Context

Museums, libraries, archives, universities and colleges and other public bodies across the UK own a vast range of creative works from artworks to manuscripts to academic research. Many of these works are ‘in copyright’ and often, the copyright is owned by third parties, such as the artist themselves, their heirs, representatives or other third parties. These works include those which have a high commercial value, such as fine art and commercial films and others, which are of negligible commercial value but high academic, cultural and historic worth, e.g. documentary photographs, amateur films, letters and sound recordings.

In order to use these works, and provide access to them, public sector bodies have to effectively manage the associated rights and permissions of these works.

The Nature and Impact of Orphan Works

The longevity of copyright in much of the material owned and used by public sector bodies (it can last until 31st December 2039 for unpublished text-based works) and the likelihood that many of these works would have been created by amateurs, means that for a significant proportion of works the rights holder is unknown or cannot be traced. These are known as ‘Orphan Works’.

The huge scale and significant impact of Orphan Works, conservatively estimated to be well in excess of 50 million items across the UK’s public sector organisations by a recent UK-led survey by JISC and the Collections Trust¹, has led to several likely outcomes:

- Works only being used under limited conditions
- Works not being used at all
- Works being made available on a risk assessed basis and subsequent to carrying out reasonable searches where possible.

In addition to this, ‘Due diligence’ (a process by which the public body takes reasonable steps to ascertain the provenance of a work) can also be an expensive and costly process in terms of human effect and resource. Very often, whilst best efforts are made to find the rightsholder, it is still not possible to trace them which means that the work remains ‘orphan’, having taken much resource to confirm this.

¹ http://sca.jiscinvolve.org/ipr-publications
Recent Developments Regarding Orphan Works

Orphan works have been acknowledged as a major disruption to projects such as the Europeana\(^2\) charged with ensuring that European Citizens can fully benefit from the wealth of European cultural heritage. Therefore, resolving the problem of Orphan Works is now an important issue requiring resolution for the European Commission (EC) and internationally.

Recent initiatives which have focused on addressing the issue, have included the EC funded MILE\(^3\) and ARROW\(^4\) projects aimed at creating Orphan Works registries, as well as the European Digital Libraries Initiative which has produced “due diligence” guidelines\(^5\).

In the UK, there have been some recent developments regarding Orphan Works. The Digital Economy Bill, for the first time, provided a possible solution for Orphan Works, encased initially within Clause 42 and later Clause 43. These clauses included provisions potentially providing collecting societies and others, such as public sector bodies, with the ability to secure a non-exclusive licence directly from the Secretary of State for the use of Orphan Works. However, after extensive lobbying by photographers and Picture Libraries the whole of Clause 43 was dropped. These provisions would have provided public sector bodies with hope that they would have been able to use and provide access to these immensely important works, without incurring legal uncertainty and associated risks. It is hoped that, following the ‘Independent Review of Intellectual Property and Growth’\(^6\), this issue will be considered again in significant depth.

Managing Orphan Works

Subsequent to the recent developments and the current lack of legal certainty for the use of Orphan Works, public sector bodies need to understand their choices regarding Orphan Works in their collections and ensure that their procedures are as effective as possible in the use and preventing the creation of Orphan Works of the future.

The following provides an overview of some of the actions that public sector bodies might consider when encountering Orphan Works and/or preventing Orphan Works.

**Pre-existing Orphan Works**

- Carry out reasonable searches to check if the works are genuine Orphan Works. Searches might include:
  - Checking the object itself
  - Searching in acquisition files, entry forms and other registries
  - Looking in archival files
  - Discussing work with staff
  - Searching on the internet
  - Checking online databases, such as the WATCH file: [http://tyler.hrc.utexas.edu/](http://tyler.hrc.utexas.edu/)
  - Checking trade journals and/or exhibition catalogues
  - Liaising with owners of works by the same creator, such as other museums
  - Checking with relevant collecting societies and other rights holders, such as DACS [www.dacs.org.uk](http://www.dacs.org.uk) and the Bridgeman Art Library [www.bridgeman.co.uk](http://www.bridgeman.co.uk). Please refer to the “Where to Go for Rights Clearance” paper contained within the SCA IPR and Licensing Toolkit for further information about possible rights holders.
  - Checking Wills at: The registry of births, deaths and marriages (to check wills): Probate Department, Principal Registry of the Family Division, First Avenue House, 42-49 High Holborn, London, WC1V 6NP

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\(^2\) www.europeana.eu/portal/
\(^3\) www.mileproject.eu/
\(^4\) www.arrow-net.eu/
\(^6\) [www.ip.gov.uk/preview.htm](http://www.ip.gov.uk/preview.htm)
If you are successful in tracing rights holders, please refer to the paper “Seeking Permissions” and associated rights clearance templates contained within the SCA IPR and Licensing Toolkit: http://sca.jiscinvolve.org/ipr-publications.

