

## **Standing Committee on Copyright and Related Rights**

**Thirty-Ninth Session**  
**Geneva, October 21 to 25, 2019**

ARCHIVES COPYRIGHT EXCEPTIONS: TYPOLOGY ANALYSIS

*prepared by Kenneth D. Crews, J.D., Ph.D*

## I. Introduction

This analysis of copyright exceptions for archives is intended to provide an in-depth examination of possible elements of copyright statutory exceptions applicable to archives. This project isolates elements that have been included in relevant copyright statutes, and in so doing this analysis can assist WIPO delegates as they consider the terms of any guidance or instrument on these copyright exceptions. Further, this study can be of assistance to lawmakers in individual member states as they consider drafting new or revised statutes.

Although this study focuses on archives, it naturally bears some similarities to the counterpart typology on libraries (see Document SCCR/38/4). Indeed, many of the statutes commonly called “library exceptions” also explicitly apply to archives. Yet the copyright issues for archives sometimes differ from the issues that libraries might confront when working with other types of collections. This analysis has benefitted greatly from the *Background Paper on Archives and Copyright* by Dr. David Sutton (see Document SCCR/38/7), which presents in detail the nature of archives and the copyright implications. The analysis by Dr. Sutton demonstrates extensive justification for copyright law to address the extraordinary and distinctive conditions related to archives and archival collections. Dr. Sutton’s report also clarifies that the need to consider the copyright issues of archives is not restricted exclusively to dedicated archives; archival collections and related needs are often integrated with libraries, museums, and many other private and public organizations.

The following is a summary of some ways that archives may differ from libraries with respect to the development and application of copyright exceptions and limitations:

- Both archives and libraries can comprise diverse holdings, but many of the works in archives are held in large collections of related materials that need to be considered as a group of many separate works, and archives sometimes collect materials only from specific institutions or other sources that may be subject to institutional rules and requirements.
- The content of archival collections can be unlike typical library collections; archives often hold unpublished materials and other rare or unique items that merit extraordinary measures to protect them from any form of loss.
- The research and user needs can be distinct; official archives can have a priority to serve immediate information needs and long-term recordkeeping objectives of the institution.
- Aspects of copyright law can sometimes have broader implications for archival collections; governmental archives have large collections of public sector information that may be public domain or have extended years of protection; unpublished writings, photographs, and other materials are often without attribution to named authors and may need to be treated as orphan works; the disclosure of some unpublished content may also violate an author’s moral rights in some countries.
- The legal circumstances, beyond copyright law, of some archival materials can affect the need for either strict confidentiality or wide public access; archival collections may include personal confidences or governmental secrets; they may also be subject to public access laws that require their reproduction and disclosure.

As a result of these distinctive qualities of many archival collections, the need for copyright exceptions is an essential part of enabling archives to meet their objectives. The following typology can assist with identifying these issues and others.

## II. Structure of the Typology

This typology analysis is presented as a series of tables, with each table generally representing one topic, concept, or activity that is included in the construct of the law. For example, the first table examines the law on preservation services and activities. Each table is divided into four columns. Reading the columns from left to right, they present a systematic means for conceiving and beginning to comprehend the possible structure and detailed elements of a statute. Beginning with the first table on preservation, the first column highlights the nature of the subject, with a brief description of the affected archives services. The second column tells the reader which rights of the copyright owner may be affected. The third column identifies and organizes the detailed elements that appear in some statutes and related legal resources, and that a lawmaker may need to consider when developing the parameters of a statute or other legal instrument. The fourth column isolates and lists aspects of the relevant law, where little consensus has emerged about including them in a statute or other legal instrument; these items in the fourth column are therefore the subject of ongoing consideration.

The four columns may be described more fully as follows:

- Column 1: Category of Archives Activity.
  - General topic or description of the relevant statute or legal provision.
  - Relevant functions or services or other activities affected by the provision.
    - “Archives functions” are activities of archives in order to achieve their core missions.
    - “Archives services” refer to activities provided by archives to and for the benefit of the users.
  
