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International Perspectives on Archival Copyright

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“Copyright” is increasingly becoming an international word. In French *le copyright* is seen more and more frequently, at the expense of *les droits d’auteur*; in German *das Copyright* is almost as current as *das Urheberrecht*; in Portuguese *os direitos de autor* is regularly qualified by (*copyright*) in brackets; and on a longer timescale one suspects that *los derechos de autor* in Spanish and *i diritti d’autore* in Italian will also eventually succumb to the word which is recognised almost everywhere as a little c in a circle.

There is a profound irony in this, for although the English word increasingly predominates, the history of copyright over the past three centuries is a history of movement away from the Anglo-American concept of the property right, which is the right to make copies, and towards the more philosophical French notion of *droits d’auteurs* (authors’ rights, based upon intellectual responsibility for a creative work).

In the English pre-history of copyright, ownership of property was paramount. In the Elizabethan theatre, authors had almost no rights: the theatre-owner came first, the actor second, and the playwright a poor third. When the great actor Ned Alleyn moved from the Lord Admiral’s Company to Lord Strange’s Men in the 1590s, he was prevented from taking his celebrated *Tamburlaine* with him not by Marlowe (who had sold the play and was therefore uninvolved) but by the theatre company who owned *Tamburlaine* as their property.

Similarly in 1603 Shakespeare was powerless to prevent second-rate shorthand note-takers from coming into the theatre, copying down their hearing of his *Hamlet* and then publishing it in the well-named “bad quarto”. The publication of the “good folio”, the play as Shakespeare wrote it, the following year, was principally a definition by his theatre company of their property.

For poets the situation was even worse. The publication of Shakespeare’s *Sonnets* in 1609 by Thomas Thorpe was done without Shakespeare’s consent and entirely for Thorpe’s profit. Thorpe had acquired fair copies of the sonnets as they circulated from hand to hand in London, and the fair copies were Thorpe’s property.

This sort of theft of intellectual property was lamented by great authors down the centuries, from Plato (who was furious that his dialogues were being pirated in Sicily) to Martin Luther (whose printer in 1525 was able to publish an unfinished draft of the *Postillae* which had been removed from Luther’s workroom).

If we compare the property-based scenario of four hundred years ago with today’s world of authors’ rights, we will find that the copyright pendulum has gone through a full swing. Imagine trying to go to a printer with fair copies of poems by Wendy Cope or Seamus Heaney, or even safely dead authors like T. S. Eliot or Kathleen Raine, and asking for them to be printed for you. The printer would think you were at best a fool and at worst a criminal. And to try to print previously unpublished poems even by authors as long dead as William Wordsworth (died 1850) or John Clare (died 1864) is equally to invite litigation. Authors’ rights and copyright cast a very long shadow - certainly back as far as the 1790s for the UK. Manuscripts written by Wordsworth and Coleridge in the 1790s are not only still in copyright (and in the UK will remain in copyright, as we shall see, until 31 December 2039), they are also still carefully copyright-protected by representatives of the Wordsworth and Coleridge families.

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On more than one occasion I have issued what I hope were provocative sallies indicating my belief that the copyright pendulum has swung much too far. A copyright period of 70 years after an author’s death (more than that in France where extra time is added for the world wars) for any and all literary works (where “literary work”, in the UK at least, is interpreted so generously as to include an alphabetical list of British railway stations) amounts to a constraint on publishing, scholarship and biographical research which is unjustifiable logically, socially or culturally. And the position for manuscripts is even worse.

When the law decrees that Bernard Shaw’s novels, first published in the 1870s and 1880s, are going to remain copyright-protected until 1 January 2021, and that the handwritten personal diaries of Charles Dickens (dating from the late 1830s and held in the Victoria and Albert Museum) will be in copyright until the end of 2039, two hundred years later, it is appropriate to recall Mr Bumble’s famous comment to Mr Brownlow in *Oliver Twist*:

‘If the law supposes that,’ said Mr Bumble, squeezing his hat emphatically in both hands, ‘the law is a ass - a idiot.’

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

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

In the period between the introduction of printing into Britain by William Caxton in 1477 and the passage of the 1710 act, there was plenty of litigation and legislation about the book trade, but virtually all of it related to the rights of printers, booksellers and the Stationers’ Company. The idea of authors’ rights came to prominence only in the writings of Daniel Defoe from about 1703, and authors’ rights did form some part of the thinking which created the 1710 Act, although there were ambiguities in the balance between authors’ rights and book trade rights which remained unresolved for many decades.

