

THE

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ARCHIVES



Orphan Works

Guidance for archive services on reasonable searches to identify rights holders

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1. Introduction

The digitisation of images of material from archive collections can be a valuable contribution to the preservation, access, inclusion and outreach functions of archive services. It can also be a source of income from academic or family history markets. To realise these benefits, there is a requirement to establish the copyright position of any given record collection. This, however, poses significant challenges to archivists.

Understanding how to navigate those challenges can enable archive services to take decisions with confidence. This guidance offers advice to archivists undertaking research into the copyright status of works in their collections with a view to digitisation or publication.

A common feature of copyright works in archive collections is that the archive service holding them may have little knowledge of who holds the rights in those works. By their nature the works may often be very old, or may have been written by authors who are no longer known or traceable. Archive collections are unlikely to have been managed over time with a view to documenting and controlling information about rights holders. Such collections may typically feature single archive series which naturally contain works created by a large number of authors (collections of incoming correspondence, for instance) and which therefore have a large number of rights holders.

Unlike publishers, which routinely have direct (or indirect via an agent) contact with the authors of the works they publish, an archive will rarely have any form of contact with the authors, or other owners of copyright, of the works in its collection. And unlike in published works, where copyright in the published words and images is almost always asserted, copyright of works in an archive collection will automatically exist without having been asserted. This does not mean that there is no copyright in the works – on the contrary, copyright will automatically exist in any work which qualifies for copyright protection.

Where an archive service, or a provider of digitisation services for archive collections, wants to use a work protected by copyright, it would ordinarily, with a few exceptions, need to seek the permission of the relevant rights holder(s). It is not normally possible to reproduce a work if the rights holder cannot be found. Archive services are then faced with three choices:

- of relying on copyright exceptions for limited use of the archive collection, or;
- of seeking to secure licences for the collection with the Orphan Works Licensing Scheme, which while relatively easy to accomplish for works by a single author becomes increasingly complex for extensive collections of works by multiple authors, or;

- of not proceeding with the proposed digitisation or publication and losing the potential benefit of preserving, of spreading knowledge and awareness of, and access to, the archive collection, and any income generated.

The possibility of an archive service proceeding without either securing the rights holder's agreement or securing registration of the collection as an Orphan Work, is not one that can be advocated in this guidance. The rights of the copyright holder are real and should not be set aside. Any such choice made by an archive service will be that service's own responsibility. The service must manage the risk that a rights holder might come forward to press a claim about an infringement of copyright. This might require the archive service to take out and maintain an insurance policy to mitigate any future liabilities, and to put in place appropriate take down policies.

This guidance is intended for archive services facing these decisions, and contemplating undertaking a search for rights holders. It flags questions which should be asked before starting a search, and suggests possible approaches to take if seeking to register a collection as an Orphan Work. This guidance is not intended to replace existing guidance on conducting diligent searches for single, stand-alone items, (such as a single letter or photograph), where they are found in an archive collection. Applicant archive services should continue to use the existing Orphan Works Licensing Scheme [guidance](#) for such single items in the usual way.

By the nature of the subject, the guidance can only be general – the situation for each specific archive collection will be different. It will be necessary for the archive service concerned to come to its own decision on the best course of action in each case, taking legal advice where appropriate. The guidance can inform decisions about whether and how to conduct a search, what constitutes a reasonable search, available options regarding copyright, and risk mitigation. It has been developed by The National Archives in consultation with the Intellectual Property Office.

UK statutory provisions as they affect archive services

Copyright, Designs and Patents Act 1988 and the 2039 rule

Under the [Copyright Designs and Patents Act 1988](#) (the CDPA), the starting position is that original copyright works held in archives, including published and unpublished works, are protected for life of the creator plus 70 years. However, certain works that were:

- not published before August 1989 and

- the author died before January 1969

will remain in copyright until the end of 2039. A consequence of this is that many older, unpublished documents from archival collections, where the authors may have been deceased for centuries, remain in copyright until the end of 2039. The Intellectual Property Office has published a [notice on term of copyright](#), which archive services can refer to assess whether the copyright term has expired in a given situation.

Copyright exceptions for archives

Archive services in the UK can rely on copyright exceptions that make it easier and cheaper for them to use, share and preserve their collections. For example, copies may be made for preservation (section 42 CDPA), single copies can be provided for research and private study (section 29 CDPA) or used for illustration for instruction, such as if the archive is conducting a course (section 32 CDPA). Further guidance on the exceptions is provided by the Intellectual Property Office's [Exceptions to copyright: Libraries, archives and museums](#) (October 2014). This is not an exhaustive list, and several other copyright exceptions may be relevant in different circumstances.

