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PAPER GIVEN TO THE SOCIETY OF GREEK ARCHIVISTS, FEBRUARY 2006
Συνέδριο "Αρχεία, Βιβλιοθήκες και Δίκαιο στην κοινωνία της πληροφορίας"
2-3 Φεβρουαρίου 2006, Εθνικό Ίδρυμα Ερευνών

COPYRIGHT ISSUES IN ARCHIVES

Two key questions throughout the history of copyright have been "what is copyright for?" and "how long should copyright last?". The biggest question in copyright today, however, is "how can we establish international standards?"

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My usual way of describing the history of copyright over the past three hundred years[1] is as a movement away from the Anglo-American concept of copy-right, a property right, which is the right to make copies, and towards the more philosophical French notion of *droits d'auteurs* (authors' rights, based upon intellectual responsibility for a creative piece of work).

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I have also strongly supported the view that the copyright periods which now apply are too long, sometimes absurdly long. A copyright period of 70 years after an author's death (more than that in France where extra time is added for the world wars) for any and all original writings amounts to a constraint on publishing, scholarship and biographical research which has no justification. And the position for manuscripts is even worse.

In the UK we have a law which decrees that Bernard Shaw's novels, first published in the 1870s and 1880s, are going to remain copyright-protected until 1 January 2021, and that the handwritten personal diaries of Charles Dickens (dating from the late 1830s and held in the Victoria and Albert Museum) will be in copyright until the end of 2039, two hundred years later. It is not possible to treat such a law with any sort of respect.

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The first copyright act in the world, grandly entitled *An Act for the Encouragement of Learning*, was passed in Britain in 1710 and introduced the legal idea of a **term of protection**. The term was established as fourteen years from the date of publication, with a second fourteen-year term to be added if the copy were re-registered.

The 1710 Act will have applied also in British North America and its curious fourteen- and twenty-eight-year terms (which date back at least to a patent law of 1623) were to prove exceptionally durable on the American side of the Atlantic.

The duration of British copyright was extended in 1814 to 28 years from publication or until the death of the author and again in 1842 to 42 years from publication or 7 years after the death of the author (in both cases, whichever was the longer period). These changes adopted the idea of the death of the author as a key factor, but were a great disappointment to authors' rights campaigners like William Wordsworth, who had been pressing for a 60-year *post mortem* copyright term. In 1912, Britain became a full signatory of the Berne Convention of 1886, and its copyright period went to 50 years *post mortem*.

The *post mortem* concept had been borrowed from French legislation, and the idea of *"le droit moral de l'auteur"* was confirmed during the French Revolution by the acts of 1791 and 1793. The 1791 act gave copyright protection for literary works until five years after the author's death. Further French legislation in 1866 extended this period to 50 years, a term then adopted by the Berne Convention. By the mid-nineteenth century, the leading role in copyright legislation was clearly being taken by the French. Although the French acts of 1791 and 1793 had been preceded by legislation in the UK (1710), in Denmark (1741), and in the USA (1790), they came to be seen as the international model laws, and were largely endorsed at Berne in 1886.

After the Berne Convention, the copyright period continued to grow in individual countries. Prior to standardisation within the EU in the 1990s, duration of copyright had extended to 56 years in Italy, 60 years in Belgium, 65 years in France and 70 years in the Federal Republic of Germany. In Spain, the copyright period was extended to 80 years, before (remarkably) being reduced again in December 1987 to 60 years.

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Duration of copyright is by no means the only area in which the emphasis has swung away from public access and towards authors' rights. I would suggest four areas which are involved in the move towards increased protection and an increased focus on authors' rights:

-- duration of copyright
-- inclusiveness of copyright
-- presumed continuation of copyright
-- non-registration of copyright

The duration of copyright in most countries in the world is now excessively long, and, notoriously, far longer than the duration of patents. Most countries have accepted the Berne Convention minimum period of 50 years after an author's death; more and more are moving on to a 70-year period; some go further still: in Côte d'Ivoire, for example, copyright lasts for 99 years after an author's death. There has been a similar shift in respect of inclusiveness. The British 1710 copyright act was supposed to apply only "to literary matter of lasting benefit to the world", although its interpretation was always broader than that. No-one in the eighteenth century, however, could have imagined a

situation where copyright applied to lists of prices of stocks and shares, lists of railways stations, text for advertisements, sheets of election results or the contents of a literary author's shopping list.

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Presumed continuation of copyright can be the bane of the lives of copyright clearers and nervous publishers. Even when they can prove beyond reasonable doubt that the copyright of an author who died in, say, 1945, has not been invoked since, say, 1950, the copyright still exists and could be claimed in a court of law. Again and again the researchers in our UK WATCH office encounter situations where they work out, from exhaustive research, who must be the copyright holders for a particular author, only to be faced with total ignorance and indifference on the part of the rights-holders themselves.

