law provides a legal framework for the use and management of a broad range of creative and intellectual works found in cultural institutions, including books, manuscripts, plays, works of art, maps, musical scores, sound recordings and films – see TABLE 1. It does this by granting the owner of copyright the exclusive

right to perform certain acts in relation to the protected material, including the right:

- to 'reproduce' or 'copy' it (which includes **digitising** an analogue work or audio-visual item); and
- to 'communicate it to the public' (which includes publishing a digital copy of the work or audio-visual item **online**).

Rights in copyright are separate from ownership of the underlying physical work. For example, the purchaser of a book or CD does not become the owner of the copyright in his or her purchase. Instead, copyright is retained by one or more others, such as the author, publisher, artist and music company.

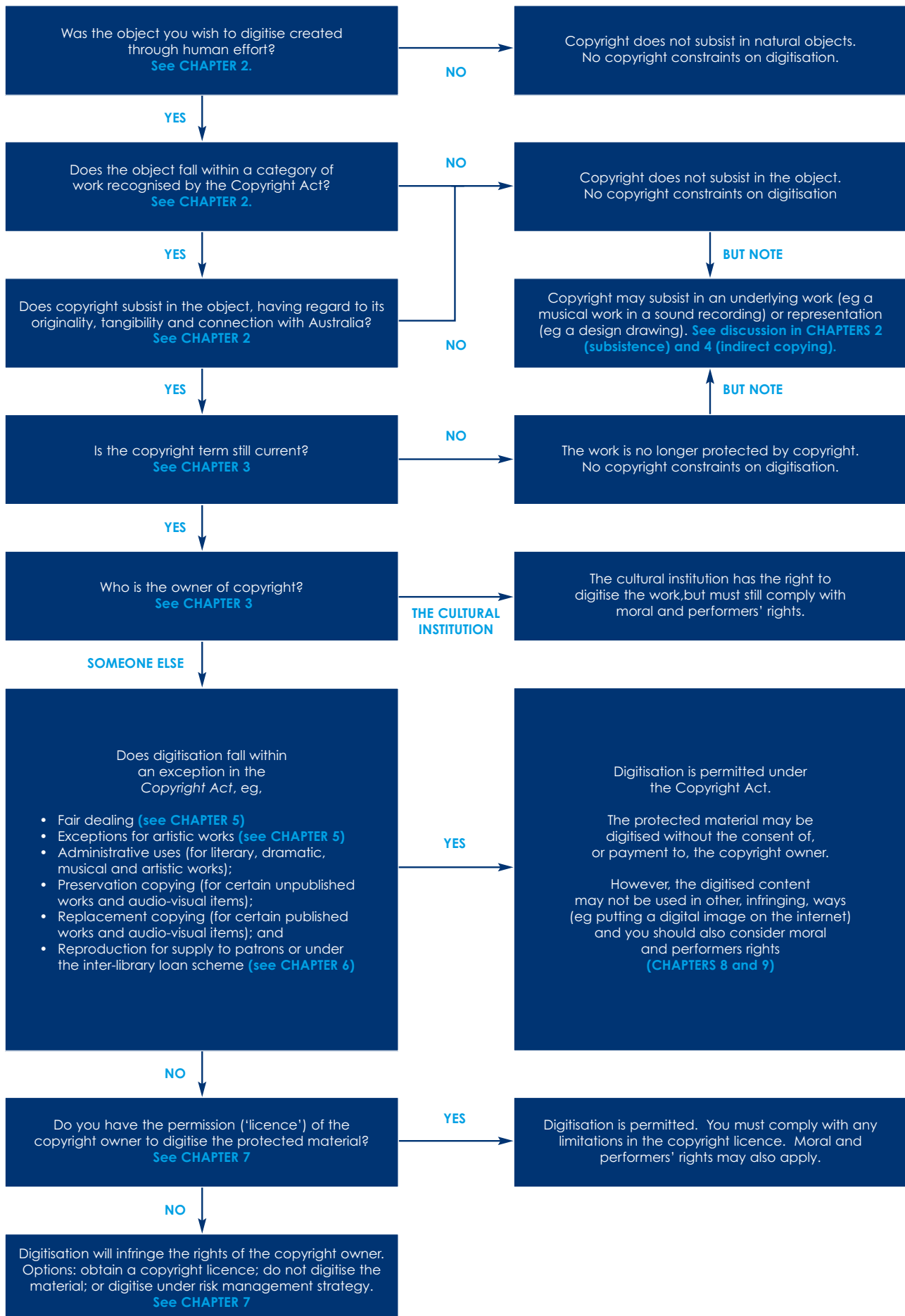
Copyright is relevant to cultural institutions because they commonly do not own copyright in collection items. That is, when an item is donated or sold to a cultural institution, the institution typically becomes the new owner of the physical item, but not any copyright that subsists in it. This means the cultural institution risks infringing copyright if it does an act that the copyright owner has the exclusive right to perform (which includes digitisation). Cultural institutions must therefore consider copyright law when they are digitising works, or putting digital content on the internet.

Copyright does not need to be registered with any government agency, nor does it need to be asserted (for example, by inserting © Author Name 2005 on a work). Copyright subsists in a work the moment it is 'published' or 'made'.