The celebrated court case *Donaldson v. Beckett* (1774) had a big influence both in the UK and in the US (which was still just about under British jurisdiction). Effectively it established the supremacy of copyright over older forms of common law protection, and made it clear that when a work was “out of copyright” its copyright holder could not seek additional common law protection. The ruling enshrined the public domain in British and American law.

The following hundred years in the history of British copyright was a period of much debate and comparatively little change. The duration of British copyright was extended in 1814 to 28 years from publication or until the death of the author and again in 1842 to 42 years from publication or 7 years after the death of the author (in both cases, whichever was the longer period). These changes adopted the idea of the death of the author as a key factor, but were a great disappointment to authors’ rights campaigners like William Wordsworth and Sir Thomas Noon Talfourd, who as early as the 1830s were pressing for a 60-year *post mortem* copyright term. In 1912, Britain became a full signatory of the Berne Convention of 1886, and its copyright period went to 50 years *post mortem*.

The *post mortem* concept had been borrowed from French legislation, and the idea of “*le droit moral de l’auteur*” was confirmed during the French Revolution by the acts of 1791 and 1793. The first French copyright act was moved by Le Chapelier, with his often-quoted definitive words:

La plus sacrée, la plus légitime, la plus inattaquable, et, si je puis parler ainsi, la plus personnelle des propriétés, est l’ouvrage fruit de la pensée de l’écrivain.

Le Chapelier’s act gave copyright protection for literary works until five years after the author’s death. Further French legislation in 1866 extended this period to 50 years, a term then adopted by the Berne Convention. By the mid-nineteenth century, the cultural and intellectual leading role in copyright legislation was clearly being taken by the French. Although the French acts of 1791 and 1793 had been preceded by legislation in the UK (1710), in Denmark (1741), and in the USA (1790), they came to be seen as the international model laws. Le Chapelier’s words were quoted by legislators throughout Europe, and French notions of authors’ rights, public domain, and copyright duration prevailed, and were largely endorsed at Berne in 1886.

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

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

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

In different ways, I will want to deplore all of these four trends, but I should declare an interest first and say that for one of the research projects which I direct, known as WATCH, they are a strong justification of its continuing existence. WATCH (Writers Artists & Their Copyright Holders – www.watch-file.com) is a joint project of the Universities of Reading and Texas, researching and publishing information about copyright holders and copyright contacts for published authors and for public figures, probably the only such resource anywhere in the world. If copyright laws were less all-embracing, WATCH would be less necessary. End of declaration of interest.

The duration of copyright in most countries in the world is now excessively long, and, notoriously, far longer than the duration of patents. Most countries have accepted the Berne Convention minimum period of 50 years after an author's death; more and more are moving on to a 70-year period; some go further still: in Côte d'Ivoire, for example, copyright lasts for 99 years after an author's death. There has been a similar shift in respect of inclusiveness. The British 1710 copyright act was supposed to apply only "to literary matter of lasting benefit to the world", although its interpretation was always broader than that. No-one in the eighteenth century, however, could have imagined a situation where copyright applied to lists of prices of stocks and shares, lists of railways stations, text for advertisements, sheets of election results or the contents of a literary author's shopping list. On inclusiveness, the pendulum has very little further to swing.

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

- first, the rights-holders might tell us that they don't know anything about it and they don't want to know anything about it and would we please leave them alone;
- second, the rights-holders might become very interested in the prospect of large royalty receipts, only to lose interest completely when told that this is highly unlikely;
- third, the rights-holders might give a cautious agreement to cooperate, but only on condition that their name does not appear on the Internet, and that the name of my Texan colleague Tara Wenger or myself is given instead;
- fourth, some rights-holders enthusiastically embrace their newly discovered status, and phone up every couple of months wondering why they haven't received any copyright enquiries;
- and fifth, there are the rights-holders who understand exactly what is going on, who accept that they probably own all or part of the copyright but equally accept that they are unlikely to be contacted about it more than once a year.

In all of these cases, however, the key fact is that copyright persists. WATCH discovers copyright holders who had no idea that they were copyright holders, and their rights remain intact even if they have not been exercised for 50 or 60 years.

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

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

The Berne Convention, and thus almost all modern copyright thinking, is founded upon the idea of automatic copyright. In caricatural terms, we have to think no longer of an author with script in hand thinking "Hey, this is pretty good; in fact, I think it's good enough for me to go down and register copyright in it." Instead we have to imagine that in every author's garret there is a hovering ectoplasm called automatic copyright which descends upon each sentence, each expression, as they are written - regardless of merit, sense or spelling, and surviving even if the author subsequently crosses out the whole lot.

