

## Toolkit for jurisdictional / institutional guidelines on copyright: discussion draft

## Archives and copyright: toolkit for institutional guidelines

Archival material differs from other cultural artifacts in that it frequently engages the law far earlier and sometimes irrespective of any appraisal of value. Access, including privacy, patrimony, evidential value and copyright are typical areas involved. Most jurisdictions have also enacted specific protections and constraints on particular classes of archival material either within or without the custody of archival institutions that may work alongside their ownership or cut across the normal rights of proprietorial owners.

The International Council on Archives [ICA] has adopted a Copyright Declaration [2022] that sets out the principal issues for archival institutions arising from copyright and encourages the ICA community to support the broader libraries, archives and museums agenda at World Intellectual Property Organization (WIPO) to benefit the work of cultural memory institutions: <https://www.ica.org/resource/ica-copyright-declaration/>. ICA, in common with IFLA and ICOM, sends an observer representative to the WIPO Standing Committee on Copyright and Related Rights. Influencing Member States' intellectual property offices is key, though, as they are full participants.

Copyright is a different kind of property right, focusing on the intangible or intellectual content<sup>1</sup> and acknowledging the creative act of bringing it into being. It applies to copyright protected matter in the broadest range of created content: books, articles, letters, diaries, maps, videos, sound recordings, etc and it reserves to the creator – or rights owner – a number of actions in relation to the work:

- Copying
- Publishing
- Performing
- Distributing (including posting on the internet)
- Adapting or modifying

The principal goal of copyright is to reserve the benefit – usually financially - from intellectual investment in creation to the rights owner (usually the creator, at least to begin with) and so to achieve wider societal benefits such as encourage innovation and

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<sup>1</sup> other branches of intellectual property law include patents, trademarks, industrial designs, trade secrets. They may sometimes relate to the work of archival institutions, even archival material, but are not the focus here

creativity and facilitate access to knowledge and entertainment for the public. It generally does this through a time-limited monopoly over uses of works.

Many (most) archival material records the discourse between more than one creator. It follows that the copyright work will not usually map neatly to the archival unit aggregating as it does to include a number of works.

Whilst many of the copyright protections for creators are designed to reserve rights to copy, present to the public and so protect income streams through publication, they go broader. For example, much provision for unpublished works envisages the creator at some indeterminate date in the future initiating publication and with the option of deriving revenue from it. This and similar effects have far-reaching effects on archives, some of it arguably unintended given much archival practice and use is not in direct rivalry with that of creators.

Fortunately, many jurisdictions have enacted exceptions to the full range of copyright protections to enable archives to carry out their functions of acquiring, preserving and giving access to archival material. This also works to the benefit of society and culture, including creative activity, so is a route balancing off the normal operation of copyright to achieve some similar things. Most of these apply to acts by the archival institution itself rather than by their users but even there may only amount to providing onsite access to a single user or a single copy of an archival records for private study.

This toolkit will assist archives and archivists in navigating this complex area of law, understand how their particular circumstances facilitate and constrain practice and what information and assistance can realistically be given to the users of archives. It is designed to be customised for different settings and to support archivists in developing their copyright knowledge and applying it to their practice.

## Know your collection

You will need to understand copyright as it applies to your archival institution's remit and collecting activity. **Different types of material may have different copyright periods, with different triggers: that for literary copyright might not be the same as artistic, photographic or film / video**

Different types of creators may engage copyright differently, e.g. state and other public authorities<sup>2</sup>, corporations or associations with members and/or employees, private individuals. In jurisdictions such as Sweden and the USA, national governments have no overarching copyright. The UK and some Commonwealth countries have a unified Crown copyright. Many governments worldwide have liberalised their [state] copyright management to align with transparency or open data policies for officially-created material<sup>3</sup>.

