Responsibility, Orphans and Working Beyond the Law: Copyright Best Practices and Challenges

Catriona McPherson

As a disclaimer, I will advise that, I am not a lawyer and information in this article does not constitute legal advice. Should you require advice please consult an Intellectual Property Lawyer.

Copyright can be a terrifying concept. After four years as a Media and Image Researcher I like to think that I have faced (and triumphed over) every rights’ issue imagined, but the reality is that with each new exhibition or project come new challenges to overcome. At the Museum of New Zealand Te Papa Tongarewa (Te Papa) it’s part of my role to ensure we (the Museum) are ‘toeing the line’ when it comes to all things copyright, permissions and consents, but what does that mean and to whom really is my responsibility? With the widening dissemination of museum content, copyright is becoming more and more prevalent to museums and society in general. How do museums position themselves between the expectations of the public and the mandate of our governance? Furthermore, where are artists/estates/copyright holders and our moral obligations to iwi or community groups positioned in this equation? As a copyright specialist working in a GLAM (Te Papa) institution, we often act as a mediator in these situations, balancing relationships and responsibilities. What is the balance and how can we ensure we get it right? This article will endeavour to explore some of these challenges that museums and museum professionals face and outline how we, at Te Papa, endeavour to approach each situation and inevitably create a balance between our responsibility to our artist/copyright holders/community groups and to the public/the museums goals.
There is a clear expectation that physical access to museum collections is no longer enough in order for our public to truly engage with our collections, heritage and knowledge.¹ This is further reinforced by mandates from governance, such as boards and leadership teams, that digital access to collections is part of our core business.² What isn’t always transparent to the public or to the sector are the potential copyright, and moral, implications upon the museum and its staff. It is a common misnomer that along with the ownership of an object or artwork, comes the right to reproduce images/footage of the object. This is separate to the ownership and while this can be transferred or licensed to the new owner (the collecting institution) this isn’t always standard practice. Quite often museums aren’t purchasing, or receiving, the object directly from the copyright holder so this discussion must happen separately from the acquisition process.

Both sourcing external content and securing copyright licences for Te Papa’s collection objects can involve extensive research and skilled negotiations. Since 2006 Te Papa has been actively licensing its collection objects. This proactive approach ensures efficiency during the inevitable pressures of exhibition development and thus our collection has, what we refer to as, ‘the 80/20 split.’ 80% covers objects which have been assessed to have ‘No Known Copyright Restrictions’, where Te Papa is the sole rights’ holder or where we have negotiated a copyright licence. It is the remaining 20% of the collection where the relationship with copyright holders/artists is tenuous, or where there are specific iwi or community groups to consult, or where either makers or copyright holders are unknown and cannot be found - which keeps me employed! Often these more tenuous situations give the more rewarding results and personal triumphs. With this in mind, how do we approach that 20% and what tactics should be taken to ensure responsibility and balance is maintained?


*Figure 1* Te Papa’s copyright licence files, 2018. Photo by Catriona McPherson. © Te Papa
What is our responsibility to the copyright holder?

In order to establish a balance between the copyright holder and our directives from governance or expectations from the public, we must first understand the nature of copyright. In general terms, copyright, is a legal right which grants the maker the right to determine who can copy their work and how these copies are represented. Copyright is an automatic right that exists after the physical expression of creativity; it does not need to be registered and can be transferred, sold or bequeathed. Copyright also lasts for 50 years after the death of the maker. This means the copyright holder will change during its duration and could be now managed by a relative, an estate, a designated copyright agency, or assigned manager.

Given all the facets associated with copyright, it becomes the museums’ responsibility to ensure the relationships with copyright holders are established and maintained. As copyright duration spans decades and generations, negotiations and conversations happening now can impact the nature of the relationship your institution will have with future copyright holders and can impact a variety of roles in your organisation beyond that of curator.

That being said, there can be benefits for both copyright holders and museums to allow reproductions of collection objects. Museums’ reproductions can build an artist’s reputation, but the sector must be mindful of artist concerns around commercial values of Intellectual Property (IP), misrepresentation and potential derogatory uses of reproductions.

Te Papa’s standard approach to copyright licensing is to offer a non-commercial museum use licence to copyright holders for their consideration. This licence grants the museum permission to:

- Exhibit copies of the work
- Make documentation copies of the work in any medium, including electronic media (for museum records and administration purposes)
- Reproduce the work in museum publications (such as brochures and pamphlets), promotional material, educational and public programmes, in any medium, including electronic media – excluding commercial merchandise
- Reproduce or adapt the work (or a part of the work) for use via any medium (including, but not limited to, electronic media, such as reproduction on a Museum website or in an electronic guide)

3 A common example of this type of use is reproduction in a graphic panel providing additional context and interpretation of the physical collection item.
While we acknowledge that a ‘one size fits all’ approach doesn’t always work for everyone, the above licence provides a good framework to discuss and negotiate specific terms. While we continue to work through the 2.5 million objects in our collection, we may come across specific works where we haven’t yet negotiated a licence or the copyright holder has requested to be contacted each time we wish to reproduce the object. What is the easiest course of action for such a situation?