The Spanish language, as it can do, converts this idea into beautifully weighted poetic prose:

Desde el momento de la creación de la obra el autor adquiere una serie de facultades exclusivas de orden moral y patrimonial, sin que medie el cumplimiento de ninguna formalidad adicional.

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

This has been one great item of unfinished business of the Berne Convention. The Convention removes from authors and copyright holders any need to register their rights, but it makes no allowance at all for those who wish to make use of copyright-protected writings. Readers, researchers and scholars who went into repositories and asked where they could find information about copyright-holders used to be told that this was a mini research project which they had to conduct for themselves. Before the emergence of WATCH, there was no area of research in which archivists were less able to help than in respect of copyright owners. And this was true in just about every country in the world.

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

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

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

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

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

- there is the statement in the Berne Convention (article 7, section 8) that duration of protection for foreign authors will not normally exceed the duration of protection in their country of origin; this is significant where the foreign author's country of origin has a shorter copyright duration;

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

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

We should note that posthumous publication is treated differently in different countries, and, as this example shows, we will need to be aware of these differences. For example, the Portuguese law on duration states clearly that the copyright period (formerly 50 years, now 70 years) runs from the year of the author's death "even in the case of works disclosed or published posthumously". In South Africa (and until 2004 also Australia), by contrast, where the copyright period has been 50 years, copyright in posthumously published work has lasted for 50 years from first publication. Britain's law on copyright in posthumous works is in transition. Until 1988, the British law was the same as the South African. In the year 2040, we in the UK will finally arrive at the same legal position as the Portuguese (i.e. 70 years from death for everything).

(As far as I can see, although I don't have a Portuguese lawyer to confirm this, *My friends the baboons* will have come out of copyright in Portugal at the end of 1986, not 1990, but will then not come back into Portuguese copyright when the Portuguese duration-period was extended in the 1990s, because by then the South African copyright period had expired.)

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

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

In the UK, all unpublished works with an author are copyright-protected until 31 December 2039. In theory, this would apply to a newly-discovered manuscript by Shakespeare or by Geoffrey Chaucer (who died – murdered or not – on 25 October 1400). In practice, it certainly applies, as we have seen, back as far as the 1790s.

As you can imagine, in the UK we are preparing for a huge Public Domain Celebration Party on 1 January 2040. Let me explain the reason for this remote date. The most recent British copyright legislation, the Copyright Designs and Patents Act 1988, virtually abolished perpetual copyright. Perpetual copyright in the UK now subsists only in the Bible, the Book of Common Prayer, and J. M. Barrie's *Peter Pan*. The perpetual protection previously afforded to unpublished works has been removed, but transitional arrangements accompanying the Act gave a further period of protection for fifty years from the Act's implementation in 1989 - until midnight on 31 December 2039.

It has been suggested that this inordinate protection for manuscripts in the UK could be challenged under the European Convention on Human Rights. In any event, the British 2040 cut-off date is disregarded (if they are aware of it at all) by other European and English-speaking countries. It might possibly be recognised by default in the diminishing number of countries which have retained perpetual copyright. (I understand that both Ireland and Canada have now withdrawn from the "perpetual copyright" club.)

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

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

By the second of our two guiding principles, this also means that any manuscripts of UK authors who died before 1934 which happen to be housed in US repositories are also regarded as out of copyright. This leaves us in a situation in which, for a work by D. H. Lawrence where part of the manuscript is in the University of Texas at Austin and part in the University of Nottingham Library, the Texas part of the manuscript is in the public domain from 2003, while the Nottingham part of the manuscript remains in copyright until 2040. Any D. H. Lawrence manuscript housed in the Bibliothèque Nationale in Paris has (since he died in 1930) been out of copyright since 2001.

Conversely, turning to the manuscripts in UK repositories of US authors who died pre-1934, the assumption must be that, since last year, these are all in the public domain. I shall illustrate this paper with the entry in our WATCH database for the US author Elinor Wylie. Let me try to explain why we say what we do.

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

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

This is a curious US-specific example of published works having a longer copyright duration than unpublished works. All unpublished works by US authors who died before 1934 are out of copyright. For published works, it is easier to state the rules than to explain them. All works by US authors published before 1923 are out of copyright. For works by US authors published from 1923-1963, duration of copyright depends upon whether or not copyright was renewed with the US Copyright Office 28 years after publication. If it was not so renewed, then the work is in the public domain. If it was so renewed, then the renewal is now deemed to extend for 67 years, making 95 years in total. So a work by Elinor Wylie published in 1928, and copyright-renewed in 1956, will remain in copyright until 2023. Cue Mr Bumble.