For archives holding public records, the interplay between the public administration exception and public records legislation, is worth noting. The exception for copyright material held by public bodies (the "public administration" exception) allows public bodies to publish third party copyright material they hold for the purpose of their public duties, without the permission of the copyright owner (so long as it is not commercially available). This enables services required under the Public Records Act 1958 which might otherwise only be available on site in the archive due to copyright reasons, to instead be delivered remotely through digitised images. Further guidance on the public administration exception is provided by the Intellectual Property Office's [Exceptions to copyright: Copyright material held by public bodies](#) (October 2014).

Archives may hold works which are anonymous or pseudonymous: archives may be able to rely on certain assumptions on copyright term (section 57 CDPA). This may apply only to deliberately anonymous or pseudonymous works, but it is helpful that for those works, copyright is not infringed if it is not possible by reasonable inquiry to identify the author, and it is reasonable to assume that copyright has expired.

The Orphan Works Licensing Scheme

Under the UK Orphan Works Licensing Scheme, a licence may be issued for orphan works to be used commercially or non-commercially, subject to payment of fees and only if a diligent search has been carried out first. The search must be completed before the work in question has been used, it must be done in good faith, and the diligent search must involve consultation of the appropriate sources. The Scheme states that a diligent search must comprise a reasonable search of the relevant sources to identify and locate the rights holder(s).

Guidance is available to help applicants consider which sources might be relevant in different circumstances – it will rarely be necessary to search every possible source: <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>. The guidance may also be useful when considering anonymous works, or as a general aid for locating rights holders.

Further guidance on the scheme is provided by the Intellectual Property Office: <https://www.gov.uk/guidance/copyright-orphan-works>.

The difficulties that face archive services in carrying out diligent searches are in determining what would be the relevant sources to search in an effort to locate rights holders; and in determining what would constitute a reasonable search. The costs associated with diligent search under the Orphan Works Licensing Scheme for collections with multiple authors could be considerable. Publicly funded archive services may want to consider negotiating funding for diligent searches and licences for digitisation projects with commercial partners as part of the contract, or as part of the bid if the funding is public.

The position of archive services

Archive collections consist of documents created or received for the transaction of day-to-day business, which are then permanently preserved for historical reference. Few collections are created with the intention of communication or sale to the public, and so they rarely carry the kind of embedded metadata on intellectual property rights that most published works have. Nor, in most cases, will the collections have been managed by their creators and subsequent custodians with copyright in mind. Archives should add copyright and other intellectual property to their considerations on acquisitions and deposits.

The documents forming the archive will often have been in existence for many decades or centuries, so that the original author is long dead. In such circumstances, current rights ownership may be difficult to trace, and will usually not have been documented by the archive institution holding the collection.

Furthermore, a single series or collection held by an archive – say the correspondence of a prominent individual – will contain, alongside the works of

the prominent subject whose rights holder now owns the intellectual property of the author (relatively easy to locate), myriad incoming letters from the wide variety of that person's correspondents. Many of these may now be otherwise unknown to history, and the rights holders of these authors will be difficult or impossible to trace.

Many archive services will hold material created by themselves or their parent organisation or associated official bodies. In this case they can be reasonably assumed to own or control the copyright. But archive services will also contain:

- Official archives which have been received by them from other creators, and so are the intellectual property of third parties
- Material donated or deposited by a wide variety of private bodies or individuals

The bulk of third-party material held by archive services will be unpublished. Even where a work has been published, the archive service may not always know this. Works may have been published before the original source documents were transferred into the archive service's custody, or the fact of publication may not have been recorded at the time to enable identification of published works now.

While commercial copyright material typically consists of a coherent physical item, items found in archive collections may well contain works such as files which are the copyright of multiple authors; and a single logical archival entity may contain numerous such files.

While archive services today will normally attempt to secure a transfer of rights in such material, or at least licensing rights, when accepting a record series into their collections, depositors do not always agree to this, or sometimes cannot agree because they themselves do not control the rights. Transfers will not always have been done for past accessions. And in any case, where depositors themselves do not own the intellectual property rights in the material they are passing to the archive for permanent preservation, such a transfer of rights will not have been possible.

From this, it will be seen that archive services considering a search for rights holders of a logical archive collection face a number of issues which do not confront a copyright researcher clearing rights in the work of a single author.

