



Making History: Copyright and Rights Management

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Abstract

Copyright is central to any policy of access to archaeological work, particularly if that work is in a digital format, and access can occur on many different levels from academic research to commercial exploitation. Copyright is therefore increasingly a major issue for electronic records and all organisations involved in archaeological fieldwork or disseminating research. The RCHME is no exception to this. Like many other public sector bodies the RCHME wishes to expand access to its collections by all appropriate means and to generate revenue to supplement its core funding. It is also conscious of current and impending changes to copyright law and their potential impact on the Commission's activities, and has recently completed a wide-ranging internal review of copyright and licensing. This paper presents an overview of the main copyright issues in the UK and their relevance to archaeologists working with electronic or traditional records and uses the current dispute over the Chauvet Cave paintings as an example of copyright issues in archaeological material.

1 Introduction

Copyright is increasingly a major issue for electronic records and all organisations involved in archaeological fieldwork or disseminating research. The RCHME is no exception to this. A review of its rights management procedures and the implications of current and proposed changes to copyright legislation was considered to be critical to underpinning its plans for providing extensive access through the WWW to its national database and associated records in digital form. This paper sets out the importance of copyright to archaeology using the discovery of the famous Chauvet Cave in France as an illustration of some of the issues which can arise. It also presents a selection of the findings and issues identified in RCHME's own review of copyright and implications for its work. The paper is therefore concerned primarily with the operation of copyright law in the UK and Europe but many of the issues will be recognisable to a wider international audience.

This paper can only indicate some of the areas that archaeologists should consider in addressing copyright. Copyright law and its application is complex and in many cases there will be exceptions and qualifications to the outline statements given here. Copyright law will also vary according to national legislation. More detailed sources of advice and guidance are therefore given at the end of the paper. Please note that specific legal advice must always be taken by individuals and institutions and this paper does not constitute legal advice by the author, his employer or RCHME.

2 The Chauvet Cave

The discovery of the paintings in the Chauvet Cave at Pont-d'Arc in France is one of the most important palaeolithic finds made this century. They were found by Jean-Marie Chauvet, an amateur speleologist employed by the French government as a warden whilst potholing with two volunteers in December 1994. The three potholers made a short video film and took photographs of the stunning cave

paintings they had discovered. There was intense world-wide interest in the discovery and many archaeologists and others will have seen the digital images of the paintings hosted on the French Ministry of Culture's website (<http://www.culture.fr/culture/arcnat/chauvet/>). There was extensive press coverage of the find in national newspapers and on television networks.

However how many archaeologists are aware of the sequel to this discovery? Two years later there is a bitter dispute over the copyright in the film and photographs of the cave paintings, which is attracting some press coverage in the UK (Lowry 1997, Macintyre 1996). This press coverage has reported that the French Ministry of Culture had laid claim to the copyright and sold on the film rights to television stations at Fr3,000 a minute, and reproduction rights for the collection of photographs at Fr14,000, making some £1 million to date. Its claim to the copyright is based on Chauvet discovering the cave whilst on official duty and in the employment of the French government. However Chauvet has claimed that the discovery was made on Christmas Day, in his and the volunteers own time as part of their hobby and as such had nothing to do with the Government. He has sued the Government for forgery alleging that officials deliberately ante-dated documents to 15 December to suggest he had made the discovery whilst on official duty. Judgement in the case is awaited, but it illustrates in sharp relief many of the issues of copyright ownership, employment contracts, use of volunteers, and commercial exploitation of archaeological work which are explored further below.

3 What is copyright ?

Copyright is an intellectual property right, which can be sold, transferred or licensed. It exists automatically and there is no need for registration. It can therefore be difficult or impossible to find out who is the current copyright owner of a particular item. It is also possible for several different forms of copyright to exist in a single object, eg a book can

have separate copyrights in the text and photographs as well as the copyright in the arrangement held by the publisher.

Copyright exists in original works and copies will only have a secondary copyright if skill and judgement is used in their creation. This is important in archaeology in two areas. Within museums photographing an out of copyright object can create a new copyright. This copyrighted image can then be used for reproduction and additional revenue. Secondly in an electronic context a separate copyright from the original can exist in a digital image if skill and judgement are involved in its creation. Awareness of this potential additional copyright in any digital image is important in granting permission or awarding contracts for imaging projects to ensure this copyright is not inadvertently given away to others.

4 Ownership of copyright

Ownership of copyright is usually vested in the author of a work. There are two principal exceptions:

1. Where an employee in the course of their employment creates a "work", their employer holds copyright.
2. Where an agreement exists transferring copyright from the author to someone else.

Authorship is defined by the type of copyright and can be the person who creates the work or makes the necessary arrangements (e.g. a publisher).

It is also important to recognise that if work is not undertaken by an employee but by a contractor then the contractor has the copyright unless the contract specifically assigns the copyright to you. Similarly you should note that ownership of the material is separate from any copyright associated with it. Hence possession and ownership of a physical item, eg an archive or manuscript, does not itself mean you have the copyright and rights to use it.

