



Digital Rights Toolkit

Democratising digital arts for everyone



This is an incredibly exciting time to be making art – in whatever form that comes in.

Engaging audiences online means you have the opportunity to talk directly to people five feet from your door who never walk through it at the same time as reaching out to virtual visitors across the globe.

But in taking your work to the world – whether that's through short form content on social media, live streaming on your own channels, TV broadcasts or cinema screenings – there's a thorny issue that needs to be grappled with: digital rights.

I realise that digital rights sound like a dry, dull subject but don't be put off. I know from personal experience that it's worth working through these legal technicalities and that artists and audiences alike can thrive by doing so.

Digital rights are a personal mission for me. Having worked with musicians, dancers, orchestras, ballet companies and broadcasters, it's about trying to get everyone to realise that they are all on the same side in wanting to extend the audience and understanding of these art forms.

Difficulties arise because traditional practices around rights have not evolved and adapted as the possibilities for self-publishing have grown with the advent of platforms like YouTube, Facebook, Vimeo, Instagram etc. Of course we must ensure that artists and organisations are not unfairly exploited but many of the current agreements were not built for the digital world.

Rights can be the single biggest obstacle to sharing your work online. I know of plenty of projects that simply haven't happened, or that have got so far along the road and then fallen over because of rights issues. Those are huge missed opportunities for the organisations, their audiences and the sector as a whole.

So that's why The Space has been talking with rights holders, arts organisations and arts representatives including the Musicians' Union, Equity and the Writers' Guild about making a new digital rights framework that everyone could work to as part of the DCMS Culture Is Digital programme.

This toolkit is the result of some of that work to make it easier for everyone approaching digital rights. We have started with a piece of work primarily focused on the rights clearances related to the performing arts organisations but we are now discussing further application of the framework with partners in the museums and galleries sector.

In these pages, you will find: an introduction to what we mean by digital rights; things to think about when approaching a contract by digital rights expert Ben Green; top tips on this knotty issue from leading producers in the field of stage-to-screen; and, a digital rights lexicon – developed with rights specialist Ben Green in consultation with union representatives – that defines the terms around digital rights to help artists and rights holders to know what's being negotiated.

More than being a dictionary, we hope the lexicon will mean that groups can appreciate why they would use a particular method of reaching an audience and better understand the opportunities and exploit them instead of being exploited themselves.

As we work together to make culture digital, we hope this toolkit will serve as a useful resource for organisations and artists looking to make their work available online. The results – as evident in The Space's own commissions on TV, in cinemas and online in recent years – are truly worth jumping the rights hurdle.

Fiona Morris, The Space's Chief Executive and Creative Director, was speaking to William Gallagher.

Part 1



A beginner's guide to digital rights

Contributor: Ben Green

Ben Green is the Founder and Director of Ben Green Associates, a company focused on digital rights strategy, negotiation and management. He was previously Head of Rights Business Development at the BBC, and has worked with organisations including the V&A, Tate Britain and the British Museum. He was speaking to Eleanor Turney.





What are digital rights?





'Digital rights' is a phrase that's grown up over time, and it covers the rights within and across digital/online distribution. So essentially the right to publish a digital copy of something, whether that's online, via mobile or on DVD or CD.

You can also protect that digital copy by putting 'digital rights management' (or 'DRM') technology on top of it. That could be, for example, to stop people copying it, viewing it in a different territory, or not being available after a certain period of time.

The intellectual property or copyright definitions of all artworks are covered under the UK Copyright Designs and Patents Act of 1988. It covers all artistic contributions to any performance/artwork across all arts genres including theatre, dance, opera, music, literature and fine art.

These 'underlying' rights remain integral to the artistic work/performance when it is digitally recorded and must be secured by your organisation in order to publish/distribute the work. The rights to publish the recorded work are sometimes described as 'distribution rights.'





Where should I start?



Recorded digital works have an ongoing life and can be distributed via many different platforms/formats, this usage is referred to as 'ongoing or secondary use' rights and these are entirely separate to any live performance rights that may have been secured. You need to consider well in advance how you are planning to distribute the work beyond the live presentation. This may be as simple as a free to air live stream via an organisation's own YouTube or Facebook page or it may include a publication plan to broadcast, release in cinema, on DVD, VOD (video on demand), or DTO (download to own).



The first thing you need to do is to establish where the work will be published and whether or not this publication involves a commercial transaction where the organisation or its distribution partners will be receiving payment for the digital artwork. In order to distribute the work on these various platforms, the organisation needs to ensure it has put in place the correct rights, or 'clearances' in the created work – if it puts that work online or distributes it without those clearances, there is a legal risk of a claim (it may well have infringed another party's rights). When appropriate, the rights owner may receive additional fees or royalties for those different uses or platforms.

There are some national recording agreements already in place with rights bodies including MU (The Musicians' Union), Equity, UK Writers' Guild and PRS but these tend to cover recording for standard broadcast and cinema.



Who are the rights holders?





What kind of artistic contributions may be subject to underlying rights?

- Any artist who has contributed to the creation of the recorded work whether or not they appear in vision. So dancers, actors, musicians, designers (sound, costume, set, visual fx), composers, visual artists, choreographers, conductors, stage managers, writers, directors.
- Any third party artist whose copyright is included in the recorded work – does it reference (or is it an adaptation of) an underlying work like a book or poem, does it feature or reference other artworks, photographs, archive footage?
- Any existing copyright music: either an existing recording or live music based on a previously published musical work. For example, if a dance company wanted to use a David Bowie track, they would need permission to use that commercial sound recording in the live performance, but would then need to seek entirely separate permission to record and distribute it online. (And just because permission has been granted by the rights holder to include the music in a live performance does NOT mean that permission can or will be granted to its inclusion in a recorded work as these rights may have already been licensed elsewhere in connection with another recording). Music is fiendishly complex.