2. Do you need to conduct a search at all?

Before commencing a search, applicant archive services should first consider the following issues relating to the record series under consideration, the rights within the work(s) and the rights holders.

Is there any copyright material in the work?

It is worth pausing to consider whether the work that is intended for digitisation actually includes any relevant copyright material. Copyright does not attach to facts, including personal names – so a collection that comprises only facts about named individuals, for instance a series of returns over time of individual tenants of an estate, might not contain copyright information, only factual information (“So-and-so lives in this property, has these family members, and pays this much rent”). If the subjects are now more than 100 years of age, it can usually be a safe assumption that Data Protection legislation is not a consideration and then such documents might be attractive propositions for digitisation. Even if the original work includes non-factual opinions about the subjects (“So-and-so is reliable and can be trusted to pay in full on time”), it might still be possible to digitise and make available just those parts of the returns that dealt in facts, excluding the literary works of opinion.

Such a return of tenants might have been completed using a form which may itself attract copyright or database right. However, the form may have been a standard one published at the time of use, and so for works of a certain age will be well out of copyright. Or the rights holder in the form might have waived or not asserted copyright – this will particularly be the case for Crown copyright forms, which will all be re-usable under Open Government Licence terms. Should the form and its contents meet the threshold to qualify for the related right of database protection¹, that protection lasts for 15 years from the year of creation of the database (or from its being made available to the public if within those first 15 years).

In such circumstances there would not be any copyright or related right to prevent the copying and digitisation/publication of the works, and there would be no infringement of copyright in doing so. A search will not be necessary, but the archive service should document that it has applied its expert knowledge as custodian of this collection to assess the content of the information to be copied (digitised) and has determined that no copyright material will be involved.

¹ Under the Copyright and Rights in Databases Regulations 1997

Why do you want to use this particular work?

Is this work the only possible source, or could another collection be used to achieve the same end?

This question would not be relevant if the sole objective of the digitisation proposal is to preserve a vulnerable archive collection, (and may be done by relying on the preservation copyright exception). If however the proposal is to digitise a collection to make copies commercially available, say to research libraries – it may be sensible to ask, if there are difficulties in clearing rights, whether another collection with more straight-forward copyright characteristics is available and could be used instead.

The Orphan Works Licensing Scheme provides a legal process to reproduce works that cannot currently be used because the rights holder is unknown or cannot be located. It is the nature of archive collections that it will not usually be possible to find an alternative source for the information in the work. However, it is sensible to think about whether a substitute is available. An obvious example would be where material might be openly licensed or copyright has expired and so available as an alternative to third party copyright works.

If, after considering this, no alternative is available, an archive service may decide to proceed with an application to licence the orphan work(s).

Does the public administration exception apply to this proposal?

Where material is held as part of the collection of an archive service and is open to public inspection under a statutory requirement, then the Public Administration exception may apply. Section 47 CDPA provides that in order to disseminate it, material can be copied and made available to the public:

- so that it can be inspected at a more convenient time or
- to otherwise facilitate the exercise of any right under that statutory requirement.

Making the document available to the public by electronic transmission to allow the public to access it at a place and time of their own choosing can be done as long as the material is not being made commercially available.

Similar provisions in section 48 CDPA apply to Crown bodies. For them, where the action is for the purpose for which the work was communicated to the Crown or any related purpose which the copyright owner could reasonably have anticipated, and the work hasn't previously been published – then it can be

copied and copies can be issued to the public under the public administration exception. Again, works can be made available to the public by electronic transmission. Non-Crown places of deposit will also benefit from these provisions in respect of the deposited public records in their holdings.

In such circumstances, a search will not be necessary, but the archive service should document that it has applied its expert knowledge as custodian of this collection to determine that the proposed use of the material to be copied (digitised) falls within the public administration exception and that therefore no breach of copyright will occur.

In publishing, the archive service must take steps to inform the users of its service that it is only through the public administration copyright exception that publication has been possible. It will be down to each user of the information to come to their own decision about whether their intended onward use is covered by an exception or whether they need to consider and seek approval from relevant rights holders.

Does the archiving and preservation copyright exception apply to this proposal?

A search for rights holders and an application to the Orphan Works Licensing Scheme will not be required if the proposed use of the work is covered by the archiving and preservation of resources copyright exception. Archive services are permitted to preserve by copying any type of copyright work that is held in their permanent collection (but not available for loan to the public) and cannot readily be replaced.

