

## MUSEUM COPYRIGHT

This paper simplifies the confusing bundle of issues relating to copyright as it relates to museum and gallery professionals; specifically who owns copyright in photographs, recordings, published works, works of joint authorship and commissioned works.

### 1. What Is Copyright?

Copyright is a bundle of rights. It includes the right to:

- (a) reproduce the work;
- (b) publish the work;
- (c) include the work in a television broadcast (or transmit it by cable services)
- (d) make an adaptation of the work

### 2. Reproduction

Although it is most usually used as a synonym for "copy" it really has a wider meaning in copyright law for the copy does not have to exact:

It need not be in the same dimension, (for example, a photograph of a musical instrument).

It need not be in the same form, (for example, the film of a book).

It need not be a copy of the whole work, merely a "substantial portion" of it.

### 3. Publication is given a special meaning by the Copyright Act.

It is defined as meaning the supply to the public (whether by sale or otherwise) of reproductions of the work.

Few museums are aware that in order to reproduce and publish copyright works even in an exhibition catalogue, the permission of the copyright owner must first be obtained.

Because of the inconvenience of this, the registrar of the collection would be well advised to ensure that the acquisition documents state:

- (a) whether or not the work is copyright;
- (b) if so, when the copyright expires;
- (c) who is the owner of copyright;
- (d) and if the owner is the donor/vendor of the work, whether that person gives the museum a licence to reproduce the work for, say, non-commercial use within the museum and the right to publish it in catalogues (which presumably will be for sale).

It must be noted that **exhibition** has nothing to do with copyright. Mere exhibition has nothing to do with reproduction, publication, or the other aspects of copyright.

### 4. WHAT MATERIAL CAN ATTRACT COPYRIGHT PROTECTION?

- (a) Artistic works
- (b) Musical works
- (c) Literary works

- (d) Dramatic works
- (e) Sound records
- (f) Cinematograph works
- (g) Broadcasts
- (h) Published editions

## 5. Who Owns The Copyright?

### 5.1 General Rule

The person who gives form to the creative idea.

It is not necessarily the person who first had the idea.

### 5.2 Photographs taken prior to 1 May 1969

Establishing who owned the material is usually impracticable for busy museum personnel unless that information is sought at the time of acquisition of the work.

### 5.3 Photographs taken after 1 May 1969

### 5.4 Commissioned works

The general rule applies

There are three exceptions:

- (a) photographs
- (b) portraits
- (c) engravings

Thus upon acquisition, the vendor or donor of such artistic works should be asked whether or not the pieces were commissioned.

Not only is this an important curatorial detail, it may also may later become vital should the museum later wish to reproduce the work.

## 6. Employees-where work was made prior to 1 May 1969

The employer owns everything.

Exception: employees of journals and newspapers, the employee can restrain the employer from using the work in any way unrelated to newspapers and magazines.

## 7. Employees-where work was made after 1 May 1969

The general rule is that the employer owns the copyright for all purposes relating to reproduction in newspapers and the like, while the author retains all other rights.

Thus if a museum wished to reproduce such a work in its magazine it would need the permission of the publisher.

But if it wished to include it in a video or reproduce it on a poster, it would need the permission of the author.

## 8. Musical Works

### The general rule

- (a) commissions
- (b) employed writers
- (c) distinguishing between the author of the music and the author of the lyrics (if any).

## 9. Literary Works

The owner is the author, even where the work is commissioned.

Employment (is as set out above for artistic works).

As a consequence of this, museum personnel who write learned books and articles should clarify with their employers, exactly who is to control the copyright of their works. This is a potential industrial relations landmine for most writers of academic material would be horrified to think that their employer may have the right to claim the copyright in their work.

## 10. Recordings

The maker almost always a record company.

On the other hand, as many small record companies go broke every year, it can become extraordinarily difficult to get clearances for some.

If a company is commissioned to make a recording (and this is increasingly common in the industry) the copyright will be owned by the commissioner. The most useful test is to ask who paid for the making of the recording. That will be the person or company from whom any permissions will have to be sought.

