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BACKGROUND PAPER ON ARCHIVES AND COPYRIGHT

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1. INTRODUCTION

1.1 Objective and remit

This background paper has been commissioned to provide an introduction to the principal issues relating to the intersection of archives and copyright. It covers both archival collections and archival institutions, as well as the fundamental mission of archivists in the countries around the world which hold archival collections. The author has been asked to examine “the copyright challenges facing archives with a special emphasis on the digital environment”, using international and cross-border examples, and including observations on the intersection of archival practices with copyright in different legal traditions. It is not part of the remit to make any particular recommendations or proposals in respect of exceptions or limitations for archives, but rather to describe the specific characteristics of archival collections and archival functions which may frame the discussion of any such exceptions and limitations that may be considered.

1.2 The meanings of “archives”: definitions, terminology

Many languages use words equivalent to “archive” and “archives” to describe both archival materials and the archival institutions which house those materials. The present background paper is principally concerned with archival materials and, for the avoidance of ambiguity, frequently uses alternative terms such as “repositories” (French: “dépôts”) to describe archival institutions. To further avoid ambiguity, this paper will use the terms “archival collections” or “archival material” when referring to the works preserved in memory institutions, whether they be archives, libraries or museums.

In addition, many documentary traditions distinguish between the management of archives (seen as historical or memory documents or subject-based *fonds*) and the management of records (seen as current and for organisational or administrative use). Certain languages, however, notably the Scandinavian languages, do not have separate words for archives and records. In this background paper, “archives” is used to describe all types of documentary materials and primary sources for recorded human action and enterprise, human history and human memory – including records, manuscripts, muniments, personal papers, ephemera, scripts, forms, legal documents, file-copies, registers, reports, technical papers, deeds, publicity materials, films, videos, sound recordings, photographs, documentary art, architectural plans and maps – whether found in analogue or digital format.

Dictionary definitions of archives typically describe “a collection of historical documents or records providing information about a place, institution or group of people”. Archivists tend to use broader definitions to indicate that archival materials are materials in all formats, created or received by a person, family or organisation in the conduct of their affairs and preserved because of their enduring value and significance.

An excellent, and widely endorsed, description of archives and their role in society has been provided by the Universal Declaration on Archives, as adopted by UNESCO in 2011:

Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life.¹

General archival collections may contain both published and unpublished materials, but (in clear distinction from trade books, periodicals and newspapers) it is a defining characteristic of archival collections, which comprise predominantly unpublished materials, that they exist in one

¹ Universal Declaration on Archives, <https://www.ica.org/en/universal-declaration-archives> (accessed 6 March 2019)

single and unique version in one location. This location will often be appropriate to the nature and origin of the archive, especially for organisational papers, but in the case of some types of personal papers, locations of archival collections may be unpredictable, illogical and unguessable.

Archival collections may contain many works subject to intellectual property rights. There can be great variation in their nature (form, material, etc.), the way they entered the archival institution or any other relevant institution, and their type of author. For example, in a single public archival institution, copyrightable works can be found in collections of a private origin (e.g., a professional photographer who bequeathed his or her personal collection) or in collections of a public origin, be it the case of records produced by civil servants as part of their official duties (e.g. a report or a speech) or those produced by third parties in the context of their relations with the administration (e.g. an architect's blueprints in the construction file for a public building, or the correspondence between a citizen and a political authority).

Archivists are the custodians of these vital sources for human memory. The role of archivists can therefore be summarised as “safeguarding human memory”. Archivists preserve, manage, describe and provide access to archives.

1.3 Archives collections and archives institutions

Archives institutions around the world generally operate on a not-for-profit basis. With a few exceptions which are discussed below (see section 2.7) the value which is inherent in archival collections is a value based on memory, heritage and information rather than a financial or market value.

The distinction between archival materials and archival institutions is critical to the arguments and descriptions in this background paper. One important reason for the principal focus on archival materials rather than archives institutions is that archival materials are often housed in places other than archives institutions – for example, in libraries, museums, schools, universities, hospitals, private foundations, authors' houses, religious organisations, charities, arts bodies, community groups, government departments and businesses.

In the particular case of literary archives, many countries have established the National Library rather than the National Archives as the principal archival repository. For example, in South America, Argentina, Chile, Paraguay, Peru, Uruguay and Venezuela.

It is therefore considered to be more useful to apply criteria for potential copyright exceptions and limitations to archival collections rather than to archival institutions. By extension, copyright exceptions for archives will likely apply to archival activities in libraries and museums.

1.4 Archives and copyright implications

Copyright plays a crucial part in the role of the archivist in mediating the requirements of documentary preservation, the rights of citizens to access information, respect for the law, and ethical and moral imperatives.

Archivists are not lawyers, but they do need legal knowledge and experience in order to achieve this mediation. Copyright laws are often complex and difficult to interpret, and archivists are often faced with a choice between refusing access to archives in order to avoid risk, or allowing access to archives based on common sense and their personal knowledge about precedents, especially precedents about the absence of legal challenges. Archivists are often faced with the need to balance “copyright common sense” on the one hand and “the letter of the law” on the other.

Where archivists have taken risks with copyright law, there have been very few instances of those archivists being brought before the courts.