Say there is an object by X which is planned for inclusion in an upcoming exhibition. In addition to the display, the curator has identified this object as a “hero” which will be used across the exhibition marketing, communications’ plan, on websites, in education resources, in exhibition graphic panels and as part of our associated public programmes. Reuben Paterson’s Te Pūtahitanga ō Rehua, 2005 (Fig 2) was included in the exhibition Kaleidoscope: Abstract Aotearoa. Reuben’s work was selected by curators as a “hero” for the show as the work encapsulated the ethos of the exhibition and would work well to encourage excitement for the new exhibition. Te Papa didn’t hold an existing copyright licence for this work, but it was clear from previous correspondence with the artist that he would be open to licensing his works. Knowing this, I approached Reuben with a complete list of all potential uses and ‘mock ups’ where possible, attempting to be as transparent as possible. Our specific uses included an education resource, family trail, press releases, marketing collateral, social media and even this year’s Te Papa Christmas card (Fig 4). We aimed to allow ample time for feedback and amendments to ensure works are accurately represented - after all they are a direct representation of the artist and should be treated thus. While the saying might be “it is easier to ask forgiveness than it is to get permission”, this isn’t always solid advice when it comes to copyright and licensing. You are more likely to get a positive response by being ‘up-front’ and honest with your copyright holders than seeking a licence retrospectively and thus losing any chance to negotiate terms or fees. Essentially, the earlier you can start the licensing process, the better. The last thing you want is to hold up the printer while you wait on permissions, or worse, get yourself into the situation where you have gone to print and are still waiting on permission. Thus it is left to you to attempt damage control, or contemplate how to glue 1,500 booklet pages together because you were unable to secure a licence (true story - although luckily due to some swift negotiating, I did never have to actually get my glue stick out).
Figure 2 Reuben Paterson, Te Pūtahitanga ō Rehua, 2005 (still), digital video. Gift of the artist, 2011. Te Papa (2011-0015-1)

Figure 3 Installation view of Reuben Paterson's Te Pūtahitanga ō Rehua, 2005. Photo by Maarten Holl. © Te Papa
If there is one clear message on maintaining balance between governing factors and copyright holders, it's transparency. We can achieve this by presenting both sides with planned uses and having processes/policies in place to ensure copyright holders feel comfortable with the ways in which GLAMs wish to reproduce copies of their objects and by explaining to the public why images sometimes aren't available. I feel Te Papa has established a good working practice of ensuring copyright holders are fully aware of the museum’s plans for reproductions, but could still do more when it comes to informing the public and the sector of our issues regarding copyright. Not only would this increase public awareness about the importance of copyright, but may enlighten our own sector into the intricacies of our roles.

Where does our responsibility lie when we can’t have the conversation with the copyright holder?

Museums are inevitably faced with a portion of their collections where the maker and/or production date of specific collection objects are unknown, whereby tracing the potential copyright holder becomes impossible. There are also objects where, despite knowing the maker, the copyright holder can’t be traced. These objects are referred to as orphan works, but what is an orphan? How does a work become one and what are the risks GLAM institutions face by reproducing orphan works?
An orphaned work is a work which is protected by copyright but whose rights owner or owners cannot be identified and/or located." Reproducing an orphan work without permission is fundamentally in breach of New Zealand's copyright law, but when this impacts a large portion of an institution's collections, it can have a huge bearing upon what is visible to the public. Statements have even been made “that often works are selected for digitisation based on the fact that they do not pose any copyright issues, thus creating a black hole of 20th century content”. The GLAM sector is faced with the reality of becoming the mediator between an unknown copyright holder and our requirements to offer the public an unbiased view of our collections and heritage. Classifying a collection item as “orphaned” isn't always a straightforward process, nor is it one approached lightly by GLAM institutions. As our current legislation has no provision for orphan works, some GLAM institutions are left to make their own decisions based on an assessment of risk, appropriate mitigation strategies and experience.