TABLE 1: Types of works that are protected by copyright

Category of work	Examples
'Literary works'	Books, journals, manuscripts, letters, newspapers, computer software, databases.
'Dramatic works'	Plays, scripts, choreography.
'Musical works'	Musical scores.
'Artistic works'	Paintings, sculptures, drawings, engravings, photographs, applied art.
'Sound recordings'	Commercial and private sound recordings, whether stored in analogue or digital format.
'Cinematograph films'	Feature films, documentaries, television commercials, home movies, computer games.
'Broadcasts'	Sound and television broadcasts.
'Published editions'	The typographical arrangement of published works.

FLOWCHART 1: Procedure for determining whether digitisation might infringe copyright. References are to chapters of the long-form guidelines which are available at [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl)



## Copyright and older works

Australia's current copyright legislation, the *Copyright Act 1968* (Cth), came into force on 1 May 1969. The 1968 Act replaced, and contained some important differences from, the earlier copyright legislation that applied in Australia. An important question arose as to how the 1968 Act should treat material that existed prior to its entry into force.

The general approach is that no distinction is drawn between works that were made or published before 1 May 1969 and those created after that date: the 1968 Act applies in a like manner to items existing at its commencement and to items made later. However, there are certain exceptions to this rule. For example:

- The 1968 Act represented the first time that Australian copyright law had a category of protected material called 'cinematograph films'. However, films made prior to 1 May 1969 may be protected as original dramatic works or a series of photographs.

- Copyright does not protect a sound or television broadcast made before 1 May 1969 (or a repetition of such a broadcast).
- Copyright does not subsist in an artistic work made before 1 May 1969 which was, or could have been, registered as an 'industrial design' under designs legislation.
- There are subtle differences in the rules regarding when copyright subsists in a literary, dramatic, musical or artistic work made prior to 1 May 1969, and who owns that copyright.

The operation of these provisions (called the 'transitional provisions') is discussed in detail in CHAPTER 2 of the long-form guidelines. Some of the rules regarding copyright in photographs, sound recordings, audio-visual items and broadcasts may be particularly relevant to cultural institutions.

TABLE 2: Duration of copyright

Section	Type of work	Duration of copyright
33	<input checked="" type="checkbox"/> Literary, dramatic and musical works, and engravings.	<input checked="" type="checkbox"/> For works published during the author's life: duration is life of the author plus 70 years. <input checked="" type="checkbox"/> For works or engravings first published after the death of the author: duration is 70 years after the year in which first publication took place. <input checked="" type="checkbox"/> For unpublished works: duration is effectively indefinite.
33	<input checked="" type="checkbox"/> Artistic works (including photographs, but excluding engravings).	<input checked="" type="checkbox"/> Duration is life of the artist plus 70 years. <input checked="" type="checkbox"/> Copyright has expired in all photographs made before 1 January 1955 (due to previous rules under copyright law).
93, 94	<input checked="" type="checkbox"/> Sound recordings and films.	<input checked="" type="checkbox"/> For published recordings and films: duration is 70 years after the year in which the item was published. <input checked="" type="checkbox"/> For unpublished recordings and films: duration is effectively indefinite.
95	<input checked="" type="checkbox"/> Broadcasts.	<input checked="" type="checkbox"/> Duration is 50 years after the broadcast was made.
96	<input checked="" type="checkbox"/> Published editions.	<input checked="" type="checkbox"/> Duration is 25 years after the edition was published.

## How has the Free Trade Agreement changed the duration of copyright?

The Free Trade Agreement with the United States has led to an **extension** in the duration of copyright for certain published works. In addition, it repealed the existing rules for the duration of copyright in:

- photographs taken after 1 May 1969: formerly 50 years from the date of publication, now life of the artist plus 70 years; and
- photographs and sound recordings made prior to 1 May 1969: formerly 50 years after the year in which the photograph was taken or the sound recording was made, now life of the artist plus 70 years for photographs, and 70 years after the year of publication for sound recordings.

The changes introduced by the the FTA are **not retrospective**: that is, where copyright in a work has already expired, it is not revived by the FTA Amendments, which came into force on 1 January 2005. TABLE 2 sets out the current rules for duration of copyright.

National Gallery of Victoria Photographic Studio,  
North Melbourne  
Photo: NGV Photographic Services

The Colonial Galleries at The Ian Potter Centre:  
NGV Australia  
Photo: NGV Photographic Services

## Copyright infringement

The general rule is that copyright in a work is **infringed** where:

- a person who is **not the owner** of copyright;
- performs an act that the copyright owner has the **exclusive right** to perform (such as reproduction or first publication);
- or **authorises** someone else to perform one of these acts;
- in relation to the **whole** or a '**substantial part**' of the work;
- without the **permission** (in copyright law called a '**licence**') of the copyright owner.

However, the *Copyright Act* also sets out a series of **exceptions**, that is, activities which do not infringe copyright. Some of these are specifically directed towards cultural institutions. These exceptions are important because they allow certain activities to be performed for free and without the permission of the copyright owner.

TABLE 3, on the next page, lists a series of steps to help cultural institutions determine whether they are at risk of infringing copyright by digitising a collection item.