- Column 2: Owner’s Rights Implicated.
  - Rights of owners that are affected by the exercise of the exception.
  - Rights that are most directly affected are distinguished from those that are secondarily or less likely to be affected.
  
- Column 3: Elements of Statutory Exceptions.
  - Identifies detailed elements that may appear in relevant statutes, with the following characteristics:
    - Each element in Column 3 defines the scope or conditions of the statute and its application.
    - Most elements in Column 3 appear in many of the relevant statutes.
  - Based on the evidence from statutes in the member states, a country may choose to include the elements from Column 3 in their law, but interested parties are not likely to dispute how the terms will be included.
  - No one Member State is ever likely or expected to enact a statute that includes all of the elements from Column 3.
  
- Column 4: Elements for Ongoing Consideration.
  - Identifies detailed elements that may appear in relevant statutes, and that have the following characteristics:
    - Each element in Column 4 defines the scope or conditions of the statute and its application.
    - Most elements in Column 4 appear infrequently in the relevant statutes from any member state.
    - Regardless of how often any of these elements may appear in a statute, they seldom appear in the law in a consistent manner. For example, different countries may have an exception on the same topic, but they differ significantly on whether the archives may make a single copy or

multiple copies. Similarly, copyright exceptions in many countries allow archives to make copies for private study, but one country may require no proof of the purpose, while the next country requires signed documents and elaborate record-keeping by the archives.

- Because of the different view on some of these issues, these elements are identified as needing ongoing discussion and further consideration of their meaning and application. That consideration may be undertaken by WIPO delegates as they develop legal instruments, or that consideration may be undertaken by lawmakers drafting a statute for one country.

### **III. Context, Purpose, and Scope**

Legal context of the typologies:

- Analysis of copyright statutes applicable to libraries and archives was presented in earlier SCCR meetings.
- Presentations and studies at previous SCCR meetings
- Member States have enacted a wide range of relevant copyright statutes, addressing many activities and services that are important to archives and to members of the public that depend on archives and their services.
- The statutes, even on the same general issues, are highly diverse in their details.
- These statutes are in general guided only by the general concepts that constitute the Three-Step Test set forth in the Berne Convention and other international instruments.
- The European Union has included some concepts relevant to archives in its directives.

Purposes of the typologies:

- To identify many of the leading topics and archival services that are addressed in statutes of the Member States.
- To articulate the fundamental rights of the copyright owner affected by the individual copyright exceptions.
- To isolate the nuances and specific differences among the statutes and therefore the possibilities for drafting statutes or international instruments.
- To set forth major issues that remain unclear or generally unresolved and that may be the subject of future analysis or negotiation.

Scope of these typologies:

- This study focuses only on archives, with some reference to related matters about libraries. While many of the issues presented here may be relevant to archives and other institutions, WIPO will be preparing and sharing with the member states additional studies that give specialized attention to the needs and circumstances of archives, museums, and educational institutions.
- This study is based on existing statutes that are explicitly applicable to archives. As a result, it does not encompass issues and proposals that do not actually appear in the laws of Member States.

### **IV. Topics of the Archives Typologies**

The typologies on archives exceptions include tables on the following topics:

- Preservation of Works.
- Replacement of Works.
- Copies for Study & Research.
- Making Available on Terminals.
- Exhibition of Physical Materials.

Certain charts from the library typologies may be applicable or helpful for a fuller understanding of copyright implications for archives, particularly the charts related to lending of physical and digital work, and the chart presenting “additional considerations” for the development of statutory exceptions.

