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Basic copyright resources for UK archives and special libraries

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This article provides practical first steps and basic resources for tracing copyright owners in archives and special libraries, through a compilation of sources, guidance notes and useful practices. It points out online diagnostic tools and suggests how to find copyright holders through different search streams, when those holders are known, and when the institution holding the work in question is based in the UK.

Introduction

Copyright generates lively discussion, with numerous books, articles, websites and blogs written on the subject. Unfortunately, most people find a great deal of the prose written about it is dry, overwhelming or not specifically relevant. In an attempt to deal with issues that have arisen during the course of my career, I've compiled sources, guidance notes and useful practices. My sincere thanks go to all the authors mentioned in the recommended reading section – they've confirmed and expanded ideas that I've had, but have been more knowledgeable and articulate than I could hope to be on this topic.¹

This article has the following structure: it recommends creating a ready reference tool that allows its users to view institutional copyright information, it points out online diagnostic tools that are useful for projects, and suggests how to find copyright holders through different search streams, when those holders are known and when the institution holding the work in question is based in the UK. The views expressed here should be taken into consideration with your own institution's legal advice.

The 'C' word

‘Copyright is a dirty word among archivists,’ wrote Post, because among the most cautious the decisions are complicated and based on guidelines that are vague and unhelpful, and among the easygoing because copyright is a reminder of ‘nitpicking technicalities which never seem to matter, but one day just might’.²

This is quite true in many ways. Often, the attitude of people put in charge of copyright issues seems to fall into one of four categories:

- indifferent – we will deal with issues as they arise
- risk averse – copyright is too difficult and time-consuming, so let’s not think about it or have an overly cautious approach that deters use of some material and causes further work for us
- methodical/cautious – copyright issues are manageable if we have clear policies and procedures and try to be systematic in acquiring material and doing retrospective cataloguing
- entrepreneurial – copyright law has not caught up with technology, so let’s do limited experiments, like putting some images online asking for help in identifying people, places and events in them.

The approach of those in charge greatly influences how a particular institution will treat copyright, and what motivates some of the attitudes listed above is fear, but often fear of the wrong thing. Instead of being afraid of expending resources processing and conserving material that nobody will ever use, people fear, with some justification, wasting staff time and money in pursuing answers that may be negative, ambiguous or expensive. They also fear that they don’t have access to legal expertise to clarify or appeal against just/unjust penalties. There is also an inherent attitude amongst archivists and special collections librarians that, because material under their care is unique, their situations must be unique as well. However, this is not the case. Much research has already been done on copyright, as well as advocacy on behalf of heritage institutions about certain copyright implications. It therefore just takes a willingness to go through the effort of clarifying what needs to be done on the ground in particular circumstances, and overall, strategically.

The most striking feature about the copyright clearance process in archives, wrote Alastair Dunning in 2004 after investigating two case studies, was that in dealing with

copyright there were more social than legal concerns. The task of copyright clearance involved much more engagement with people related to the project than time spent on consulting legal texts and money expended on solicitors. Both the Swansea and Hampshire teams involved in these case studies emphasised the importance of using local knowledge networks, contacting retired staff and local history groups, and liaising with the press in order to unearth more clues and uncover copyright holders. It was by calling on such local sources of expertise that connections began to be made, permitting the teams to identify the relevant copyright holders.³

So, how does one go about tracing copyright holders and managing that information? The first thing I would suggest is to check whether there is an easy reference tool within the institution, like a database or a spreadsheet, that specifically lists the copyright status of each collection, whether processed or unprocessed. Much of the information may already be there in donor files, in a CALM or similar archival database system or finding aid files. At some institutions it may be possible to create a query using a few keystrokes that will pull the needed copyright facts. However, if it is not possible to access the information within 10 to 15 minutes, a separate internal copyright reference tool of some sort must be created. Copyright information on one's collections is too important not to have readily available.

Another very real problem with managing copyright information is that when material comes to an archive or special collection, copyright details are just accepted as they are provided. Often no further work is done to get more information on correspondents' files, for example, unless this happens to be a high-profile collection. It may not be until after material gets processed that it becomes apparent how much third party material is present. More likely it is a researcher who finds this third party material, then asks about using it, often decades after a collection was accessioned, arranged and described.

