



ASSOCIATION *of* ARCHAEOLOGICAL
ILLUSTRATORS *&* SURVEYORS

Technical Papers



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AAI&S TECHNICAL PAPERS

The Association has had requests from both individuals and organisations for a chance to obtain Technical Papers which have sold out. This folder has been compiled using photocopies of AAI&S Technical Papers 1-7 (edited by Richard Bryant). These papers are now out of print although some are presently under revision.

The reader should be aware that some of the advice is now very dated particularly as work on information technology and computer aided design has advanced at an enormous pace. However even the old information is of considerable interest in the history of archaeological illustration in general and of the Association in particular. Paper 4 was a joint publication with IFA (their Paper 10) and was assigned this number at a later date as Technical Paper 4 was never produced. The papers are as follows:

1. **The Preparation of Archaeological Illustrations for Reproduction**
 by A.S. Maney (1980)
2. **Computers in Archaeological Illustration**
 by J.D. Wilcock (1982)
3. **Drawing Ancient Pottery for Publication**
 by C. Green (1983)
4. **Preparation of Artwork for Publication**
 by C. Philo and A. Swann (IFA Technical Paper 10 1992)
5. **The Archaeological Illustrator and the Law of Copyright**
 by M. Vitoria (1984)
6. **Photogrammetry & Rectified Photography**
 by R.W.A. Dallas (1981)
7. **Drawing for Microfiche Publication**
 by R. Bryant (1984)

Mélanie Steiner (Technical Papers Editor 1999)

added 2006

12. The Survey and Recording of Historic Buildings

by David Andrews, Bill Blake, Mike Clowes and Kate Wilson

Technical Paper 5

The Archaeological Illustrator and the Law of Copyright

Dr. Mary Vitoria

The word 'copyright' is really a convenient word to describe the bundle of rights which the creator of a work such as a book, a play, a piece of music, a painting, a drawing or a photograph possesses and which enable him to control the exploitation of his work by others. The present law of copyright is governed by the Copyright Act 1956 and all current

rights in the nature of copyright are derived from that Act.

The 1956 Act gives copyright protection to certain categories of works and gives to the owner of the copyright in those works the exclusive right to do and to authorise others to do certain acts in relation to those works. This can be made clear by the Table below:

Type of work protected by copyright.

Literary works (eg. books, articles, words of a song, tables of data, street directories, trade pamphlets and price lists)

Dramatic works (eg. plays of any kind, operas)

Musical works (eg. operas, ballets, concertos, symphonies, pop songs)

Artistic works (eg. paintings, drawings, photographs, engravings, sculptures, works of artistic craftsmanship, works of architecture)

Types of act which only the owner of the copyright can do or authorise others to do.

1. Reproducing the work in any material form.
2. Publishing the work
3. Performing the work in public (often known as the performing right)
4. Broadcasting the work
5. Causing the work to be transmitted to subscribers to a diffusion service.
6. Making any adaptation of the work (eg. converting a book into a play or vice versa, making a translation of the work, scoring a work for the piano for a full orchestra or vice versa, converting a story into strip cartoon form)
7. Doing, in relation to an adaptation of the work, any of the acts specified above.

It can be seen from the above that the word 'copyright' when used in relation to an artistic work has a different meaning than when used in relation to a literary, dramatic or musical work. However, the most important rights conferred by copyright are common to both, namely the right to control the making of reproductions of the work and the right to control publication.

Before turning to discuss in detail the copyright in artistic works I should like to make two things clear. First, the owner of the work itself and the copyright in the work may be two different people. For example, if an artist sells a painting to a gallery, then unless a special arrangement is entered into the artist will own the copyright, while the gallery will own the painting. Thus it is the artist and not the gallery who has the right to issue photographs or prints of the painting. Second, the copyright in a work is infringed only if the work has been copied in some way. Copyright cannot be used to prevent independent conception; there can only be infringement if a causal nexus can be shown to exist between what a defendant has done and the copyright owner's work. For example, a manufacturer sells some novelty glassware which is made using his production drawings. Copyright subsists in those drawings. Another manufacturer copies the glassware. He thereby infringes the copyright

in the production drawings by copying the glassware which is itself a copy of those drawings.

Copyright in artistic works

Section 3 of the Copyright Act 1956 confers copyright protection on *original* artistic works and this term is defined so as to cover, *inter alia*, the following *irrespective of artistic quality*: paintings, drawings, engravings and photographs. A drawing includes any map, chart or plan and a photograph is defined as 'any product of photography or of any process akin to photography, other than a part of a cinematograph film'. The reason for the exclusion is that cinematograph films are given a separate form of copyright protection in their own right.

The word 'original' here means that the work must have been the product of independent skill and labour. The cases show that once an artistic work gets above a fairly rudimentary level the courts will be reluctant to hold that it is not entitled to copyright merely on the ground of lack of originality. This means that even rough 'thumbnail' sketches would be protected by copyright. In such cases, of course, it may be difficult to prove copying unless the copy drawing is virtually identical to the original.