<b>TOPIC:</b> <b>Preservation of Works</b>			
<b>Definition: Copyright exception authorizing archives to make reproductions and other uses of copyrighted works for the primary purpose of preserving the works.</b>			
<b>Category of Archive Activity</b>	<b>Owner's Rights Implicated</b>	<b>Elements of Statutory Exceptions</b>	<b>Elements for Ongoing Consideration</b>
<p><i>Statutory Provision:</i></p> <p>Preservation of Works for Official Purposes. Preservation of Works for Research and Cultural Heritage.</p> <p><i>Archives Functions:</i></p> <ul style="list-style-type: none"> <li>• Copies to prevent loss.</li> <li>• Copies in response to loss or damage.</li> <li>• Copies for deposit in other archives for security or safekeeping.</li> <li>• Copies for storage of originals to safeguard cultural heritage.</li> <li>• Copies to assure official access and reference.</li> <li>• Copies to add to other specialized collections.</li> </ul>	<p><i>Primary:</i></p> <p>Reproduction.</p> <p><i>Secondary:</i></p> <p>Distribution (if the copies may be loaned by the archive or deposited elsewhere). Derivatives (translations and revisions of official documents). Circumvention (if the original is secured by TPM). Moral rights (protecting integrity and identity of authorship; first publication of unpublished works). Licensing and implications for terms of acquisition of works and collections. Extended collective licensing and implications for uses.</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• Audiovisual works.</li> <li>• Published or unpublished works.</li> <li>• Textual and printed works.</li> <li>• Official or institutional documents.</li> <li>• Photographs and images.</li> <li>• Images accompanying textual work.</li> <li>• Audiovisual works.</li> <li>• Music and sound recordings.</li> <li>• Works protected by neighboring rights.</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• Copying regardless of condition to prevent loss of official archives.</li> <li>• Copying regardless of condition of unpublished works to prevent loss of unique items.</li> <li>• Copying of works that are damaged, etc. (see library typology).</li> <li>• Orphan works (especially prevalent in archives).</li> </ul> <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> <li>• Preservation.</li> <li>• Official access.</li> <li>• Add to collections.</li> <li>• Add to collections of another archive as a safe haven.</li> <li>• Add to collections of another archive to combine split collections.</li> </ul>	<ul style="list-style-type: none"> <li>• Application of digital technology.</li> <li>• Implications of public domain for public sector documents.</li> <li>• Implications of longer duration for some works (e.g., Crown copyright).</li> <li>• Number of copies allowed to be made.</li> <li>• Permitted uses of the copies by the archive or by researchers.</li> <li>• Simultaneous availability of the original and the copy.</li> <li>• Authority for cross-border transfers of works or copies to readers.</li> <li>• Making copies of works for safekeeping before lending or exporting originals.</li> <li>• Liability for subsequent activity by users.</li> <li>• Liability protection for archives.</li> <li>• Extent of proof or documentation of compliance with statute.</li> </ul>

<b>TOPIC:</b> <b>Replacement of Works</b>			
<b>Definition: Copyright exception authorizing archives to make reproductions and other uses of copyrighted works for the primary purpose of replacing a work (or a part of a work) that is missing from the archives collection as a result of specified causes. The concept includes the possibility of making copies from works made for preservation and held in a safe haven.</b>			
<b>Category of Archive Activity</b>	<b>Owner's Rights Implicated</b>	<b>Elements of Statutory Exceptions</b>	<b>Elements for Ongoing Consideration</b>
<p><i>Statutory Provision:</i></p> <p>Replacement of Works.</p> <p><i>Archives Functions:</i></p> <ul style="list-style-type: none"> <li>• Copies to replace works in the collection that have been damaged, etc.</li> <li>• Copies that may be made in anticipation of risk.</li> <li>• Copies made from the preservation copies deposited in another library or other “safe haven” in preparation for future need.</li> <li>• Copies to assure official access and reference.</li> <li>• Copies for completion of a work or other item in the collection.</li> <li>• Copies for replacement of works held in another archive.</li> </ul>	<p><i>Primary:</i></p> <p>Reproduction.</p> <p><i>Secondary:</i></p> <p>Distribution (if the copies may be loaned by the archive or deposited in another archive).            Circumvention (if the original is secured by TPM).            Moral rights (protecting integrity and identity of authorship; first publication of unpublished works).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• See notes at preservation.</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• See notes at preservation.</li> </ul> <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> <li>• Replacement.</li> <li>• Maintenance of collections.</li> <li>• Official access.</li> <li>• Add to collections of another archive as a safe haven.</li> <li>• Add to collections of another archive to combine split collections.</li> </ul>	<ul style="list-style-type: none"> <li>• See notes at preservation.</li> <li>• Permitting copies before loss, etc.</li> <li>• Clarify that an archive may obtain an original from another collection for making the copy.</li> <li>• Clarify that an archive may make and deliver a copy to another archive whose copy is lost or damaged, etc.</li> </ul>