1.5 Categories of archives

Archives covering different subject-areas, purposes and functions have their own particular characteristics. Using the subject-areas covered by the existing Sections within the International Council on Archives, together with potential Sections which could exist in the future, the following subject-based headings could be suggested:

- Archives of archaeology
- Architectural archives
- Business archives
- Archives of community groups
- Archives of disability
- Educational archives (schools, colleges, universities)
- 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 peoples
- 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
- Medical and hospital archives
- Military archives
- Archives of museums

- Music archives
- Photographs
- Mixed media archives
- Archives of cultural heritage
- Archives of national governments and their departments
- Oral history archives
- Parliamentary archives
- 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

The list is not, of course, exhaustive, but it covers most current areas of archival activity and collecting, and each of these types of archives has its own characteristics and conventions, but all intersect with copyright – even if the particular copyright issues may vary by type of material or institution.

1.6 “Split collections”

Original archival materials are normally unique, but the component parts of any complete archival *fonds* may be distributed across several repositories in several countries, and thus held under several different copyright regimes. For example, the principal collections of the archives of the author Samuel Beckett are held in Ireland (Trinity College Dublin), the United Kingdom (University of Reading), the United States (University of Texas) and France (Institut Mémoires de l'édition contemporaine). Individual Samuel Beckett items, however, are found in repositories in many other countries; for example, two handwritten cards from Beckett to his Finnish translator are held by the Finnish Literature Society in Helsinki. Similarly the papers of Léopold Sédar Senghar, the great Senegalese poet and politician, are divided, with his literary papers in the Bibliothèque nationale de France; his publishing papers in the Institut Mémoires de l'édition contemporaine in France; and his political papers in Dakar in the Archives nationales du Sénégal. The records of “Miss Lou” (Louise Bennett-Coverley), one of Jamaica's most important cultural icons are preserved partly at McMaster University in Canada and partly at the National Library of Jamaica. The papers of the South African poet and anti-apartheid activist Dennis Brutus reflect the locations of his political exile from South Africa under apartheid, being held principally in Northwestern University (USA) and the universities of York and Brunel (UK).

This phenomenon of “split collections” is particularly typical of collections of the personal papers of prominent individuals, and results in complex copyright anomalies for scholars studying the life and work of any particular person or group of persons.

1.7 Born-digital archives and digitised archives

The distinction between born-digital archives and digitised archives is important. Born-digital archives are archives which were created in digital format and generally exist only in digital format. Most archivists would see born-digital archives simply as archives in another format, to which all the usual rules about managing, processing, cataloguing and access will apply.

Digitised archives, by contrast, are archives which were often created in a different (non-digital) format and whose digitisation presents significant copyright challenges (see especially sections 5.1 and 5.2 below).

1.8 The role of the archivist

Archivists are generally trusted to safeguard their official documentation and their cultural heritage in the public interest and for future generations. Governments and the public believe and trust that archivists will ensure that the records which make up archival collections are preserved in ways which preserve their authenticity, reliability, integrity and usability.

Archivists are thus the trusted custodians of our heritage, our administration and our documentary future. They are experts in their subject area, who abide by the law and maintain high ethical standards. The International Council on Archives and many national associations of archivists have codes of ethics to guide their members, and such codes will typically call upon archivists to respect intellectual and other property rights in the archives which they curate.

2. ARCHIVAL ACTIVITIES

2.1 Making copies and facilitating access

Because archival materials generally exist in a single unique form and because archival practice (unlike library practice) does not permit the borrowing of materials held in archives repositories, the making of copies is arguably more important for archival research than for research in any other area of cultural scholarship. Decisions about access to archives are similarly critical to the success of scholarship and research.

Making copies also has a particular importance in archival repositories for purposes of preservation and protection of unique material which may be damaged or fragile, or may have been created on acidic wood pulp paper, perishable microfilm or media that is (or is about to become) obsolete. Preservation copies may be made in traditional analogue format, or, increasingly, by digitisation of the originals. Archives users who visit repositories will then normally be issued with the copies rather than the originals.

Other important aspects of facilitating access to archival collections include the creation of exhibitions and inter-institutional loans for exhibition and other purposes.

Where two institutions in different countries each hold part of a “split collection” it may be sensible, and helpful to users, for them to agree an exchange of copies so that each institution is able to offer a fuller archival selection to its users. Again, such copies may be analogue or may be digitised.

2.2 Archives across borders

International cooperation among archival institutions is important and necessary. Archival material may need to cross borders when institutions send them abroad to try to preserve them, to digitise them, to store them, to provide special access to them, or to provide a safe haven for their protection from destruction. There are many underlying reasons that explain this type of international cooperation. They may concern lack of funds or expertise to preserve the archives locally, or they may derive from projects to collate archives of a specific creator or event, that may be scattered across the globe. They may concern the physical safety of archivists who are charged with the custody of sensitive records.

