

Archives and Copyright

The principal themes of the
Background Paper

David Sutton

Director of Research Projects, University of Reading Library, UK

**Regional Seminar
Nairobi
12-13 June
2019**



Dr David Sutton FRSA FRSL

Director of Reading Research Projects (Location Register & WATCH)

Director of the Diasporic Literary Archives Network

Editor of the UK Location Register of Literary Manuscripts

Chair of the Group for Literary Archives & Manuscripts (GLAM)

Member, Executive Board, International Council on Archives

Chair of the ICA Section on Archives of Literature & Art

THE MEANINGS OF “ARCHIVES”

In many languages, the word for archives has multiple meanings:

- ▶ Archives as documents (archival collections)
- ▶ Archives as buildings (archival repositories)
- ▶ Archives as organizations (archival institutions)

- ▶ A descriptive definition of archival collections is provided by the **Universal Declaration on Archives** (as adopted by UNESCO)

ARCHIVAL INSTITUTIONS

- ▶ Archival institutions may charge for some of their services (especially copying), but they are essentially not-for-profit organizations.
- ▶ Archival collections may be held in many types of institutions
- ▶ These include archives, libraries and museums (often grouped as a trio)
- ▶ But also: universities, hospitals, private foundations, authors' houses, religious organizations, charities, arts bodies, community groups, businesses and government departments
- ▶ Archival collections are thus not restricted to institutions known as “Archives”

CATEGORIES OF ARCHIVES

The Background Paper enumerates a wide range of types of archives, as follows:

- ▶ Archives of archaeology
- ▶ Architectural archives
- ▶ Business archives
- ▶ Archives of community groups
- ▶ Archives of disability
- ▶ Educational archives
- ▶ Film archives
- ▶ Archives of folklore and traditional beliefs
- ▶ Archives of foundations, societies, clubs and associations#
- ▶ Archives of heraldry, vexillology and sigillography
- ▶ Archives concerned with human rights and liberation struggles
- ▶ Archives of indigenous people
- ▶ Labour and trade union archives
- ▶ Legal, judicial and notarial archives
- ▶ Archives of lesbian, gay, bisexual and transsexual (LGBT) movements
- ▶ Archives of literature, art and the theatre
- ▶ Archives of local, municipal and territorial governments

CATEGORIES OF ARCHIVES, CONTINUED

The enumeration of this wide range of types of archives continues (M-Z):

- ▶ Medical and hospital archives
- ▶ Military archives
- ▶ Mixed media archives
- ▶ Archives of museums
- ▶ Music archives
- ▶ Archives of national governments and their departments
- ▶ Oral history archives
- ▶ Parliamentary archives
- ▶ Photographs
- ▶ Archives of political parties
- ▶ Religious archives
- ▶ Archives of science, technology and mathematics
- ▶ Sports archives
- ▶ Archives of transport and travel
- ▶ Archives concerning women and women's rights


“SPLIT COLLECTIONS”

Although archival items are usually unique, archival *fonds* may be divided across several institutions, and sometimes across several countries.

- ▶ Authors' papers – examples including

- Léopold Sédar Senghor [Senegalese poet with some literary papers in France (Senegal has no Exceptions and Limitations)]

- The papers of J. M. Coetzee [South African] are split between Grahamstown and Texas

- ▶ Split collections are often held in different countries under different copyright regimes
 - ▶ The correspondence of any particular cultural creator or public figure is **always** split between multiple institutions (normally in the archival collections of the recipients, not those of the creators)
- 

DIASPORIC ARCHIVES

Certain types of cultural archives are diasporic in nature and often cross boundaries. Examples of African literary authors include:

- ▶ Papers of Chinua Achebe (Nigerian author) in Harvard University Library
- ▶ Papers of Amadou Hampâté Bâ (Malian author) in the IMEC, near Caen
- ▶ Papers of Mohammed Dib (Algerian author) in the Bibliothèque nationale, Paris
- ▶ Papers of Léopold Sédar Senghor (Senegalese poet) in Paris as well as Dakar
- ▶ Papers of Sony Labou Tansi (Congolesse author) in the Bibliothèque multimédia de Limoges
- ▶ Papers of Mahmûd Taymûr (Egyptian author) in the Lilly Library, Indiana University
- ▶ Papers of Amos Tutuola (Nigerian author) in the University of Texas and Syracuse University

BORN-DIGITAL ARCHIVES AND DIGITIZED ARCHIVES


These are the two types of digital archives.

