



Catholic Archives Society Publications: Archive Advice Leaflet No. 14

## **COPYRIGHT ADVICE RELATING TO ARCHIVES**

Produced on Behalf of the Birmingham Archdiocesan Trust and The Catholic Archives Society by Veale Wasbrough Vizards LLP, 28 October 2022

This guidance is applicable to archives housed in the United Kingdom and deals with legal changes post-Brexit. Whilst much of the guidance can provide helpful advice for archives around the world, legal advice for specific issues should be sought in relation to local or national laws.

### **1 BACKGROUND**

#### **What is copyright?**

- 1.1 Copyright is an intellectual property right which exists to protect authors' creations of original works against copying by third parties. Copyright protects the following type of works:
  - 1.1.1 literary, dramatic musical or artistic works;
  - 1.1.2 sound recordings, films and broadcasts; and
  - 1.1.3 typographical arrangements (how things are set out on a page, for example, your headed paper is likely to attract copyright protection).
- 1.2 The most relevant copyright works in relation to the work of archives are literary works (such as letters, diaries and journals) and artistic works (such as drawings and photographs).

#### **Duration**

- 1.3 The general rule is that copyright lasts for the period of the author's life, plus 70 years, starting at the end of the year in which the author died.

In context of this advice, there are, however, the following notable exceptions which need to be taken into account:

- 1.3.1 If the author of literary works or photographs **died before 1969, but their work was not published on or before 31 December 1988**, copyright expires on 31 December 2039.
- 1.3.2 **If the author is unknown**, then copyright protection lasts the **longer** of 70 years from the date of the work's creation, or if made publicly available, 70 years from the end of the year in which it was first made publicly available.

Due to the nature of historical archives, it is inevitable that you will encounter works that fall into one or both of the above categories.

### **Ownership**

- 1.4 When it comes to ownership of copyright, the general rule is that the owner is the individual who created the original work. However, one key exception to this is that if the individual created the work in the course of their employment, then subject to any agreement to the contrary, the owner will be the employer. This means that if an individual created a copyright work in the course of his or her employment, then ownership in the works would sit with the organisation and not the individual. If, however, the copyright work was completed outside the scope of their employment (such as a private letter home to family or a personal poem), then ownership would be retained by the individual.
- 1.5 The position under civil law is not entirely aligned with Canon law, in that under civil law the individual may own the copyright, whereas under Canon law, it would be more likely to be subject to rights of the Roman Catholic church. As Canon law would not present a valid defence to a claim for copyright infringement, our advice addresses the risks based on the position under UK copyright law.

## **2 EXCEPTIONS PERMITTING USE OF WORKS PROTECTED BY COPYRIGHT**

- 2.1 Having established that copyright subsists in a work and on the assumption that there is a lack of clarity either in relation to ownership, the identity of the author or the permission to use/digitalise the copyright works, the next stage to avoid the risk of any claim for copyright infringement, would be to consider whether the particular works fall within one of the relevant exceptions. There are 2 main exceptions that apply here, the first of which (**Fair Dealing**) applies to both authored and orphan works (copyright works in which the rights holder is either unknown or cannot be found) and the second of which (**Section 57(1) of the Copyright Designs and Patents Act 1988 ("CDPA")**) only applies to works of unknown authorship.
- 2.2 **Fair Dealing** The most prominent exception permitting use of copyright works for both authored and orphan works is the fair dealing exception applicable to both research and private study. This exception requires:

- 2.2.1 **research to be for a non-commercial purpose** - non-commercial purposes has been construed widely, meaning that any charge for access or commercial interest will likely mean you cannot rely on this exception; **and**
  - 2.2.2 **the author to be sufficiently acknowledged** - unless this is impossible for reasons of practicality or otherwise. This involves identifying the work by its title and the author, or carrying out reasonable enquiries as to the identity of the author.
- 2.3 **Section 57(1) of the CDPA** provides that you will not infringe copyright if:
- 2.3.1 it is not possible by reasonable enquiry to ascertain the identity of the author; **and**
  - 2.3.2 it is reasonable to assume that copyright has expired, or the author died over 70 years ago.

This legislation permits use of works of unknown authorship only when it is also reasonable to assume that the copyright in the relevant work has expired. It would therefore be necessary to evidence that serious efforts had been made in good faith to locate and contact the rights holder, including all reasonably available avenues of enquiry. Further, current legal resources suggest that even if the conditions of section 57(1) are met, use of that copyright works would only be permitted once. Therefore, in relation to any subsequent uses (such as appearing in other publications or use by researchers) the processes would need to be repeated (by the researchers in this context) to ensure that the above criteria were met. However, any further use would be able to benefit from any enquiries already undertaken.

