

Museums, Orphan Works and Risk Management

- **What is this advice sheet about?**

This advice sheet is about what you need to know about Orphan Works and risk management. It explains the new Orphan Works solutions introduced by the UK Government in 2014 and the role of risk management in a 21st century museum. The fact sheet also suggests appropriate resources that can be used by museums to search for rights holders.

- **Who is this information for?**

This information is for anyone who has **responsibility for managing or caring for the museum's collections and/or is likely to use collection works and/or content created by third parties and/or wishes to use and exploit any other IPRs associated with your museum.** This includes trustees, staff and volunteers working within the following departments: curatorial, collections, loans, digitization, exhibitions, communications, marketing, press, development, learning / education, new media, image licensing, retail, publications and legal.

- **Why is this information useful?**

In 2014, the UK Government introduced two sets of legislation for the use of Orphan Works.: An Orphan Works Exception, based upon an EU Directive and an Orphan Works Licensing Scheme (UK Only). More about the Orphan Works solutions can be found here:

<https://www.gov.uk/apply-for-a-licence-to-use-an-orphan-work>

This advice sheet explains these solutions in details and how museums might benefit from them. It also explains the role of risk management in a museum.

- **What is an Orphan Work?**

Orphan Works are in-copyright pictures, books, films, photographs etc. where the rights holders cannot be identified or tracked down in order to grant permission to use them.

- **What should I consider first?**

Orphan Works Exception

The Orphan Works Exception should be considered first if:

- You are a publicly funded museum, gallery, library or archive;
- Your use of the in-copyright work is non-commercial and online (i.e. if you are selling

the orphan work you cannot use this provision in UK copyright law);

- You are using an in-copyright work **other than** a stand-alone independent photograph, painting or other artistic work. (i.e. The orphan works exception does not allow photographs or paintings to be used unless they are “embedded” within something else such as a book or a film.)

If you comply with the above three points:

- You should keep a record of where you looked, the dates and who you contacted regarding the work you are trying to clear;
- The search for the rights holders should be common sense and proportionate – you do not have to approach organisations that make no sense to contact for example;
- If there is no starting point for the rights clearance, such as a first name, surname or organisation then this should be logged as the start and end point of the rights clearance process – i.e. if there is no starting point to the rights clearance it should be logged that you decided there was no starting point to the search.
- You will have to register the Orphan Works you wish on the EU IPO Orphan Works Database. This is not a complex procedure if you have access to a computer.
<https://oami.europa.eu/ohimportal/en/web/observatory/orphan-works-database>

Orphan Works Licensing Scheme

If you are wanting to use an Orphan Work for commercial purposes, purposes not covered under the Orphan Works Exception, or you are not a publicly funded museum (archive or library) or wish to use a photograph, painting or artistic work not “embedded” in a book or a film you may want to think about the Orphan Work Licensing Scheme.

The Orphan Works Licensing Scheme requires the same level of diligent search for rights holders as the Orphan Works Exception, but requires the museum to pay a licence and application fee to the Intellectual Property Office (the application fee is usually less than £100) for use of your Orphan Works. The fee relates in part to the use to which the in-copyright work is being put.

More information on the scheme can be found on the Intellectual Property Office’s website here: <https://www.gov.uk/apply-for-a-licence-to-use-an-orphan-work>

- **What else might help me?**

Please note that the following rules / exceptions to copyright law may mean you do not have to the Orphan Works legislation:

1. The item is in the public domain. All published material over 140 years old will be out of copyright, and most but not all published materials from before 1915 will be out of copyright.
2. If the work is anonymous, and published then the duration of copyright is just 70 years from publication;
3. If the work is an anonymous photograph, created before 1957, the duration of copyright is 70 years from creation or publication.

4. If you can already use the work under an existing copyright exception to copyright.

- **What is Risk Management and why is that important?**

Although the UK Government introduced solutions to deal with Orphan Works in 2014, it is still important that you have risk management policy in place for your museum. This will help your organisation understand how much it can rely on the new Orphan Works exceptions, other exceptions to copyright (see guidance sheet 11), or decide whether the new Orphan Works Licence is an appropriate option for you.

If your museum either has no appetite for legal and reputational risk and/or it is unable to take any risks because of its governance, constitution etc., then this guidance may not be applicable, but if it does it is useful to think the level of risk you are taking in the following way:

1. Is the item in copyright?
2. Is the item published and over 120 years old and therefore likely to be out of copyright?
3. Was the item produced for commercial purposes?
4. If it is, what is the likelihood of the copyright owner finding out?
5. If they do find out, are they likely to object?
6. If they do object, how much is it likely to cost?
How will the museum respond to such objections e.g. published “take down” policies and effective responses?