<b>TOPIC:</b> <b>Copies for Study &amp; Research</b>			
<b>Definition: Copyright exception authorizing archives to make reproductions and other uses of copyrighted works for the purpose of accessing or providing copies of the works for study and other activities by archives users.</b>			
<b>Category of Archive Activity</b>	<b>Owner's Rights Implicated</b>	<b>Elements of Statutory Exceptions</b>	<b>Elements for Ongoing Consideration</b>
<p><i>Statutory Provision:</i></p> <p>Copies to Give to Users for Study &amp; Research.</p> <p><i>Archive Services:</i></p> <ul style="list-style-type: none"> <li>• Fulfilling user requests for individual copies of specific works.</li> <li>• Copies for individual private study.</li> <li>• Copies made for users with a view to publication (archives may supply a copy, but the requesting user must clear rights for the publication).</li> </ul>	<p><i>Primary:</i></p> <p>Reproduction. Distribution. Making available.</p> <p><i>Secondary:</i></p> <p>Circumvention (if the original is secured by TPM). Moral rights (protecting integrity and identity of authorship; first publication of unpublished works). Licensing and implications for terms of acquisition of works and collections. Extended collective licensing and implications for uses.</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• Published or unpublished works.</li> <li>• Textual and printed works.</li> <li>• Official or institutional documents.</li> <li>• Photographs and images.</li> <li>• Images accompanying textual work.</li> <li>• Audiovisual works.</li> <li>• Music and sound recordings.</li> <li>• Works protected by neighboring rights.</li> </ul> <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> <li>• Private study.</li> <li>• Private research.</li> <li>• Personal use.</li> <li>• View to publication.</li> </ul> <p><i>Amount of the Work:</i></p> <ul style="list-style-type: none"> <li>• Short works, articles, book chapters.</li> <li>• Entire works or long works (if replacement not available on the market).</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• Work must be in the collections.</li> <li>• Search the market to confirm whether available (before copying whole works).</li> </ul>	<ul style="list-style-type: none"> <li>• Application of digital technologies.</li> <li>• Implications of public domain for public sector documents.</li> <li>• Implications of longer duration for some works (e.g., Crown copyright).</li> <li>• Delivery of copies to users outside the archives.</li> <li>• Relationship to inter-institutional lending or document delivery.</li> <li>• Authority for cross-border transfers.</li> <li>• Liability for subsequent activity by users.</li> <li>• Liability protection for archives.</li> <li>• Multiple requests for the same work.</li> <li>• Photographs and other ancillary or embedded works.</li> <li>• Retaining a copy in the institution's digital archive.</li> <li>• Extent of proof or documentation of compliance with statute.</li> </ul>