TABLE 3: Determining whether a cultural institution is at risk of infringing copyright

<input checked="" type="checkbox"/>	<b>Identify any copyrights that may subsist in the material you wish to digitise</b>	
	<input checked="" type="checkbox"/> The common denominator of all copyright works is that they were created by human effort.	<input checked="" type="checkbox"/> If an item was not created by human effort (eg animal or plant specimens, geological formations), it is not protected by copyright, and there are no copyright constraints on digitisation.
	<input checked="" type="checkbox"/> The <i>Copyright Act</i> sets out the types of works and subject matter that it protects. An item is only protected by copyright if it falls within this list.	The protected items are: <input checked="" type="checkbox"/> Literary, dramatic, musical and artistic works; and <input checked="" type="checkbox"/> Sound recordings, films, sound and television broadcasts, and published editions. See TABLE 1 for more detail.
	<input checked="" type="checkbox"/> More than one copyright can exist in one item.	<input checked="" type="checkbox"/> For example, copyrights in a CD of music may include lyrics (a literary work), music (a musical work) and the CD itself (a sound recording).
	<input checked="" type="checkbox"/> Some rules are different for collection items published or made before 1 May 1969.	<input checked="" type="checkbox"/> Films made before 1 May 1969 may be protected as original dramatic works or a series of photographs, but not as 'films'. <input checked="" type="checkbox"/> There is no copyright in broadcasts or published editions made or published prior to 1 May 1969.
<input checked="" type="checkbox"/>	<b>For each copyright identified above – does that item fall within all the pre-requisites for protection under the <i>Copyright Act</i>?</b>	
	<input checked="" type="checkbox"/> The <i>Copyright Act</i> sets out certain factors that must be present in order for copyright to subsist in a work or subject matter. Frequently, these will be easy to satisfy.	<input checked="" type="checkbox"/> For literary, dramatic, musical or artistic works – the work is 'original'. <input checked="" type="checkbox"/> For sound recordings and films – the work was 'not copied'. <input checked="" type="checkbox"/> The work has been 'published' or 'made'. <input checked="" type="checkbox"/> The work was authored by an Australian, or published or made in Australia (but note equivalent treatment is given to many published or made overseas).
<input checked="" type="checkbox"/>	<b>For each copyright work identified above – has copyright expired?</b>	
	<input checked="" type="checkbox"/> Digitisation will only present a copyright issue if the copyright term is still current. Where copyright has expired, the work is in the 'public domain', and there are no copyright constraints on digitisation.	<input checked="" type="checkbox"/> Copyright in unpublished literary, dramatic and musical works, sound recordings and films is effectively indefinite. <input checked="" type="checkbox"/> Copyright has expired in all photographs taken before 1 January 1955. <input checked="" type="checkbox"/> For details about other copyright material, see TABLE 2.
<input checked="" type="checkbox"/>	<b>For each copyright work identified above – who is the owner of copyright?</b>	
	<input checked="" type="checkbox"/> Does the cultural institution own copyright, or someone else?	<input checked="" type="checkbox"/> If the cultural institution owns copyright, there are no copyright constraints on digitisation, although the institution may need to consider 'moral rights' see below. <input checked="" type="checkbox"/> The institution risks infringing copyright if digitises an item for which copyright is owned by someone else.
	<input checked="" type="checkbox"/> The general rule is the 'author' or 'maker' is the owner of copyright.	<input checked="" type="checkbox"/> The 'author' of a literary, dramatic, musical or artistic work is the person who supplied the expression of a work. <input checked="" type="checkbox"/> The 'maker' of a sound recording is generally the producer. <input checked="" type="checkbox"/> The 'maker' of a film is the person who marshalled the resources for the film to be made.

	<input checked="" type="checkbox"/> There are statutory exceptions to this general rule, and copyright can also be assigned or bequeathed.	For example: <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Literary, dramatic, musical or artistic works made in the course of employment are owned by the employer, unless different ownership is agreed.</li> <li><input checked="" type="checkbox"/> Commissioned sound recordings and films are owned by the person commissioning the recording or film, unless different ownership is agreed.</li> <li><input checked="" type="checkbox"/> Some works are owned by the Crown under the Crown copyright provisions.</li> </ul>
<input checked="" type="checkbox"/>	<b>If copyright:</b> <ul style="list-style-type: none"> <li>• <b>subsists in a collection item;</b></li> <li>• <b>has not yet expired; and</b></li> <li>• <b>is owned by someone else,</b></li> </ul> <b>the cultural institution risks infringing copyright by digitising the item unless digitisation is covered by an exception or the institution has a licence.</b>	

### *‘Not the owner of copyright’*

A cultural institution only risks infringing copyright when it deals with an item:

- that is **protected by the *Copyright Act*** (this is termed ‘subsistence’ in copyright law);
- for which copyright has **not expired** (copyright subsists in copyright works for a prescribed period of time - ranging from 25 years to indefinitely, depending on the item under consideration); and
- for which copyright is **owned by someone else.**

For example, there are no copyright issues in digitising ‘natural history’ collections (such as geological formations or plant specimens) as copyright does not subsist in those items. Nor is it an infringement of copyright to digitise photographs taken before 1 January 1955, because any copyright has expired in those photographs. (As discussed above, the duration of copyright was recently changed by the Free Trade Agreement with the United States - see TABLE 2.) Finally, there are no copyright issues if copyright in a work is owned by the cultural institution (say, because a manuscript was written by an employee in the course of their employment). However in that case, the institution will still need to consider ‘moral rights’, which are discussed below.