After an internal copyright reference tool has been established, it is important to apply strategies for searching, and it is also just as crucial to record in it any new information discovered.

The difficulty for the archivist or special collections librarian is that publication depends on the actual circumstances of the individual case, writes Post. ‘Not on the declared or apparent purpose of the document; upon this nicety may hang the archivist’s right to photocopy or the scholar’s right to publish.’⁴

The strategy for searching for copyright holders will vary depending upon the medium the item is in, as well as the circumstances of its creation. It is also important to know what is to be done with the copyrighted material, because this will determine the resources you will invest in tracking down the copyright holders. For example, sound recordings that were made as part of an anthropologist’s field work require a more straightforward strategy of contacting the researcher responsible for the recordings than if they were made by an amateur in a home studio. If they were made by someone in the music industry, payment of a commercial fee may be expected.

“In general, more effort should be spent trying to locate the owner of a copyright in a professional photograph, than in an amateur snapshot in a photo album, since the former made or makes a living from the exploitation of copyrighted works.”⁵

In the UK, there is no official government body that can help directly with copyright, which is unfortunate. At the Intellectual Property Office (IPO), you can look online for patents, designs and trademarks, but there is no requirement that transfers of copyright be recorded.⁶ By contrast in the US, for example, the Copyright Office provides an online database for other copyrighted documents recorded since 1978, and a walk-in service to find copyright for older documents. In Canada, the government provides an ‘unlocatable copyright owner’ license from the Copyright Board of Canada, which can be obtained after proving to the Copyright Board that every reasonable effort has been taken to locate the copyright holder.⁷ But there is no UK equivalent. There may also be a question of which copyrights need to be cleared (see figure 1). There may be multiple copyrights and other moral rights to be considered.

(Image not included in online version of article)

Helpfully, various online tools allow you to determine what copyright is needed for images. One of these is called the *Digital image rights computator*.⁸ The Computator guides you through a series of questions relating to

- the status of the photographic reproduction
- the underlying work represented in the image
- the source and contract terms governing the image.

Another online tool is Web2Rights.⁹ This allows you to

- identify any potential IPR problems, inappropriate content, data protection, and freedom of information problems on specific projects
- navigate through the various resources created as part of an IP Toolkit and apply the resources that you need to address potential problems your specific project may have.

Both these tools are invaluable when undertaking projects such as digitising collections, or parts of collections, to be put online. Even if you don't follow every detail recommended, because of the individual circumstances of the collection, the process of working through these tools gives you the right, general mindset.

They are suitable for those who are over-cautious by nature and allow institutions to create a more transparent workflow and better articulate decisions involving risk.

Strategies for locating copyright owners

There are different ways of finding copyright owners, and these can be broken down into five different search streams. They are not mutually exclusive: some can be pursued at the same time as each other, and the results of one search may lead to another, or more than one

- Authors/creators
- Owners/heirs
- Publishers
- Collective rights organisations
- Public notices/advertising.

Authors/creators

Finding a person who created a work of art, a design, or a poem will depend on several things, first and foremost that person's profession: in general, a professional writer or artist is easier to find than an amateur, unless that amateur is well-known in another field. Second, there is the type of work created, and whether that work was published, displayed publicly, exhibited in galleries or museums, reviewed, sold through an auction house, or collected. If a work, or body of work, is considered unpublished, copyright law in the UK will treat it differently.

Third, the nationality of the author or creator, and whether the country where the work was produced is a signatory of the Berne Convention. The Berne Convention is an international copyright treaty, which established a system among its signatories for internationalised copyright and agreed enforcement by law.

If the creator is from a Berne Convention signing country, the online tools listed below should be useful. Although they are meant to be international in scope, these databases tend to have more information on Anglo-American creators. I have, however, found a few Chinese and Eastern European artists through them.

The *WATCH database*.¹⁰ WATCH stands for 'writers, artists, and their copyright holders' and is created through a partnership between the University of Reading and the University of Texas. It allows users to search by first and last names for contact details of prominent figures in other creative fields.

