**Copyright Exceptions for Archives: A Checklist**

Does your country’s copyright law support archives functions and services?

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# Acknowledgements

This resource is an adaptation of the *Core Library Exceptions Checklist* published by EIFL (Electronic Information for Libraries) in June 2016. The International Council on Archives (ICA) is grateful to EIFL for making its publication available under a Creative Commons Attribution 4.0 International (CC BY 4.0) License, which has enabled the ICA to adapt EIFL’s checklist to meet archival needs, and to translate and distribute it to the archival community.

### About the International Council on Archives

The ICA is dedicated to the effective management of records and the preservation, care and use of the world's archival heritage through its representation of records and archive professionals across the globe. Effective records and archives management is an essential precondition for good governance, the rule of law, administrative transparency, the preservation of humankind's collective memory, and access to information by citizens.

The ICA is a neutral, non-governmental organisation, funded by its membership. For nearly seventy years the ICA has united archival institutions and practitioners across the globe to advocate for good archival management and the physical protection of recorded heritage, to produce reputable standards and best practices, and to encourage dialogue, exchange, and transmission of this knowledge and expertise across national borders.

### Feedback

Comments and feedback are always welcome. Please email [programme@ica.org***.***](mailto:programme@ica.org.)

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# Introduction

Copyright law provides a legal framework that governs the ownership, control, distribution, and use of original works of authorship. Copyright laws set out the criteria for copyright protection, the categories of protected works, the rules for copyright ownership, the rights of the copyright owner, limitations and exceptions to those rights, the duration of copyright, and penalties for infringement. Copyright law is a national matter; that is, each country has its own copyright law. However, national copyright laws contain certain provisions mandated by a series of international treaties that most countries have signed. These international treaties establish a basic standard of copyright protection to ensure consistent treatment when works cross borders.[[1]](#footnote-2)

Copyright law is typically understood as a balance between the interests of those who create content, and the public interest in having the widest possible access to that content.  The law provides copyright owners with certain exclusive rights that enable them to control and be rewarded for uses of their works. However, the law also recognizes that those rights must be limited in particular ways to serve the public interest in the growth of knowledge and culture.

Archives serve the public interest by enabling education and research, providing entertainment and leisure activities, and protecting human rights. To achieve this, archival institutions undertake three core functions: they acquire, preserve, and make available for use records of enduring value. Copyright issues arise in all three core functions. It goes without saying that archives respect the interests of rights holders and comply with copyright law. However, without the balancing effect of certain limitations on the exclusive rights of copyright owners, archives may have difficulty in fully achieving their mandate. In some countries, archives are the beneficiaries of legislative exceptions to enable archives to consistently carry out their functions and serve the public interest, particularly in today’s global society. Such exceptions permit archives and libraries to make socially beneficial uses of copyrighted works without permission from, or payment to, rights holders, and usually include conditions to protect rights holders’ interests. Regrettably, however, other national copyright laws lack adequate exceptions that would enable archives to completely fulfil their mission to provide access to their holdings. A useful resource for those wishing to see the state of the law in other countries is the WIPO *Study on Copyright Limitations and Exceptions for Libraries and Archives* (2015),[[2]](#footnote-3) which provides an analytical survey of the statutory provisions for libraries and archives in the copyright laws of the WIPO Member States.

This checklist is a handy way to evaluate your nation’s copyright law by identifying gaps or seeing where the law is doing well. It is a starting point for policy advocacy or, if the copyright law in your country is being updated, for proposed amendments.

The checklist sets out provisions that every nation’s copyright law should have to support the archival mission in the twenty-first century. The first part of the checklist features archives functions and services. The second part addresses cross-cutting issues that affect the scope and impact of more specific exceptions. The checklist itself is presented first, followed by a fuller commentary on each question consisting of a short explanatory note and suggested text for a model provision to be incorporated into national copyright law. The model provisions have been adapted for archives from EIFL’s *Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users* (2016) (available online at [www.eifl.net/resources).](http://www.eifl.net/resources).)[[3]](#footnote-4)

We hope that the checklist is a practical tool that will benefit archives and their users, and will result in improved copyright laws everywhere.