Te Papa currently has upwards of 60,000 collection objects which are considered “orphan works”. Similarly Auckland War Memorial Museum Tamaki Paenga Hira, is faced with 50,000 works which are considered orphaned. To remove these from our collections’ online initiatives, exhibitions, or publications would greatly alter the visual spectrum of our museums’ respective collections. Institutions, including Te Papa, have developed practices to ensure that where orphan works are reproduced a significant search was conducted to seek the copyright holder and a risk mitigation policy, or process is in place should the copyright holder identify themselves. This due diligence, to find a copyright holder, is similarly not regulated across the GLAM sector but essentially endeavours to justify museums’ decision to reproduce the work should a copyright holder come forth. For some collection objects due diligence could be a simple ‘google’ search which presented no results; for others it may cover enquiries to Birth, Deaths and Marriages, ordering probate records, lists of unanswered mail and enquiries to other organisations seeking information. It is

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It is also important to note that orphan status of a collection object is not fixed. Te Papa holds 25 works by the English painter and etcher, Gerald Brockhurst (1890-1978). In 2007 these works were assessed and deemed to still be in copyright. Victoria Leachman, Rights Manager, then conducted various avenues of research to locate the current copyright holder. Correspondence was sent to known copyright agencies, galleries, museums and other institutions which held works by Brockhurst and the internet was scoured for contact information. Some gave hope of a potential copyright holder, until mail was returned, unopened. The objects were designated as orphaned and were published to our collections online in the hopes that the copyright holder would materialise. Early this year, as part of a Victoria University Summer Research Scholarship, Curator Historical International Art, Mark Stocker and scholar, Siobhon Moore, conducted a project researching the British etchings from Te Papa’s impressive Ilott Collection which included Brockhurst. Mark and Siobhon wished to document this internship with a blog outlining their discoveries. As per Te Papa’s current practice, when an orphaned work is proposed for a further reproduction we perform an additional search to establish once again that the status is still orphaned. Since our initial research in 2007, the Tate, London has reproduced Brockhurst works as part of their collections online and the copyright ownership credited to Mr Richard Woodward. An initial enquiry was forwarded by the Tate to the current copyright holder and, after navigating time differences and technology, the copyright holder agreed to sign Te Papa’s full non-commercial museum use copyright licence which allows the works to be reproduced online and in the forthcoming blog.

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Figure 6 Siobhon Moore looking at one of her favourite etchings by Gerald Brockhurst, 2018. Photo by Rachael Hockridge. © Te Papa
**Gerald Brockhurst**
PERSON | OVERVIEW AND RELATED INFORMATION

<table>
<thead>
<tr>
<th><strong>Person details</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Name</strong></td>
<td>Gerald Brockhurst</td>
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<tr>
<td><strong>Party type</strong></td>
<td>Person</td>
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<tr>
<td><strong>Date of Birth</strong></td>
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<td><strong>Place of Death</strong></td>
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</tr>
<tr>
<td><strong>Nationality</strong></td>
<td>American</td>
</tr>
<tr>
<td><strong>Cultural group</strong></td>
<td>English</td>
</tr>
</tbody>
</table>

**Collection Objects**

- **The dancer**
  Gerald Brockhurst
  1928
  1666-0015-020

- **La tresse**
  Gerald Brockhurst
  1928

- **Vina**
  Gerald Brockhurst
  1929
  1983-0013-001

- **The black shawl**
  Gerald Brockhurst
  early 1860s
  2018-0041-1

- **Doretie**
  Gerald Brockhurst
  1921

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*Figure 7* Screen shot of Te Papa's Collections Online featuring Gerald Brockhurst, 2018. © Te Papa
This process of establishing if a collection object is, in fact, an orphan work can take anywhere from a few hours, to months and even years. While Te Papa and other institutions seek guidance and reassurance from each other, our process and policies are in no way a perfect solution. As more and more GLAMs come face to face with the ‘orphan’ issue, we are confronted with the need for legislation to reinforce current practice. On the other side of the coin, GLAMs are well aware that excluding orphan works from digitisation programmes and their subsequent use online poses the risk that the copyright holder may never surface. As Auckland War Memorial Museum Tamaki Paenga Hira stated as part of their submission addressing the Trans Pacific Partnership Agreement (TPPA) “Online reproductions of orphan works allow copyright holders to visually identify and contact the collecting institution to advise them of copyright holder’s details and negotiate permissions.”

Each institution must weigh up the risk - financially, legally and to its reputation - and act accordingly until such time as legislation changes.