A search will not be necessary, but the archive service should document that it has applied its expert knowledge as custodian of this collection to determine that the proposed use of the material to be copied (digitised) falls within the copyright exception and that therefore no breach of copyright will occur.

Importantly, this exception applies only to the archive service that takes advantage of it in order to make the works more widely available in line with its public task. The fact of preservation by an archive service does not give others the right to take advantage of the same exception.

Is there any other copyright exception relevant to this proposal?

Depending on the circumstances of each individual proposal, there may be other relevant copyright exceptions that could be engaged. Archive services may wish to consult the guidance provided by the Intellectual Property Office or to

consult a copyright expert. If another exception is found to apply, then a search will not be necessary, but the archive service should document that it has determined that the proposed use of the material to be copied (digitised) falls within another copyright exception and that therefore no breach of copyright will occur.

3. Do you know if the work is within copyright?

Archive services should also consider if it is reasonable to assume that the work under consideration is no longer within copyright. If the copyright has expired or has been freely licensed then the work can be used freely² (other considerations such as Data Protection legislation allowing). To determine if a work is in copyright, archive services should consider:

- when the work was first created/published/performed;
- the estimated age of the work;
- whether the author is known;
- whether it is known if the author is still alive, and if no longer living, when did they die?

The duration of copyright varies depending on a number of factors, including the type of copyright work. In general, copyright in literary works lasts for 70 years from the end of the year in which the author died, with some variations.³ Many archives will also contain sound recordings, published editions, or even broadcasts, which all have different copyright terms. In addition, unpublished works and works of unknown authorship have some specific rules. The Intellectual Property Office has published a [copyright notice](#) covering the copyright duration rules.

Other rules can be in place so that copyright will not apply (or in the case of Crown or Parliamentary copyright, the work may be licensed for free use and re-use):

- **Open Government Licence.** [Open Government Licence](#) material of any sort (Crown copyright or not) may be copied and re-used freely without restrictions other than those set out in the licence (none of which, once data protection legislation has been considered, should concern an archive service).
- **Crown copyright.** Most Crown copyright works will be available under the [Open Government Licence](#), and so are usually free to use even where this is not explicitly stated. If there are Crown copyright works in the collection, (unless other terms apply, which should be evident from the Crown copyright items themselves), then these will be free to use and can be set aside from any consideration of whether the work is in copyright or is an orphan work.

² Note that the term 'public domain', while used to mean this, does not have any basis in legislation and can be confusing for users, as users often conflate it with meaning 'freely available' (e.g. on the internet).

³ Flowcharts showing the duration of copyright in [Crown](#) and [non-Crown copyright](#) materials are available on The National Archives' website.

- **Parliamentary copyright.** Copyright lasts for 50 years from the end of the calendar year in which the work was created. Publications produced by Parliament are generally covered by the [Open Parliament Licence](#), which allows for their free use even while still in copyright, and these too can be set aside from any consideration of whether the work is an orphan work.
- **Works of unknown authorship.** It will not be uncommon for archive collections to include works where the author of a given work is not known. The legislation provides⁴ an exception to allow such anonymous (or indeed pseudonymous) works to be copied when it is reasonable to assume that either copyright has expired or that the author has been deceased for more than 70 years. In such cases copyright protection lasts for 70 years after the work was created or, if made available to the public during that time, for 70 years from the time it was made available to the public. This exception is not available for photographs or Crown material but otherwise, works of unknown authorship can be set aside from any consideration of whether the work is in copyright or is an Orphan Work if they are of sufficient age.
- **Bona vacantia works.** ‘Bona vacantia’ means vacant goods and is the name given to ownerless property, which by law passes to the Crown. When copyright material forms part of deceased person’s estate where he or she died without a will or known kin, that estate is administered by the Crown as bona vacantia. Bona vacantia material may be licensed under the Orphan Works Licensing Scheme.

If after consideration it appears that none of the works in question remain in copyright, then a search will not be necessary. The archive service should document that it has applied its expert knowledge as custodian of this collection to assess the copyright status of the information to be copied (digitised) and has determined that the material is all in the public domain.

How did your archive acquire the work?

An archive service may hold useful metadata about the rights holder for any given work in its collection. In some situations, the archive may hold works created by itself (for instance, a museum or gallery may hold its own archive of its administrative records as part of its collection) or by a parent or related body (such as a local authority archive’s holdings of the proceedings of the parent authority). It can be sure that it either is the rights holder, or has the ability to act as the rights holder.