Jean Dryden

On behalf of ICA’s Advisory/Working Group on Copyright and

ICA’s Expert Group on Legal Matters (ICA EGLM)

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# Copyright Exceptions for Archives Checklist

To assess whether your nation’s copyright law supports archives functions and services, consider the following questions:

## Archives Functions and Services

### Acquisition

* In order to acquire, or review for acquisition, the digital archives of an agency or individual, may an archives make copies of all such content stored on computers or other storage devices to which the donor has granted access?
* May an archives acquire and preserve publicly accessible websites and social media content delivered via the Internet?

### Preservation

* May an archives make copies of works in its holdings in any format for preservation purposes or back-up, and provide access to these copies?

### Making Available

* May an archives supply a copy of a work in its holdings, either in hard copy or electronically, to a person for research or private use?
* May an archives send and receive such copies across borders?
* May an archives digitize orphan works in its holdings, and make them available online?
* May an archives display items in its holdings (or copies thereof) in public exhibitions or presentations?
* May an archives translate materials in its holdings?
* May an archives provide copies of materials in its holdings for use in virtual learning environments to facilitate distance learning?
* May an archives make an accessible format copy of a work and provide it to a person with a disability?
* May an archives send and receive accessible format copies to and from other countries?

## Cross-cutting issues

Cross-cutting issues are those that affect the scope and impact of all topics associated with archives functions and services.

##### Archives as beneficiary

* Where exceptions are granted to libraries, does that exception include archives?

##### Format neutral

* May an archives make copies in any format, including digital copies?

##### Safeguarding exceptions in the digital environment

* Are the exceptions granted to archives in copyright law safeguarded from override by licence terms?
* Where legal protection is granted to technological protection measures (TPMs), may an archives circumvent the TPM to avail itself of an exception to copyright?

##### Limitation on liability

* Does the law protect archivists from being sued for actions performed in good faith in the course of their duties?

##### A flexible exception

* In addition to specific archives exceptions, are archival activities also supported by a flexible exception such as fair use or fair dealing?