## 11. Published Editions

### Duration of Copyright

- (a) General Rule
- (b) Photographs
  - (i) For photographs taken before 1 May 1969
  - (ii) For photographs taken after 1 May 1969
  - (iii) The death of the author is irrelevant to the calculation of the copyright period.
  - (iv) Thus, where a photograph is never published the copyright will subsist indefinitely.
- (c) Engravings
  - (i) If the engraving was published during the lifetime of the author, the usual period (author's life plus fifty years) applies.
  - (ii) But if the work is first published posthumously, the copyright period will last for fifty years from the end of the calendar year in which the work was first published. Thus, if the work is never published, the copyright will continue to exist in perpetuity.
- (d) Anonymous or pseudonymous works

- (i) The copyright in these ( except for photographs) subsists for fifty years after the end of the calendar year in which the work was first published. However, if the author's identity is generally known or could be ascertained by reasonable enquiry, the general rule applies.
- (e) Works of joint authorship
  - (i) Again, whether or not the work has been published is significant. Where it has been, the 50 year period runs from the end of the calendar year in which the last remaining author dies.
  - (ii) However, where the work is posthumously published, the period runs for fifty years from the end of the calendar year in which the work was first published.
  - (iii) Where **one or some** (but not all) of the joint authors uses a pseudonym, the fifty year period runs from the end of the year in which the last author, whose identity has been revealed, dies.
  - (iv) Similarly, where **all** of them use pseudonyms, if at any time within fifty years of publication the identity of one of the authors is or could be ascertained, the period runs from the end of the year in which the author, whose identity has been revealed, dies.
- (f) Published editions
  - (i) There was no copyright in published editions before 1 May 1969. Editions published after that date enjoy copyright protection for 25 years from that date of its first publication .
- (g) Musical works
  - (i) The general rule is that the copyright in musical compositions lasts for fifty years from the end of the year in which the composer died.
  - (ii) However, if the work was not published (say as sheet music), publicly performed, broadcast, or sold in the form of records, during the composer's lifetime, the copyright period starts running from the end of the calendar year in which the first of those events occurs.
- (h) Recordings
  - (i) Copyright in recordings made prior to 1 May 1969, last for fifty years from the end of the year in which the recording was made.
  - (ii) For recordings made after 1 May 1969, the copyright period of fifty years starts to run from the end of the year in which the recording is first published. Basically this means the year of its release to the public. Thus if a master recording is made but the record company decides for whatever reason not to release the disc, the company will retain indefinite control of the recording, for the fifty year period will never start to run.

## 12. Permissible Uses of Copyright

### The taking of photographs in the museum by the public

Most museums forbid the taking of photographs inside the museum.

Besides the conservation problems caused by flash bulbs, the photographer runs the risk of falling foul of the copyright laws. Each time the photographer shoots a copyright work the odds are that copyright will be infringed.

The most important (and misunderstood) exception to this is that works of "artistic craftsmanship" or sculpture, **permanently situated in a public place**, may be photographed, sketched, painted, or engraved without infringing copyright. This exception does not extend to other works or objects.

(a) Incidental use for film or television

No infringement occurs if an artistic work is reproduced on film or television if that reproduction "is only incidental to the principal matters represented in the film or broadcast". As to what is "incidental", that is a matter of fact and degree and will differ in each case.

(b) Fair Dealing

This covers the use of artistic literary and musical works for the following purposes:

- (i) research or study;
- (ii) criticism or review (although sufficient acknowledgment must be made); and
- (iii) reporting news in a newspaper, magazine, film or television broadcast (although in the case of the print media, sufficient acknowledgment must be made).

Museums cannot rely on "fair dealing" for the purpose of including copyright material in advertising, the annual report, brochures, catalogues.

(c) Use of an insubstantial portion

To be an infringement, the use must be a reproduction of a substantial portion of the work. Of course what is substantial is a question of fact and degree in every case. There are no valid rules of thumb although one often hears glib and reassuring little phrases such as " You can use up to 14 bars of music", or "Single pages are O.K.". None of these are true. It will vary in each case.

**In the case of published editions (of more than ten pages) of literary, dramatic or musical works the Act provides that a "reasonable portion" is:**

- (i) less than 10% of the number of pages in the edition, or
- (ii) where the edition is divided into chapters, more than 10% of the whole book, but no more than one entire chapter.

(d) Special Statutory Provisions For Libraries, Archives and Museums

There are many provisions relating to copying for users and copying for other institutions. See the book for details.