Part 2

A new lexicon for digital rights



The Space has been consulting with arts organisations and practitioners across the arts and cultural sector since late 2017 around the area of digital rights. The desire to offer audiences greater digital and online access to their work, and an increased focus on digital audience development from UK public funders to increase both engagement and reach, led to the identification of two clear needs from the sector:

- a greater understanding of intellectual property rights when seeking to publish creative work digitally, and
- simplification and clarity around terminology and the different uses on digital platforms: to make contracting contributors, creators and existing copyright holders easier.

Through negotiations with rights representatives and talent unions led by The Space and digital rights expert Ben Green, it was agreed that a sensible starting point would be to set out some common terminology and example definitions, or a 'lexicon' of different digital uses and rights, which has now been signed off by all of the major rights holders and which we are publishing here. We hope you find it useful.

It is important to stress that the intention of this terminology is not to undermine the current rights framework or Union agreements where digital use rights are already in place. Rather, it is to hopefully complement them, by identifying the primary online uses and rights increasingly required by cultural organisations and developing some common language around them, which may be referred to and/or negotiated where not already covered under existing agreements.



'Live Streaming' or 'Simultaneous Streaming'



What does this mean?

An audio/audio-visual recording and stream of (e.g.) a live performance, interpretation or event.

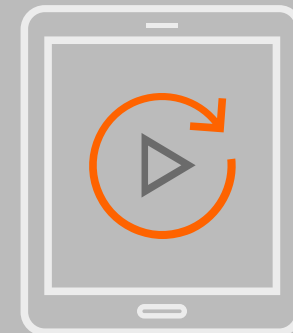
(This may be either 'simultaneous' as it happens, or 'near-simultaneous' to allow for a brief time delay in case of disturbance or compliance issues e.g. offensive language, or unexpected event taking place).

'Exemplar' contractual wording

"The act of recording and transferring the live performance and/or event containing the contribution ('the Work') as an apparently steady and continuous stream of data to the user without a permanent copy of the material being made, provided always that such streaming shall:

- (i) be simultaneous (or near-simultaneous) with the live event as it occurs;
- (ii) be streamed in the same language as the Work has initially been performed or delivered in;
- (iii) not permit downloading for the viewer to retain and/or store the Work permanently."

'On-demand access'



What does this mean?

Digital access by the user of the recording at a time and place of their choosing, where there is no transfer of a permanent copy of the Work to the user's local storage/playback device.

Access to the Work may be given by the owner to the user free of charge, with or without the inclusion of adverts (which may generate revenue for the owner), or the user may be required to pay for access, via a service subscription and/or a pay-per-view charge.

N.B. 'Commercial On demand' rights are subject to separate negotiation and agreement with the rights owner (or may be covered under existing framework terms).

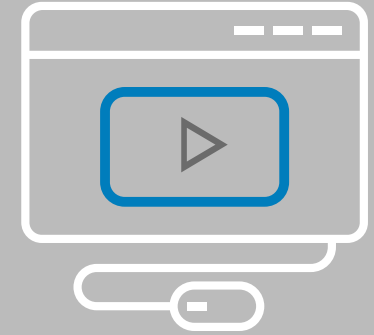
The cultural organisation publishing the Work may wish to seek an additional period(s) of on-demand availability after the initial licence period (for example, to celebrate a future anniversary, or archive access purposes), subject to negotiation with the contributor(s).

'Exemplar' contractual wording

"The act of making the Work available on demand for private, personal viewing, where:

- (i) delivery of the content follows an individual request, whether free or paid for, by an individual person, such request being at a time determined by each such individual, independently of any other person, including interactivity with the Work by or with the said person in relation to the audio/audio-visual on demand material only for sequential access (for the avoidance of doubt this does not include interactivity by the user where the narrative structure may be altered – see 'Interactive');**
- (ii) there is no transfer of a permanent copy of the Work to the user's local storage/playback device;**
- (iii) agreement has been reached with all rights holders in the Work on the terms under which the Work is made available, including period, territory and financial remuneration, if applicable."**

'Distribution/Delivery'



What does this mean?

To deliver and distribute the Work via any form of digital delivery, so whether via cable or wireless distribution (including the internet, mobile, cable, virtual augmented or mixed/enhanced reality), on digital platforms or devices however it may be delivered.

'Exemplar' contractual wording

"The act of delivering distributing and making available the Work via any means including but not limited to the internet, cable, wire, fibre, satellite and/or wireless, in actual virtual augmented mixed or enhanced reality; and

(i) delivery is to any form of reception device or platform capable of receiving the content; and

(ii) playback is via any means, whether integral to the reception device or otherwise capable of being connected thereto, or where a copy is made and transferred to another device to allow playback independently from the reception device either via a direct (wired or wireless) connection between devices or via any form of external storage including but not limited to memory cards or chips."

'Download'



What does this mean?

Digital transfer of a copy of the Work to the user's own storage/playback device from where they are able to access it locally at-will without further reference to the service from which the Work was transferred.

The Work may be made available to download by the user free of charge, via a paid-for subscription service or on a pay-per-download basis, and may be permanent or temporary.

'Exemplar' contractual wording

"The act of transferring a copy of the Work to the user's local storage/playback device, for private, personal viewing, where:

- (i) the user can access the Work from their local storage/playback device as and when required within the term, without further reference to the originating source;
- (ii) agreement has been reached with all rights holders in the Work on the terms under which the Work is made available, including period, territory and financial remuneration, if applicable."

'Interactive'



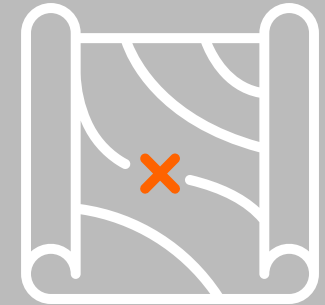
What does this mean?