# Commentary and model text

## Archives Functions and Services

|  |  |
| --- | --- |
| Acquisition | |
|  | Model law provision |
| * In order to acquire, or review for acquisition, the digital archives of an agency or individual, may an archives make copies of all such content stored on computers or other storage devices to which the donor has granted access?   Organizations and individuals now create and maintain most of their organizational and personal archives digitally. Increasingly, archives are acquiring these “born digital” records. These acquisitions may include the computer(s), portable information storage device(s), “cloud” storage services, or other shared servers used by the donor. To carry out archival functions such as archival appraisal, indexing and procedures associated with digital preservation, such digital material must be copied in its entirety to apply various analysis tools to determine the presence of sensitive materials, works authored by others, file formats, and the like.   * May an archives acquire and preserve publicly accessible websites and social media content delivered via the Internet?   The Internet has become a means of delivering a host of online content. Many organizations and individuals have websites as well as a presence on social media networks such as Facebook, Twitter, Flickr, and YouTube. Archives acquire this dynamic and often transient content because it represents important evidence of the activities of an organization or an individual.  Acquiring this online content requires copying so that the content can be preserved in an archival format for subsequent use by researchers. An exception to the reproduction right that permits an archives to copy publicly available online content that is within its acquisition mandate will ensure the preservation of digital documentary heritage. | An archives may make copies of the digital content included in the archives of an organization or individual for the purpose of performing the tasks necessary to complete the acquisition. (Sample provision that permits the copying required to acquire digital archives)  An archives may make copies of publicly accessible websites and other content delivered via the Internet without restriction for the purposes of preservation. (Modelled on EIFL Draft Law Art 12(2)) |
| Preservation | |
| * May an archives make copies of works in its holdings in any format for preservation purposes or back-up, and provide access to these copies?   Long-term preservation is a core archival function. Preservation encompasses works in all formats, both analogue and born-digital, and works of all types, including textual, graphic, and audio-visual materials.  Two types of preservation require the making of copies: preservation or replacement of damaged, deteriorating, or lost materials; and ‘preemptive’ preservation of materials before they deteriorate or the equipment required to access them becomes obsolete. | An archives may make copies of works in its collection for the purpose of back-up and preservation.  If a work or a copy of a work in an institution’s collection is incomplete, such an institution may make or procure a copy of the missing parts from another institution.  Such institutions may make copies of works that are or should be available in their collections in their chosen format, if they cannot reasonably be acquired in such format through general trade or from the publisher. (Modelled on EIFL Draft Law Arts 12(2–4)) |
| Making Available | |
| * May an archives supply a copy of a work in its holdings, either in hard copy or electronically, to a person for research or private use? * May an archives send and receive such copies across borders?   Because archival materials are largely unpublished, they are for the most part unique and irreplaceable. Therefore, archives do not lend their holdings. Instead, researchers must take notes, or obtain copies from the archives. Without the ability to copy items in their holdings for researchers, archives would find it impossible to achieve their fundamental mission to make their holdings available for research, scholarship, personal use, or education.  Increasingly, archives are acquiring materials that were “born-digital.” Archives are experimenting with the best ways to provide access to such materials. Instead of providing digital copies to users, concerns about the ease of copying and further dissemination have led many archives to provide temporary access in a virtual reading room. | An archives may provide copies, in any format, of materials in its holdings to individual researchers and other users directly or through intermediary libraries, archives, and museums for research or private use.  *(Sample provision that permits making copies for users)*  An archives may provide temporary access to copyright works in digital or other intangible media in its holdings to a user, or to another archives, for research and private use. (Modelled on EIFL Draft Law Art 12(10)) |
