

## CHAPTER FIFTEEN: PERMISSIONS & ACKNOWLEDGEMENTS FOR EXHIBITIONS

### 1. Introduction

Every exhibition uses material that is protected by copyright and moral rights. This is so even when the exhibition is of material that is either long out of copyright or in which copyright never subsisted. Exhibitions are always accompanied by vast amounts of contemporary and copyright work: photographs, essays, labels, illustrations, audio recordings, background music, catalogue design, lighting design, exhibition design, press releases, signage, merchandising materials and so on.

Accordingly, every exhibition may require a plethora of copyright and moral rights related permissions and acknowledgements. These flow from two quite different sets of relationships:

- those with consultants retained to work on an exhibition; and
- those which must be obtained from the owners of any copyright in the exhibition-related material.

Copyright and moral rights permissions and consents are frequently not complex legal documents. They are often achieved by a simple exchange of letters or emails whereby one party tells the other what they want to do and the rights owner or creator gives consent. Most exhibiting institutions have pro forma documentation that they ask the party giving permission or consent to complete, sign and return.

### 2. Copyright permissions

#### 2.1 *When a permission is likely to be needed*

Whether a copyright work may be reproduced for exhibition purposes without the copyright owner's permission is not an easy question, as in some cases one of the copyright exceptions (discussed in our copyright chapter) may apply.

Generally, however, copyright permission will be needed for uses such as:

- reproducing an image on the cover of the catalogue or in media advertising the show (neither uses are covered by fair dealing exceptions);
- reproducing an essay or article – or lengthy quotes (or, indeed, short grabs of song lyrics) within the catalogue;
- reproducing an image within the catalogue (unless it is for the purposes of criticism or review – something that is quite rare unless it is a catalogue raisonné);
- reproducing an image on any poster, postcard, invitation, flyer, sign, label related to the exhibition whether the use is commercial in nature or not;

- making a video recording of the work, whether on its own or as part of the exhibition, whether it is for non-commercial purposes (such as education or the promotion of the exhibition) or for commercial purposes (such as producing and selling a video or DVD of the exhibition); and
- making and playing educational audio recordings for use by exhibition viewers (assuming that the content is not absolutely owned by the museum).

If the exhibiting institution is not the owner of the relevant copyright and has to get a clearance, the question arises as to who it should contact.

Strange as it may seem, except in situations where a copyright collecting society such as Viscopy may be able to grant a licence, this is not always straightforward. Often if you ask contributors or lenders whether they are the owner of copyright, they will respond confidently, affirmatively and erroneously. Many people have no idea of the principles of copyright and make potentially expensive assumptions that are quite wrong.<sup>1</sup> Beliefs constructed on erroneous assumptions may be firmly held and confidently expressed, but are no less wrong for that, and visitors to an exhibition rarely consider how much copyright wrangling is essential to the mounting of any substantial show.

Accordingly, it is important to have a method by which the person who is asked for a licence has to explain the basis upon which he or she is the copyright owner. This is most easily done in the permission or licence form, with relevant staff then making an assessment as to whether or not the person claiming to be in a position to grant the permission is in fact likely to be able to do so (and, if not, then flagging that they will need to get the consent from someone else).

## 2.2     Getting the permissions you need

Given that the general rule under the *Copyright Act 1968* (Cth) is that the creator owns copyright in his or her work, it is essential that an institution commissioning work from a consultant or freelancer includes in the consultancy agreement a clause dealing specifically with copyright in the deliverables.

Depending on the respective bargaining power and longer-term interests of each side,<sup>2</sup> the copyright that would otherwise be owned by a consultant or freelancer might be either:

- assigned to the museum or gallery (or its governing body); or
- licensed to it (either exclusively or non-exclusively).

An assignment of copyright puts the institution in a stronger position long-term when it comes to the re-use of that material, but licences from the relevant creator or copyright owner can also be effective provided you pay sufficient attention to what, longer term, you want to use the material for, and then, ensure that the agreement provides you with the rights you need. For example, if using a licence it is important to ensure that your rights extend to:

- publicity purposes that may be reasonably required (including via social media and other online channels
- publication purposes; and
- archival and educational purposes.
- any merchandising or other commercial exploitation that may be contemplated (though note that a licence in these cases will usually require a fee to be paid – and indeed, is usually covered by a separate agreement (as discussed in our later chapter on merchandising);

Similarly, in an era when every visitor has a camera in their phone, exhibitors can no longer realistically control visitor photography. Accordingly, it is prudent to exclude liability for any breach by visitors (including any downstream use of such images on social media platforms).