An ability by the user or audience to interact with the recording (for example, for them to make interactive choices to enable a different narrative storyline(s), interact with characters, or explore additional or background information).

'Exemplar' contractual wording

"Use of the Work, in whole or in part, by all means and in all media (including but not limited to CD-ROM, CD-I, discs, cassettes, wired or wireless systems and delivery platforms, and any other media or interface between the end user or audience and the medium capable of carrying analogue and/or digital information) for either simultaneous or non-simultaneous use by means of playback systems or devices which respond to the user's actions to enable that user to select elements of the Work, singly or in combination, to interactively respond to and engage with actions and changes taking place within or around the Work provided always that the user is not able to distort mutilate or treat in a derogatory manner the contributor's original work."

'Territory'



What does this mean?

The geographical area where the Work is distributed.

N.B. Recognising that the internet is a global platform, unless there are specific restrictions identified by the contributor/rights holder upfront, the territory licensed for online distribution should, ideally, be for World.

There is also the additional practical and cost point that, if restricted to UK only, technical provisions will need to be implemented by the cultural organisation publishing the work to limit such territory through Geo-IP blocking or similar.

'Exemplar' contractual wording

This will be subject to separate negotiation and agreement with the rights owner (or may be covered under existing framework terms).

(e.g. "Use of the Work throughout the [Universe/World/UK]")

'Promotional Extracts'



What does this mean?

Used by the producer of brief extracts of the Work featuring the contribution for promotional and publicity purposes, including so-called 'EPK's' (Electronic Press Kits).

N.B. If practicable, and at their sole discretion cultural organisations may permit the performer or contributor to use such extract(s) for their own promotional purposes (e.g. a showreel, or their own YouTube page), in which case the performer or contributor will be responsible for clearance of other rights owners contained within the extract.

'Exemplar' contractual wording

Limited amounts of the overall Work, used for promotional and historical record keeping purposes. Rights, Term, Territory & Fees subject to agreement (or may be covered under existing framework terms).

(e.g. "The act of using a limited amount of the Work (amount tbc) to promote the Work only and for historical record purposes across all media.")

Part 3



Contracting

Contributor: Ben Green

Ben Green is the Founder and Director of Ben Green Associates, a company focused on digital rights strategy, negotiation and management. He was previously Head of Rights Business Development at the BBC, and has worked with organisations including the V&A, Tate Britain and the British Museum.



**Where are we now in terms of
contracting for digital rights?**

Most Framework Rights Agreements across the Performing Arts sector are currently lacking in the necessary rights definitions to enable the producer to distribute the performance or event digitally/online (whether in full, or extracts from it).

The Space has been actively discussing this issue with the main Talent Unions and rights holder representatives in this sector (e.g. Equity, Musicians' Union, Writers' Guild & PRS for Music) and, as a first step, has agreed some **basic terminology** (or 'lexicon') around some different digital uses.



UK Theatre (which The Space has been liaising and partnering with on this work) is now due to pick up the above discussion and will seek to agree framework terms for secondary digital uses if and where possible. (N.B. Whilst major companies like the National Theatre and the RSC have already agreed terms for their cinema screenings and associated promotion, terms for digital uses by other theatres and performances are not in place).

Of course, there may be many other contributors and copyright holders included in a piece of theatre or live event, and some of these are not contracted under union terms or frameworks. These will require separate negotiation and agreement.

PLEASE NOTE: This guidance is for general advice only, correct at the time of publication (September 2019). It does not constitute or should be read or interpreted as legal advice. For detailed contractual matters please seek advice from an experienced digital media lawyer or your representative trade body or union if you are a member.

What is the interim guidance for contracting for digital rights at the moment?



1. When an arts organisation, producer or individual is currently using standard rights framework agreements (e.g. Equity, MU)

Until new digital terms are discussed (and hopefully agreed) with the unions, we recommend that you contact the relevant union or rights organisation and seek its advice in the first instance regarding additional digital uses.

It may also advise on (or suggest) appropriate licences and fees. You will find a list of such unions/organisations in the Appendix below.

PRS for Music has its 'General Entertainment Online' (or GEOL/GEOL+) licences available for certain uses of music online when the organisation is publishing or making available content itself, and music on third party sites such as YouTube is usually covered under the licences PRS has itself with the major platforms. If in doubt, please get advice from PRS.

N.B. Sometimes the Union/organisation may be able to agree collective terms on behalf of its members, which are then notified to agents. However, if this is not possible, you will need to contact individual contributors or their agent directly to discuss and negotiate terms.

2. Where an arts organisation, producer or individual is NOT currently using union members/agreements

Building on the earlier '**Introduction to Digital Rights**', the following guidance is designed to assist those working outside of union terms and agreements.

There may be circumstances whereby you may wish to seek additional rights to enable digital or online distribution and uses of the performance or event. These could include, for example:

- a non-commercial stream of a live performance on a digital platform (as live, or 'near live').
- making a recording of the performance or event available 'on demand' for users to access whenever they wish (perhaps for a limited time period). For example, on your company's own website or via a third party VOD (video on demand) platform such as YouTube or Vimeo.
- a short promotional extract(s) for marketing purposes on your company's own website or via social media like Twitter or Facebook.

In case you've not seen them yet, there are descriptions of all of the above uses, and example clauses of how they might be seen in a contract, in the **Digital Rights - Lexicon**.

What do I need to consider before I create a contract covering digital rights?

As part of your overall distribution and marketing plan, consider what, how and where you wish to use or distribute the performance as early as possible - ideally before you start contracting any/everyone. If you decide later, you may have to then re-visit or renegotiate every contract to acquire extra rights, so careful consideration will save time and money in the long run.

