



**WIPO Standing Committee on Copyright and Related Rights
SCCR33 -- November 2016**

ICA Statement on Limitations on liability for libraries, archives, and museums

Archival institutions have two primary roles: to preserve materials in their care, and to make those materials available for study and research by everyone, no matter what they wish to study or who or where they are. In both roles, archives engage copyright. When an archives serves an individual user, by supplying a copy of a copyright work in accordance with any relevant exception permitting the activity, liability for any unlawful use of that copy should rest with the user, not the archives. Stated more broadly, where copyright regimes provide for secondary liability, archives and libraries should be exempt from liability for the actions of their users.

However, archives also engage copyright when they perform functions that serve the broader public interest to benefit many users, or to safeguard the records themselves, for example, making preservation copies of fragile originals or mass digitization to make records available online. In doing so, an archives is a user of its own resources, and the professional principles and codes of ethics that undergird archival work require the archives to take reasonable steps to protect the interests of the owners of rights in the works in their collections.

My doctoral research clearly demonstrated that fear of legal liability has made North American archivists extremely cautious when selecting what is made available online. They choose only holdings in which they own the copyright or in which the copyright has expired. Consequently, their online offerings are but a fragment of an archives' rich holdings, and may not be what best serves users' interests. The information service to which the public is entitled is greatly diminished. Furthermore, given the vast extent of works in its care (including the high proportion of orphan works), and the complexity of copyright law, an archives may unwittingly contravene the law when making or disseminating copies while serving the broader public interest.

Thus, archives and libraries require limitations on liability for their actions, subject to the following conditions. For limited liability to apply, the contravening action must be for non-commercial purposes, and the archives must be able to demonstrate that it acted in good faith, with no reasonable ability to identify or locate the rights holder. In such circumstances, remedies should be limited to civil penalties such as an injunction to remove specified material from an online service or cease the infringing action, and/or a limit on the amount of damages based on the actual economic harm suffered by the rights holder. Such a limit on liability will enhance the range of online offerings and equip archivists to better serve society.

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