⁴ Section 57 CDPA

For archive collections deposited by third parties, the archive may well hold accession or transfer information agreements documenting that intellectual property rights were waived, assigned or transferred to the archive service at the time. In these cases, it should be remembered that the depositor may not have had the authority to transfer any third party rights existing in the collection, so such permissions may only relate to the part of the collection controlled by the depositor.

If applying for a licence under the Orphan Works Licensing Scheme, archive services should document that they have checked for material where copyright may have been waived, assigned or transferred to the archive service on deposit to ensure that the application relates only to those parts of the collection where the rights holder(s) cannot be located.

Has the work already been found to be an orphan?

Though archive services have not, at the time of writing, made extensive use of the Orphan Works Licensing Scheme, it may still be useful to check the register before commencing a search for rights owners. As the first step in a wider search, an archive service should refer to the UK [Orphan Works Register](#)⁵ to see if a previous diligent search has been completed – not for the work in question (which in an archive setting we can presume to be unique), but for its author or authors. If the scheme contains an entry on the register showing that a diligent search has failed to identify rights holder(s) for the author, then aside from checking in their own internal information sources such as transfer/gift documentation, archive services may decide that there is no need for a more extensive search for the rights holder(s) for such authors. An application would still need to be made to cover the work and its use, but the Orphan Works Licensing Scheme allows new applications to be made relying on a previous diligent search, if the rights holder is the same.

Where this is the case, archive services should document that, from their own knowledge of the contents of the material in question, they have identified the principal authors of works in the collection – and that the register has been checked for each of these authors' names where they have been found. Given the age of the material and the fact that a previous diligent search has failed to locate rights holders, no further search has been conducted. Reference numbers for the records should be provided in support of the application.

⁵ The [EU Intellectual Property Office orphan works database](#) can also be checked, as the works of an author may have been alternatively registered there.

Has the work previously been published, broadcast or performed?

It is recognised that an archive service may not necessarily be aware if a collection in its holdings has been previously published (or, perhaps less likely for all except specialised archive services, broadcast or performed).

Nevertheless, archive services should consider their own knowledge of the documents proposed for digitisation in order to confirm whether or not it is known that the collection, or part of it, has previously been published. If it has been published, this may affect the duration of copyright in the works, depending on when the first performance or publication took place.

4. Conducting a search

Having considered the points in Section 3, an archive service may have decided that copyright is not an issue, and can proceed with its project. However, it may be that copyright remains an issue.

The archive service will need to decide whether it can rely on an exception or carry out a search to make contact with rights holders/apply for an orphan works licence.

There may also be a decision to be made about whether or not to work with a partner for a significant digitisation project.

The decision

Option 1 - Orphan Works Licensing Scheme searching and registration

A decision to apply to licence the work through the Orphan Works Licensing Scheme needs to balance the time and cost of undertaking a diligent search (without a guarantee of it being successful) against the outcomes. There will be an application fee payable upfront and a licence fee if the licence is granted.⁶

A licence can cover multiple uses, both non-commercial (e.g. digitisation) and commercial (e.g. merchandise) and could provide good value for money. At the end of a search, the archive service will either:

- a. Have discovered relevant rights holder(s), and so be able to enter correspondence to secure permission to proceed with the project, or;
- b. Have failed to discover relevant rights holders, clearing the way for an application to the Orphan Works Licensing Scheme.

There is detailed [Advice on conducting a search](#) for an archive collection below.

Option 2 - halting the project

This is, obviously, the safest option to avoid any possibility of copyright infringement action, and in some circumstances it may be unavoidable. But, halting the project necessarily loses the potential benefits of preserving the collection, spreading awareness and knowledge of its content, and any potential revenue from licensing digital content.

Before taking this step, archive services should consider whether some mitigation may allow them to continue with the project.

⁶ Details about the scheme and the costs are included in the [scheme overview guidance](#).

- Can a diligent search be conducted, to make contact with the rights holder for permission, or allow an application to the Orphan Works Licensing Scheme (option 1)? This may come down to a question of the availability of resources to undertake such a diligent search and to pay the relevant fees, being balanced against the anticipated benefits.
- Could a commercial digitisation partner be found to work with the archive service on the project? If this is possible, then such partners would typically undertake copyright clearance as part of their contract. Such partnerships can help an archive service to secure the benefits of preservation and knowledge and awareness raising of a collection, while still producing some licensing revenue, if the collection is an attractive commercial proposition.