- ▶ Most archivists see born-digital archives as simply archives in another format, to which all the normal rules of archives apply
- ▶ Digitization, by contrast, refers to making digital copies of born-analogue archival materials and is fraught with copyright challenges

THE IMPORTANCE OF MAKING COPIES OF ARCHIVES

- ▶ Preservation copying (analogue and digital)
- ▶ Bringing together complementary collections by copying
- ▶ Reconstituting archival collections which have become split
- ▶ Copies for exhibitions
- ▶ Copies for safety and security, including “archival safe havens”
- ▶ Making copies rather than originals available to users
- ▶ Copying for users' research purposes
- ▶ Copying for teaching purposes

WAYS IN WHICH ARCHIVES CROSS BORDERS

- ▶ Archival rescue
 - ▶ International cooperation to preserve unique archival collections
 - ▶ Digital preservation across borders
 - ▶ Exhibitions and other loan arrangements
 - ▶ Copies for research
 - ▶ Sharing copies to strengthen “split collections”
 - ▶ Copies for preservation, safety and security
- 

“ORPHAN WORKS” IN THE WORLD OF ARCHIVES

- ▶ “Orphan works” are commonplace in archives
- ▶ Archival copyright holders can be especially difficult to trace
- ▶ A key reason for this is that the archival collections generally have little exploitable financial value
- ▶ This is still more true of individual archival items
- ▶ Archives are therefore especially susceptible to the “orphan works paradox”
- ▶ The “orphan works paradox” indicates that the lower the financial value of a work, the less likely it is that the copyright owner can be traced

THE PARTICULAR EXAMPLE OF CORRESPONDENCE COLLECTIONS

- ▶ Correspondence collections present a strong example of the difficulties faced in clearing archival copyright
- ▶ One correspondence collection may include several thousand copyright holders
- ▶ The copyrights have little or no commercial value
- ▶ Copyright holders are very difficult to trace
- ▶ Even when traced, the copyright holders are often unaware that they own these copyrights
- ▶ A single letter may have its copyright shared between 20 or more heirs
- ▶ Correspondence collections are consequently an under-exploited part of cultural heritage

COPYRIGHT LEGISLATIONS AND ARCHIVES

- ▶ Published and unpublished works
- ▶ Wide variation within national legislations
- ▶ Variations in duration
- ▶ Special clauses for unpublished works in some legislations
- ▶ The importance of the public domain
- ▶ The limited relevance of Extended Collective Licensing in respect of archives

THE AFRICAN REGION
AND THE
EXISTING EXCEPTIONS AND LIMITATIONS
FOR ARCHIVES



COUNTRIES IN THIS REGION WITH NO LIMITATIONS OR EXCEPTIONS FOR ARCHIVES IN THEIR COPYRIGHT LEGISLATION

- Burkina Faso
- Cameroon
- Comoros
- Democratic Republic of Congo
- Equatorial Guinea
- Eritrea
- Gabon
- Guinea
- Libya
- Namibia
- Togo
- Somalia [not for archives]
- Senegal

COUNTRIES IN THIS REGION WITH LIMITATIONS OR EXCEPTIONS FOR ARCHIVES IN THEIR COPYRIGHT LEGISLATION



Countries in this Region
with **SPECIFIC**
Limitations or Exceptions
for Archives in their
Copyright Legislation

Countries in this Region with
GENERAL
Limitations or Exceptions for
Archives in their Copyright
Legislation

COUNTRIES IN THIS REGION
WITH SPECIFIC
LIMITATIONS OR EXCEPTIONS FOR ARCHIVES IN
THEIR COPYRIGHT LEGISLATION



Archival activities and the commonalities in the current copyright framework in countries of the region