(e) Unpublished Works

The Act provides for two situations in which the authorised officer can copy **unpublished** works without breaching copyright.

(f) Theses and Manuscripts

If its not been published, and is kept in the library of a university or an archive, and the officer is satisfied that the person requesting it, is doing so for the purpose of research or study.

(g) Expiration of time

With other unpublished literary, dramatic, or musical works, or unpublished photographs and engravings, copies may be made if

- (i) the author has been dead more than 50 years;
- (ii) the work was executed more than 75 years ago;
- (iii) the work is available for public inspection in the collection (subject to the governing regulations);
- (iv) the officer is satisfied that the copy is sought only for the purposes of research or study or with a view to publication.

(h) Copying Works For Preservation Purposes

In certain circumstances, the officer in charge of the library or archive may order a copy of a copyright work to be made if the work is in danger of loss or deterioration:

- (i) if the work is in **manuscript** form or is an **artistic work** the copy can be made for the purposes of **preserving** the work or for the purposes of research within a library or archive;
- (ii) if the work is in **published form** it may be copied for the purpose of **replacing** the work.

Published works that are being replaced because they have been damaged, have deteriorated or have been stolen, can only be replaced by copying, if the authorised officer signs a declaration that the work cannot be purchased new within a reasonable time at an ordinary commercial price.

(i) Microfilming Material That Is Impracticable To Retain

A microfilm may be made of any work held in the collection, even if it does not come within the above categories, so long as the work that is copied in this way is destroyed as soon as practicable thereafter.

## 13. Disclaimers

It is often very difficult to obtain the permission of the copyright owner. They change address, die, and do all sorts of things designed to make the registrar's life a misery. If the copyright owner cannot be traced or refuses to reply to one's requests, it is no defence to include a statement saying that all reasonable efforts were made to obtain the copyright permissions.

## 14. Copyright Questions Commonly Posed By Museums

### 14.1 Can the museum photograph all material as it is accessioned, for record purposes?

Strictly speaking, this is may be a breach of copyright if the material is copyright material.

In many cases the copyright will have expired, either though the passage of time .

If the reproduction is only for record purposes it is unlikely that anyone will sue because the cost of taking legal action would never be outweighed by the nominal damages that might be awarded.

**14.2 Can the Museum take photographs to give to persons who need illustrations for articles, books, or unpublished research?**

If the reproduction comes within the defences of "fair dealing", "private research", or "criticism or review", there is no problem.

Officers giving such permissions should satisfy themselves that the purpose of the reproduction is lawful and get the person making the request to sign a suitably worded form setting out the purpose for the reproduction, limiting the use to that specified purpose, and demanding an acknowledgment that the subject is held in the museum's collection.

**14.3 Can the museum reproduce collection material for postcards that will be sold in the museum bookshop, the profits of which will go to the acquisitions fund? What about catalogues?**

If the work is protected by copyright, this reproduction would be a breach of copyright and could cost the museum dearly. Permission must be sought. It is arguable that reproduction in the exhibition catalogue may be permitted under the criticism or review aspect of "fair dealing". However it is always best to obtain a licence to reproduce the work in exhibition catalogues at the time of accession.

**14.4 Is it true that "as far as sculpture and craft items are concerned, there is no infringement of copyright if they are reproduced in a two dimensional format"?**

As with so many rules of thumb, this is more wrong than right and therefore more dangerous than useful. It is safer to think of this the other way round: generally, one can breach copyright in a work if one reproduces it in the same or a different dimension.

If the subject is a work of artistic craftsmanship (and remember that has a wider meaning than "craft item") or a sculpture, the Act says that the reproduction will not be a breach if it would not appear to a "person, not an expert in relation to objects of that kind, to be a reproduction of the artistic work". Thus, the photograph of a vase, a necklace, or hand-made chair would be a breach, but the two dimensional plan of a mechanical device would probably not. Similarly one might not be able to make a drawing of a hand crafted guitar but may be able to do a plan of the mechanism of a hand-made harpsichord.

If a sculpture or work of artistic craftsmanship is permanently situated in a public place or places open to the public, copyright will not be infringed by the making of two-dimensional versions of it. Doing models or selling miniatures of the work is not lawful without the usual permission.