In the case of photographs the necessary originality is supplied by the photographer's choice of

lighting, angle of shot and composition within the frame. This probably applies even where the subject of the photograph is a landscape or a building. Although there has been very little case law on the question of originality in photographs, it is thought that the court would not set a high standard. Consequently it is unsafe to copy a photograph.

Assuming that the drawing or photograph in question is original in the sense discussed above it will be subject to copyright protection even though it is of little or no artistic merit. This is because section 3 specifically provides that such works are protected irrespective of artistic quality. Thus the following works have been held capable of copyright protection: architect's plans, engineering production drawings, parts for machinery, parts for a boat, sketches for a dress, cutting patterns for a dress. It is thus safe to assume that virtually every drawing, provided it is original, is entitled to copyright. Under English law a work is entitled to copyright as soon as it is created. There is no requirement for registration. In some countries, notably the United States, it is necessary to register copyright works in order to be able to sue for infringements occurring in the United States. For non-US residents the requirement of registration are deemed to have been met, if, when the work is published, the symbol C is placed on the work. It is, in any case, a good idea to place the copyright symbol, together with the author's name and the date on the work, as this serves as a warning to others that copyright exists and is claimed in the work.

There are two other conditions to be met in order for copyright to subsist in a work. These are (i) if the work is unpublished, the author was a citizen of or resident in the UK or in any country which is a member of either the Berne or Universal Copyright Convention and, (ii) if the work was published, that at the time of publication to author satisfied the above requirements or alternatively that the work was first published in the UK or in any country which is a member of the Berne or Universal Copyright Conventions. These requirements hardly ever cause problems as most countries now belong to one or other of the two Conventions and China is now the only notable exception. However, some problems can arise in the case of works made before 1957 by non-UK authors (the Copyright Act came into force in 1957 – hence that particular date) and so it is worth more careful enquiry to determine the exact status of a work. This is too detailed a topic for treatment here and specialist works should be consulted.

Length of copyright protection

This depends on the nature of the work. For drawings and paintings copyright lasts for the author's lifetime plus 50 years after the end of the calendar year in which he died. So, for example, if an author died in June 1980 the copyright would expire on the 31st December 2030. For photographs the length of copyright is 50 years from the end of the year in which the photograph was published. If the photograph has not been published it remains in copyright until published and the act of publication then sets the 50 years

period running. So in a sense there is perpetual copyright in unpublished photographs. For literary works the period of copyright is the author's life plus 50 years from the end of the year in which he died but, if the work was not published during his lifetime, then the copyright period is 50 years from the end of the year in which the work was first published. So again, for literary works there is perpetual copyright in unpublished works. So, if a hitherto unpublished manuscript of Schliemann were to be published this year (1984), the copyright would expire in 2034 and the owners of that copyright would (probably) be Schliemann's heirs. It can be seen from the above that it may be important to know whether a work is published or unpublished. Publication is defined in the Act as 'issuing reproductions of the work to the public' and it is specifically provided that the exhibition of an artistic work does not amount to publication. So, for example, if an exhibition were held in which were drawings and plans of a particular archaeological site, that would not amount to publication, but if post-card or poster reproductions or black and white or colour slides were made then sale of these reproductions to the public would 'publish' the drawings and scale plans.

I have spoken in terms of the 'author' of a work even in the case of a drawing and a photograph because this is the term used in the Act. Curiously the Act does not provide a general definition of the term 'author' but he can be taken to be the person who expends the skill and labour in bringing the copyright work into existence. The 1956 Act does, however, define the term 'author' in relation to a photograph. The author of a photograph is the person who at the time the photograph was taken was the owner of the material on which it was taken. (This may seem rather curious but under the older legislation the courts got into an awful mess trying to decide whether the author was the person who clicked the shutter or the person who arranged the model and the potted plants!) This means that a company may be the 'author' of a photograph and it is interesting to note that unlike the other works the term of copyright protection in a photograph is independent of the author's lifetime. For photographs taken before 1957, the copyright lasts only for 50 years after the photograph was taken. Thus, there are no pre-1930 photographs still in copyright.

OWNER OF THE COPYRIGHT

Primarily, the first owner of the copyright in a work is the author of the work. There are exceptions to this general rule; the most important exceptions being: commissioned works, works created by employees in the course of their employment and works made under or by direction of the Crown or first published by the Crown.

Copyright on Commissioned works

The Act provides that where a portrait, an engraving or a photograph is commissioned the copyright in the work belongs to the commissioner. It is important to note the narrow ambit of this excep-

tion. Drawings such as plans, elevations or artist's impressions are not covered by this exception and the copyright in such commissioned drawings remains with the artist. Where it is necessary to employ an independent photographer the simplest method is to provide all the filmstock since the employer will then be the owner of the copyright by virtue of being the author of the photograph. If this is not done and the photographer provides his own material then, provided there is either payment or an agreement to pay for the commissioned photographs before they are made, the copyright in these photographs when made will belong to the commissioner.