When determining who is the owner of copyright, it is important to remember that one item may contain **more than one copyright work**. For example, a film may have separate copyright in the recording itself (a ‘cinematograph film’), the script (a literary and/or dramatic work), and, in some instances, songs included in the soundtrack (protected as musical works and sound recordings). In addition, it is possible for **more than one person to own copyright** in an item, as is the case when a work has joint authors.

### *‘Performs an exclusive act’*

The *Copyright Act* grants the owner of copyright the **exclusive right** to perform certain acts in relation to their copyright work. These rights vary depending on the copyright material under consideration. This is set out in TABLE 4 on the next page.

Many activities undertaken by cultural institutions - including digitisation projects - involve performing acts that are the exclusive right of the copyright owner. For example, the terms ‘reproduction’ and ‘copying’ include **digitisation** of an analogue item. Furthermore, a **three-dimensional** artistic work is reproduced by making a **two-dimensional** version of it - such as taking a photograph of a sculpture.

Given that cultural institutions commonly own the physical property in a collection item, but not the underlying copyright in it, this means that digitisation raises a risk of copyright infringement.

TABLE 4: Exclusive rights of the copyright owner

Category of work	Exclusive rights of the copyright owner
Literary, dramatic and musical works.	Reproduction; first publication; public performance; 'communication' (eg uploading to the internet, broadcasting); making an adaptation; doing any of the above in relation to an adaptation.
Artistic works.	Reproduction; first publication; communication.
Sound recordings.	Copying; causing the recording to be heard in public; communication; entering into a commercial rental arrangement in relation to the recording.
Films.	Copying; causing the film to be seen or heard in public; communication.
Broadcasts.	Making a film or sound recording of the broadcast; making a copy of such a film or recording; re-broadcasting; communication.
Published editions.	Making a 'facsimile copy' of the edition (ie an exact reproduction).

### *'Or authorises the doing of'*

It is not just an infringement of copyright to perform an exclusive act yourself - it may also infringe copyright to **authorise someone else** to perform an infringing act. For example, the High Court of Australia once held that a library authorised copyright infringement by providing self-service photocopiers to patrons. Following this decision, the *Copyright Act* was amended to allow notices to be placed next to photocopiers and computers warning about copyright infringement (see sections 39A and 104B). If a cultural institution uses these notices, it will not be liable for having authorised copyright infringement merely because the infringing copy was made on a machine installed on its premises.

### *'Substantial part'*

It does not infringe copyright to perform an exclusive act in relation to less than a 'substantial part' of a work. When assessing whether a part is 'substantial', quality is more important than quantity, and even small amounts of a work can be 'substantial' if they are recognisable, form an important part of the work, or encapsulate the essence of the work. Given that many digitisation projects will involve copying entire works, the 'substantial part' rule may be of limited relevance to cultural institutions.

### *'And without the licence of the copyright owner'*

It is not an infringement of copyright for a person to perform an exclusive act of copyright with the 'licence' (that is, permission) of the copyright owner. A licence differs from an **assignment** in that the copyright owner retains ownership of copyright when he or she grants a licence, but transfers ownership to the cultural institution in the case of an assignment. A licence can be **exclusive** or **non-exclusive**. Where a licence is exclusive, the recipient of the licence can perform the licensed rights to the exclusion of all others. However, in most cases, a non-exclusive licence will be sufficient to meet a cultural institution's needs and will respect the interests of creators. In those cases, the copyright owner can continue to do any of the acts he or she has permitted the cultural institution to do, and can license others to do those same acts.

If a cultural institution forms the view that a licence is required to digitise a collection item or make it available online, the first step is to **identify all the copyrights that subsist in the item and the owner or owners of those rights** (see **KEY POINT**). Second, the institution will need to ensure that **all relevant rights are cleared**.

A non-exclusive licence does not need to be in writing to be legally binding – although it is preferable to obtain written licences as these are better evidence of the existence of the licence and its terms. The question of what **terms** are necessary and desirable in a copyright licence is considered in detail in CHAPTER 7 of the long-form guidelines. As discussed in that chapter, at a minimum a licence should include: the parties to the agreement; a description of the work being licensed; the date the licence was made; the rights granted to the cultural institution; the territory and duration of the licence; and (where appropriate) the

remuneration structure of the licence. The copyright owners may be represented by one or more of Australia's collecting societies, which can offer a streamlined process for rights administration in relation to some copyright material (see CHAPTER 7 of the long-form guidelines).

### Key Point: Some collection items have multiple copyrights or owners

Copyright can become complex when more than one copyright subsists in an item, or copyright is owned by more than one person. The former occurs when a copyright item contains 'underlying works'. For example, a sound recording of a song may embody the following separate copyright works: a literary work (the lyrics), a musical work (the music) and a sound recording (the CD). These copyrights exist independently of one another, and if a licence is required to copy the recording, **all three rights must be cleared**. The second situation can arise where a work has been jointly authored by two or more people. In those instances, each author will be an owner of copyright. Again, if an institution wishes to digitise the work and requires a licence, it must obtain permissions from **all owners of copyright**. For ways to streamline the process of dealing with multiple rights holders, see CHAPTER 7 of the long-form guidelines.

## Orphan works

In some instances, it may be difficult or impossible to locate the owner of copyright in a work – either because the creator or copyright owner is unknown, or because he or she is impossible to track down. These items are commonly referred to as '**orphan works**'. Cultural institutions frequently report that copyright law makes it difficult to deal with orphan works.