The *Artists' papers register*¹¹ provides a finding list of archival documents relating to artists, designers and craftspeople in publicly-accessible collections in the UK. It allows users to search by artist name, location, artist type, keyword, or by their biographical details.

Initial steps for this search strand in archives and manuscript collections include checking accession files for owners of unpublished material or checking with institutions that hold other works by the same author and contacting them to see if they might know something. The *Artists' papers register* is useful here, as is a general search in *Access to archives*¹² or *Archives.hub*.¹³ Many universities and large

public libraries also have subscriptions to *ArchiveGrid*,¹⁴ which includes archival collection descriptions harvested from WorldCat bibliographic records and from finding aids from around the world.

It is also a good idea to look at scholarship on the author or artist, as well as societies dedicated to that person, and to get in touch with the ‘fans’ to see what they know. One can also do a simple online search for works by that artist or writer and look for copyright attributions but, as always, one should be mindful of the website source and use one’s judgement and further confirmation to see if the attribution seems accurate.¹⁵

Owners/heirs

In the UK, copyright is treated as property. Therefore, like any other property, it continues to exist after a person has passed away; it can also be transferred to another owner. If a prominent artist or creator has died there are several things you can do to track down the current copyright holder.

- If he or she has died recently, you can write to the last known address. Someone should be there or mail should be being forwarded to the correct address.
- Research where the creator or his or her family lived.
- Use genealogical and probate investigations. HM Court Service has a guide to obtaining copies of probate records which can indicate who the heirs are.¹⁶
- Check the creator’s membership with organisations for writers/artists, because they might have information.
- Publish queries in appropriate journals, listservs or websites.
- Contact their publishers, literary agents or former employees. In some cases a creator may have given the copyright to their employer as part of a contract.

Publishers

Publishers can provide an important resource for permissions on copyright and there are benefits to using this search stream. First, as a working business, they are easier to find and more willing to be found, unlike some artists or writers who guard their privacy closely. Second, they already know about copyrights as this is a major source of their income. In some cases, they may even own the exact copyright you are seeking, or be able to grant a limited non-exclusive licence for a project like digitisation. If the publisher does not own the rights, often they have heirs' contact information, especially if the publisher is responsible for sending royalty cheques to them.¹⁷

There are several online tools that allow you to track down a publisher by name:

- Firms out of Business Database (<http://tyler.hrc.utexas.edu/fob.cfm>)
- Preditors and Editors (<http://pred-ed.com>)
- International ISBN Agency (<http://www.isbn-international.org>)
- History of Advertising Trust (<http://www.hatads.org.uk>)

The History of Advertising Trust keeps track of many images created for British advertisers. In some instances they know the firm that created a specific media campaign. In other cases they only have final advertisement as it was commissioned. Either way, it provides a useful resource for tracking down images.

Collective rights organisations

Reproduction rights organisations are societies that act as agents for a large number of copyright owners. These collecting societies administer copyright owned by members and distribute income generated from copyrights. They exist because many copyright owners don't wish to deal with copyright enquiries and they authorise a collecting society to manage the business on their behalf.¹⁸

Examples of reproduction rights organisations in the UK include:

Artists' Collecting Society (<http://www.artistscollectingsociety.org.uk>)

Copyright Licensing Agency (<http://www.cla.co.uk>)

Authors' Licensing & Collecting Society (<http://www.alcs.co.uk>)

International organisations include:

International Federation of Reproduction Rights Organisations

(<http://www.ifrro.org>)

Visual Artists and Galleries Association (<http://www.vaga.co.uk>)

The Plus Coalition (<http://www.useplus.com>)

It should be noted that while copyright collectives can simplify the permissions process, not all organisations are authorised to license all possible uses, and the rights to license online distribution often stay with the publisher or author. The costs for securing permission can often be high, even if the use is educational or non-commercial.