2.3 Digital preservation across borders

Digital preservation is another essential part of archival action plans and of international cooperation. Many early digital formats, typical of the late twentieth century, were extremely ephemeral and many cultural and information artefacts created in such early digital formats are at risk of being lost forever. In this context, a further example of preservation activity across borders is one shaped by technological and market practices. One of the central principles of digital preservation is that multiple copies of works should be kept in multiple, geographically-dispersed locations.² This is intended to mitigate the risk of damage at one or more sites. Currently available market solutions for digital preservation reflect this principle, indeed they often insist upon it. Commercial providers offer customers the option of choosing cloud-based storage across multiple vendors in multiple locations, within and across specific regions.³

2.4 Access across borders

Just as archives may cross borders for preservation purposes, they also cross borders for research and other purposes – or, at least, copies of archives often cross borders for these

² Digital Preservation Coalition, *The Digital Preservation Handbook* (2018), ‘Storage,’ available: <https://dpconline.org/handbook/organisational-activities/storage> (accessed 4 March 2019).

³ For example, see: Preservica, *Choose how to safely store your valuable information* (2018), available: <https://preservica.com/digital-archive-software/secure-storage-solutions> (accessed 4 March 2019); and, Amazon Web Services, *Global Infrastructure* (2018): <https://aws.amazon.com/about-aws/global-infrastructure> (accessed 4 March 2019).

purposes.⁴ The reasons for this cross-border activity are many and varied. Typically, it is for research and private study. Archives also cross borders for academic publication or for use in exhibitions. Often archive institutions will be collaborating on a project, or simply trying to share or deepen their knowledge of a specific collection held in one jurisdiction that concerns another. Consider the following examples of uncertainty caused by copyright implications of transnational research:

- A researcher based in the Netherlands is trying to access the designs and drawings of a world-famous Armenian-Iranian architect relating to buildings constructed in Germany in the 1920s and 1930s. The original documents are part of a US-based archive collection. If the researcher were based in the USA, the archival repository would simply make copies for the researcher. Because he is not, they are unsure whether they can.
- An archival repository holds the papers of a mid-twentieth century anthropologist, including his studies of Andean native communities during the Colonial Era in Latin America. This includes unpublished ethnographic and anthropological studies on topics such as cottage weaving in Ecuador, Peruvian mythology and folklore, and the effect of land reform on the native population of Chiapas Mexico, all produced by third parties. The archivists are uncertain about whether they can make copies of these third-party documents to send to researchers based in Peru, or Ecuador, or Mexico, or Belgium.
- An archival repository has received an anonymous donation. It contains over 150 pre-1920s photographs of rural India showing village and agricultural life, taken from the perspective of a white, protestant missionary. South Asian specialists who have seen the album have noted the material's rarity, however, the collection lacks any contextual data, such as dates, place names, and so on. The archival repository wants to make the collection available online, in the hope that crowdsourcing might offer up the contextual information needed to make this collection a truly valuable cultural resource. However, because of the uncertain copyright status of the photographs, it made a decision not to take the necessary steps (digitisation and online dissemination) to crowdsource the material.

2.5 Copying for other purposes

There are various reasons why an archival repository would want to make copies of archives from their collections other than for preservation or security purposes. The copying may be for the use of staff within the archival institution. It may be for sharing or depositing material that is relevant to the collection of another institution. It may also be for users, for research or private study, or perhaps some other related purposes.

In his 2017 study, Professor Crews noted that 'one of the most common statutes' uncovered by his research 'is the provision permitting a library or other institution to make copies (usually

⁴ Rarely will original archival materials be transferred across borders other than for preservation or exhibition purposes.

single copies) at the request of a user'.⁵ Indeed, it is striking to note that more countries permit copying in response to a user request than they do for preservation purposes – 105 countries as opposed to 102 countries.⁶ The problem for archival institutions, however, is that only a minority of those 105 countries permit copying unpublished material for a user.⁷

Archivists around the world face divergences and contradictions between different national legislations, and archival collections of a similar nature held in repositories in different countries (even two parts of the same collection) are subject to different regulations on copying from country to country.

2.6 Copying for users: scope and conditions

As with the other cases already considered in this paper, most countries impose conditions on copying for users. In this section, there is a focus on those jurisdictions that permit the copying of unpublished material. Almost all exceptions contain a proviso to the effect that a copy cannot be made if the copyright owner has prohibited copying. In many respects, this is uncontroversial. Sometimes the terms and conditions agreed at the time of the deposit of the materials with the archival repository or any other relevant institution will contain a provision to this effect, and when they do the archivist will naturally respect that condition – for as long as the work remains in copyright (or as long as there are other legal provisions at stake, notably privacy).

Other issues worth noting include the following:

First, many countries prohibit copying when the work in question has been published before it was deposited with the archival repository or any other relevant institution, whereas others, like Belize,⁸ simply specify that the work should be unpublished at the time of making the copy.

Second, there are countries that restrict the exception to certain types of copyright work, for example, Antigua and Barbuda (literary, dramatic or musical works only), Brunei Darussalam (literary, dramatic, musical and artistic works), and Nigeria (literary or musical works only). Other countries, such as Canada, Fiji, the United Kingdom and Zimbabwe, permit copying of any type of work.

Third, almost all existing exceptions are tethered to variations on the concept of 'research and study'. That said, there are one or two interesting exceptions to this more general rule. For example, in the Bahamas an archive can make a copy of an unpublished work for teaching,

⁵ K. D. Crews, *Study on copyright limitations and exceptions for libraries and archives: updated and revised*, SCCR/35/6 (2017), p 9.