There is no general exception in the *Copyright Act* permitting the digitisation or communication of an orphan work following 'reasonable efforts' to locate the copyright owner. In some cases, digitisation is permitted under one of the statutory exceptions that are discussed next. However, these provisions only apply in limited circumstances, and may not extend to numerous projects that a cultural institution wishes to complete. In this situation, many institutions have developed a **risk management policy** to deal with orphan works. These policies consider questions such as: what steps should staff take to **identify** the copyright owner of a work? What steps should staff take to **contact** that person? What happens if it is not possible to identify or locate the copyright owner? Are there circumstances in which an orphan work can be reproduced, published or communicated? This is discussed in further detail in CHAPTER 7 of the long-form guidelines.

## Exceptions to copyright infringement

A statutory exception allows individuals to perform exclusive acts of copyright:

- without obtaining the permission of the copyright owner; and
- without the payment of any licence fee.

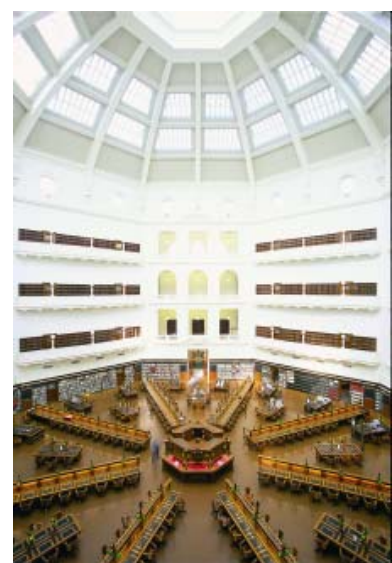
Three sets of copyright exceptions are particularly relevant to cultural institutions.

First, the **fair dealing** exceptions permit dealings that are 'fair' and undertaken for one of these purposes: research or study; criticism or review; reporting the news; or giving professional advice by a lawyer, patent attorney or trade mark attorney. Exceptions that do not fall within one of these purposes will not constitute a fair dealing, regardless of how 'fair' they are. That is, fair dealing is not a free-floating exception allowing reasonable conduct. The fair dealing exceptions may be relevant to patrons or staff performing their own research, or a curator giving a critical lecture about a collection item in which images or excerpts from the item are shown. However, the fair dealing exceptions are not of general relevance to cultural institutions, due to the limited purposes for which they apply.

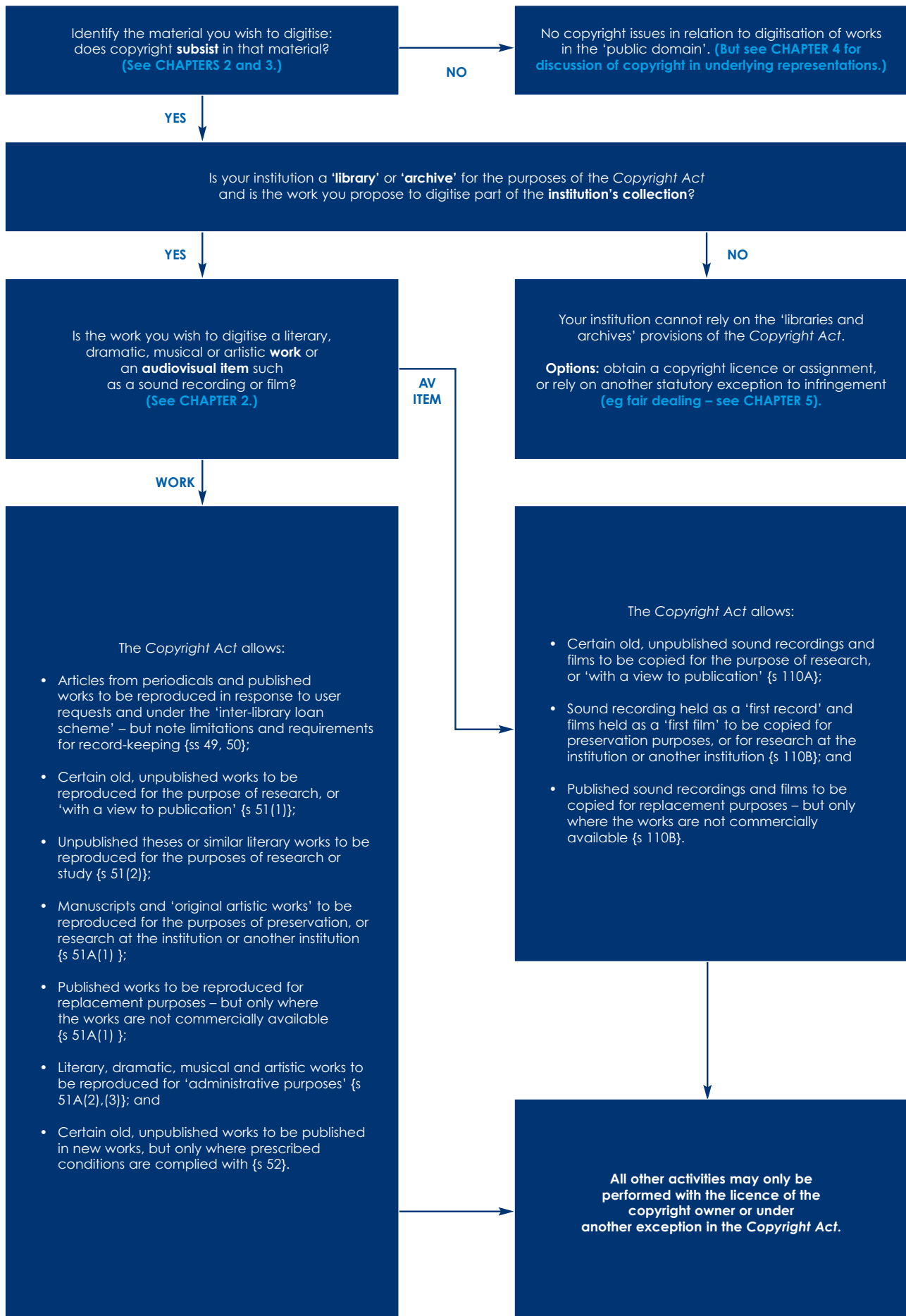
Second, the *Copyright Act* contains exceptions permitting certain reproductions of some **publicly-located sculptures and 'works of artistic craftsmanship'** (that is, craft and applied art). This provision appears to have been introduced to allow people to photograph sculptures installed in parks and gardens. However, the wording is broader than this. The provisions allow photographs to be taken of a sculpture or 'work of artistic craftsmanship' situated (other than temporarily) in premises open to the public. However, such photographs cannot be made available online.