| * May an archives digitize orphan works in its holdings, and make them available online?   Orphan works are in-copyright works whose rights holder(s) cannot be identified or located in order to obtain permission for use. The orphan works problem is huge – the British Library estimates 40% of works in its holdings (published and unpublished) are orphan. Overall, archives holdings include a high proportion of orphan works. Because much archival material was not created for commercial purposes, it is of little commercial value, and the so-called "orphan works paradox" states that the lower the commercial value of a work, the less likely it is that the rights holder can be found. Because the least valuable works create the biggest search costs, there is no incentive to incur the cost of a search for owners. Consequently, archives are unlikely to make them available, and holdings of high social, cultural, and educational value may remain unused. An exception would enable this material to be made available. | An archives may make copies of works, and make them available, where the permission of the author or other owner of copyright cannot, after reasonable endeavour, be obtained or where the work is not available through general trade or from the publisher. (EIFL Draft Law Art 12(6)) |
| * May an archives display items in its holdings (or copies thereof) in public exhibitions or presentations?   Archives frequently prepare exhibitions (both onsite and online) of items from their holdings (or copies thereof) in order to promote their services or their holdings. Archivists also include copies of items from their holdings in conference or workshop presentations. An exception for display would enable an institution to promote copyrighted works within their collection. | (1) An archives may publicly display originals or copies of works from its holdings without the authorization of the rights holder for the purpose of promotion of the archives holdings, or training of users of the holdings;  (2) An archives may publicly display or publicly perform parts of a work as part of a presentation at a conference, seminar or workshop or other such similar activity without authorization of the rights holder. (Modelled on EIFL Draft Law Art 16.)) |
| * May an archives translate materials in its holdings?   Archival institutions do not routinely translate their holdings into other languages. However, there are occasions when it is necessary for an archives to translate in-copyright documents (or a portion thereof) that are in another language to present such documents in an exhibit, to prepare descriptions of their holdings in the official language(s) of the archival institution, or to establish whether there is sensitive content that should be restricted in some way. | An archives may translate works in its holdings for the purposes of research, scholarship, or private study. (Modelled on EIFL Draft Law Art 11B(1)) |
| * May an archives provide copies of materials in its holdings for use in virtual learning environments to facilitate distance learning?   A Virtual Learning Environment (VLE) is a secure network used by institutions to structure, manage and deliver learning activities and content. Resources managed by the archives are often used in VLEs. E-learning offers new opportunities for distance education, self-learning and part-time study. | An archives may transmit material from its collection to be used in virtual learning environments accessible only by the persons giving and receiving instruction, to the extent justified by the purpose. (Modelled on EIFL Draft Law Art 11) |
| * May an archives make an accessible format copy of a work and provide it to a person with a disability? * May an archives send and receive accessible format copies to and from other countries?   Access to knowledge is a human right. The right of people with disabilities to take part in cultural life on an equal basis with other people is enshrined in Article 30 of the UN Convention on the Rights of Persons with Disabilities. The Convention refers specifically to the right to enjoy access to cultural material in accessible formats and the duty of Member States to ensure that laws on intellectual property rights do not constitute an unreasonable or discriminatory barrier to access to cultural materials by those with disabilities. | An accessible format copy of a work may be created and distributed, including by import or export, for persons who are blind, visually impaired or otherwise disabled, without authorization of its author or copyright owner. (EIFL Draft Law Art 17) |