SPECIFIC ARCHIVAL ACTIVITY

MAKING COPIES

(a) For research or study

(b) For preservation and replacement

(c) Personal Copying

(d) Archive use/users

(e) Use by other institutions

SCOPE OF WORKS

**All Categories of Works
i.e. All lawfully published works/
All works**

- Côte D'ivoire
- Malawi

- Algeria
- Benin
- Botswana
- Cabo Verde
- Chad
- Egypt
- Ethiopia
- Gambia
- Ghana
- Liberia
- Madagascar
- Malawi
- Mali
- Mauritania (only replacement)
- Mauritius
- Morocco
- Mozambique
- Niger
- Rwanda
- Sierra Leone
- Sudan
- Tunisia
- Zambia
- Zimbabwe

- Algeria [single copy]
- Angola [including transformation, adaptation and translation]
- Burkina Faso
- Chad [excluding works of art intended to be used for purposes identical to those for which the original works were created]
- Cote D'Ivoire
- Egypt
- Madagascar
- Morocco
- Niger
- Senegal
- Seychelles (single copy)
- South Africa

- Angola
- Burundi
- Cabo Verde
- Congo
- Djibouti

- Algeria (when it is impossible to obtain copies under reasonable conditions)
- South Africa

Archival activities and the commonalities in the current copyright framework in countries of the region	SPECIFIC ARCHIVAL ACTIVITY				
--	-----------------------------------	--	--	--	--

MAKING COPIES	(a) For research or study	(b) For preservation and replacement	(c) Personal Copying	(d) Archive use/users	(e) Use by other institutions
----------------------	----------------------------------	---	-----------------------------	------------------------------	--------------------------------------

SCOPE OF WORKS (Contd.)				
--------------------------------	--	--	--	--

Specific Category of Works i.e. only literary works in specific forms such as: article form; excerpts from published articles; and short extracts	<ul style="list-style-type: none"> ➤ Algeria ➤ Botswana ➤ Egypt ➤ Ethiopia ➤ Gambia ➤ Ghana ➤ Madagascar ➤ Liberia ➤ Madagascar ➤ Mali ➤ Mauritania ➤ Mauritius ➤ Mozambique ➤ Niger ➤ Rwanda ➤ Sierra Leone ➤ Tunisia 		<ul style="list-style-type: none"> ➤ Djibouti [subject to remuneration] 	<ul style="list-style-type: none"> ➤ Benin [single copy] ➤ Chad 	
---	---	--	--	---	--

Excluded Category of Works: Computer Programs specifically excluded	<ul style="list-style-type: none"> ➤ Algeria ➤ Malawi ➤ Madagascar ➤ Mali ➤ Mauritania ➤ Mozambique ➤ Niger 	<ul style="list-style-type: none"> ➤ Malawi [excluded if copy is machine readable] 	<ul style="list-style-type: none"> ➤ Burkina Faso ➤ Cote D'Ivoire 	<ul style="list-style-type: none"> ➤ Benin ➤ Chad ➤ Morocco 	
---	--	---	---	--	--


Data extracted from the 'Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)' (SCCR 35/6)

Archival activities and the commonalities in the current copyright framework in countries of the region	SPECIFIC ARCHIVAL ACTIVITY				
MAKING COPIES	(a) For research or study	(b) For preservation and replacement	(c) Personal Copying	(d) Archive use/users	(e) Use by other institutions
Applicable to works in collections	➤ Malawi	➤ Sudan ➤ Zambia			
Applicable to works in permanent collections		➤ Benin ➤ Mauritius ➤ Mozambique ➤ Zimbabwe			
Applicable specifically to unpublished works	➤ Nigeria (only literary and musical works) ➤ Zimbabwe	➤ South Africa ➤ Sudan			➤ South Africa