One strategy might be to seek – if you can get it – an ‘all rights, all media buyout’ for a fee (and do mention this upfront at the start of any conversation), then you will only need to discuss and agree the fee.

However, if you do not wish to use this strategy (or are unable to agree) the above ‘all rights’ position, then to help inform the extent of the rights you require you should really know the answers to at least the following before discussing terms or making any offer:

What?

What exactly are you wanting to publish or distribute?
The full performance, or just an extract?

Have you recorded it yourself, or contracted a third party production company to? (if the latter, what rights does the production company have in the recording?).

How?

The method of distribution (e.g. your own/company website, via a third party site/platform or on social media? N.B. If via any third party, do remember to check carefully the rights you will be granting to them under their Terms & Conditions!).

Are you offering it Live, or a recording of the performance on-demand?

Are you wanting to offer it freely to the user/audience? (N.B. you may still have to pay your contributors for this use, even though you might decide to offer it for free!).

Or you might think it should be offered commercially, in which case what is the revenue model? Subscription? Advertisement-funded? Pay to View on an individual temporary basis, or permanent download copy? All of these types of use and models may require separate negotiation and/or payments (either a ‘residual’, one-off payment for a time period, or an ongoing ‘royalty’ when a percentage share of revenue goes to the contributor/ rights holder).

Why?

Being really clear about why you want to do all of the above will help your conversations with rights holders.

They are far more likely to agree permission and terms if they can see a valid reason(s) why you wish to use or publish their work in a certain way.

Where?

The territory you need to specify (global, or limited to a specific country or area?)

If the latter, then either you or the third party platform will need technical capability (often called ‘Geo-blocking’) to ensure you protect and limit the availability of your digital asset to such territory).

Who?

Does the recording or extract contain all the performers, or just some of them?

And what about other existing copyright works such as existing music, still photographs, artworks, or third party film footage? (Remember that you are likely to need permission from each contributor or copyright holder to put their work up online).

How long for?

Often described contractually as the ‘Term’, the licence period can be anything from a one-off performance of a live event, through to a brief ‘catch up’ on demand period (e.g. 7 days, one month), to a longer availability.

Do consider (as rights holders will) whether a longer ‘free’ availability will have an impact on any commercial potential.

It’s important to think about these questions as soon as you can. If you can’t get the rights to do what you want to do, that could scupper the whole creative project.

And finally, once you’ve posted something online, don’t necessarily think that the work stops there. You might need to manage your rights afterwards, for example you might need to remove a recording from your website after a year or six months, or you might have to report music to the PRS, or have to pay people at different stages. So, both think ahead and get your rights organised, and you’ll keep everyone happy.

How much should I pay?

Often called in contracts 'the Consideration' (i.e. the fees paid by the Producer or commissioning party to the Contributor in exchange for certain work or rights), the fees for different rights naturally vary depending on the type of use or distribution, the licence term, territory, non-commercial/commercial, etc.

You might seek to base a fee on a broadly similar use or model type found in industry agreements, but until minimum terms and rates are agreed with the unions and rights holder organisations for the ever-expanding number of digital uses, there are currently no set fees or rates so producers are currently having to use 'trial and error.' Or they seek help from others who have been in a similar situation.

Producers are often surprised how expensive clearance costs can be, particularly in the areas of existing commercial sound recordings (e.g. pop music) and third party archive film footage, which can amount to hundreds of pounds per minute. Both of these areas also have multiple layers of rights holders and can be fiendishly complex and extremely resource-heavy to clear. It is therefore good practice to (i) clear/cost these items as early as possible when planning digital distribution, and (ii) find an alternative if possible that is clearable and within your budget.

With more non-commercial projects an often effective way of being fair to everyone to deliver the project on an equal footing, you might offer all the contributors the same fee and terms. This has the added benefit of saving a great deal of time for everyone by not having to negotiate different fees and terms with every individual. Some agents might then wish to agree so-called 'favoured nations' terms/fees:- everyone receives the same deal, and if anyone later receives a more favourable deal then that same preferable deal must then be honoured to the others. This can be useful, but be warned that there have been examples when this has back-fired: when the project later employed 'star talent' (when it was re-cast) and the producer was then held under 'favoured nations' terms to paying all other cast members the same!

Promotional use – it would be reasonable to request some promotional (and historical record) rights using the contribution, to permit marketing and promotion of the performance or event on different digital platforms. Ideally this use should attract no further payment to the contributor, but for this free use it's fair to limit the amount of extracts you publish (e.g a reasonable limit would be, say, up to 1-2 minutes duration per clip, with a total of up to 5 minutes maximum of clips per hour of original performance).

One approach to help secure these rights (if difficult, and it's not too onerous for you to provide) is to suggest to the contributor that they may also use the extract for their own promotional purposes (e.g. for their own showreel), but this must be subject to them clearing the rights of other contributors and copyright holders.

Is there anything else I need to consider in terms of contracting?

Protecting the rights of the Producer

A producer should be fully aware of the different levels of intellectual property (IP) ownership, not only to ensure the correct contracting and clearances of underlying contributors and copyright holders set out in this note, but also to understand the IP owned in the digital recording of a production.

Potentially, IP in a recording may be shared between any number of interested parties: digital producers, theatres, creatives and designers, co-producers, commissioners/funding bodies, investors, etc., so it makes prudent business sense to know exactly what each party's rights and interests are in order to avoid potential breaches of contract or conflicting rights being exploited.

Any rights contracts should therefore be aligned to reflect the different parties' interests, in order that the recording can be used and distributed correctly (either non-commercially or commercially).

Warranties/Indemnities/E&O Insurance

It is standard practice that a contract with a contributor includes warranty and indemnity clauses. This is put in place in order that both parties 'warrant' that they have done certain things in terms of their obligations (and rights granted) to each other, so, for example, a writer may warrant to the producer that their script is original and doesn't infringe the copyright of another, or warrant that the script is not libellous or defamatory.