- Document all efforts when attempting to trace rights holders ideally on collections management or similar internally accessible databases
- List the names of the creators and/or rights holders that you are attempting to trace on your own website and/or relevant publications
- Carry out a risk assessment regarding the use of the work. Considerations might include the nature of the work and the commercial or non commercial use of the work. Further information can be found in the SCA Briefing Paper on Risk Assessments: http://sca.jiscinvolve.org/ipr-publications. The JISC funded OER IPR Support Project has also developed a Risk Management Calculator7 which can be used to help provide a greater understanding about the types of variables which might reduce or raise an indicative risk score www.web2rights.com/0ERIPRSupport

- If you do decide to publish Orphan Works:
  - Include a disclaimer and ensure it has high visibility (via a prominent link, for example) rather than being buried away on an obscure page of the website. Some like the following could be considered: “Every effort has been made to trace copyright holders, obtain permission from them and to ensure that all credits are correct. XXXX has acted in good faith at all times and on the best information available to us at the time of publication. We apologise for any inadvertent omissions, which will be corrected as soon as possible if notification is given to us in writing.”
  - Instigate a rapid take down policy and associated procedures. The SCA IPR and Licensing Toolkit contains a template notice and take down policy and procedures which can be customised and adapted to suit requirements http://sca.jiscinvolve.org/ipr-publications
  - Put aside money in case rights holders come forward. This might be based upon the perceived level of risk associated with the use of the work, i.e. the higher the risk, the more money that is put aside.
  - Amend your corporate risk registry as necessary
  - Ensure that your organisation has an agreed approach for liaising with rights holders if they come forward as well as named individual who will take responsibility for this
  - You might also wish to take out possible insurance

Possible Actions to Prevent Orphan Works From Occurring
There are a number of suggested approaches which might help reduce the number of new orphan works being created:

- Request permission from rights holders and/or persons appearing in any photographs and/or film to use works and/or materials at the point of acquisition and/or creation of the work. The SCA IPR and Licensing Toolkit contains rights clearance templates which can be customised and adapted to suit requirements http://sca.jiscinvolve.org/ipr-publications

- If works are being acquired from parties who are not rights holders, check with them if they have any knowledge about rights holders.

- Document all rights, permissions and/or information about the works and/or materials on appropriate paper-based documentation systems and collections management and/or asset management systems.

- When making works available to the public, include embedded metadata about rights holders, credit lines and licensing terms.

- If you choose Creative Commons Licences (CC Licences) to provide access to works, embed the CC licence that you have selected in your work, alternatively, consider how you communicate terms of use and/or attribution requirements. The SCA IPR and Licensing Toolkit contains a briefing paper on embedding Creative Commons licences into digital content http://sca.jiscinvolve.org/ipr-publications. The Open Attribute Tool www.openattribute.com can be used to help users copy and paste the correct attribute information for any CC-licensed work.

Want to Find Out More?

Strategic Content Alliance IPR and Licensing Toolkit http://sca.jiscinvolve.org/ipr-publications

JISC Legal
www.jisclegal.ac.uk

In From the Cold Survey of Orphan Works

i2010 European Digital Libraries initiative

“Due diligence” guidelines published by the EC to assist those who seek to demonstrate that they have carried out such a search.

WATCH File (Writers, Artists and Their Copyright Holders)
http://tyler.hrc.utexas.edu/
The WATCH database provides contact details for a number of rights holders.

WATCH File Database of Firms Out of Business
http://tyler.hrc.utexas.edu/fof.cfm

Database of publishing and literary-related firms who are out of business

Creative Commons
www.creativecommons.org

OER IPR Support
www.web2rights.com/0ERIPRSupport


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