The ownership issue is central to the dispute over the Chauvet Cave discussed above. It is important for individual archaeologists to be aware of the rights of their employer in any work they create during their employment and equally for employers to be aware of the copyright implications of voluntary work or of unpaid and unofficial overtime!

If legal ownership of any archaeological work is unclear or is excessively fragmented, it may be impossible for anyone to actively disseminate or use that work in the future. It is vital therefore for anyone involved in an archaeological project who has a potential copyright ownership or part ownership of datasets and other works created by that project to agree at the outset as to how the rights are to be held and any benefits shared.

5 Crown copyright in the UK

A unique feature of copyright in the UK compared to other countries is the existence of Crown copyright.

Under the 1988 Copyright, Designs and Patents Act (HMSO 1988) all works made by Her Majesty or by an officer or servant of the Crown in the course of his or her duties are governed by Crown copyright.

Prior to the 1988 Act the definition of Crown copyright was much wider. The 1911 Copyright Act gave copyright to the Crown in any work prepared or published by, or under the direction or control of the Crown, and also covered any "Crown" works created before the Act came into force. The 1956 Act replaced this with slightly more elaborate provisions. Essentially it established Crown copyright in: all works made by or under the direction or control of the Crown; and all works first published by or under the direction of the Crown (hence all works published by HMSO became Crown copyright even if the authors had no connection with the Crown in any other way).

Crown copyright is of considerable importance for archaeologists in the UK as most archaeological work prior to the 1980's was funded by the government, or is now undertaken by government bodies covered by Crown copyright such as RCHME. The provisions of Crown copyright therefore cover many archaeological archives and publications. It is worth noting however that the 1983 Act establishing English Heritage specifically states its employees are not to be considered as Crown servants and for this reason Crown copyright does not apply to EH's work.

An interesting anomaly has arisen because of the uniqueness of Crown copyright. EEC copyright directives could not accommodate it and therefore the duration of Crown copyright has been unaffected by the EEC Copyright Term Directive. Crown copyright therefore still remains valid for 50 years in published material and 125 years in unpublished material.

6 Moral rights

The 1988 Act introduced a series of "moral rights" usually exercisable by the author or his/her heirs. These are as follows:

1. Paternity- the right to be identified as the author or director of a work
2. Integrity- the right to object to the derogatory treatment of the author's work or its false attribution
3. Privacy- the right to privacy in relation to photographs and films commissioned for private and domestic purposes

All archaeologists need to be aware of these rights and ensure they are respected or ensure that contracts include the necessary waiver of these rights.

7 "Fair Dealing" and permitted acts

There are a number of "fair dealing" and other provisions within the 1988 UK Copyright Act for individuals, libraries, and archives. Providing the use of copyright material falls within these provisions no permission from the copyright holder or payment of a royalty is required. Examples include:

1. "Fair Dealing"- a single copy of a work for the purposes of research or private study, criticism or review
2. Preservation copying by a library or archive.

These provisions are important for both users and information providers accessing archaeological data in traditional formats.

8 Recent or proposed changes to copyright legislation

8.1 Publication right

A new intellectual property right known as "Publication Right" has been introduced as a result of a Directive (EEC 1993) to harmonise copyright terms and related rights in member states by the European Commission.

A Statutory Instrument giving legal force in the UK to this Right came into force in December 1996. The Right applies to all works covered by copyright including literary works (eg manuscripts, computer programmes) or artistic works (eg photographs and maps).

A Publication right will come into existence in works where copyright existed at some point but has since expired, when the work is first "made available to the public" either by:

1. issuing copies
2. publication
3. exhibition
4. broadcast (eg TV, cable or online access)
5. Making it "available for inspection" at an establishment open to the public

The publication right will not automatically be held by the owner or curator of the work but by the person/organisation who first makes the work available to the public. The Right will exist for 25 years from the end of the calendar year in which the work is first made available to the public. The Right can be assigned, or licensed in return for a royalty.

The Publication Right is potentially important to the RCHME and other public repositories and may provide new intellectual property rights in some out of copyright and unpublished collections for archaeological organisations (or for others if it is overlooked).

8.2 EEC directive on copyright term

The copyright term provisions of this directive (EEC 1993) was implemented in UK law from 1st January 1996 and has changed the term of copyright protection from the norm of "life plus 50 years" to "life plus 70 years". It extends by 20 years the copyright protection in works still in copyright and revives copyright in works where copyright has expired during the last 20 years. The duration of Crown copyright is unaffected by this change.

8.3 EEC directive on database copyright

In March 1996 a new directive (EEC 1996) was announced by the EEC which will need to be enacted in UK law within 2 years.

The directive aims to give a degree of copyright protection to databases which might otherwise be excluded from copyright

law. Current copyright law is designed to protect creativity and facts in themselves cannot be copyrighted: hence most databases have limited protection in law except where appropriate as compilations/ literary works.