WATCH regularly discovers copyright holders who had no idea that they were copyright holders, and their rights remain intact even if they have not been exercised for 50 or 60 years. **Copyright persists**.

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Registration and non-registration of copyright have an equally important history. In Britain, copyright was dependent upon registration at Stationers' Hall for the period from 1710 until 30 June 1912, when British adherence to the Berne Convention became fully effective. In other countries, including notoriously the USA, **necessary** registration lasted far longer.

In fact, it is **in the removal** of any requirement for copyright registration that we see most clearly the move away from copyright conceived as a registered property to the idea of copyright as an **inherent** author's right.

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The extension of duration, the extension of inclusiveness, the presumed continuation of copyright and the disappearance of the need to register have been features of the history of copyright in most countries in the world over the last hundred years and more. All four features point decisively to the need for pro-active central registers of copyright holders. And yet until 12 years ago there was no country in the world which had such a research-based register.

This has been one great item of unfinished business of the Berne Convention. The Convention removes from authors and copyright holders any need to register their rights, but it makes no allowance at all for those who wish to **make use** of copyright-protected writings. Readers, researchers and scholars who went into repositories and asked where they could find information about copyright-holders used to be told that this was a mini research project which they had to conduct for themselves. Before the emergence of

WATCH, there was no area of research in which archivists were **less able to help** than in respect of copyright owners. And this was true in just about every country in the world.

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All the legal textbooks tell us that copyright depends upon national legislation and that strictly there is no such thing as "international copyright": there are only reciprocal arrangements. International copyright may not, legally, exist, but no-one will doubt that copyright is becoming increasingly international.

The importance of an international archival approach to copyright is particularly strong for countries (including the USA, Canada, France, the UK, the Netherlands and Australia, for example) which have always taken an international approach to collecting and collection-building.

What follows from this is the need to be aware of the copyright laws of countries whose authors are amongst one's archival collections - in order correctly to apply the regulations of **reciprocity** which thread through all of international copyright.

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The first important point to make about **international copyright reciprocity** is that it transfers protection and it transfers aspects of duration of copyright. It does not in general transfer other national regulations. To take one example of this, the Mexican law on "fair use" is fascinating, as its determining principle is the absence of a profit motive; broadly speaking, if there is no financial gain, unlimited copying is permitted. It does not follow from this, however, that in Spain or the UK we can go out and photocopy for ourselves the collected works of Octavio Paz.

It is in the international transferability of **duration** of copyright that we, as archivists, have to be most alert. I suggest that there are two guiding principles to be borne in mind:

- there is the statement in the Berne Convention (article 7, section 8) that duration of protection for foreign authors will not normally exceed the duration of protection in **their** country of origin; this is significant where the foreign author's country of origin has a shorter copyright duration (the only country which I know to disregard this norm is the USA and that is for published works only, not for archives);

- on the other hand, there is the very natural working practice which has developed, which is that although Berne would permit greater protection to be given to foreign authors and their works than to those of the home country - in cases where the foreign author's country of origin has a longer copyright duration – in practice I know of no country which does this.

The USA's policy leads to strange anomalies. Literary journals have made much out of the fact that some writings of Marcel Proust and Sir Arthur Conan Doyle, published in the late 1920s and out of copyright in their home countries, are still copyright-protected in the USA.

Book-librarians and publishers have long been aware of the issue of national copyright differences. To take a real example, let us consider the work *My friends the baboons* by the South African author Eugene N. Marais (who died in 1936). The standard South African copyright period is 50 years - normally 50 years after the death of the author. Most of Marais's books therefore came out of copyright around the world at the end of 1986. In fact *My friends the baboons* was published posthumously in 1939, which in South Africa gives it 50 years of protection from the end of the year of first publication. *My friends the baboons* has been out of copyright since 1 January 1990, in Europe as well as South Africa, notwithstanding the fact that the copyright period in Europe is now 70 years and that some European countries (including the UK) recognise the idea of posthumous works being protected from the date of publication.

In the context of **unpublished works**, the Berne Convention (article 5, section 4(c)) helpfully tells us that the country of origin should be regarded as the country of the author's nationality – and **not** the country where the manuscript is to be found.

Reciprocity in the copyright in unpublished works such as literary manuscripts operates on the basis of the two principles I have outlined.