⁶ K. D. Crews (2017), p 10.

⁷ These include, for example: Antigua and Barbuda, the Bahamas, Barbados, Belgium, Belize, Brunei Darussalam, Canada, Fiji, Israel, Jamaica, New Zealand, Nigeria, Saint Kitts and Nevis, St Lucia, Saint Vincent and the Grenadines, the United Kingdom, the United States and Zimbabwe; See K. D. Crews (2017).

⁸ Belize. Copyright Act 2000, s.70(2)(a).

research or private study,⁹ whereas in Fiji the ability of an archivist to provide a copy of an unpublished work is not limited by a specific purpose at all.¹⁰

Fourth, most exceptions limit copying to a single copy for the user, although some countries, such as New Zealand, clarify that no one may be supplied with more than one copy of the same work on the same occasion.¹¹

A literal interpretation of the 'single copy' rule would require that the copy that is made must be the same copy that is also supplied to the user. In a world of analogue copying this kind of condition would be relatively uncontroversial. But, in a world of digital copies, a single copy rule would frustrate the commonplace reality of delivering material online. It can be argued that exceptions permitting copying for users should not impede practical and efficient copying in the digital environment. It would then follow that an archival repository – or any other relevant institution – should be able to make as many copies as are reasonably necessary to supply the user with a single copy of the work

2.7 Commercial exploitation

While archival collections may have potential commercial value, archival institutions generally do not operate for profit. It is their users who may see a commercial opportunity in the archival collections and bring the resulting product to market.

It is important to acknowledge that there will be circumstances in which an archive collection lends itself to commercialisation, whether because the archives relate to a notable author or artist, or a person or an organisation of extraordinary historical significance, or because the data contained within the archival institution can be reimagined and repurposed in new and innovative ways, or because the archives have an obvious value for bespoke markets, such as family history and genealogy. At times, it is also possible for archival institutions and other relevant institutions to exploit the commercial value in the archival material and potentially consider it as a source of added revenue.

A good example of the first category is the Churchill College Archives Centre in the UK which contains a wide range of records and documents relating to more than 570 political, scientific and military figures from the Winston Churchill era and beyond. Perhaps the single most significant collection within the Archives is the Churchill Papers: more than one million personal and official documents, charting Churchill's writing throughout his entire life. The original copies of these documents are no longer issued to researchers and other members of the public, for preservation reasons. However, digital preservation copies are made available to researchers

⁹ Other conditions apply, for example: a copy may not be made if the copyright owner has prohibited reproduction of the work; a copy may not be made if the work was published before the document was deposited with the archive; and, no more than a single copy may be supplied. Bahamas. Copyright Act, s.71.

¹⁰ Again, other conditions apply, for example: a copy may not be made if the copyright owner has prohibited reproduction of the work; a copy may only be made if there is no collective licence available to enable copying; and, no more than a single copy may be supplied on the same occasion. Fiji. Copyright Act 1999, s.53.

¹¹ New Zealand. Copyright Act 1994, s.56(3)(a).

on-site. In addition, an online digital edition of the Churchill Papers has been published by Bloomsbury Academic Publishers working in partnership with the Archives. The online resource remains behind a paywall, with access provided to individual or institutional subscribers.¹²

Most examples of archives with a high commercial exploitation value relate to personal papers of famous cultural creators, politicians or other prominent individuals which have been purchased by archival institutions, generally in one of the four archival collecting countries which regularly and systematically collect the archival papers of non-nationals – Canada, France, the UK and the USA. Around the world such collections are unusual and untypical and very many archival institutions have no acquisitions budget at all. Nonetheless, these high-profile and high-value collections attract disproportionate attention.

One of the most celebrated recent cases is the archive of Gabriel García Márquez, which was actively sought by the national institutions in Colombia, but was acquired by the University of Texas. The papers of the Nigerian author Chinua Achebe are in Harvard University. The papers of Mexico's Carlos Fuentes are in Princeton University. For Trinidad and Tobago, the papers of V. S. Naipaul are in the University of Tulsa. For Japan, the papers of Kōbō Abe are in Columbia University, New York. For Congo-Brazzaville, the archive of Sony Labou Tansi is in the Bibliothèque francophone multimédia de Limoges. For Algeria, the papers of Mohammed Dib are in the Bibliothèque nationale de France. For Vietnam, the papers of Pham Van Ky are also in the Bibliothèque nationale de France. And for Syria, the papers of the poet known as Adonis (Ali Ahmad Said Esber) are in the Institut Mémoires de l'édition contemporaine, Caen.

Finally, it is worth noting that almost all the current exceptions for 'archives' that exist across Member States make the availability of the exception contingent on the institution operating solely on a non-commercial basis. The EU orphan works exception, for example, is limited to public mission activities only, although institutions may generate revenues when carrying out this work for the exclusive purpose of covering the costs of digitising the orphan works and making them available to the public.¹³ In the same way, most of the exceptions for dedicated terminals prevent use of the work for any commercial purpose, while many of the exceptions for preservation impose a similar limitation.