## Acquire as much information as possible prior to and at acquisition

Extent of published material

Most archival material is unpublished and will not have copyright statements made by their creators to assist with copyright management. Prominent or eminent people – or their heirs - may be far easier to track biographical information for than others. Record rights information in catalogue descriptions to assist archivists and archival service users

Keep copyright records not suitable for descriptions with other collections management information, e.g. on acquisitions, donors, authors

## What to do about orphan works?

For some archival material, including but not limited to anonymous material, the identity of the rights owner can be obscure either because it was never clear or it has

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<sup>2</sup> Article 2(4) of the Berne Convention leaves it up to national legislation what protection applies to legislation, administrative and legal texts

<sup>3</sup> A public authority in correspondence with non-public entities such as corporations or individuals will only own copyright in the side of the correspondence they created, irrespective of the ownership of the archival material in its context

been lost over time. Intellectual Property Offices and other policy authorities have sometimes sought to make it possible either to license or have exceptions for such works in cultural institutions. The problem with archival material is that aggregations of documents have multiple creators multiplying the challenge of attempting to trace them even to satisfy the terms of such schemes<sup>4</sup>, let alone to seek permission direct. Similarly a broader category of “out of commerce” works (ones still in copyright but no longer distributed by the rights owners) can be the subject of a licensing scheme in the European Union, but it is likely to involve attempts to consult potential rights owners, Where multiple, untraceable rights owners are in play, it might be possible to take a risk-based approach. This is discussed in a later part.

#### **Broad illustrative schematic of likely copyright issues with different types of archival institutions and material**

<b>Broad type of collection<sup>5</sup></b>	<b>Main copyright subsistence[s] likely to be</b>	<b>Other likely copyrights to manage</b>
<b>State, federal, national public archives*</b>	State / federal copyright if it exists in works created by official employees	External bodies' / persons' correspondence to public bodies will be the copyright of the former
<b>Municipal or local government*</b>	May depend on the constitutional basis of local authorities, possibly similar to state or different	“
<b>Commercial companies or other incorporated bodies*</b>	Copyright in works create by employees probably vest in the corporation but are sometimes linked to the employee’s lifespan	“ Works of commercial value might indicate a heightened degree of copyright risk
<b>Community archives</b>	By definition a complex picture with content crowdsourced from many creators	If the archival institution has a close community-based relationships it might be possible to encourage

<sup>4</sup> a typical model is to make the licence or exception dependent on a public registration of a “diligent search” for rights owners and payment into a fund to remunerate any who come forward and can substantiate claims

<sup>5</sup> Note: this table does not attempt to go beyond copyright in archival material, into copyright in the operations or management of an archival institution

		creators to assign copyright on deposit
<b>University archive*</b>	Typically broad collecting remits mean a complex picture is likely	
<b>Literary archive*</b>	If focused on a remit of a discrete number of prominent authors the rights of each or their heirs will need thorough investigation unless they can be assigned or licensed. The crossover between creative manuscripts and the subsequent published works will require great care	External persons' correspondence to the main subject will remain the copyright of the former
<b>Private estate or family archives*</b>	Close liaison with owners or their legal advisers will be necessary and may need to be reflected in deposit agreements setting out handling of copyright	External persons' correspondence to the main entity will remain the copyright of the former

*\*Note: There will also be implications from whether the archival institution is in-house as regards the governing entity or external, needing instruments giving authority to handle the copyright*

*More information is given on the archival functions of acquisition, preservation and giving access in later sections.*

## **Know the copyright laws applying in your jurisdiction**

*[This page and Annex 1 can be replaced by reliable researched information on a jurisdiction's applicable law, EGLM suggests by a professional body, archival leadership body or other national expert committee. It could be further specialised by tailoring to a particular (group of) archival institution(s). Depending on the results of this enquiry, the subsequent sections could also be tailored]*

## **The ICA WIPO Representative has developed an online training workshop to support the ICA community to research which copyright laws are relevant in their jurisdiction**

Copyright law is mostly national legislation and case law reflecting and implementing international Conventions and Treaties<sup>6</sup>. The extent of national provision varies: it is recommended that archival institutions identify, reference and maintain the relevant legislation that applies to them and work the implications through their institutional policies and practice. The relationship of applicable copyright law to archival material and the activities of archival institutions may involve an interface with records, archives-specific or other legislation.