Archival activities and the commonalities in the current copyright framework in countries of the region	(a) For research or study	(b) For preservation and replacement	(c) Personal Copying	(d) Archive use/users	(e) Use by other institutions
MEDIUM OF COPIES					
Medium of Copy Not Specified	<ul style="list-style-type: none"> ➤ Algeria ➤ Liberia ➤ Tunisia (only reproduction is specified) 	<ul style="list-style-type: none"> ➤ Algeria ➤ Liberia ➤ Mauritania (only applicable for replacement) ➤ Tunisia (only reproduction is specified) 			<ul style="list-style-type: none"> ➤ Algeria ➤ Mauritania (only replacement)
Specific Medium of Copy i.e. only reprographic reproduction	<ul style="list-style-type: none"> ➤ Gambia ➤ Ghana ➤ Seychelles ➤ Mozambique ➤ Madagascar ➤ Mali ➤ Mauritius ➤ Morocco ➤ Rwanda ➤ Sierra Leone ➤ Tanzania ➤ Mauritius ➤ Mozambique ➤ Niger ➤ Rwanda ➤ Sierra Leone 	<ul style="list-style-type: none"> ➤ Benin ➤ Cabo Verde ➤ Chad ➤ Gambia ➤ Ghana ➤ Madagascar ➤ Mali ➤ Mauritius ➤ Morocco ➤ Niger ➤ Rwanda ➤ Sierra Leone 		<ul style="list-style-type: none"> ➤ Benin ➤ Chad ➤ Mali 	

MAKING COPIES	(a) For research or study	(b) For preservation and replacement	(c) Personal Copying	(d) Archive use/users	(e) Use by other institutions
MEDIUM OF COPIES (contd.)					
Specific Medium of Copy i.e. photography or other analogous format	<ul style="list-style-type: none"> ➤ Angola ➤ Lesotho (specifically includes electronic storage) ➤ Burundi ➤ Cabo Verde ➤ Congo ➤ Djibouti 	<ul style="list-style-type: none"> ➤ Malawi 			

COUNTRIES IN THIS REGION WITH
GENERAL
LIMITATIONS OR EXCEPTIONS FOR ARCHIVES IN THEIR
COPYRIGHT LEGISLATION



General Exception for Archives in the Legislations of the Countries in this Region

Archival activities and the commonalities in the current copyright framework in countries of the region	Countries	Specific mention of the elements of the Three-Step Test in the legislation
Applicable to all lawfully published works/ all works	<ul style="list-style-type: none"> ➤ Lesotho ➤ Uganda ➤ Burundi ➤ Central African Republic ➤ Congo ➤ Djibouti ➤ Somalia ➤ Tanzania 	<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ ✓ ✓
Applicable only to works in article form, excerpts from published articles and short extracts	<ul style="list-style-type: none"> ➤ Guinea-Bissau 	
Notice to the users by the archive to ensure non-commercial use	<ul style="list-style-type: none"> ➤ Guinea-Bissau 	
Permitted use without remuneration to the author	<ul style="list-style-type: none"> ➤ Lesotho ➤ Tanzania ➤ Malawi 	<ul style="list-style-type: none"> ✓ ✓
Only elements of the Three-Step Test mentioned without any general exception	<ul style="list-style-type: none"> ➤ Namibia 	

INTERSECTION OF
EXCEPTIONS OR LIMITATIONS FOR ARCHIVES WITH
OTHER ASPECTS
RELATED TO COPYRIGHT



EXCEPTIONS AND LIMITATIONS SUBJECT TO MORAL RIGHTS

▶ **Both Attribution and Integrity**

- Sudan
- Egypt
- Malawi

▶ **Only Attribution**

- Angola
- Central African Republic

EXCEPTIONS AND LIMITATIONS APPLICABLE TO RELATED RIGHTS

- Malawi
- Benin
- Burkina Faso (E&L are only applicable for the purpose of private use)
- Djibouti (E&L are only applicable for the purpose of private use)
- Sudan

EXCEPTIONS AND LIMITATIONS APPLICABLE ONLY FOR NATIONAL ARCHIVES IN COUNTRIES OF THE REGION

- Lesotho
- Malawi
- Nigeria (reproduction is non infringement)