3. OTHER COPYRIGHT CHALLENGES RELATING TO ARCHIVES

3.1 Published works and unpublished works

Archives are typically considered to be among the materials described in copyright legislation as "unpublished works". The distinction between published and unpublished works is made in the

¹² It took the project team five years to clear the rights to the third-party content contained within the collection, and then, building on this work, one further year was needed to secure permissions to make the material available online. And even then, not all rights-holders could be located or responded to requests, while a small number refused permission. For further details, see: <https://www.chu.cam.ac.uk/archives/collections/churchill-papers> (accessed 4 March 2019).

¹³ Orphan Works Directive, Article 6(2).

copyright legislations of most countries, but the rules applied to published and unpublished works vary considerably from country to country.

When national legislations address copyright issues facing libraries, museums and archives, they tend to do so by way of an exception, or multiple exceptions, to copyright. These exceptions often distinguish between work that has been published (typically held in libraries) and work that is unpublished (typically held in archives repositories). For example, whereas Belgian law allows copying only for the preservation of lawfully published works,¹⁴ copyright law in the USA allows copying for the preservation of both published and unpublished works.¹⁵ Whereas New Zealand allows librarians and archivists to make a copy of an unpublished work for research or private study, Dominica, Georgia and Uruguay do not.

3.2. Moral rights

Moral rights are also relevant to the intersection of copyright and archival activities, particularly in civil law jurisdictions where moral rights, tend to be strong. In some jurisdictions they may be perpetual, unwaivable, or both. For example, in France and some other civil law jurisdictions, disclosure or a moral right of divulgation of works has a fundamental impact on archival activities. It has implications not only in terms of copies, but also in terms of providing access to the original document (i.e. communication). In France, if a work has not been disclosed by its author, it cannot be communicated (even on a table of a reading room) or reproduced by the archive service that holds it (Article L122-5 of the French Intellectual Property Code). This condition represents a major restriction to the main missions of archive services, which are to communicate and diffuse the documents they hold to the public. This restriction is all the more problematic because it is not limited in time, as perpetual moral rights continue to apply, even after the termination of economic rights. Finally, the application of this provision also poses a problem, because in a great number of cases the archive services are not able to determine whether or not a work has ever been disclosed.

3.3. Wide variation in rules

For almost all types of copyright work, in almost all jurisdictions, the term of copyright protection is time-limited and derived from the date of death of the creator(s). However, in some jurisdictions, special rules apply to the duration of protection for unpublished works, effectively creating a perpetual term, regardless of when the works were created. The (anomalous) special status that unpublished works enjoy in these jurisdictions is of particular relevance for archive research and scholarship.

In recent years, various common law jurisdictions have been consulting stakeholders on this issue, including Canada, Ireland, the UK, Australia and Singapore.

¹⁴ Belgium. Law of April 19, 2014, Art.XI.190.12°: <https://wipolex.wipo.int/en/legislation/details/15744> (accessed 4 March 2019).

¹⁵ USA. Copyright Act 1976, s.108 (b) and 108 (c).

At present, the Irish *Copyright and other Intellectual Property Law Provisions Bill* proposes to 'clarify' that perpetual copyright does not exist in certain unpublished works, ensuring that all works, whether published or unpublished, enjoy a standardised copyright term.¹⁶

More significantly, the Australian *Copyright Amendment (Disability Access and Other Measures) Act 2017* established new terms of copyright protection for unpublished literary, dramatic, musical and artistic works, sound recordings and cinematographic films, all of which have previously enjoyed protection in perpetuity.¹⁷ In effect, perpetual copyright protection has been abolished, effective as of January 1, 2019. On that date, millions of unpublished works in archive collections (and elsewhere) have entered the public domain.

The copyright regulations attached to any particular institution or archival material will derive from a combination of the nationality of the creator and the country where the archival institution or other institution is located. For example, with regard to copyright duration, which is of great importance to the archival mandate for permanence, the Berne Convention proposes that, in cases where the legislation respecting duration varies between the country of origin and the country of location, the lesser duration should apply unless otherwise provided in the legislation of the country of location. For example, where the Indian copyright period is 60 years and the South African copyright period is 50 years:

- A letter from an Indian author in an Indian repository has a copyright duration of 60 years from the author's death.
- A letter from a South African author in South African repository has a copyright duration of 50 years from the author's death.
- A letter from an Indian author in a South African repository has a copyright duration of 50 years from the author's death.
- A letter from a South African author in an Indian repository has a copyright duration of 50 years from the author's death.

Legislation of some countries deviates from this "rule of the minimum", however, and most notably the USA applies its own complex and distinctive rules of duration to archival material housed in repositories located within the country regardless of the nationality of the creator.

3.3 The public domain

The concept of the public domain is vital to researchers working with archives. The public domain is deemed to comprise all documentary material to which no exclusive intellectual property rights apply. Because of the difficulties in clearing copyright in large and diverse collections, research topics will often be chosen not on their own merits but based primarily on

¹⁶ Ireland. Copyright and Other Intellectual Property Law Provisions Bill 2018 [No 31 of 2018] (see proposed s.7 of the 2018 Bill for the provisions regarding perpetual copyright): <https://www.oireachtas.ie/en/bills/bill/2018/31> (accessed 4 March 2019).