<b>TOPIC:</b> <b>Making Available on Terminals</b>			
<b>Definition: Copyright exception authorizing archives to use copyrighted works in digital formats for the primary purpose of making the works available for viewing and other uses on terminals at the archive.</b>			
<b>Category of Archive Activity</b>	<b>Owner's Rights Implicated</b>	<b>Elements of Statutory Exceptions</b>	<b>Elements for Ongoing Consideration</b>
<p><i>Statutory Provision:</i></p> <p>Viewing on Computer Terminals.</p> <p><i>Archives Services:</i></p> <ul style="list-style-type: none"> <li>• Making and allowing access to digital copies via terminals at the archives.</li> <li>• Viewing digital copies on terminals on the premises of the archive.</li> <li>• Viewing or accessing digital copies on terminals outside the premises.</li> <li>• Fulfilling user requests for access to specific works.</li> </ul>	<p><i>Primary:</i></p> <p>Making available.</p> <p><i>Secondary:</i></p> <p>Reproduction (to digitize the work). Circumvention (if the original is secured by TPM). Public display or performance (but not applicable if access is individual and not public). Moral rights (implications for integrity of the work or identification of author; first publication of unpublished works). Licensing and implications for terms of acquisition of works and collections. Extended collective licensing and implications for uses.</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• Any work.</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• Implication of licenses applicable to the work.</li> <li>• Restrictions on ability of users to make copies.</li> <li>• Limit on the number of simultaneously accessible copies.</li> <li>• Work must be in the collections.</li> </ul>	<ul style="list-style-type: none"> <li>• Application to all types of works.</li> <li>• Application to entire works.</li> <li>• Application to any legal deposit work.</li> <li>• Implications of public domain for public sector documents.</li> <li>• Implications of longer duration for some works (e.g., Crown copyright).</li> <li>• Clarification of whether license needs only be available or must be in effect at the archives.</li> <li>• Concept of “premises” of the archives; whether access may be allowed on closed network.</li> <li>• Whether the purpose of the use must be limited to personal study.</li> <li>• Whether users may make copies consistent with other copyright exceptions.</li> </ul>

<b>TOPIC:</b> <b>Exhibition of Physical Works</b>			
<b>Definition: Copyright exception authorizing archives to exhibit (loaned or acquired) copyrighted works for public viewing.</b>			
<b>Category of Archive Function or Service</b>	<b>Rights Implicated</b>	<b>Elements of Statutory Exceptions</b>	<b>Elements for Ongoing Consideration</b>
<p><i>Statutory Provision:</i></p> <p>Concept: Ability to make a public display of a copyrighted work by the owner or possessor of the original or an authorized copy.</p> <ul style="list-style-type: none"> <li>• Accepted as a customary practice in many countries.</li> <li>• Enacted as a statutory provision in some countries.</li> </ul> <p><i>Archives Services:</i></p> <ul style="list-style-type: none"> <li>• Exhibition of works or collections onsite at the institution.</li> </ul>	<p><i>Primary:</i></p> <p>Public display (see also the note in the column 4 regarding the nature of the “exhibition right”). Public performance (recordings, motion pictures, etc.)</p> <p><i>Secondary:</i></p> <p>Moral rights (if the integrity or authorship of the work is affected; first publication of unpublished works). Derivative works (if the works are altered in any way).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• Any works with no exclusion, or only some type of work if exclusion applies.</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• If copies are exhibited, copies must be lawfully made.</li> </ul> <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> <li>• Exhibition to the public at the premise of the archives.</li> </ul>	<ul style="list-style-type: none"> <li>• Legal nature of any “exhibition right” (i.e. whether the exhibition right is (i) an L&amp;E, (ii) included in the exclusive right of the rightsholder, (iii) transferred via the physical ownership).</li> <li>• Implication of public domain for public sector information.</li> <li>• Implications of longer duration for some works (e.g., Crown copyright).</li> <li>• Restrictions based on national security or governmental interests.</li> <li>• Implication for cross-border lending of works or copies.</li> <li>• Limits on application of performance or display right for certain works.</li> <li>• Privacy implications of public displays.</li> <li>• Including some works in online presentation.</li> <li>• Retaining copies of the exhibition works in the institution’s digital archive for future reference.</li> </ul>