ARCHIVAL INSTITUTIONS

Archival activities and the commonalities in the current copyright framework in countries of the region	(a) For research or study	(b) For preservation and replacement	(c) Archive use/users	(d) Use by other institutions
No indirect or direct commercial profit; or No indirect or direct profit making; or No indirect or direct gain/financial gain	<ul style="list-style-type: none"> ➤ Botswana ➤ Chad ➤ Ethiopia ➤ Madagascar ➤ Mauritius ➤ Mozambique ➤ Niger ➤ Rwanda ➤ Seychelles ➤ Sierra Leone 	<ul style="list-style-type: none"> ➤ Algeria ➤ Benin ➤ Botswana ➤ Ethiopia ➤ Gambia ➤ Madagascar ➤ Mali ➤ Mauritania ➤ Mauritius ➤ Morocco ➤ Mozambique ➤ Rwanda ➤ Seychelles ➤ Sierra Leone 	<ul style="list-style-type: none"> ➤ Benin ➤ Chad ➤ Mali ➤ Morocco ➤ Mozambique 	<ul style="list-style-type: none"> ➤ Algeria
No direct commercial gain	<ul style="list-style-type: none"> ➤ Liberia 	<ul style="list-style-type: none"> ➤ Liberia 		
No indirect commercial advantage		<ul style="list-style-type: none"> ➤ South Africa 		<ul style="list-style-type: none"> ➤ South Africa
Non-commercial establishments; or No economic or commercial advantage; or No gain	<ul style="list-style-type: none"> ➤ Cote D'Ivoire ➤ Ghana ➤ Tunisia 	<ul style="list-style-type: none"> ➤ Ghana ➤ Tunisia 	<ul style="list-style-type: none"> ➤ Nigeria 	

Data extracted from the
'Study on Copyright Limitations
and Exceptions for Libraries and
Archives: Updated and Revised
(2017 Edition)' (SCCR 35/6)

ARCHIVAL INSTITUTIONS (CONTD.)

Archival activities and the commonalities in the current copyright framework in countries of the region	(a) For research or study	(b) For preservation and replacement	(c) Archive use/users	(d) Use by other institutions
Nothing specified	<ul style="list-style-type: none"> ➤ Angola ➤ Burundi ➤ Cabo Verde ➤ Central African Republic ➤ Congo ➤ Djibouti ➤ Guinea-Bissau ➤ Lesotho ➤ Sudan 			

EXCEPTIONS AND LIMITATIONS AND TPMS IN COUNTRIES OF THE REGION

No TPM provisions	<ul style="list-style-type: none">➤ Algeria➤ Angola➤ Cabo Verde➤ Central African Republic➤ Congo➤ Djibouti➤ Gambia➤ Guinea-Basu➤ Madagascar➤ Mali➤ Mauritania➤ Mozambique➤ Tunisia➤ Uganda
Specific applicability of circumvention provisions to all exceptions and limitations	<ul style="list-style-type: none">➤ Cote D'ivoire➤ Liberia➤ Mauritius
Specific applicability of circumvention provisions for certain archival activities (e.g. for use by another institution)	<ul style="list-style-type: none">➤ None

IN A NUTSHELL...

- ▶ Archival institutions exist for the public good, and are non-commercial
- ▶ Archival institutions need to make copies of their holdings for purposes of preservation, access and scholarly research
- ▶ Archivists wish to promote access to their collections, but are often troubled and thwarted by copyright uncertainties
- ▶ Copyright risk-assessment is an important part of the work of archivists; attitudes and approaches, however, vary from country to country
- ▶ Some collections, notably correspondence collections, remain under-used and under-exploited because of the difficulty of tracing copyright owners
- ▶ When traced, archival copyright owners are usually happy to grant permissions and do not usually expect remuneration

IN A NUTSHELL...

- ▶ Archival documents are unique in nature
- ▶ They are not generally created for financial gain
- ▶ They are, however, subject to copyright law, often under the heading “unpublished works”
- ▶ Rules for copying archival materials vary from country to country
- ▶ Component parts of any archival *fonds* may be held in several institutions in several countries, and hence subject to different copyright legislations
- ▶ Individual archival collections may have hundreds and even thousands of copyright owners
- ▶ Many archival materials therefore come into the category of orphan works; to conclude, “archival orphanages” need WIPO’s assistance



DIASPORIC
LITERARY ARCHIVES



Thank you. The Background Paper is a work in progress. Your comments, questions and suggestions will be very welcome.
David Sutton