Is the item still in copyright?

It can be very difficult to work out if an item is still in copyright. Here are some basic, but not full proof, guidelines:

- Published text based works and artistic works are in copyright for 70 years after the death of the copyright holder.
- An item like a book, a film and a sound recording can contain multiple layers of copyright.
- Most, but not all, pre 1915 published works will be out of copyright.
- Unpublished works from the UK will be in copyright until 2040 if the author died before 1969 and the work was unpublished before 1 August 1989.
- If the work is anonymous, and published then the duration is just 70 years from publication;
- If the work is an anonymous photograph, created before 1957, the duration is 70 years from creation or publication.

Copyright Infringement Scenarios

The scenarios below outline two different approaches taken by museums to their infringement of third party rights, and the impact of their approaches:

Scenario 1

A museum was wanting to display some items in its collections on its website, and in its visitor literature. The museum generally tried to use Victorian photographs, or photos it had taken

itself. In one instance the museum used a modern photograph from the web and did not look for the copyright owner, or use their name alongside the photograph. The museum was contacted by the photographer's husband who was quite angry. The museum took the works down from the web in accordance with an organisation-wide Notice and Take Down, and said they were terribly sorry for not accrediting the photographer. After a few phone calls the husband said he did not want to be paid for damages, but would like his wife's work to be credited on the website and in the future on any reprints.

Scenario 2

A museum used a number of images from a commercial organisation on its website promoting the museum without asking permission. When the commercial company approached them, the museum failed to respond appropriately and did not apologise, or rectify the situation. As a result, the museum was taken to the Patents County Court and forced to pay damages of £23,000. (This is based on a real case).

- **What is the role of due diligence?**

When looking for a rights holder, you should always contact or check with logical organisations that might be able to help you.

It is vitally important that you record centrally who you have contacted, when you contacted them, when you did a Google Search, what results you found, whether you got a response, what response you got etc. This is needed if you use the orphan works legislation, but even if not, to show that you acted responsibly trying to find the rights holders. Ideally, this information should be recorded on your collection management system.

However, if there is no starting point to look for a rights holder, please refer to the Orphan Works section above.

Recommended searches that might be useful:

For books

- Google search
- WATCH FILE <http://norman.hrc.utexas.edu/watch/>
- PLS Clear Website <http://www.plsclear.com/Pages/ClearWizard.aspx>
- A few very famous estates are represented by the Society of Authors <http://www.societyofauthors.org/literary-estates>
- Author Licensing Collecting Society (ALCS)

For art

- You could ask whether an artist is represented by the Design, Artists, Collecting Society (DACS)
- Don't forget to carry out a Google search
- If your item is unique, the rights holder may not have a digital footprint! This does not mean that they do not exist, but instead, you should consider other ways that you might try and locate them – such as adverts in local papers, parish/local records, local

genealogical societies, wills etc

- **Remember**

1. It is always wise to have a notice and takedown policy, and point of contact who can remove in-copyright works quickly from the website if someone objects as this minimises your legal and financial exposure to copyright infringement. It is worth remembering that your approach to risk is only as good as how you make things better if they do go wrong!

(The British Library has a good policy which you can use as a template:
<http://www.bl.uk/aboutus/terms/notice/>)

2. Always use out of copyright works, or works where you have the permission. Have you thought about using material licensed under a Creative Commons Licence?

3. Provide good and accurate acknowledgements of the rights holders.

4. Always try and get permission where feasible, or see if the work can be substituted for something available under a Creative Commons Licence

5. Record your due diligence efforts ideally on your collections management system. Whether you use an Orphan Works solution or a risk management approach, you will need to make sure you record the efforts you make to try and trace the rights holders.

6. Review your existing insurance policies – you may already have a clause somewhere that protects your museum against copyright infringements. If you don't this might be worth investigating

7. Make sure that your staff are aware of their roles and responsibilities in terms of copyright clearance, as well as any agreed Notice and Take Down Policies.

Final Thought:

Risk is an important issue to think through when using an in-copyright Orphan Work. Your usage may be so low risk that it may be worth not expending the costs of an Orphan Works Licence fee and/or the costs of inputting the information on the Orphan Works Database, to gain coverage under the Orphan Works Exception. Risk, cost and benefit should therefore all feature in your decision making processes!



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