Third, the **libraries and archives provisions** set out instances in which cultural institutions can reproduce collection items, and communicate them to the public. The term 'archives' is defined to include public museums and galleries. As with the fair dealing provisions, the libraries and archives provisions are purpose-specific,

applying to reproductions made for purposes including: preservation; replacement; supply of copies in response to user requests and under the inter-library loan scheme; and (for literary, dramatic, musical and artistic works) for 'administrative purposes'. When applying the libraries and archives provisions, it is important to remember that the exceptions for literary, dramatic, musical and artistic works are broader than those that apply to audio-visual items. Finally, there are limitations on the circumstances in which reproductions made under the libraries and archives provisions can be accessed by the public. For example, reproductions made for 'administrative purposes' may only be communicated to staff, and there are limits on the public accessibility of preservation copies of collection items. The content and operation of the libraries and archives provisions is set out in **FLOWCHART 2**. They are discussed in detail in **CHAPTER 6** of the long-form guidelines.



FLOWCHART 2: The libraries and archives provisions. References are to chapters of the long-form guidelines which are available at [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl)



## Moral rights

The *Copyright Act* has special rules in relation to the 'moral rights' of:

- authors of literary, dramatic, musical and artistic works; and
- directors, producers and screenwriters of films.

Moral rights were first introduced into Australian copyright law in 2000. Moral rights aim to protect authors' honour and reputation, and the integrity of their works. They do this by providing three rights:

- the right to be attributed as author of a work or film;
- the right not to have authorship falsely attributed to someone else; and
- the right not to have their work subjected to forms of 'derogatory treatment'.

There may be other considerations that arise in relation to digitisation of collection items in addition to the rights recognised by the *Copyright Act*. For example, cultural considerations may arise where an institution wishes to digitise material that has an Indigenous subject matter. It may be appropriate to obtain community consents for some uses, or for limitations to be placed on who may access material (for example, for secret or sacred information).

Moral rights are additional to other rights granted by the *Copyright Act*. It is possible for one person to own the copyright in a work, but another person to have the moral rights. In contrast to copyright, moral rights cannot be assigned, and thus can only be held by authors. However, an author can consent to an infringement of moral rights. In addition, conduct that is reasonable in the circumstances will not infringe moral rights.

It is worth noting that Australian legislation was passed in 2004 that contains amendments to the *Copyright Act* that recognise the moral rights of some performers. However, these provisions are not yet in force.

TABLE 5 contains a checklist for ensuring that your institution complies with moral rights. Moral rights are discussed further in CHAPTER 8 of the long-form guidelines.

## Performers' rights

The *Copyright Act* gives performers two rights in relation to their live performances:

- ownership of copyright in respect of sound recordings of live performances; and
- the right to prevent unauthorised creation and use of sound recordings and films of their performances.

Performers' rights provisions were first introduced into the *Copyright Act* in 1989. Recently, they have been amended following the Free Trade Agreement with the United States. Performers' rights are relevant to cultural institutions because many institutions have sound recordings and films of 'live performances'. Digitisation may infringe rights held by performers, both in their capacity as owners of copyright in sound recordings, and as holders of rights in relation to the making or communication of unauthorised recordings.

Like moral rights, performers' rights are additional to other rights granted under the *Copyright Act*. Performers' rights are discussed further in CHAPTER 9 of the long-form guidelines.