Option 3 – Risk assessment searches for rights holders outside the Orphan Works Licensing scheme

This option would involve undertaking some of the search steps required for an Orphan Works Licensing Scheme reasonable diligent search. Information on the copyright situation would be gathered so as to allow a decision to be taken as to the risk of a copyright infringement should the project go ahead without seeking registration as an Orphan Work. Guidance on conducting a search can be found under Option 1 above.

Armed with more information after such a search, the archive service might decide on option 1 (Orphan Works registration), option 2 (halting the project), or may decide to go ahead with the project with or without procuring relevant insurance, based on its assessment of the risk of any infringement. It must be emphasised that adopting such an approach would be the responsibility of the archive service, and is not one advocated by this guidance. The service must manage the risk that a rights holder might come forward to press a claim about infringement of copyright. This might require the archive service to take out and maintain insurance to mitigate any future liabilities, and to put in place appropriate take down policies.

The National Libraries of Scotland and Wales have done work on assessing the risks involved in taking such a decision. Archive services might find it helpful to refer to this Copyright Assessment Framework⁷. Based in UK copyright law, it integrates guidance from Intellectual Property Office and RightsStatements.org, allowing formalisation of copyright risk acceptance at organisation level.

⁷ The Assessment Framework was available as a Google spreadsheet at time of publication, from tiny.cc/CopyrightAssessment.

For the archive service, undertaking a digitisation and publication project with a commercial partner may enable a situation where the partner indemnifies the archive service against any possible copyright infringement case.

One element of risk management for an archive service that decides to go ahead with a project, either with or without taking out insurance, will be to have in place a review and take down policy. This provides a route to allow an emerging rights holder in the published information to assert their copyright. In response the archive service should be able to take the relevant material off-line (a “take-down” policy) until such a time as the work falls out of copyright. Where the project is undertaken with a commercial partner, the archive service should ensure that its contract terms with the partner include provision for take-down.

Advice on conducting a search

Archive services, like any other applicant wishing to use the Orphan Works Licensing Scheme, must perform a [diligent search](#) for the rights holder(s) prior to an application being considered. Where there are multiple rights holders, a diligent search is still needed for each rights holder where the right is relevant to the proposed use – but that search should be “reasonable”. The diligent search will need to be carried out to the satisfaction of the authorising body (the Intellectual Property Office).

The object of the diligent search will depend on the proposed use of the work, and the aim of the diligent search is to find the rights holder who controls the appropriate rights. A diligent search should be appropriate to the orphan work as a whole or to an orphan right within the work depending on the proposed use. The search will need to strike a balance, which will vary from collection to collection, depending on factors such as the age of the material and its authors, the number and variety of creators, the proportion of factual to creative content in the collection, and so on.

Where an archive collection contains works by more than one author, then it is likely that the rights to each of the works by each author will belong to different rights holders. The diligent search must consider the rights of each of these potential rights holders. As with any other copyright work, applicants will need to gain permission from any relevant known and locatable rights holder in order to avoid copyright infringement. The authorising body can only license for unknown or unlocatable rights holders – but in the case of archive collections, it may be considered reasonable to conclude the diligent search having identified the principal authors and only completed the search for them.

Where an archive service has located some, but not all, rights holders for a collection, these are considered to be partial orphan works. To avoid unnecessary delay in the process, applicants will not need to obtain these

permissions before making an application. Obtaining permissions for the non-orphan parts of part orphan works can be done at the same time as applying for a licence for the orphan rights. Where permissions have been obtained before an application is made, then details of the rights holders who have granted permission should be included to support the application.

While there is no set minimum requirement for a reasonable diligent search to follow in every case, applicant archive services will need to show that their search was indeed diligent, considering multiple sources where possible. This sector specific guidance considers what is reasonable for an archive service when searching for rights holders – it is not generally transferable to other sectors. The guidance does not list every possible source or every possible set of circumstances that an archive service will face in conducting a diligent search.

Having decided to conduct a search, the archive service should apply its expert knowledge of the collection in question to plan how it will search. Some elements of a diligent search are mandatory for an Orphan Works Licensing Scheme application. The following advice may be helpful to assist an archive service in making such a plan – but the searchers should always be ready to amend their plans based on what information, if any, they discover.

Which rights holders to search for?