An indemnity is included when one party wishes the other to 'indemnify' them from legal actions by third parties (e.g. if there was a claim for copyright infringement in the script, the writer might be expected to indemnify the producer). Including an indemnity gives the producer an ability to claim more in terms of losses.

A producer should clear the necessary rights to third party contributors and copyrights in a production. However, there are times when something slips through the net and claims are made. Producers can put in place 'Errors and Omissions' (E&O) insurance to cover themselves in the event of such claims, and the Producer will then be required to satisfy the insurer that best efforts were made to clear and contract the relevant rights holder.

Most broadcasters are now expecting or asking independent producers to take out E&O insurance on any recordings provided to them, so you may wish to consider this as a sensible policy for your recording(s).

UK Law

If you are contracting in the UK, your contracts with contributors should reflect that the terms will be governed by the laws of England, Wales and Scotland, along the lines of this clause or similar:

Governing Law

The validity and interpretation of this Agreement shall be governed by the laws of England and any dispute arising thereof shall be submitted non-exclusively to the English Courts.

N.B. Should you be contracting or licensing ex-UK contributors or copyright, it is particularly important to have a Governing Law clause, and in an ideal world this should be under UK legal jurisdiction. You may find that the third party is seeking for the contract to be governed by their local jurisdiction and this can be a risk and incur significant additional costs. For example, US contracts often refer to governance by their local laws, so if a UK producer ended up in court subject to US legal governance, then he/she may be required to seek specialist US legal advice or an attorney familiar with US law to represent them.

Conclusion: contracting



Rights is a complex area: with multiple layers of ownership, no global database of who owns what or where to find them, and trying to 'get it right' when you are contracting or clearing existing copyrights, it can all seem completely overwhelming! It's no wonder that some people just put their head in the sand and decide to take the risk to use material without permission/clearance and cross their fingers that nobody claims.

However, the 'head in the sand' approach is neither a sensible or legal way to proceed, and you should be diligent in your contracting and clearances. A great deal of this is common sense, and if you have considered the questions and issues in this document and thought about the answers, you will be a long way ahead of most people when starting to looking at contracts or clearances in preparation for your digital distribution strategy. Online and digital distribution is an important and worthwhile activity that **CAN** be done well if you navigate the rights sensibly and pragmatically.

The Space is working hard to try and find a way through this complex area, so that arts organisations and individuals can source some straightforward guidance and advice on how best to secure the necessary rights to enable digital distribution of their work. Please do feed back to us any additional areas of advice that you think would be useful.

Through a combination of online guidance, toolkits and forthcoming workshops for practitioners, this work will continue throughout 2019/20 as part of its commitment to the Department for Digital Culture Media and Sport under the 'Culture Is Digital' initiative. The Space, in partnership with UK Theatre, is continuing to actively demonstrate to rights holders' organisations the benefits and opportunities of being digitally engaged with audiences, with the hope (and need) to then modernise framework agreements to include digital uses where possible.

Part 4

Practical tips from leading producers



Ten Top Tips for negotiating Stage-to-Screen Projects



Contributor: Anne Beresford

Anne Beresford is an independent producer working in film and television. She has a long track record of producing award-winning music and arts films. Her stage-to-screen credits include Peter Grimes on Aldeburgh Beach, Maxine Peake as Hamlet, King Lear and The Railway Children. She is currently working on a new short film with Hong Kong Ballet, a hip hop music drama and a new music feature film supported by Ffilm Cymru Wales.

1.

Ask yourself: Why are you doing this?

It's good to know what your answer is to this question at the earliest stage because it will guide you through subsequent decisions.

If your aim is for your content to be available on every platform, all over the world, that will take you down one path and inform the conversations you have with rights holders; if your goal is a single screening at your own venue to mark an anniversary, that will take you down a very different path.

Keep coming back to this question throughout the process – and be aware that your answer may change (see Tip 5, overleaf).

Is there buy-in to the project from senior management within your organisation? These projects can impact the whole production and your relationships with your cast and creative team so it's vital that there is support and oversight from a senior member of the team.



2.

Do what you do best

Think about working with a specialist producer whose job it is to know their way around the film/TV/online distribution contracts, pitfalls and technical challenges – it could avoid serious headaches later. Yes, some skills are transferable between film/screen and theatre production; I (as a film/television producer) could probably manage a passable stab at producing a theatre show but you – as theatre producers – would do it so much better than me.

The same is often true the other way round. A positive collaboration between film/TV and theatre producers in my experience brings the best results.

3.

Be fair and be open

Creating and maintaining good relationships with all the teams involved is crucial and being fair and open in your negotiations is a key part of that. Short term gains can sometimes have long term costs.

In terms of the negotiations themselves, try to keep your proposals as simple as possible. You might want to think about creating bands or tiers of payments/agreements rather than 20 (or more!) individual contracts. In my experience, banded or tiered contracts can help people to feel the process has been transparent and equitable.

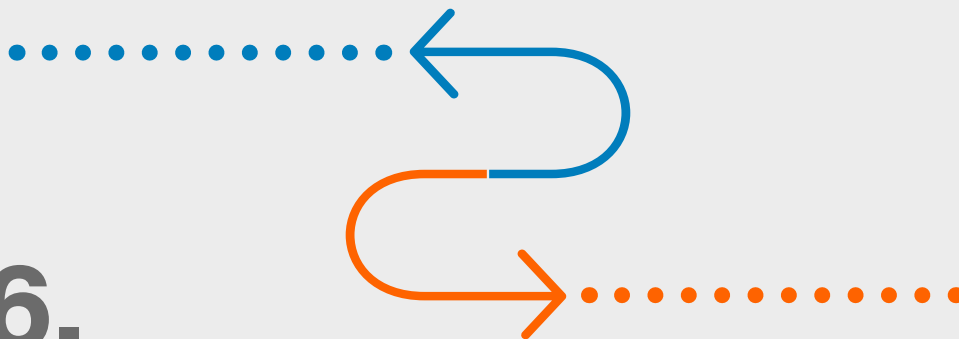


4.