**When does our responsibility extend beyond the law?**

There are situations where a collection object’s copyright has expired, that have other, moral obligations of which GLAMs must be mindful, specifically our relationship with iwi, hapū and whānau. Current copyright and IP legislation does not cater well to indigenous heritage/collections/knowledge. Western views of IP firmly sit with an individual maker of a creative work, rather than from a collective, community, or person on behalf of a group. GLAMs must assign their own practices, processes and policies to respect the wishes of the indigenous communities from which these taonga works come and who have ongoing relationships with these works. As Wend Wendland, Director of Traditional Knowledge at the World Intellectual Property Organisation (WIPO), states;

> The effective participation of the peoples and communities whose knowledge and cultural expressions are the subject of discussion is obviously crucial. In general terms, indigenous and other communities argue for the right to control access to and disclosure and the use of their traditional knowledge and traditional cultural expressions.

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9 O’Donovan, “Auckland War Memorial Museum Tamaki Paenga Hira TPPA Submission.”


Te Papa is acutely aware of the importance of engaging with source communities and, through various policies and processes, aims to respect iwi and other communities’ moral rights surrounding taonga in our collections. Te Papa's Mana Taonga Principle “affirms the special relationship that exists between Māori and taonga.”

This principle governs Te Papa's approach to Māori content. Where taonga is provenanced to a specific iwi, or hapū group, or taonga depicts known persons, support and guidance is sought before the taonga is displayed, reproduced, or made accessible to the public. This ensures iwi can care for their taonga, with respect to their custom or tikanga. Unlike copyright, these moral obligations of the museum don’t expire, thus leaving GLAMs with the responsibility to regulate the potential reuse of these “restricted” taonga.

So how is our Mana Taonga Principle applied to a practical setting? Ko Rongowhakaata: The Story of Light and Shadow was Te Papa’s most recent iwi exhibition. Rongowhakaata and Te Papa worked together to create an exhibition which tells the story of the Rongowhakaata people from their perspective. The exhibition’s rich object focus gave Te Papa the opportunity to engage with the iwi, hapū and whānau who are strongly connected to taonga within our collection and taonga which was borrowed from other institutions and individuals. Once such object was a Hīnaki (eel trap) from the 1930s made by Ere Whaitiri of Rongowhakaata, on loan from Tairāwhiti Museum in Gisborne. The Hīnaki was originally donated to Tairāwhiti Museum by Douglas Porohiwi Jones and, given the strong connection the Jones whānau have with the Hīnaki, Te Papa wanted to ensure the whānau’s involvement in the way this object was interpreted in the exhibition and online. Te Papa identified that the Hīnaki would be an excellent example of the innovative conservation work and mount making which prepared this taonga for display and planned to document this work with a blog and associated short documentary. Involving the whanau from the outset gave not only a stronger sense of the significance of the taonga but enlightened the understanding of the museum to the taonga; “No longer is it acceptable for museums not to engage their communities of interest.”

The footage concurrently told the hīnaki’s story, both from the museums perspective and of the whānau’s connection and overall significance to the Rongowhakaata people.

Both interpretations intertwine the overarching exhibition theme of innovation and community focus. By including both interpretations of the taonga, the public were presented with a more insightful look into a significant object. The knowledge imparted by the whānau could not have surfaced if Te Papa had not been open to iwi, hapu and whānau involvement.

Te Papa’s approach isn’t a perfect example. We acknowledge that our current approach has limitations which effectively hide a significant portion of the collection from the view of the public and are looking at ways to follow an approach of “Responsible Discovery”, whereby taonga is released to Collections Online prompting conversation and potential debate, thus giving the source community the chance to view, respond and request removal, if necessary. Our guiding policy currently acts as a ‘closed by default’ measure and, while we acknowledge some taonga should have certain restrictions in place, much of the taonga is currently unavailable to access online. This is because it hasn’t been assessed for iwi clearance, meaning we don’t yet know if, or who should be consulted in regards to its reproduction. We are no longer in a position to remain ambivalent about indigenous cultures, or their connection to taonga and museum collections. We can see that through active involvement and consultation we are able to present a more rounded and enlightened interpretation of these objects/taonga. While legislation and current IP doesn’t cover all the needs of indigenous people and community groups, museums are in a position to set presidents within the GLAM sector to ensure responsibility of caring for taonga extends beyond caring for the physical.
Conclusion

There is a clear correlation between copyright and responsibility in the GLAM sector. As museums open their collections via digital means, copyright will become more prevalent to society and sector. Keeping the balance between the expectations of the public, directives from governance and our copyright holders, iwi and community groups isn’t always an easy task, especially when the expectations of both sides are continually moving and changing. What, therefore, becomes more relevant for the GLAM sector is our ability to change alongside our copyright holder, iwi and community groups and the public. The approach we have taken in the past may no longer be relevant. We should encourage transparency and open communication. By remaining as transparent as possible, we open up the lines of communication and understanding to best cater for both parties. While we may never find the perfect solution to all our issues regarding copyright, consents and permissions, we can remain proactive in our approach and open to discussion and debate.