### **Uncertain primacy of laws: which one takes precedence?**

Example: an archive in a jurisdiction with no preservation exception has a legal obligation to preserve its holdings. Both digital and actively used physical collections require copies to be made to preserve them. Legal advice may be required on how to proceed. Sometimes statutory interpretation legislation or case law can be of assistance in resolving the tension, e.g., if it is significant in the jurisdiction when legislation was passed and the archives law was a more recent expression of the legislature's will. The WIPO *Toolkit on Preservation* and professional knowledge of preservation practice will be invaluable in analysing the problem, instructing legal advisers and/or advocacy.

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<sup>6</sup> Some major characteristics of copyright law applying internationally are derived from the Berne Convention. For example copyright protection being automatic unless waived or expired and not reliant on being claimed or registered. A very small number of countries have not yet ratified it.

## Exceptions to copyright

Most applicable exceptions are made for libraries, archives and museums [LAM] in the same breath and specific archival issues are not always addressed. One major requirement behind the *ICA Declaration* was to clarify the specific needs of archives which may not align with those of libraries or other cultural heritage institutions.

Occasionally, exemptions derived from overlap with other sectors or principles are relevant to archives, for example:

- Fair use [e.g. US] / dealing [e.g. UK, Canada]<sup>7</sup>
- Private research and study
- Education and instruction
- Public administration (for public archives)
- Open data or information access regimes

Archives have a far higher prevalence of unpublished material in their collections compared to libraries. How national laws handle unpublished copyright can vary and keeping it updated with the expectations of archive service users has not always been a legislative priority. In some cases, this has led to perpetual or very lengthy copyright terms.

You will need to understand clearly the triggers for copyright terms as well as the terms of protections themselves. For literary works authored by natural persons or other unpublished material, it may link to lifespan of individuals, even if the copyright belongs to their employer. Where works are anonymous or pseudonymous, the copyright period usually starts from the date of their being disseminated to the public, unless the author is identified subsequently. Copyright periods for sound recordings, photographs, films etc., might be different. The sorts of techniques you use to determine lifespan for archival access may need to be deployed to manage copyright.

Some of the terminology used in copyright is also used in understanding other information rights, but to mean something else. A good example is “public domain” which frequently means copyright term has expired but could equally be used to describe access status, which is quite separate and will not necessarily map. It is also

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<sup>7</sup> The Fair Use / Fair Dealing Handbook Band, J. & Gerafi, J. ([updated edition](#)) listed over 40 jurisdictions with such provisions in 2023



worth remembering that copyright is a *property* right, not strictly an information one although it has consequences for the use and management of information, including in archival material.

The following actions are recommended:

- Insert [links to] your applicable legislation at Annex 1 and keep it up to date.
- Assess your applicable legislation against the *checklist* written by the ICA's WIPO Representative, accessible from: <https://www.ica.org/resource/copyright-exceptions-for-archives-a-checklist/>
- Compile flowcharts of applicable copyright terms covering the main categories of material in your collection to assist staff and users of the timescales when copyright considerations remain live.
- Monitor developments in your national law for changes to copyright

Consider how to become involved in your professional body's - or national archival institution's - lobbying for better copyright exceptions<sup>8</sup> / support for keeping LAM issues notified to your national intellectual property office.

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<sup>8</sup> The Berne Convention Article 9(2) permits the granting of national exceptions provided they meet a three-step test: applying to 'certain special cases', not conflicting with the normal exploitation of the work and not unreasonably prejudicing the legitimate interests of the author,

## Acquisition

The amount of information on applicable copyright that can be gained when acquiring new archival material will vary, but in almost all cases it provides an opportunity to do so that may not be repeated. The immediate source of acquisition is one step nearer the creator than the archivist is.