¹⁷ Australia. Copyright Amendment (Disability Access and Other Measures) Act 2017: <https://www.legislation.gov.au/Details/C2017A00049> (accessed 4 March 2019).

the public domain availability of the archival sources. For example, PhD students may be advised to move away from their first-choice research topic if the archival sources present copyright uncertainties, and steered towards a second- or third-choice topic where the archival sources are in the public domain.

The public domain is precious to research and scholarship. All works created before copyright existed are deemed to be in the public domain. In addition, creators (for example, those involved in social and political campaigning, or those committed to creating “public domain software”) may renounce any claim to copyright, even during the statutory term of protection. Beyond that, different countries have different regulations about how and when works may be said to fall into the public domain. For example, in the USA, all works published before January 1, 1924 are deemed to be in the public domain.

One legal and practical challenge to enable access to our shared digital heritage concerns the debate about whether copyright does or should exist in the digital surrogate of a public domain work after the work has been digitised for preservation or other purposes. That is, should cultural heritage institutions, such as archival institutions, extend the life of the copyright in a public domain work by claiming rights in the digital surrogate of that work?¹⁸

Both as a matter of law and policy this warrants careful consideration.

The European Union has taken the view that copyright should not subsist in such digital surrogates. In 2008, the European Commission stressed ‘the importance of keeping public domain works accessible after a format shift.’¹⁹ Similarly, in 2011, the Commission stated that, to ‘allow wide access to and use of public domain content, it is necessary to ensure that public domain content remains in the public domain once digitized.’²⁰

In 2008 the European Commission launched Europeana, an organisation that works with thousands of European archives, libraries and museums to share cultural heritage for enjoyment, education and research. At present, the Europeana Collections provide access to over 50 million digitised items, books, music, artworks and more.

In 2010, EUROPEANA published its “Public Domain Charter”. It states that: No other intellectual property right must be used to reconstitute exclusivity over Public

¹⁸ For an excellent analysis of the copyright status of digital surrogates in the cultural heritage sector, see: A. Wallace, *Surrogate IP Rights in Cultural Sector* (University of Glasgow, 2018) (unpublished doctoral thesis).

¹⁹ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Europe’s cultural heritage at the click of a mouse: progress on the digitisation and online accessibility of cultural material and digital preservation across the EU* [SEC(08) 2372], EUR-LEX (2008): <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012580%202008%20ADD%201> (accessed 4 March 2019).

²⁰ Publications Office of the European Union, Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (2011): <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:283:0039:0045:EN:PDF> [accessed 4 March 2019].

Domain material. The Public Domain is an integral element of the internal balance of the copyright system. This internal balance must not be manipulated by attempts to reconstitute or obtain exclusive control via regulations that are external to copyright.²¹

3.4 Copyright holders and “orphan works”

“Orphan works” are works which remain in copyright, but whose copyright holder is unknown or untraceable or has ceased to exist. A work is deemed to be “orphan” if the copyright holder cannot be identified or located by someone seeking permission to exercise one of the exclusive rights provided for under any particular copyright regime.

Problems caused by “orphaning” have increased as copyright durations have been lengthened in many jurisdictions, meaning that for long-lived creators works created in their youth may remain in copyright for 140 or even 150 years from the year of creation.²² Other factors are also at play. The Berne Convention specifies the automatic protection of creations as copyright-protected (independent from the substantive conditions for ‘originality’ in creations as prevalent in different legal traditions). The Berne Convention also specifies that copyright protection cannot depend upon formalities such as registration, and most countries lack other legal formalities such as voluntary registration of copyright and legal deposit. Finally, because archives are generally not created for commercial purposes, they lack a market mechanism for locating copyright owners.

There are several reasons why the burden of orphan works is more onerous compared with copyright clearance for published works, and commercial works of music and the arts. Above all, archival institutions tend to have much larger collections, as regards numbers of individual items held, than other cultural institutions, including libraries. Additionally, copyright holders for components of archival collections tend to be more difficult to trace, and therefore a much greater proportion of archival collections will tend to be orphan works.

Because archival materials were generally created for non-commercial purposes and usually have little intrinsic financial value (except for the types of collections discussed in 2.7 above), they are often unpublished at the time of their deposit. The copyright holders are often unaware that the materials have been deposited, and unaware of any copyright ownership of the material within archival collections which is legally theirs.

The notion of “diligent search” which is usually a precondition for recognition of orphan status is similarly more difficult to apply in respect of archival collections. Diligent searches for copyright

²¹ The Europeana Public Domain Charter (2010): https://pro.europeana.eu/files/Europeana_Professional/Publications/Public_Domain_Charter/Public%20omain%20Charter%20-%20EN.pdf (accessed 4 March 2019).

²² E.g. works written in the 1870s by the Irish author George Bernard Shaw (1856-1950), which remain in copyright until 31 December 2020.

owners within non-commercial archival collections are both difficult to effect and difficult to demonstrate.

This is a characteristic of the so-called “orphan works paradox²³”: that the lower the financial value of a work, the less likely it is that the copyright owner can be traced, and hence the clearance of copyright in these low-value or zero-value transactions can be exceptionally difficult.