## Cross-cutting issues

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| --- | --- |
| Archives as beneficiary | |
|  | Model law provision |
| * Where exceptions are granted to libraries, does that exception include archives?   National copyright laws vary with regard to the beneficiaries of exceptions. In some cases the exceptions may apply only to libraries; in others to libraries and archives, and still others may also include museums.  To see whether archives are a beneficiary of your country’s copyright law:   * Check the exceptions to see if archives are explicitly included as beneficiaries of the exceptions. * If not, check the definitions in the statute to see whether archives are included in the definition of the named beneficiary. | “Library, “archive,” or “museum” means an organisation that systematically collects, preserves, and facilitates access to information resources, records, and objects without any purpose of direct or indirect commercial advantage. (Sample definition that includes all three types of memory institution.) |
| Format Neutral | |
| * May an archives make copies in any format, including digital copies?   Copyright law must enable the use of digital technologies by archival institutions. Exceptions must keep current with technology, and permit the making of copies in any format, regardless of the format of the work, the information carrier, or the mode of delivery. Here are some ways to check the law:   * Silence implies consent. If the law is silent on format, it implies that copies may be made in any format. * Search for the word ‘reprographic’ in the law. ‘Reprographic’ is generally understood to refer to photocopying. It should be deleted if it appears in a definition of ‘reproduction’ (if there is one), or if it appears in the wording of the archives exception itself. | An archives may make a copy in accordance with Sections [x] in any format. (Sample provision that asserts format neutrality.) |
| Safeguarding Exceptions in the Digital Environment | |
| * Are the exceptions granted to archives in copyright law safeguarded from override by licence terms?   Public policy goals enshrined in copyright exceptions must apply equally to both analogue and digital content in an archives’ holdings. However, legal exceptions can be overridden by contractual agreements.  For example, some archives are using private sector vendors to provide cloud storage for their digital holdings. If the vendor is in another jurisdiction, the cloud storage provider may fail to comply with the copyright and privacy laws of the repository’s jurisdiction. The mere presence of standard clauses establishing the choice of law that will govern an agreement may undermine the principle of territoriality that is the basis of international operation of copyright law.  Contractual overrides completely nullify the purpose of the exceptions. Thus, national copyright statutes must include a provision that permits an archives to invalidate any contractual provision that prevents or restricts it from doing any act that is consistent with the exceptions provided by law. | Any contractual provisions contrary to Sections [x] through to [x] shall be null and void. (EIFL Draft Law Art 21(4)) |
| * Where legal protection is granted to technological protection measures (TPMs), may an archives circumvent the TPM to avail itself of an exception to copyright?   Technological measures, or digital locks, used by copyright owners to control uses or to prevent infringing uses, can prevent lawful uses of material. Archives must be allowed to bypass such copy protection systems in order to access public domain material and to take advantage of exceptions in copyright law, for example, for the purposes of preservation or to serve persons with disabilities. | Any beneficiary of an exception or limitation under Sections [x] through to [x] shall have the means of benefiting from that exception or limitation where technological protection measures have been applied to a work, including where necessary the right to circumvent the technological protection measure so as to render the work accessible. (EIFL Draft Law Art 22) |
| Limitation on Liability | |
| * Does the law protect archivists from being sued for actions performed in good faith in the course of their duties?   In making their holdings available for use, archivists deal with questions of copyright and licensing every day. Archivists now need to understand and apply the law as part of their daily work, and they are often the first source of information on copyright for archives users.  Yet few archivists have the benefit of formal legal training, and most do not have access to specialist legal advice. A limitation on liability empowers archivists, acting in good faith, to fully utilize copyright exceptions, and to help manage risk when undertaking work such as digitization projects. | An archives, or a person acting under its authority within the scope of his or her duties, shall be protected from claims (including damages) arising from copyright infringement and from criminal liability arising from copyright infringement, when the action is performed in good faith:   * In the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of an exception in this Act, or in a way that is not restricted by copyright; or * In the belief, and where there are reasonable grounds for believing, that the work or material protected by related rights is in the public domain or under an open content license.   An archives, or a person acting under its authorityshall be exempt from liability for the actions of its users. (Modelled on EIFL Draft Law Art 12(12)) |
| A Flexible Exception | |
| * In addition to specific archives exceptions, are archives activities also supported by a flexible exception such as fair use or fair dealing?   The virtue of a flexible exception such as fair use/fair dealing is that the law can enable uses of copyright- protected content that were not foreseen when the law, with whatever specific exceptions for archives it may contain, was developed. It helps to keep the law up-to- date with technology, and with new ways of learning and sharing.  More than 40 countries around the world have a general, flexible exception in their copyright law. National laws should make clear that where particular categories of uses (e.g. by archives) are concerned, any specific exceptions are supplemented by the general, flexible provision. | In addition to the uses specifically authorized by section 8 through 17B, fair dealing with a copyright work, including such use by reproduction in copies or phonorecords for purposes such as research, private study, scholarship, teaching, criticism, comment, parody, review, or the reporting of news or current events, does not infringe copyright in the work.  For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including   * the nature of the work in question; * the amount and substantiality of that part of the work affected by the act in relation to the whole of the work; * the purpose and character of the use, including whether such use is of a commercial nature or is for non- profit educational purposes; and the effect of the act upon the potential market for, or the commercial value of, the work. (EIFL Draft Law Art 17C) |

## A Note on the Three-Step Test

The 3-step test is a clause that appears in treaties such as the Berne Convention (Article 9(2) that establishes the criteria to assess the scope of limitations on a copyright holder’s rights. The three-step test is a drafting tool or guideline to assist governments in determining the way in which particular exceptions and limitations are worded in national law. Because the exceptions, once drafted, are deemed to comply with the test, and because the test is not directed at users of exceptions, it should not be included in national law relating to exceptions for archives and libraries.

1. For a general overview of copyright, see Understanding Copyright and Related Rights, 2nd ed. (Geneva: WIPO, 2016), <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf> [↑](#footnote-ref-2)
2. Kenneth D. Crews, Study on Copyright Limitations and Exceptions for Libraries and Archives (Geneva: WIPO, 2015). Available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr\_30/sccr\_30\_3.pdf. [↑](#footnote-ref-3)
3. Note that EIFL’s Draft Law is “work in progress.” Its content may change over time. [↑](#footnote-ref-4)