Some types of archival material have a simpler copyright status than others, usually boiling down to the number and prominence of the creators of the material. For example, contrast a literary archive of essentially one author with their manuscripts and little external correspondence with a business archive with aggregations of records relating to suppliers, customers and dealings with the wider community.

Some archival material can only be acquired through copying, particularly born-digital material: it will be necessary to ensure this is permitted either through the operation of a copyright exception or the granting of permission, e.g. through the issuing of a licence.

Cataloguing new accessions should include adding copyright information to archival description at an appropriate level. *The extraction of factual information from archival material for catalogue entries is highly unlikely to involve any infringement of copyright.*

Acquiring ownership of archival material through purchase will not usually include acquiring the intellectual property rights, unless the transaction is with someone authorised to assign them and an effective assignment is made. Material donated or deposited – especially by the creator directly – may come with copyright stipulations or an opportunity to negotiate these. A clear standard acquisition agreement including a licence for use of the material or an assignment of rights is recommended.

Occasionally, archival institutions may have opportunities for archival material to be acquired with a licence from the copyright holder to give access to service users. Exceptions are usually of far greater use to archival institutions than licences as they are less likely to apply to particular material and uses. The transactional nature of licences also involves more administration (in agreeing, documenting, implementing and tracking across the copyright term to avoid infringement) that would rarely be scalable across a large collection. There may be some utility in licences for some archives with particularly close relationships with depositors.

## Preservation

Preserving archives, an essential part of our professional mission, frequently requires the making of copies to mitigate physical damage or assist with technological obsolescence even to achieve the minimum of ensuring one instance survives. Shifting formats, e.g., from physical to microfilm or to digital formats through digitisation is also a type of copying. Without these facilities, only passive preservation of a single physical instance can be achieved and digital probably not be preserved at all.

Preservation exceptions to copyright ideally provide for both clearly and permit multiple copies provided they do not bypass copyright protection for presentation or material to the public.

Archival institutions in jurisdictions without appropriate preservation exceptions but with legal preservation duties (i.e. particularly public archives) may need to seek legal advice on how the obligations can be squared.

The *Toolkit on Preservation* published by WIPO has detailed considerations and framing / drafting guidance for an effective preservation exception for archives, as well as libraries and museums (pp15-23).

Reference: <https://www.ica.org/ica-welcomes-wipos-new-toolkit-a-key-resource-for-archives-libraries-and-museums/>

## **Giving access (including digitisation)**

Copyright issues in archival use are generally better understood than other parts of the lifecycle of archival material, but it can be made easier by addressing the preceding issues holistically. They also need to be considered when configuring services an archival institution can provide to researchers and how it does so.

You may observe from your study of exceptions that they are generally designed to support private, individual study and research and not onward use and exploitation by either users or archival institutions themselves (in some jurisdictions, unfortunately, not mass digital access either). This section deals with the two phenomena separately:

### **Traditional access models**

**Copying of records in archives: by archivist or researcher?** Where a jurisdiction has a 'fair dealing' or similar exception to permit the taking of a copy of a work for private study or research, it may make sense for an archive to permit researchers to copy (photograph) archival material themselves, subject to appropriate collection care procedures. Where there is a more specific exception for an archivist (it is sometimes contained in a general way grouping the profession with librarians) to provide a single copy to an individual – including one accessing services remotely - for the same purpose, this may facilitate the staff of an archival institution taking and providing the copy without infringement. Such exceptions on their own do not permit mass or onward transmission.

Archival institutions should provide at least minimal copyright guidelines to researchers, not least to safeguard themselves from secondary infringement actions. Copies supplied under the preceding types of exception could be accompanied by a notification that they are provided for personal use, not including transmission to others including by social media posting. If resources do not permit the institution to go any further, some wording for a basic disclaimer of responsibility for researchers' copying to be displayed in service information and reading rooms is provided at Annex 3 (this is not a replacement for a notification with copies supplied).