Talk to people

Emails have a place, but not always for negotiations. You can often much better judge how the other side feels and their negotiating position if you talk to them – so pick up the phone or meet face-to-face and then follow up with an email to confirm the detail.

During these conversations, think about what you can more easily identify and potentially offer which matters to the person on the other side of the table.



6.

Things may change so keep your options open

Try to build some flexibility into your approach because your situation might change as the project develops. Therefore, try to construct things so you can adopt and adapt as necessary. Don't box yourself in so much that, if you find you have a hit on your hands, you can't extend or expand your screening scope.



5.

Expect the unexpected

All sorts of things can come up and change during the process of negotiations and production so be prepared. Something is almost bound to catch you out at some point, and you will never be able to anticipate everything. Keep an eye out for pitfalls where you can – for example, have you checked in with your composer/set designer/writer that you have an accurate list of any third-party material that is in the finished piece.

7.

Don't overpromise

No one is likely to make a fortune on the back of this project so focusing too much on potential additional payments further down the line on the back of a broadcast is not wise. Be honest – if it comes, great.

8.

Templates are useful, not tablets of stone

Existing contract templates are tools to be used and can save a huge amount of legwork but that doesn't mean that they can't be adapted for your needs.

During these conversations, think about what you can more easily identify and potentially offer which matters to the person on the other side of the table.



9.

"Well, no one else has ever asked for/said that before" is not a helpful thing to say or to hear in negotiations

Each production and person is different. Start in your preferred position but expect and prepare to make reasonable changes.

10.

Keep it real and in proportion

In negotiations, people can become locked into disagreements about what are – in reality – small points. For example, a percentage point or two might be the equivalent of a lot of money for one production, but a tiny amount for another. Keep a sense of what things mean in real terms and, during negotiations, work out how close the parties really are and what compromises can be made to get the project over the finishing line.

Bonus tip 11!

Enjoy the ride

People are often excited about stage-to-screen but they can be suspicious of it as well. There is a potential for an awful lot of work to be fitted in around already busy schedules. Try and enjoy it – it should be a pleasure not a chore!



Cinema distribution and rights – how could it work for you?



Contributor: Penny Nagle

Penny Nagle was a pioneer in the Event Cinema industry screening her first live to cinema events in 2002, including Led Zeppelin and Robbie Williams (the first live High Definition rock broadcast to Europe).

She co-founded More2Screen in 2006 and was Creative Director until 2016. Penny now consults to a range of film, music and media companies through Flaming Lassie Ltd. Recent clients include Creative United, presenter Lucy Cooke, The Space, Warner Music, Suede, Westlands Yeovil, and the Octagon Theatre.



It may feel daunting or irrelevant to consider cinema if your organisation is so small it could fit in the back of a taxi, but there are plenty of good reasons you should think about cinema distribution. Cinema could: extend and enhance the visibility and value of your brand; find new audiences for your work – whether they're hyper local, national or international; and, help your team develop new partnerships and skills.

If you have had a cinema release, it will also be much easier to get other platforms (such as Home Entertainment, Online) to take you seriously because not every content provider goes into cinema whereas nearly everybody can go online (thank you YouTube, Facebook et al). However, do be careful as cinema usually has to go first ahead of any online release (it's called an "exclusive cinema window") and if you do it the wrong way you can wave goodbye to cinema...

Routes for cinema distribution

There are two main ways of putting your cultural project into cinemas for distribution to a wider audience: -

(i) **Commercial Third Party Distribution strategy** (less risk) usually through an established commercial distributor

As a rule of thumb, the cinema distributors will only be interested in your project if it's going to gross £70K or more at the UK Box Office. It's useful to think of it in terms of admissions – do you think your project will bring 5-6,000 people into cinemas to watch it? If not, then commercial third party distribution may not be for you – yet.

(ii) **Hyper Local/Arts and Film Festival distribution** which can be used either in conjunction with commercial cinema distribution or as a Plan B if no third-party cinema distributor is interested. It is more risky and needs more set-up funding.

I would recommend considering three main types of boutique cinema distribution:

- creative crew and cast with Q&A following the screening
- hyper local screen events within a very local area
- arts & film festivals both in the UK and internationally

These all need 3-6 months' advance notice, and creative marketing support (approved marketing assets available immediately, including image, press release, social media content).

Tips on rights clearances for cinema

Rights clearance is a dark art, and there is no one solution. Unions including Equity, BECTU (the media and entertainment union for camera crew) and the MU (Musicians' Union) all have different approaches and requirements.

My advice for any film is to try to future proof the use you can make of it as much as possible – without breaking the bank. It's usually better to do it upfront when everyone is signing the *live event contract*. It's harder and takes more human bandwidth to do later in the production. But clearing after the event – for example if you have a runaway hit – can be done, and definitely consider cinema as an option if that's the case.





The key to success in cinema distribution is keeping costs (and especially rights costs) low

The easiest way to think of rights is like a cake. You can cut a cake in many different ways depending what you need, and if you are trying to diet you can even cut out the jammy middle. Here's how it might play out in terms of rights:

- you could clear all rights, across the world, forever, in a copyright piece of work (the whole cake – it's delicious but expensive).
- or, you could just clear for cinema (theatrical rights) in the UK for 3 years (say, a slice of the cake).
- or, you could consider limiting your rights further (dieting by cutting through the jammy centre of the cake) by clearing rights for 100 screenings across the world within 3 years.