David Keany, Senior Conservator and Barbara Reeve, Head of Collection Services with the Australian War Memorial's newly acquired Russell Drysdale's 1942 painting *Soldier*.  
Australian War Memorial  
Photographer: Kerry Alchin

Exterior of the new Asian Gallery wing,  
Art Gallery of New South Wales  
Achitect: Richard Johnson,  
Johnson Pilton Walker  
Photographer: Jenni Carter

TABLE 5: Moral rights

<input checked="" type="checkbox"/>	<b>Right of attribution</b>	
	<input checked="" type="checkbox"/> The right of attribution arises when a cultural institution performs an 'attributable act' in relation to a literary, dramatic, musical or artistic work, or a film.	'Attributable act' means: <input checked="" type="checkbox"/> Reproducing, publishing, performing, communicating and making an adaptation of a literary, dramatic or musical work. <input checked="" type="checkbox"/> Reproducing, publishing, exhibiting and communicating an artistic work. <input checked="" type="checkbox"/> Copying, exhibiting or communicating a film.
	<input checked="" type="checkbox"/> Has a reasonable form of identification been used?	<input checked="" type="checkbox"/> If the author has identified their preferred form of attribution, must use that form (so long as this is reasonable).
	<input checked="" type="checkbox"/> Is the identification 'clear and reasonably prominent'?	<input checked="" type="checkbox"/> The identification should be included on each reproduction or copy of the work. <input checked="" type="checkbox"/> The identification should be included in such a way that a person acquiring the item will have notice of the author's identity.
<input checked="" type="checkbox"/>	<b>Right against false attribution</b>	
	<input checked="" type="checkbox"/> Do not include a false attribution on a work or film, or deal with an item that is falsely attributed.	
	<input checked="" type="checkbox"/> Do not attribute an altered work in a way that suggests it is the unaltered work of the author.	<input checked="" type="checkbox"/> This rule does not apply to insubstantial alterations. <input checked="" type="checkbox"/> There will be no infringement where the alteration was required by law, or was necessary to avoid breach of the law.
<input checked="" type="checkbox"/>	<b>Right of integrity</b>	
	<input checked="" type="checkbox"/> Arises where a cultural institution does an act that results in a 'material distortion of', 'mutilation of' or 'material alteration to' a work or film that is 'prejudicial to the author's honour or reputation'.	Could include: <input checked="" type="checkbox"/> Deletion or editing – such as making an excerpt of a film. <input checked="" type="checkbox"/> Alteration – such as making a black and white version of a colour film or, possibly, digitisation in some circumstances. <input checked="" type="checkbox"/> Rearrangement – such as translating a work. <input checked="" type="checkbox"/> Destroying an artistic work.
	<input checked="" type="checkbox"/> Arises where a cultural institution does any other act that is 'prejudicial to the author's honour or reputation'.	<input checked="" type="checkbox"/> May extend to 'contextual abuse' – the way in which a work is presented or communicated.
	<input checked="" type="checkbox"/> Arises where a cultural institution exhibits an artistic work in public in a way that is 'prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs'.	
<input checked="" type="checkbox"/>	<b>Do any exceptions apply?</b>	
	<input checked="" type="checkbox"/> If an act may constitute an infringement of moral rights – is it reasonable in the circumstances?	Considerations include: <input checked="" type="checkbox"/> The nature of the work. <input checked="" type="checkbox"/> The purpose for which the work is used. <input checked="" type="checkbox"/> Manner and context in which the work is used. <input checked="" type="checkbox"/> Any relevant industry practice. <input checked="" type="checkbox"/> Whether the work was made in the course of employment. <input checked="" type="checkbox"/> Difficulties in compliance.
<input checked="" type="checkbox"/>	<b>Obtain consent if necessary</b>	
	<input checked="" type="checkbox"/> If in doubt, obtain consent from the author to perform an act.	<input checked="" type="checkbox"/> The consent must be in writing and given by the author, a person administering his or her affairs, or, if the author has died, his or her legal personal representative. <input checked="" type="checkbox"/> The <i>Copyright Act</i> places limits on the ambit of these consents. The content of a lawful consent differs between films and non-films. <input checked="" type="checkbox"/> Broader consents can be obtained from employees – although using broad consents may unduly prejudice the interests of some employees.

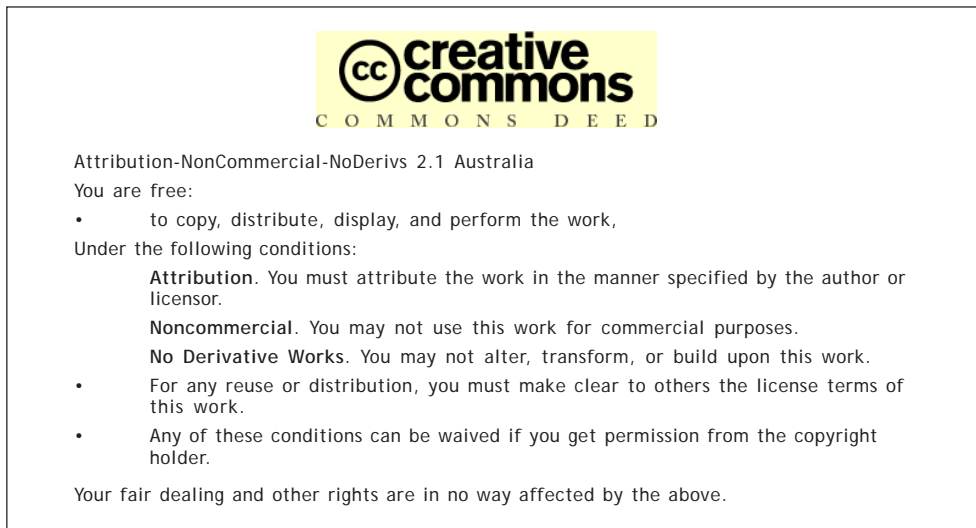
## Further information, CC licence and image credits

The law discussed in these guidelines is current to July 2005.