The directive defines a database as a collection of independent items accessed by electronic or other means. It confers rights for a period of 15 years to prevent certain actions eg extraction and re-utilisation of work. However others can take an "insubstantial" part. For protection under the directive to apply an organisation must demonstrate investment in a database in any of the following ways: verification of data, obtaining data, or its presentation.

If any of these processes are continuous then effectively the database will never be out of copyright as the protection rolls forward.

9 Electronic media

It is important to recognise that there is no separate copyright for electronic media and that copyright in an electronic work is a sum of the parts, which are covered by existing categories of copyright material (photos, sound, etc) in analogue form. The EEC Directive on Database Copyright, when it is implemented in the UK, will therefore represent an important departure: the first time that an electronic medium is covered by separate legislation (although the term database will cover items in a collection accessed by electronic or other means).

Many of the difficulties in obtaining or drafting licences for electronic materials arise because of the particular challenges they represent in protecting the owner's rights. Electronic material can have very high resolution and be copied repeatedly with little or no degradation. Electronic images are therefore frequently only made available in low resolutions unsuitable for traditional publications, protected by encryption or watermarking, and/or are available with stringent licensing conditions.

The fact that electronic media are more easily manipulated and altered also means that maintaining the integrity of the information is a major issue. Most licences for electronic media even from archaeological projects need to consider the limits to alteration and manipulation permitted to prevent potential abuse. The authenticity and validation of electronic materials is also of far greater importance and increasingly problematic.

Another area of difficulty is that there is considerable uncertainty as to the legitimacy of fair dealing in electronic materials under current legislation. This is because a single copy of a work is permitted but the process of transmitting over a digital network or caching within a PC will always create additional, often transient, but potentially infringing copies. There is therefore potentially no "fair dealing" defence in using digital materials and you must acquire specific rights to make information available in digital formats.

The recent World Intellectual Property Organisation treaty negotiations have concluded and the treaty is open for signature by governments until December 1997. The treaty recognises that the principal of fair dealing should apply to

electronic materials but there is considerable debate over its interpretation and it will be interesting to see how the governments who are signatories to the agreement implement the treaty (for further information see <http://www.wipo.int/>).

10 Conclusion

Archaeological research is demanding and it is easy for copyright issues to be looked upon as of little interest or of too great a complexity for professionals in the field to consider. However copyright is central to developing computerised records in archaeology and ensuring access to them: the implications are now too great for copyright to be overlooked. The partnerships and licences needed for widespread distributed access to digital collections to develop further will raise many issues including ensuring due acknowledgement of an author's work if it is re-used, developing agreements for educational use, and controlling commercial exploitation.

Although copyright can be daunting for individuals alone to consider, there are many organisations within the archaeological community or in related areas that have combined or can combine, to develop frameworks and licences for archaeological use, or to lobby for the copyright changes needed in an age of digital information. A good example of this is the guidance and model transfer of title and copyright, or copyright licences for archaeological archives developed by the Society of Museum Archaeologists on behalf of its members with funding from the Museums and Galleries Commission (Owen 1995, 14-19 and 61-67). Another is the common Rights Management Framework and licences being developed for digital collections held by the five Services (Archaeology, History, The Oxford Text Archive, Performing Arts, and Visual Arts) forming The Arts and Humanities Data Service, which has been established within the UK Higher Education sector (full details of this Framework and licences will be available from the AHDS web pages at <http://ahds.ac.uk> later in 1997).

Archaeologists must now always address copyright as part of any funding bid or in drawing up contracts, and consider copyright at the outset of a project rather than the end. In doing so they can draw on experience in a wide range of

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institutions from libraries, or museums to photo archives. A selection of these resources is given below.

11 Further Reading and Sources of Information

11.1 Web Resources

For information on Crown copyright see HMSO Crown Copyright Unit (<http://www.hmso.gov.uk/copy.htm>)

For information on copyright in archives see the Public Record Office copyright pages (<http://www.open.gov.uk/pro/copy1.htm>)

For information on copyright in libraries see the International Federation of Library Associations copyright and intellectual property bibliography pages (<http://www.nlc-bnc.ca/ifla/II/copyright.htm>)

For information on international copyright treaties see World Intellectual Property Organisation pages (<http://www.wipo.int/>)

11.2 Printed Publications

Oppenheim, C, Phillips, C, and Wall, R A, 1996 *The Aslib Guide to Copyright*, Release 4. This Guide published by The Association for Information Management is updated annually and provides an authoritative and accessible guide to copyright matters. The inclusion of the texts of relevant EEC Directives and UK legislation is particularly valuable.

11.3 Organisations

BAPLA- British Association of Picture Libraries and Agencies
18 Vine Hill
London EC1R 5DX

The Copyright Licensing Agency
90 Tottenham Court Road
London W1P 0LP

Design and Artists Copyright Society
Parchment House
13 Northburgh Street
London EC1V 0AH