Applicants conducting a diligent search need to submit evidence of the search for each rights holder to support an application, although this does not have to be on the checklist if this is unreasonable in the circumstances. Instead, archive services should show that they have taken every reasonable step to complete a diligent search. For instance, by applying their knowledge of a collection to identify principal authors to show that a diligent search has been completed for each of them, but not attempting to identify every single author or to search for each of their rights holders, depending on the circumstances. Any subsequent application for registration in the Orphan Works Licensing Scheme should document how the archive service has applied its expertise to identify the key principal authors, and show what their relationship to other, lesser authors in the collection is. The number of principal authors will, of course, vary from collection to collection, and the archive service will need to exercise its judgment to decide which are the relevant principal authors for each collection – and must be able to document how it has arrived at this decision.

Similar documentation should be made for purposes of an internal risk assessment exercise.

Once the searches for principal authors have been completed (assuming that rights holder(s) have not been found), for Orphan Works Licensing Scheme purposes a checklist can be completed for the archive collection, supported by

individual checklists for rights holders for each of the principal authors identified in the collection. Alternatively, a general report of the search made may be acceptable, as long as it is comprehensible and in sufficient detail to allow a decision on the application to be made.

However it is formatted, the diligent search report should include a narrative of how the search was conducted for the collection; and the individual checklists for each principal author should include a narrative of the search for the rights holder for that author, both including details of sources checked. Such a collection checklist might include an estimate of the number of unique authors represented in the collection. The estimate might be made using a suitable sampling technique. Guidance published by The National Archives on the application of sampling techniques to case paper series⁸ may be of assistance to applicant archives in assessing the most appropriate sampling methodology to use for a given archive collection.

As with diligent searches for rights holders in single works, a failure to submit the checklist(s) or not including sufficient information will result in the authorising body requesting further information and will delay the application.

There is no set way to conduct a diligent search as this will depend on the information available on the work and, for archive services, the age of the documents in the archive collection and the nature of the contents of the constituent works.

Collection level searches

Applicants **must** complete and submit a diligent search report for the archival collection, and separately for each of any principal authors identified in the collection

For the archival collection the report should set out

- Information on the age of the collection. It would obviously be more reasonable for an archives service to be expected to attempt to find the rights holders for authors in a collection dating from the 1950s than from a collection dating from the 1850s; and even more so than one dating from the 1750s, and so on. The age of the collection, and so the period of time since the death of the authors and the resulting difficulty in locating present day rights holders, is clearly relevant to what is reasonable in a diligent search of archival material

⁸ [The selection of case files: Sampling techniques](#), The National Archives, 2005

- Information about the type of authors represented in the collection. An archival collection featuring, for instance, authors who were at the time government ministers or generals would require greater efforts to locate rights holders than one featuring authors who were ordinary tradesmen or servicemen – since the latter would have left fewer clues from which a diligent search might identify present day rights holders
- A description of the collection showing why its inherent character makes it impracticable and unreasonable to attempt to search for every author. This might include estimates of the numbers of different authors represented in the collection, or the paucity of information associated with each of them to enable present day rights holders to be located.
- If the catalogue description of the collection is available on line a link to it should be included to enable the authorising body to form its own view of the nature and scale of the archive collection. If not available, it might be practical to include a copy with the application if that would help the authorising body to make its decision
- Any sources that have been checked for the entire collection
- The identity of any principal correspondents in the archival collection, for whom separate diligent searches will need to be carried out. The definition of what characteristics would constitute a principal correspondent would vary from collection-to-collection. As an example, in a series of correspondence in the archival collection of a noted 19th century individual, there may be hundreds of external letter writers corresponding with that individual. The principal authors would be those who wrote frequently to that individual over the time span of the collection, and whose works therefore represent a significant proportion of the total collection.
- The identity of any prominent authors of works known to feature in the collection. It would not be reasonable to expect an archive service to comb through an entire collection to identify any prominent author. But where they are already known to feature, they should be included in separate diligent searches as they are more likely to have left clues to enable the rights holder to be identified

The archive service applicant for an orphan works licence will need to maintain a record of the diligent search(es). The authorising body will keep a record for up to eight years, but if the archive service wishes to make a further application, they will be able to update the existing diligent search record to support it. Other supporting evidence such as correspondence should also be retained following the archive services usual record retention policy.

Principal author level searches

In general, an archive service should allow for around half a day's effort for each diligent search for a principal author. This effort may be spread over, say, a fortnight if it becomes necessary to correspond with external agencies.