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

I am tempted to tell you the story of Walt Whitman's stuffed canary, which is in Bolton Central Library in northern England, but there is enough absurdity in literary copyright without speculating about duration in canaries. The example of Henry James would, I am sure, reinforce Mr Bumble. One of the greatest US authors, Henry James took UK citizenship in 1915 as a protest against the non-entry by the USA into World War I. Later that year he suffered a stroke, and he died in 1916. Had he not made his protest in 1915, all his manuscripts around the world would be in the public domain. Because of his change of citizenship, any of his papers in UK repositories are still in copyright.

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

With our hypothetical case of a D. H. Lawrence manuscript in the Bibliothèque Nationale, we had a British author receiving less protection in France than in the UK (or even the USA). Lawrence's near-contemporary Marcel Proust (who died in 1922) provides the obverse example. The country of origin for all Proust's manuscripts, naturally, is France. The duration of copyright in unpublished papers in France is the same as the duration of copyright for works published during an author's lifetime (now 70 years after death). This means that the manuscripts of Proust are in the public domain in every country in the world.

France, however, has a very strong tradition of moral rights, in addition to economic copyright. In France moral rights can never be extinguished; in the splendid French expression they are "inaliénables et imprescriptibles". (It was the force of moral rights in France which, famously, enabled Samuel Beckett to prevent a production of *En attendant*

Godot played by women - and his heirs will be able to do the same for ever.) In addition, French moral rights give to an author's heirs, in perpetuity, the power to sanction or to forbid first posthumous publication. This is true, for ever and ever, for the heirs of Proust, the heirs of Racine and Molière, and even, in theory, the heirs of François Villon (who died – murdered or not - around 1485).

This means that an unpublished Proust manuscript in the Bibliothèque Nationale is in the public domain, but could be published only with the consent of the Proust family. An unpublished Proust manuscript in the University of Texas, however, is in the public domain and could be freely published without need for consent, although any publisher should be careful not to allow distribution in France.

For an unpublished Proust manuscript in the British Library, the position is, I would say, uncertain. On the one hand, there is the Berne Convention statement cited earlier, to the effect that duration of protection for foreign authors should not exceed that granted by their country of nationality. But on the other hand, there are rulings on EU legislation (from the famous 1994 case, “Phil Collins v Imtrat”, to a 2003 case known as “Land Hessen v G Ricordi”), tending to internationalise rights offered by individual countries, which have led some experts to conclude that Proust's manuscripts should be regarded as still protected in the UK. As a non-lawyer, I am not completely convinced by this. The EU legislation seems to me to say principally that an EU country should not offer rights to its own citizens which it does not offer to other EU citizens. I am far from sure that it compels one EU country to recognise the special provisions of another EU country.

If it were to prove permissible to publish a Proust manuscript in the UK, by a further irony, the copyright in that published manuscript would then belong to the publisher for a 25-year period. This is because the whole of the European Union has now adopted the French idea of publication right in posthumous publications - even though the French law makes sense principally in the context of French moral rights. This 25-year posthumous publication right (which was introduced in Europe by the Copyright and Related Rights Regulations, 1996) will become really effective in the UK only from 1 January 2040 - except for this possible exception of French manuscripts in British libraries!

Publication right, which is a “property right ... equivalent to copyright”, means that the prospect of a few nineteenth-century writings being in copyright at any time will remain in Europe for ever. We still have to face the extraordinary possibility that a work by William Wordsworth written in 1800 and first published in 2100 will then be rights-protected until 2126. Because the definition of “publication” for the purposes of “publication right” is very broad in the UK, potentially broad enough to include “making available to the public”, it is also possible that many publication rights will pass to UK archival repositories after 2039.

Clearly archivists and librarians need to have an ever greater awareness of what is going on world-wide in the sphere of copyright. The WATCH project teams in Austin and Reading will do their best to help. No-one will ever know everything and there will always be some areas of knowledge that we will choose to leave to someone else. The example of Spain, which I mentioned earlier, with a copyright period of 80 years to December 1987, then 60 years, and now 70 years, is certainly one best left to Spanish lawyers!

To cope with copyright together, we need an internationalist approach and an international awareness, together with good international colleagues and links. International and transnational copyright will remain full of traps and pitfalls, but we cannot simply wish it away.

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

In the meantime, it is the sharing and interpreting of information which is vitally important to us all. The internationalist approach to information about copyright ownership is being pioneered, I trust, by the transatlantic partnership of the WATCH project. An internationalist and comparative approach to the understanding of archival copyright laws, across national boundaries, could and should be a priority area for future work by the ICA.