In the UK, all unpublished works with an author are copyright-protected until 31 December 2039. In theory, this would apply to a newly-discovered manuscript by Shakespeare or by Geoffrey Chaucer (who died in October 1400). In practice, it certainly applies back as far as the 1790s. This bizarre British law is generally disregarded by archivists in other European countries (if they are aware of it at all).

In fact, in the world of archival copyright for personal papers, at a time when international cooperation is more desirable than ever, what is being seen is more and more divergence between national practices. These divergences apply both **within** the old "copy-right" tradition (most notably between the USA and the UK) and **between** the "copy-right" and "droits d'auteur" traditions.

The new divergence between US and UK practice comes from the implementation in the USA of a new archival cut-off date of 1 January 2003. From 2003, for manuscripts, the 70-year post-mortem figure in the USA becomes fixed – meaning that all the manuscripts of any author who died in 1933 or earlier would be out of copyright in the USA. This date is now 1936 or earlier.

By the second of our two guiding principles, this also means that any manuscripts of UK authors who died before 1936 which happen to be housed in US repositories are also regarded as out of copyright. This leaves us in a situation in which, for a work by D. H. Lawrence where part of the manuscript is in the University of Texas at Austin and part in

the University of Nottingham Library, the Texas part of the manuscript is in the public domain from 2003, while the Nottingham part of the manuscript will remain in copyright until 2040.

Conversely, turning to the manuscripts in UK repositories of US authors who died pre-1934, the assumption must be that these are all now in the public domain. I shall illustrate this paper with the entry in our WATCH database for the US author Elinor Wylie.

Elinor Wylie (1885-1928) was an interesting US author, with UK connections and a few papers in UK archival collections. This is what WATCH says about her copyrights:

> Elinor Wylie was a US citizen, and her copyrights come under US law. This is understood to mean that all of her manuscripts and unpublished papers are in the public domain from 2003, including manuscripts held in UK repositories. Any of her writings first published before 1923 is also in the public domain. Writings first published after 1922 might possibly still be in copyright.

This is a bizarre US-specific example of published works having a longer copyright duration than unpublished works, and it would take too long to explain why.

Elinor Wylie is, of course, one of very many US authors for whom some papers are to be found in European repositories. There are papers of authors like Mark Twain and Walt Whitman held in European repositories. I wonder how many of their custodians are aware that these papers are now out of copyright.

One particularly odd examples is the case of Henry James. One of the greatest US authors, Henry James took UK citizenship in 1915 as a protest against the non-entry by the USA into World War I. Later that year he suffered a stroke, and he died in 1916. Had he not made his protest in 1915, all his manuscripts around the world would be in the public domain. Because of his change of citizenship, any of his papers in UK repositories are still in copyright.

Conversely, the author Frank Harris, who was born in Ireland, thought of himself as English, lived at the end of his life and died in the south of France, but, crucially, took US citizenship in 1921 (as part of his race around the world to avoid his creditors), has the copyright in his manuscripts covered by US law. And this means that the many Frank Harris manuscripts in UK archival collections, like all Frank Harris manuscripts anywhere in the world, are in the public domain.

Clearly archivists and librarians need to have an ever greater awareness of what is going on world-wide in the sphere of copyright. To cope with copyright together, we need an internationalist approach and an international awareness, together with good international contacts and links.

I was recently reading with interest a paper by Professor Joachim Bornkamm. Professor Bornkamm is a judge of the German Supreme Court, but his paper was in French and entitled "*L'heure est-elle venue d'instaurer un code européen du droit d'auteur?*" It is good that such possibilities are being discussed, but no-one should seriously believe that a single European law of copyright will be with us within five or even fifteen years.

Finally, we need to try to establish a separate archival voice in the business-dominated world of copyright legislation. The concept of "orphaned works" (archives with no known author, corporate or individual) means nothing to commercial publishers nor to most legislators. Archivists know that all orphaned works ought to be in the public domain. But we struggle to make legislators listen.

Following the ICA meeting in Vienna in 2004, I have been involved in world-wide initiatives to try to advance the interests of "archival copyright". Frankly, these initiatives are not thriving, and may founder, mainly on account of problems of distance and cost. It may prove to be the case that a European initiative is a better starting-point for the important work of establishing separate regulations for aspects of archival copyright.

[1] See e.g. David Sutton: 'International perspectives on archival copyright'. Paper given at the International Congress on Archives, Vienna, August 2004: on the ICA 2004 website -http://www.wien2004.ica.org – under "Speakers". See also: David Sutton: 'The copyright detectives'. *The Bookseller*, 9 July 1999, pp. 24-26; and David Sutton: 'Keeping WATCH: tracking down copyright holders'. *Library & information update* 4 (12), December 2005, pp. 42-43.