If you have 50 clearances to do, and are a publicly-funded organisation – it's quite helpful to set out your financial case to the Union or third party you are clearing with. For example, if they want £1,000 for one clearance, and you are planning a single local screening at £10 per ticket with 50 admissions, the total income for the entire event will be £500, meaning you won't even cover the cost of that one licence fee. In other words, it's not going to happen. This can help everyone to appreciate the economics of the project.

Other ways to keep costs low include:

- you might want to use a Madonna or Beatles backing track throughout your show but it's going to cost a whole lot more than library music or even better, something you might create yourself.
- you could make a Blu-ray, not Digital Cinema Package (DCP), to screen from as this costs £500 as opposed to £1,500.

The key takeaway for you is that a cinema release is a spectrum – from the commercial to the hyper local – and, provided rights clearances and costs are kept low, it can be a viable option in your release strategy for your film. No matter what your size.

Music rights: A producer's perspective

Contributor: Adrienne Liron

Adrienne Liron is a producer and co-founder of 3 Minutes West, an award-winning production company which develops, produces and distributes arts-related films for cinema, TV and digital release. Her recent work includes a capture of Crystal Pite and Jonathon Young's *Betroffenheit* and the family feature film *Coppelia*.



Across my career as a producer I have worked with performing arts companies of all sizes, from big opera houses to tiny touring outfits. In recent years, I have seen more and more opportunities open up for small companies to share their work, whether that's on digital platforms, on TV or in cinemas. It's really encouraging that even the smallest companies can now see a way of getting their work out there.

However, there are pitfalls that companies of all sizes need to avoid when it comes to navigating rights. In my experience, music is often a blind spot and I have seen some shocking omissions, misunderstandings and errors in this area over the course of my career.

Creators/directors/choreographers can – when they first fall in love with a piece of music – forget that that track may be owned by lots of people and is subject to a range of rights. Most small theatre companies don't have the luxury of having in-house rights specialists, and it's easy for these issues to be put on the back burner. However, this initial music choice should not be made without careful consideration of whether it is 'clearable' because it can soon become integral to the production.

I encourage creative teams to think about what the future life of a show might be right from the beginning of the process. Imagine you have a hit show on your hands and a producer or broadcaster approaches you suggesting that you film it to show it online/ on TV/in cinema. It would be great to know at that moment that the music in the piece was clearable, wouldn't it?

When music and/or musicians' rights are not considered up front, it can lead to a really big mess for producers to clear up afterwards and getting it wrong can put a stop to a production, even after filming.



I have two horror stories from my own experience that illustrate this:

Imagine the scene: Thirty minutes before a live worldwide cinema relay of a dance performance, a lawyer representing one of the composers whose work features in the performance threatens to sue the dance company if their client's piece is played.

In this case, we had been trying to clear the music rights to the piece for a couple of months but had been unable to do so because the composer was unaware his work even featured in the stage production. Those performance rights should have been cleared years earlier, but hadn't been. The track in question was very personal to the composer and he said he would not have granted permission for it to be used in the staged piece, let alone for the cinema transmission.

The result was that we had to mute that entire track for the cinema broadcast, whilst the stage manager played it from the wings as softly as possible so the dancers could perform the piece as if in silence. It was far from ideal, but the only solution at that stage of the game.

This example illustrates how important it is to ensure that all music is cleared for use on stage. Any use beyond the stage will then have to be specified and subsequently cleared for film/TV/online as necessary. Having to revisit initial clearances and even clear them retrospectively when a film/broadcast company arrives on the scene can be very difficult and painful, so get your ducks in a row from the beginning.

My second example of music rights gone wrong was the result of a genuine accident...

Some time ago, I oversaw the filming of a theatre production that used lots of sampled music. It was due to be broadcast on TV so everything was done absolutely by the book in terms of rights. However, following the broadcast, the broadcaster's algorithm that seeks and identifies music in finished programmes found a track that no one on the production team was aware of – 3 seconds by a very famous artist that the composer had simply forgotten had made it into the final mix.

We were horrified, especially as the production had already been broadcast. However, we made representations to the artist in question and the choreographer wrote to him directly explaining that the use of the sampled track was a genuine error and setting out the choreographer's artistic intentions. Thankfully, it was resolved because the musician in question felt that the production chimed with his own artistic aims. Nevertheless, this wrinkle held up distribution of the film for a year.

This example shows the problems that can spring up if you don't have a totally accurate and up-to-date list of all the music in your production. However, it also shows that if you talk to music publishers and musicians you can often find a way forward. Communication is key, and that can mean explaining some of the financials involved in a production if you are asked for tens of thousands of pounds for a single track (and don't be surprised if you are in the first instance!). If you explain your situation and your artistic aims, you may find yourself amazed by goodwill and a willingness to compromise from the other side. After all, generally creatives share the same aim – creating great work and bringing it to the widest possible audience.



However, if you hit a wall in terms of clearing music, flexibility is key. I have been very impressed by small companies who have been realistic about the difficulties or costs of clearing certain tracks and swapped them for others.

In conclusion, my key tips for clearing music are: do things early, be thorough, be flexible and, finally, seek help: I would not advise people do music clearances on their own as they are notoriously tricky. Get help, whether that's from an organisation such as The Space or a music rights specialist – they don't have to cost a fortune but may save you a fortune later.

If you are organised and careful, music rights don't have to be a headache.

We survived!

Producers' advice following their first digital rights experiences



Phoenix Dance Theatre

Contributor: Mark Hollander
Executive Director, Phoenix Dance Theatre

Phoenix Dance Theatre's *Windrush: Movement of the People*, choreographed by the company's artistic director Sharon Watson, was broadcast on the BBC in February 2019.



Give a senior staffer responsibility for clearing the necessary rights

To get a project like this over the line, you need someone senior from within your organisation/production to take charge of it. This person needs to have a laser focus on rights issues: negotiating and clearing them. They also need to be senior enough that they can take the decisions required, to mitigate financial risk.