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Other useful sources of information about copyright and related matters include:

- Arts Law Centre of Australia  
[www.artslaw.com.au](http://www.artslaw.com.au)
- Australian Copyright Council  
[www.copyright.org.au](http://www.copyright.org.au)
- CAL (Copyright Agency Limited)  
[www.copyright.com.au](http://www.copyright.com.au)
- ComLaw (Commonwealth of Australia Law) (for the latest compilations of legislation)  
[www.comlaw.gov.au](http://www.comlaw.gov.au)
- NAVA (National Association for the Visual Arts) [www.visualarts.net.au](http://www.visualarts.net.au)
- National Museum of Australia (Museum Law website) [www.nma.gov.au/about\\_us/corporate\\_documents/museum\\_law\\_website/](http://www.nma.gov.au/about_us/corporate_documents/museum_law_website/)
- Viscopy (Visual Arts Copyright Collecting Agency) [www.viscopy.com](http://www.viscopy.com)



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Felton Bequest, 1932  
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Giambattista Tiepolo  
*The Banquet of Cleopatra 1743-44*  
Felton Bequest, 1933  
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Jeffrey Smart  
*Cahill Expressway 1962*  
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La Trobe Reading Room  
Photographer: David Rosendale  
State Library of Victoria

Paper conservator, Ruth Shervington, working on  
Tommy McRae's *Sketchbook* c. 1891  
Photo: NGV Photographic Services

## Notes

## Copyright checklist

This copyright checklist summarises key questions to assist cultural institutions identify the copyright issues relevant to digitisation. As well as the summary in these short guidelines, more detail about the content of copyright law and rights management is contained in the **long-form guidelines** which are available from [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl).

<input checked="" type="checkbox"/>	<b>Identify the collection item you wish to digitise. Is the item protected by copyright? If so, who owns copyright?</b>	
	<input checked="" type="checkbox"/> The <i>Copyright Act</i> sets out the types of items it protects.	<input checked="" type="checkbox"/> Literary, dramatic, musical and artistic works. <input checked="" type="checkbox"/> Sound recordings, films, broadcasts and published editions.
	<input checked="" type="checkbox"/> There are additional prerequisites for subsistence – although these are generally easy to satisfy.	<input checked="" type="checkbox"/> Originality (ie, the item was not copied and was created using skill or labour). <input checked="" type="checkbox"/> Publication or authorship connected with Australia. <input checked="" type="checkbox"/> Item has been published or 'made'.
	<input checked="" type="checkbox"/> Has any copyright expired?	<input checked="" type="checkbox"/> Duration of copyright varies depending on the nature of the copyright work. <input checked="" type="checkbox"/> If copyright has expired, there are no copyright constraints on digitisation.
	<input checked="" type="checkbox"/> There may be more than one copyright in an item – or more than one author.	<input checked="" type="checkbox"/> Copyright may subsist in underlying works – such as a script for a film. <input checked="" type="checkbox"/> Some works may have more than one owner – such as a co-authored article.
	<input checked="" type="checkbox"/> Who owns any copyrights that subsist in the collection item?	<input checked="" type="checkbox"/> A cultural institution risks infringing copyright if it digitises a collection item for which someone else owns copyright.
<input checked="" type="checkbox"/>	<b>Identify your strategy for complying with copyright: does digitisation fall within an exception to copyright infringement? Or is a licence required?</b>	
	<input checked="" type="checkbox"/> Copyright exceptions allow copyright works to be digitised for free, and without the permission of the copyright owner.	Relevant exceptions: <input checked="" type="checkbox"/> Fair dealing exceptions. <input checked="" type="checkbox"/> Exceptions for certain reproductions of publicly-located sculptures and 'works of artistic craftsmanship'. <input checked="" type="checkbox"/> Libraries and archives provisions.
	<input checked="" type="checkbox"/> Note limits on public accessibility of reproductions made under copyright exceptions.	<input checked="" type="checkbox"/> Some reproductions may only be made for internal use. <input checked="" type="checkbox"/> On their current interpretation, copyright exceptions do not permit digitised material to be made available on publicly accessible websites, regardless of the resolution used.
	<input checked="" type="checkbox"/> If no exception applies – a licence will be required to digitise the work or make it available online.	<input checked="" type="checkbox"/> What rights are required in the licence? <input checked="" type="checkbox"/> What remuneration structure is appropriate? <input checked="" type="checkbox"/> Is the licence of fixed duration or perpetual?
	<input checked="" type="checkbox"/> If the copyright owner is impossible to identify or locate – will digitisation proceed?	<input checked="" type="checkbox"/> Treatment of 'orphan works' will depend on the institution's risk management strategy.
<input checked="" type="checkbox"/>	<b>Don't forget moral rights and performers' rights.</b>	
	<input checked="" type="checkbox"/> Moral rights.	<input checked="" type="checkbox"/> Right of attribution of authorship. <input checked="" type="checkbox"/> Right against false attribution. <input checked="" type="checkbox"/> Right of integrity.
	<input checked="" type="checkbox"/> Performers' rights.	<input checked="" type="checkbox"/> Rights given to certain performers in live performances.