Where the Marrakesh Treaty has been implemented, it is not an infringement to create accessibility copies for visually impaired researchers.

## **Digital / mass access models**

Digital surrogates do not usually involve a sufficiently creative act to give rise to new copyright, so consideration of copyright issues with digital access needs usually to focus on the subsisting rights of the original rights holder.

Transmitting copies of archival material – born digital or digitised - over and between computer networks creates a plethora of copies, even before one of them is accessed by a researcher. If the material is in copyright, and depending on exceptions and access to information laws, web hosting and /or transmission to remote users may create infringing copies. Sometimes this can be overcome by introducing a transactional request under archival access or freedom of information law as part of a web interface or enquiry service, provided that aspect of access operates irrespective of copyright.

## **Cross-border uses**

The Berne Convention provides for mutual recognition of copyright in member countries and seeks the broad harmonisation of most copyright terms. This does not mean one state's copyright laws have direct effect in another, but that broadly equivalent protections usually exist. Archival institutions with international collections or shared archival heritage should be aware of the implications where there is divergence relevant to these. For example, sound recordings have significantly longer copyright protection in the United States than most other countries. Some copyright material may also be subject to jurisdiction-specific exceptions or licences eg the European Union's Orphan Works Directive or those of original publishers. Archival institutions may need to restrict access of such material to the jurisdiction (eg by geo-blocking).

## **Licensing**

Licensing partnerships can be constructed to leverage commercial investment in digitisation that archival institutions can rarely afford themselves, particularly for name-rich content with a broad public user interest. As a general rule, archives will only be able to licence the onward use of in copyright archival material they either own (through first ownership or assignment), have licensed to cover this and/or out of copyright material. The last scenario itself is not strictly a licence of copyright. Some of these licensing models operate instead under a basis of contract, i.e., the provision of an

online service, rather than a copyright licence. Archival institutions taking their first steps in this complex area will need to take appropriate legal advice. Commercial partners sometimes accept contractual conditions to indemnify the institution from third party copyright claims.

### Initiatives to permit archival use and re-use

Some jurisdictions have put licensing (or even exception) schemes in place to ease blocks to the use of cultural heritage material. They have specific provisions to uphold the interests of rights holders. EU and Canadian initiatives on **orphan works** have already been mentioned and usually operate at the level of individual works, which can be problematic for archival aggregated material.

The EU Directive on Copyright in the Digital Single Market (DSM Directive), in force since April 2019, aimed to modernise copyright for the digital age. The DSM Directive empowers archives to share more of their collections online, increasing accessibility to cultural heritage for a wider audience. For archival institutions, it introduces key provisions enabling broader online access to cultural heritage materials. Specifically, the directive allows institutions to share **out-of-commerce** works—those no longer available through customary channels of commerce—without needing individual permissions from rightsholders. This is facilitated through two mechanisms:

- **Extended Collective Licensing:** Where Collective Management Organisations (CMOs) are deemed 'sufficiently representative' of rightsholders, they can issue licences covering both members and non-members. This simplifies obtaining permission for large-scale digitisation and presentation projects;
- **Fallback Exception:** When no representative CMO exists for a specific type of work (e.g., software, databases), institutions can make these works available online without a licence.

Both require registration with the European Union Intellectual Property Office (EUIPO), and a six-month waiting period. The directive also includes an opt-out mechanism for rightsholders who wish to have their works removed from online platforms. Approximately 2.2 million works had already been registered by October 2024

## **Onward use and re-use**

Decisions on how much involvement to have with service users' copyright needs, e.g. few institutions are resourced to assist users with rights clearances but as a minimum need to alert users to their responsibilities, such as moving from research to publication, and deploy disclaimers.