Get the expert advice you need

If this is your first experience of capturing work for TV/cinema/online, be aware that often you don't know what you don't know until a specialist flags it up to you.

It can be bewildering at first – for me, just trying to work out and understand the differences between the contracts sent to me by the various agents and companies alone was challenging. The help that we were given by The Space was enormously helpful and I would strongly advise companies that are in our position to seek help.

Allow more time than you think you will need for negotiating and clearing rights – and build in time for things to go wrong

Negotiating contracts with everyone from our cast to music publishers took a long time. There was a lot of to-ing and fro-ing and everyone had their own (different) set of questions along the way. If I was doing it again, I would start the process of clearing and licensing earlier and make everyone involved aware that it was going to take time to get everything ironed out.

In particular, get as much of a headstart as you can on music which is notoriously difficult to license. We had to substitute some pieces in *Windrush* that proved impossible to clear – in the end, we had to get some replacement library tracks and commission a composer who we often work with to reversion them into what we needed. This was only possible because we (just) had enough time, but it went all the way down to the wire.



Know what's in your production, down to the tiniest detail

Think of everything that is going to be seen or heard on screen – if it's a copyright creation or performance, it's going to have to be cleared. In *Windrush*, we were asked about the origins and clearance status of everything from a sound effect of a baby crying (who was that baby and what use had their cries been licensed for) to photographs that were used as props. Leave no stone unturned.

Have confidence that you will find a solution

As you know as a producer of live work, things change at the last minute. Be prepared to be flexible and alive to potential B plans during your preparations. Be confident in your team that you will find a work-around if needed – and you will!

Do your homework on costs

There can be an assumption by creatives that broadcasting means money. This is often not the case, and it's important you are clear about this upfront.

You need to check what your financial obligations are to your cast and creative team. Depending how the filmed piece is commissioned or funded, there are different requirements and it may also depend what union contracts (or not) your cast and creative team are on. These factors will determine whether you have a financial obligation to the cast and creatives in order to film the piece.

At Phoenix Dance Theatre, because of the salaried and non-unionised nature of our contracts, we did not have a financial obligation. Nevertheless, we wanted and did make a payment to the cast and creative team as a goodwill gesture and came to an understanding that if the filmed version resulted in a substantial financial income (above and beyond its own costs) we would re-negotiate with the cast and creative team. This arrangement was a mutually agreeable approach to managing and affording the licensing and to get the project moving.

Be aware that you may also have to navigate some internal politics in terms of payments. We had expected to pay everyone whose faces or creative work appeared on screen but additional company staff members put forward their case for a payment for their work on the show which needed handling sensitively.



Tongue Fu

Contributor: Liz Counsell
Producer, Tongue Fu

A special performance of the spoken word and music show Tongue Fu was live streamed on Facebook and Twitter from Arnolfini in Bristol on 4 October 2018, National Poetry Day.



Firstly, I should explain how Tongue Fu works: we have a three-piece band who improvise music to a series of spoken word performances. Our performers have included poets, journalists, rappers, writers and comedians and, although the music is invented on the spot, the words are never improvised. In the past, we've had texts ranging from poems to newspaper articles.

The nature of the show meant we needed to take a two-pronged attack when it came to rights for the live stream: the texts were one issue, the improvised music another.

As the texts pre-existed the show and came from all sorts of sources, we had to think through the rights for each one. The key question was, does the artist own the rights to the work or does someone else? In the past, we have had performers reading articles from newspapers and – if this had been the case for the livestream – we would have needed permission from the publication.

Indeed, even when an artist owns the copyright to a work, there can be another layer of people who need to be consulted. With up and coming poets, we often liaise with them directly but if we have a well-known artist on the show, we might have to clear the rights to use their work with their literary or music agents, as well as negotiating the performances.

For us, handling the music rights was surprisingly straightforward. The music was all improvised so there were no underlying rights, meaning that we only had to negotiate with our fantastic band. What we agreed with them was that they would retain the IP rights to anything they created on the show but that Tongue Fu would have the rights for unlimited use of the music thereafter. I am aware how lucky we were to be able to clear for unlimited usage.

The only potential wrinkle in terms of music was that the spoken word performers cue the band with the kind of music they want within the performance. In previous shows, this has led to requests for iconic film music or classic rock riffs which the band played before blending them into an improvised piece. When I thought through this, I realised we could stumble into a copyright nightmare with no warning during the livestream. The solution was simple: we asked our performers not to ask for any existing music and keep their requests abstract, like the sound of a wave crashing. Thankfully, they all obliged.

We also wanted to be ahead of the game in terms of where the footage might end up – our live stream was for our Facebook and Twitter pages but we were aware (and hopeful!) it might get picked up elsewhere and wanted to make sure we had the correct clearances in place if it did. So, with all of performers their contracts covered both their live performances and the rights to use footage of their performances in perpetuity – all wrapped into a single fee.

I would say to anyone considering putting their work online – Don't be too scared by rights. I was terrified when we embarked on this project but in our case, once we had thought through where everything came from and where the final stream might end up, it was relatively straightforward. Go for it!



Appendix

List of useful Talent Unions, Collecting Societies and Trade bodies representing rights holders:

Performers: Equity equity.org.uk

Script Writers: Writers' Guild of Great Britain writersguild.org.uk

Musicians' performance: Musicians' Union musiciansunion.co.uk

Existing Copyright:

Music: PRS for Music prsformusic.com

Still Photographs: British Association of Picture Libraries and Agencies (BAPLA) bapla.org.uk

Fine Art: Design and Artists Copyright Society (DACS) dacs.org.uk

Archive Film: Federation of Commercial Archive Libraries (FOCAL) focalint.org

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Mark Hollander

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Liz Counsell

tonguefu.co.uk

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