As a result of all these factors, many individual archival rights-holders are unaware or only partially aware of their position as a copyright owner. Over decades, many of these rights holders have been contacted by the copyright research project known as WATCH (Writers Artists & Their Copyright Holders) run by the Universities of Reading and Texas.²⁴

Again and again the [WATCH] researchers encounter situations where they work out, from exhaustive research, who must be the copyright holders for a particular author, only to be faced with total ignorance on the part of the rights-holders themselves. There are roughly five responses to the situation:

- first, the rights-holders might tell us that they don't know anything about it and they don't want to know anything about it and would we please leave them alone;
- second, the rights-holders might become very interested in the prospect of large royalty receipts, only to lose interest completely when told that this is highly unlikely;
- third, the rights-holders might give a cautious agreement to cooperate, but only on condition that their name does not appear on the Internet;
- fourth, some rights-holders enthusiastically embrace their newly discovered status, and phone up every couple of months wondering why they haven't received any copyright enquiries;
- and fifth, there are the rights-holders who understand exactly what is going on, who accept that they probably own all or part of the copyright but equally accept that they are unlikely to be contacted about it more than once a year.

In all of these cases, however, the key fact is that copyright persists. WATCH discovers copyright holders who had no idea that they were copyright holders, and their rights remain intact even if they have not been exercised for 50 or 60 years.²⁵

²³ See IFLA Copyright and Other Legal Matters Advisory Committee Network: Background paper on Extended Collective Licensing, p. 35, n. 57: https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf (accessed 21 March 2019).

²⁴ With the alias www.watch-file.com (accessed 4 March 2019).

²⁵ David Sutton, 'International perspectives on archival copyright', paper given at the Congress of the International Council on Archives, Vienna, 2004: https://www.ica.org/sites/default/files/SLA_2004_International%20Congress_Paper-International%20Perspectives%20on%20Archival%20Copyright_DSutton_EN.pdf (accessed 4 March 2019).

3.5. Extended Collective Licensing

Extended collective licensing (ECL) has been proposed as a solution to the challenges associated with rights clearance for mass digitisation, among other things.²⁶ ECL functions on the basis of a voluntary transfer of rights from rights-holders to a collective management organisation (a CMO), combined with a legal extension of the repertoire of a CMO to encompass rights-holders that are not members of that society. That is, an organisation that collectively manages the interests of a substantial number of rights-holders is given a statutory mandate to grant licences to prospective users on behalf of rights-holders who have not formally agreed to be represented by the organisation. The extended collective licence applies to all rights-holders in the given field, whether domestic or foreign, deceased, and unknown or untraceable. Rights-holders who are not formally represented by the organisation can only subsequently claim remuneration for the use of their work against the organisation, and not the end user. Typically, although not always, rights-holders who are not members of the collecting society can opt out of the system such that they will not be covered by any licence granted by the collecting society. In this way, ECL avoids becoming a form of compulsory licensing that might otherwise violate well established principles of the international copyright regime.

The advantage of this mechanism is that the CMO can offer licenses for the use of large numbers of works. There is no longer a need to negotiate with individual rights-holders, or to conduct lengthy diligent searches for rights-holders in orphan works.

As a mechanism for addressing large scale rights clearance, ECL has proved effective in certain circumstances only, most notably for the broadcasting industries in the Nordic countries but also for some library digitisation projects.²⁷ For archives, however, a recent article illustrates that “archival holdings and ECL are not a good match”, and that the usability of ECL will not extend to archives.²⁸

²⁶ See: J. Axhamm and L. Guibault, ‘Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe’s Cultural Heritage’ (2012) Institute for Information Law Research Paper No. 2012-19: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001347 (accessed 4 March 2019); T. Riis and J. Schovsbo, ‘Extended collective licenses and the Nordic experience - it’s a hybrid but is it a Volvo or a lemon?’ (2010) *Columbia Journal of Law and the Arts*, 33:4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230 (accessed 4 March 2019); and, D. Gervais, *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2006).

²⁷ See T. Riis and J. Schovsbo (2010 – previous footnote), as well as the responses from Koninklijke Bibliotheek (National Library of the Netherlands) and the Nationaal Archief (National Archives of the Netherlands) included in V. Stobo, et al, *Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options* (2018) EnDOW Report No. 3, available at <http://diligentsearch.eu/wp-content/uploads/2018/05/EnDOW-Report-3.pdf> (accessed 6 March 2019).

²⁸ Jean Dryden, ‘Extended collective licensing and archives’, *Journal of Archival Organization* (2018): <https://doi.org/10.1080/15332748.2018.1503015> (accessed 6 March 2019).

4. CORRESPONDENCE COLLECTIONS AND DIGITISATION

4.1 Copyright particularities of archives, illustrated by collections of correspondence

Issues created by multiple copyright holders do sometimes present problems in the world of books and libraries, where one finds various types of multi-author works, including anthologies and collections of essays. In the world of archives, however, this potential problem can be multiplied a thousand-fold, most notably with collections of personal and institutional correspondence. Large collections of correspondence can include several thousand different authors, and hence several thousand different copyright holders. A correspondence collection will often be named after the recipient of the letters (e.g. The Margaret Atwood Correspondence) but the copyrights in such a collection attach primarily to the writers of the letters.