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<sup>1</sup> One former director of a State gallery, now thankfully retired, would forcefully assert, fist hammering on the desk, that if the museum owned the work, it also owned the copyright, notwithstanding the Copyright Act (which he viewed as an unwarranted centralist interference with his rights.)

<sup>2</sup> and leaving aside situations where a “government” commissions material through the exhibiting institution

### 3. Moral rights permissions

A moral rights claim by a creator<sup>3</sup> can arise against a person who publishes, exhibits, reproduces or communicates to the public an artistic work,<sup>4</sup> or publishes, reproduces or adapts a written work. For example, you are obliged by the moral rights provisions of copyright law, to give the creator proper attribution.<sup>5</sup> To do this, the exhibition organiser must be able to identify both the creator and their role.

If the person providing a copyright work is not the sole author of it, or a person who has the consent of the author(s) to be attributed as the author, they should be asked to provide as much information as they can to enable the institution to find the author(s).

The principal moral rights are (i) the right of attribution (to be acknowledged as the author of the work), and (ii) the right of integrity (to prevent any alteration to the work by the collecting institution or its agents).

So, depending on the circumstances, a gallery or museum might consider:

- agreeing to take reasonable steps to comply with any internal moral rights policy it may have in place (as amended from time to time);
- undertaking to employ best endeavours to ensure that relevant creators are acknowledged as the authors of any relevant materials, consistent with industry custom and practice;
- seeking the creator's agreement not to take action or make any claim for any inadvertent breach of moral rights;
- seeking to limit what action the creator might take to having their name removed from the material;
- seeking the creator's specific consent to do things such as:
  - adapt, modify, delete or contextually place the material so it can be used in any and all media;
  - incorporate advertising into the material or use the material in advertising or promotions for the institution, the material or a third party; and
  - make foreign language versions of the material.

Note, however, that many of the above may be more relevant to exhibition materials created by freelancers than to substantial bodies of work such as a book or an artistic work – and that every case will depend on its own facts.

#### 3.1 Companies providing copyright material

Only individual persons have moral rights, not companies or other organisations. However, you need to be sure that if you commission or retain a company to provide services, that that organisation has all relevant moral rights consents from the humans that provide those services.

Where a company provides the material<sup>6</sup>, the moral rights consent must be from the individual who performed the work for the company. So, to ensure that there is compliance with moral rights law, those claiming to be the author must be either:

- the true author; or
- joint authors (all of them); or

<sup>3</sup> generically referred to in the *Act* as “author”)

<sup>4</sup> “artistic work” is (relevantly) defined in the *Act* as a painting, sculpture, drawing, engraving or photograph or a building or a model of a building, whether of artistic quality or not.

<sup>5</sup> Author means the individual person or joint authors who created the project. The term is not defined relevantly in the *Copyright (Moral Rights) Act 2000* (Cth), but in most cases, such as for a written work, the meaning is the ordinary meaning. However, in a more complex task such as a building, for example, it is generally accepted to be those who contributed creative effort.

<sup>6</sup> For example, a design company commissioned to produce the catalogue or commissioned to design the exhibition itself.

- authorised to make the attribution of authorship by freely given written consents given them by the true individual author(s).<sup>7</sup>

In firms that are in the business of creating and delivering copyright material,<sup>8</sup> it has become standard practice to obtain standing consents from their staff. Such firms will usually include such consents in their standard agreements with all employees and consultants. The clause should have three limbs. It will:

- expressly assign all copyright in the work to the firm;
- authorise the firm itself to claim authorship of the work; and
- authorise the firm to exercise the moral rights of the author.

If the provider of the material is the copyright owner and has already obtained moral consents from the author(s), it has the right to pass the benefit of that consent on to third parties such as the exhibiting institution. If the provider of the materials does not have those consents already, you must require that it obtains them or at least tell you from whom they should be sought.

Accordingly, where any copyright work is provided for use by the collecting institution, it is prudent to require:

- a written undertaking by the person(s) or organisation that claims to be the author(s) that they are the author(s); or
- a written undertaking that it holds a valid consent to be attributed as the author(s); or
- the identity of the author so that the museum can seek the necessary consents.

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<sup>7</sup> This means all of the people in the firm that were involved in the creative process, whether they are the firm's partners, directors, employees, subcontractors or consultants.

<sup>8</sup> Such as architects, designers and engineers.