The public

One way of tracing rights holders is simply to advertise – on listservs, in newspapers, and often on websites or online using Web 2.0 technologies. This takes longer and could be riskier, but some institutions have mitigated that risk by stating upfront, ‘we know nothing about these images and would like further information’, including knowledge of who the copyright owners are. This seems to have worked if collections are selected wisely, there is a robust take-down policy in place, and disclaimers state well-intentioned aims and word them in a way makes it clear that the repository holding the collection cannot be liable, (or are non-profit organisations have no money and are making no money from these works). This can be riskier with orphan works, that is works whose copyright holders are not known, rather than copyright holders who are known but can’t be reached. Again, it depends on what your overall institutional strategy is, and what you are trying to achieve. See the advice about putting digitized collections of unpublished materials online on the OCLC website, which provides specific guidance.¹⁹

Kraus makes the case for creating a ‘transformative work’ with one’s collections in such a way that the new product is not infringing copyright.²⁰ For example, in the music industry DJs often sample, that is cut small pieces of previously-released songs, and mix those small pieces with another song. However, it has been argued that these new pieces of work are creative in their own right, and introduce new generations to

music they would not have heard before.²¹ Kraus argues that libraries are following the wrong business model when it comes to permissions, that libraries should actually looking to ‘transform’ their collections into something new.

The History of Advertising Trust (HAT) has gone down this route. The main aim of HAT is to provide an archive for people researching the advertising and design industry. Some images and collection information is online but the Trust states very clearly that further information is welcome, including copyright holder information.²²

The National Archives (TNA) has gone even further. After acquiring over 30,000 images from the Foreign and Commonwealth Office, which span over 100 years of British Colonial history in Africa, TNA launched the *Africa Through a Lens* project, and approximately 10,000 images, a third of the total collection, were uploaded onto Flickr, a photo sharing website. The goal of the project is information gathering, as well as public engagement and building new audiences, by providing a means for people around the world to contribute by identifying people and places in photos, drawings or paintings.²³ This is clearly a transformative project, as the original intention of the images was to document the territories through what art and cultural historians would characterize as a ‘Western fetish gaze’²⁴ and provide propaganda of the glorious British Empire narrative. The TNA seeks to give actual names to people and places and capture more accurate information, which will be an interesting contrast to the objectified (and at times racist) metadata recorded by previous generations.

Things to keep in mind

Generally, copyright belongs to the author or creator. However, there are instances when this is not the case. For example, if

- a number of people own one or all of the exclusive rights of the copyright owner because the work was created as a joint work of authorship
- the creator has died and left multiple people to inherit his or her copyright, or
- the author automatically assigned his or her rights to their employer in a work

agreement or contract.²⁵

Conclusion

“The prime and underlying assumption of copyright lawyers is that no-one creates anything without the intention of making a profit. While this has the force of law, it clashes harshly with the liberal ethic demanded by research and the dissemination of useful knowledge.”²⁶

Archivists and special librarians should view the challenge of copyright research positively, as an opportunity to expand knowledge about their own collections. Bear in mind that once you have created a ready reference tool to view your own institutional copyright information, use diagnostic tools for projects, and begin compiling copyright holder information, it is no more difficult than doing any other research on your own collections.

Other institutions have similar questions to yours, and in this age of information and the internet, more effort should be made to connect and communicate with those outside our own institutions going through similar problems.

“The UK is becoming increasingly out-of-synch and isolated from its European neighbours in terms of copyright exceptions, which may lead to the UK’s research and innovation centres losing their competitive advantage.”²⁷

Copyright law in the UK is changing constantly, although maybe not fast enough for our needs. Perhaps we should also consider joining the other voices of advocacy out there?

References

1. This article is based on part one of a two-part presentation given at an ARLIS/UK & Ireland event held in London in February 2011. The workshop was entitled *Tracing copyright in art and design archives: theory + practice*. The second part of that February presentation dealt specifically with digitising or not digitising orphan works and risk management, using the University of Leeds Library as a case study (See the article by Jodie Double on pp. ?? - ??).

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5. Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for U.S. Libraries, Archives, and Museums, 2009*. Online at: <http://ecommons.cornell.edu/handle/1813/14142>

This is one of the most practical books on copyright that I have read. Although not all of it applies to the UK, many of the ideas about tracing copyright holders in this paper are covered in depth in Chapter 8.

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Recommended reading

Articles and Books

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