National legislations may add still further complications. For example, Italian copyright law grants rights to the recipients of letters and their heirs, as well as to the authors of the letters. This is the very specific and remarkable piece of Italian legislation in respect of unpublished correspondence:

93. Correspondence, letters, collections of letters, family and personal memoirs and other writings of like nature, having a confidential character or associated with the intimacy of private life, may not be published, reproduced or in any manner brought to the knowledge of the public without the consent of the author and, in the case of correspondence and letters, the consent also of the person to whom they are addressed.

After the death of the author or of the addressee, the consent of the spouse and children or, if none exist, the consent of the parents, shall be required; if there is no spouse, child or parent, the consent of the brothers and sisters or, if none exist, the consent of the direct ascendants and descendants to the fourth degree, shall be required.

If the persons referred to indicated in the preceding paragraph are two or more in number and disputes arise between them, the judicial authority shall decide the matter, after having heard the public prosecutor.

The wishes of the deceased person, when expressed in writing, shall in all cases be respected.²⁹

4.2 What mass digitisation studies show

Given the complexity of copyright issues within large collections of correspondence, it is helpful that we are now able to study the outcomes of a number of well-funded digitisation projects. In these projects the funding allowed for a complete programme of copyright clearance, the results of which are compelling.

²⁹ Italy. Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as amended up to Legislative Decree No. 95 of February 2, 2001), Part II, Chapter VI, Section 93: <https://wipolex.wipo.int/en/text/128286> (accessed 4 March 2019).

The Churchill College Archives Centre in the UK, for example, approached over 10,000 rights-holders for permission to digitise their works and include their works in the Centre's online resource. Of the rights-holders who responded, 98% granted permission.³⁰

The University of Michigan undertook a similar programme of copyright clearance in respect of their Jon Cohen Aids Research Collection, with a similar outcome. Of the rights-holders who replied, 95% granted permission.³¹

Another example is provided by the 'Codebreakers: makers of modern genetics' initiative run by the Wellcome Digital Library, in which 98% of the contacted rights-holders who replied agreed to grant permission.³²

These large-scale examples, carefully analysed, allow us to suggest that the great majority of rights-holders for archival collections of correspondence are happy and willing for the material whose rights they own to be digitised. There is a general awareness that there will not be any possible commercial advantage to the rights-holders in such a digitisation programme, and a preparedness to grant permission freely for the sake of the public good and the advancement of knowledge.

Very few archival correspondence collections around the world, however, have the advantage of such generous funding to engage in a large-scale programme to trace rights-holders, and many large collections of correspondence remain under-used because of copyright uncertainties.

5. SUMMARY

- Material comprising archival collections is normally unique and singular in nature, and a separate work from the perspective of copyright.
- Because of this uniqueness, archival material usually meets the so-called "*de minimis* quantum of creativity" which means that the rules of copyright apply.
- Archival institutions exist for purposes which are generally non-commercial.
- Archival institutions need to make copies of their holdings for both preservation and access.

³⁰ V. Stobo, 'Copyright, digitisation and risk: taking risks with archive collections', in R. Deazley and A. Wallace, eds., *Copyright and cultural memory: digital conference proceedings (CREATe 2017)*, pp. 26-38: <https://www.create.ac.uk/publications/copyright-and-cultural-memory-digital-conference-proceedings> (accessed 4 March 2019).

³¹ D. Akmon, 'Only with your permission: how rights holders respond (or don't respond) to requests to display digital materials online', *Archival Science* 10 (1) (2010), pp. 45-64.

³² V. Stobo, with R. Deazley and I. G. Anderson, 'Copyright & risk: scoping the Wellcome Digital Library project' (CREATe 2013): <https://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project> (accessed 4 March 2019).

- Rules for making copies from archival collections vary widely from country to country.
- Distinctions between published and unpublished works are a normal feature of copyright legislations, but the clauses which relate to published and unpublished works differ widely. In some countries unpublished works enjoy longer (and even perpetual economic) copyright protection; in other countries, notably the USA, longer copyright duration applies to works published on January 1, 1978 and later; a third group of countries makes no distinction or no special provision.
- Component parts of any one archival *fonds*, and also archives which are essentially complementary to each other, will often be found in several different countries, and thus subject to several different copyright regimes.
- Archival collections and *fonds* will often have many different copyright holders, and, in the case of collections of correspondence, potentially thousands of different copyright holders for any one collection.
- Most archival collections have very little exploitable financial value. The exceptions to this norm are mostly purchased collections of personal papers, together with documents which are many centuries old.
- Most archival copyright holders, when traced, are prepared (and often very pleased) to grant permissions freely.
- The tracing of archival copyright holders, however, can be extremely difficult, and often inconclusive, meaning that copyright in the archival item exists but no-one has any certainty about the copyright situation.
- In addition to these situations of uncertainty, many archival items are unequivocally “orphan works”, in that no copyright holder can be traced.
- Born-digital archives are becoming the norm in many types of archival collections. All the copyright uncertainties which have existed for many decades in traditional archive formats will also apply in the case of born-digital archives.

[End of document]