### 3 **THE UK ORPHAN WORKS LICENSING SCHEME**

- 3.1 The position in relation to the use of orphan works was much more straightforward pre-Brexit. However, unfortunately the relevant EU orphan works exception no longer applies in the UK and was repealed from UK law from 1 January 2021. Therefore, the only remaining option in the event that it is not possible to rely on either of the above exceptions would be to apply for an orphan works licence through the UK orphan works licensing scheme (<https://www.gov.uk/guidance/copyright-orphan-works>).
- 3.2 In return for payment of application and licence fees, the Orphan Works Licensing Scheme allows orphan works to be licensed in the UK for both commercial and non-commercial use, subject to completion of a diligent search demonstrating that it has not been possible to identify the rights holder. The licence is geographically limited to the UK, therefore in the event that the archive does obtain any licences under this scheme, it would need to ensure that it limits any online access to users based in the UK to avoid a claim for copyright infringement in the EEA.

## 4 **ADVICE SUMMARY**

- 4.1 In context of the above legal analysis, we have identified the following 3 main areas of risk for archives in practice:
- 4.1.1 Copyright works you hold of known authors in relation to which you have not been assigned the copyright and where the author is still alive or died within the last 70 years.
  - 4.1.2 Copyright works that you hold of unknown authors, which were created in the last 70 years.
  - 4.1.3 Any copyright works which you obtain in the future.

### **Suggested steps**

- 4.2 For copyright works which you already hold that fall under 4.1.1 and 4.1.2 above, it is important that prior to providing access to them, you inform the researcher that you are unable to confirm that you hold the copyright in them and that you provide no warranty or guarantee that the researcher's proposed use will not infringe a third party's copyright. So as to fall within the Fair Dealing exception, use by the researcher must be for non-commercial purposes and the author of the work must also be acknowledged wherever possible. You must of course, also ensure that you do not use the works for commercial purposes and should acknowledge the author wherever feasible.
- 4.3 In relation to 4.1.2, before copying or using works from unknown authors, we would recommend that contact is made with the archives in addition to undertaking all reasonable enquiries to attempt to determine the identity of the author. If the works have already been copied, the same enquiries should be undertaken, and, if the author is identified, they should also be acknowledged where possible.
- 4.4 For any works received in the future, we would recommend that all reasonable enquiries are made of the donor in relation to:
- 4.4.1 the identity of the author
  - 4.4.2 the date of the creation of the copyright works,
  - 4.4.3 whether it has been published; and
  - 4.4.4 whether they believe they are the rights holder.
- 4.5 For audit purposes, it is imperative that you make a detailed record of the discussion addressing the above points to evidence the requisite reasonable enquiries. If they are able to establish that they are the rights holder and are willing to assign the copyright, it is always recommended that an assignment is executed in the archives favour.
- 4.6 As a general recommendation, due to the reasonable enquiry overlap between the research fair dealing exception and the section 57(1) exception for orphan works, we would recommend that records of deposit are checked for any information on the

authors and rights holders of the works that are being provided to researchers. Any such enquiries should be documented together with all related actions taken to identify the author.

- 4.7 As is clear from the above, it is very important that an ongoing detailed record relating to all copyright works (including all details relating to ownership, date of creation, reasonable enquiries made, publication date and any assignments agreed) is maintained and backed up to support any future challenges.
- 4.8 Although we have highlighted the risks above, from a commercial perspective, due to the nature of the works, the fact that authors were likely to be aligned to the church and the majority of the works are likely to be decades if not hundreds of years old, the overall risk of archives being pursued for copyright infringement is relatively low. As outlined, any such risk is further mitigated if all reasonable efforts are made to identify and acknowledge authors of works, supported by contemporaneous documentary evidence.
- 4.9 Finally, if there are orphan works of particular value and the archive is unable to satisfy itself with the level of exposure to risk, then we would recommend using the Orphan Works Licensing Scheme.

## 5 SPECIFIC QUESTIONS

**Where there are historic deposits to the archives and where we have no paperwork to support a claim for copyright ownership, do we have a right to permit copyright permissions? And can we put the onus on the researchers to seek permissions if not?**

- 5.1 As explained above, the author of a work is normally the owner, but this is not always the case. The rightsholder may be, for example, a descendant or an employer. As you have not been assigned the copyright by the rights holder you will not be able to provide permission to use the copyright works.
- 5.2 If, however, you make all reasonable enquiries in an attempt to identify the author but are unable to do so and the use is for non-commercial research, then you are still able to copy it and rely on the Fair Dealing exception subject to meeting the acknowledgement requirements.
- 5.3 It should be made clear that you are providing no warranty in relation to the researcher's ability to use the works for their proposed use. This is the researcher's responsibility to determine and risk to assess.
- 5.4 Alternatively, if the researcher is based and has a proposed use in the UK, you may want to consider applying for an orphan works licence. If approved you would be in a position to provide the researcher with an assurance that they are permitted to use the works, subject to the conditions of the licence.

**Am I within my rights to demand transfer of ownership of copyright when somebody deposits material today, if they aren't actually the author of the material or the heir of the creator?**

- 5.5 There is nothing that an archive can do demand the works deposited are assigned to them. You can, however, make it a term of the acceptance that a formal assignment is put in place on the assumption that the individual depositing the works is the rights holder.
- 5.6 If someone who is not the rights holder in the copyright in a work, purports to assign it, they will not provide good title.