Employees and Copyright

A distinction here has to be drawn between an employee who works under a contract of employment for an employer and a person who renders occasional services to an employer, often referred to as an independent contractor. It is difficult to define the distinction but it can be said in general terms that if a man is employed as part of the business and his work is done as an integral part of the business then he is an employee, whereas the work of an independent contractor although done for the business is not integrated into it but is only accessory to it. Factors which the Court takes into account include whether a man pays his own tax and insurance stamp or whether the employer pays, whether the man provides his own equipment or whether it is provided for him.

If a copyright work is created by an employee in the course of his employment then the copyright belongs to his employer. The copyright in works created *outside* the course of his employment by an employee belong to the employee.

Copyright and the Freelance Illustrator

If a copyright work is created by an independent contractor while employed to do a piece of work, the copyright belongs to the independent contractor, although, depending on the circumstances and the exact relationship between the parties, the independent contractor may be regarded as holding the copyright on trust for the employer or the latter may be regarded as having a royalty free irrevocable licence to exploit the work. For example, suppose an archaeologist has no in-house drawing office of his own and he takes an object or a rough sketch to a contract illustrator to have some publication drawings made. In such circumstances, although the contract illustrator will be the owner of the copyright it is highly likely that a court would regard him or her as holding the copyright on trust for the archaeologist and that he could require the assignment of the copyright to him. Problems can arise if an illustrator is commissioned to prepare site plans or elevations for a specific publication. Is the archaeologist who commissioned the drawings entitled to reproduce them in another article written for a professional journal, or in another book, or as a cover illustration without further permission and payment? These questions are not easy to answer and could of course, be avoided in the beginning by a contract expressly setting out for what purposes the draw-

ings are commissioned, and dealing with the question of who is to own the copyright. It is always possible to obtain the copyright in a work by an assignment, but to be enforceable the assignment must be in writing and signed by the owner/assignor of the copyright. However, if copyright is to be assigned to the commissioner, this must be taken into account when fees are discussed.

Crown copyright

Where a work is made by or under the direction or control of a government department the copyright in the work belongs to the Crown. It is difficult to see how an illustrator commissioned by a government department and given a fairly free hand to illustrate various stages of development of a site could be said to produce his illustrations 'under the directions or control of a government department' and so the copyright probably remains his, although the Crown would have the right to use the illustrations for the purpose for which they were made. In some cases where an excavator is employed by a department to dig a site or to write a report on a site the contract itself will provide that the work is to be regarded as carried out under the direction or control of the Crown so that the Crown is entitled to the copyright. Another way in which the Crown can acquire copyright is by being the first to publish the work. Thus if a report is written independently but is first published by the Crown, the Crown is entitled to the copyright in the report. There is no compensation for this form of 'expropriation'.

Infringement

The copyright in an artistic work is infringed if anyone does any of the acts restricted by the copyright (see Table on p. 1) without the permission of the copyright owner. The most common forms of infringement are reproducing the work and publishing it. It should be noted that reproduction in any material form amounts to infringement and this includes converting a 2-dimensional work into 3-dimensional form and vice versa. So, if someone were to make a 3-dimensional reconstruction of a building from, say, a detailed artist's impression of how that building looked and he did so without the artist's permission (assuming the artist owns the copyright) that would be an infringement.

However a certain amount of use may be made of a copyright work without committing an infringement. For example, it is permissible to make a copy of the work for the purposes of private study or research provided that such use amounts to a fair dealing with the work. Similarly it is permissible to reproduce a literary or an artistic work for the purposes of criticism or review of that or of another work, provided that the name of the author and the title of the work are acknowledged.

In order for there to be an infringement of copyright it is not necessary that the copy be identical: infringement occurs when a substantial part of the original work is taken and here 'substantial' has the meaning of 'quality not quantity'. How far away from the original one must get to steer clear of copyright infringement will depend on the

nature of the original work. A drawing of a commonplace subject may well be the subject of copyright but the originality will lie purely in the artist's special treatment of the subject and in his skill and labour of draftsmanship. An idea as such is not the subject of copyright protection and so the act of reducing the concept to a tangible form does not result in a monopoly of the idea. For example, the artist who first thought of the idea of two soldiers in a hole in the middle of no-man's land and under bombardment where one says to the other 'If you know of a better hole you go to it' would not be able to prevent other artists from depicting the same scene in their own way. But where the imitator has taken detail upon detail from the original work there comes a point in the process where he does infringe even though he may have altered some of the details and omitted others.

Once infringement by copying has been proved then the plaintiff is entitled to an injunction and to damages. The infringer may be excused damages if he can show that he was unaware and had no reasonable grounds for believing that copyright subsisted in the work. The Courts have said, however, that unless the work is obviously very old it is incumbent on anyone who wishes to reproduce or publish a literary or artistic work to satisfy themselves by reasonable enquiries about the copyright status of the work. The fact that the infringer obtained permission from the wrong person is not a defence. Thus a publisher or printer is also liable for copyright infringement if it turns out that the author or illustrator provided them with an infringing piece of work.

Editor's Note.

The council of the Association is grateful to Dr. Vitoria for all that she has done for this paper. All statements or comments expressed in this paper are Dr. Vitoria's, and the Association does not accept responsibility for such statements or comments.