- Having identified one or more principal authors for the collection, the archive service should conduct a separate diligent search for the rights holder for each principal author, following the existing Intellectual Property Office guidance on how to conduct that search.
- For archive collections where the principal author or authors would be less than 100 years old at the time of the diligent search, in the first instance, the archive service should always contact the creator(s) of the work. If the creator is not the rights holder, they might know who holds the rights.
- Where the creator cannot be found, applicant archive services should attempt to consult multiple sources indicated in the Intellectual Property Office guidance to validate information for each of the principal authors
- When consulting the most appropriate sources to search for a principal author, an applicant archive might uncover further information on the rights holder. This new information could be used in other sources that were previously ruled out so the archive should consider revisiting the suggested sources to see if these are now appropriate.

Other issues to consider

- When the person or company believed to be a rights holder has been located, but fails to respond to efforts to obtain permission to use the work, the right or work cannot be declared orphan. It is the rights holder's choice not to respond to an applicant archive.
- The authorising body is not the appropriate body to decide in disputed cases of ownership regarding orphan works. Such disputes would need to be resolved between the relevant parties through mediation or the courts.
- Applicant archives need to be aware that there may be costs associated with searching some of the suggested sources. Where the diligent search is connected to a proposal for commercial digitisation in partnership with a third party, applicant archives can consider including these costs in any contracts or agreements, along with other costs associated with the diligent search, (such as undertaking a sampling exercise in order to estimate the number of authors in the collection).
- As with material published where it is covered by the copyright exception for archives, an orphan works licence does not enable an archive service to make the works more widely available in line with its public task. The archive

service must take steps to inform the users of its service that it is only through the Orphan Works Licensing Scheme that publication has been possible – this is one of the conditions of an orphan works licence. It will be down to each user of the information to come to their own decisions about whether any intended onward use is covered by a copyright exception allowing them to proceed, or whether they need their own orphan works licence.

Making contact with possible leads and authors

Contacting the estate of an author – After referring to the relevant sources, if an applicant archive discovers a current or even last-known address of the potential rights holder, a letter should be sent seeking permission. It is important to note that if someone is contacted, they are under no obligation to respond or provide the applicant archive with information, let alone give permission. If there is evidence to suggest that they are the rights holder for a principal author of works in the collection, and they decide not to respond, this does not mean that the collection is orphan.

Contacting literary agents – If a principal author or literary estate is represented by a literary agent, it is appropriate to begin by making enquiries about the rights with the literary agent. The agent will communicate with the author, or the executor or manager of the estate.

Contacting publishers – If an applicant archive has identified as a principal correspondent a published author who is the author of (unpublished) copyright works in the collection but does not have any contact details, it should contact the publisher to seek further information. It is suggested that a covering letter is sent to the publisher enclosing a letter to forward to the author or the author's estate seeking permission to use the works.

Contacting possible rights holder(s) – If the publishers do not control the rights that an applicant archive is seeking, ask for any information they have that may assist in the diligent search, and document this in the application.

If an applicant archive succeeds in making contact with a rights holder or holders, but there are other rights holder(s) that have not yet been traced, always ask the rights holder(s) for any information that may help in the search for the rights holders for other principal authors.

5. Guidance on diligent search sources for rights holders

The main guidance on sources to be consulted when conducting a search for rights holders in archive collections remains of course the Intellectual Property Office orphan works [diligent search guidance](#). This guidance should inform archive services conducting any diligent search for a rights holder.

Usefully, the published IPO sample diligent search template for an unpublished orphan literary work features a fictional example relating to archive material, which indicates an approach to be followed when conducting a diligent search for an author in the 1870s. It gives an idea of the extent of sources needing to be checked during a search, and the construction of a narrative to document that search. For older works, the range of sources to be checked will be reduced for periods that they do not cover, while for more recent works, additional works may need to be considered.

- Sample diligent search checklist: [unpublished literary work](#)

The guidance, along with other sample searches and templates to be filled out when submitting a diligent search, can all be found on the IPO [diligent search guidance](#) page of the Gov.UK website.

The EU Intellectual Property Office

EUIPO produces information on orphan works on the situation in various EEA member states.

- [EUIPO Observatory web pages](#)

EnDOW

The EnDOW project is funded by Heritage Plus and the EU Commission, and brings together a number of research institutions. It aims to facilitate the process of rights clearance for European cultural institutions engaged in digitisation of materials in their collections. One product which may be particularly helpful to archive services undertaking a diligent search is the EnDOW diligent search tool, which helps archive service staff without legal training to carry out diligent searches. It is designed for registering works in the EUIPO register, but the questions asked can be helpful in documenting a work for registration in the UK scheme. It can produce a .pdf report of a diligent search completed using the tool.

- [EnDOW Diligent Search Tool](#)