Many researchers have expectations of what they can do with material they encounter in archives that are incompatible with any subsisting copyright, e.g., posting on social media, which is a type of distribution or publication. Similarly, archival outreach and engagement programmes may encourage user-generated activity beyond researchers who can be expected to be trained in legal issues such as copyright. A spectrum of approaches can be taken, ranging from disclaimers, drawing attention to copyright information in archival descriptions, copying notices and even to user training.

Artificial intelligence and archival collections [v brief; focus on TDM?]

## Managing copyright risk

Different archival institutions will manage the risks of copyright infringement differently according to their mission, applicable professional / ethical codes, the law in their jurisdiction (including how clear it may be), the nature of their collections and their tolerance for risk.

### Considering a 'risk-based' approach

Some archives in jurisdictions lacking copyright exceptions will take the judgment of risking infringement in carrying out their activities. This is a bold move that will need senior understanding and endorsement, as well as careful management to keep risks manageable and within their tolerance for risk. Public officials may not have this option owing to professional codes. This section explores some of the components of infringement risk in archival work: it is not comprehensive as there are many permutations but should give relevant pointers.

Steps two and three of the “three-step test” for the formulation of national copyright exceptions in Article 9(2) of the Berne Convention can be useful to apply here too as doubts about their applicability to activities by archival institutions will help predict risk: i.e., if these conflict with the normal exploitation of the work and/or unreasonably prejudice the legitimate interests of the author. It is also worth remembering that copyright exceptions may exist to enable archival institutions to carry out their core functions but not to enable them to make commercial revenue from third party copyright.

### Collection characteristics and copyright risk (see also *Know your collection* section above)

It follows from the Berne Convention test that the following variable characteristics of archival collections may affect infringement risk arising from an archival institution's functions:

Category	Source of risk
Extent, type of published material held	Copyright owners who have invested in publishing for a return are not going to want an archival institution or its researchers to be in competition with them



Material of recent date	Material where the investment in creation is recent may merely indicate the creator has not got round to publishing it yet
Economic potential of collection material	The more the potential exploitation value, the more the rights owner will be concerned with exploiting it themselves
Extent of orphan works	Doubt over the ownership of remaining rights <b>may</b> indicate the owners are not interested in asserting them

### Researcher guidance and behaviour

Archival institutions should provide researchers with at least minimal guidance on copyright on the archival material in their collections to inform their actions when working with it.

Descriptive information should where possible include copyright status and in some cases it may be possible to have some information on copyright ownership. Archival institutions may also deploy digital asset or rights management systems to record copyright (until its expiry) and inform their own and researchers' actions.

Few archival institutions will have the resources routinely to assist with copyright clearance but even there they should state clearly that researchers are responsible for checking copyright and seeking required permissions, even if all that can be provided is a clear disclaimer<sup>9</sup>. Care will be needed to ensure that users do not gain the impression that exceptions in some acts legitimise all others: for example there may be an exception to permit copying for personal research that only authorises one copy at a time and does not include any right of publication.

Ideally, archival professionals should be indemnified in national laws from liability for any infringement committed by researchers.

<sup>9</sup> Sample text for a basic disclaimer is in Annex 3

## Takedown

The first action rights owners often take in asserting copyright is the issue of a “cease and desist” communication, usually but not necessarily in quite formal terms. It may be accompanied by a claim against the infringing party. Where it is not, rights owners are sometimes placated by the infringement ceasing from that point, Takedown from websites clearly reduces the risk from primary infringement. The archive may need to attend to secondary infringements by third parties facilitated by its initial ones as part of takedown, although if prudent action has been taken to inform service users the risks can be substantially reduced. Ceasing to produce or permit other copies of works objected to by rights owners will need careful consideration as they may be covered by specific exceptions or fair dealing / use if in place in your jurisdiction.

## **Annex 1: Applicable copyright legislation**

## **Annex 2: Model copyright policy paragraphs**

### **Annex 3: Basic disclaimer notice to archival researchers**