

## **Can Archives and the Creative Industries Coexist? The Need to Create Breathing Room for Archives**

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The promotional literature for this ICA conference suggests that there is or there can be a friendly and collaborative relationship between archives and the so-called creative industries. Although it would be nice to have friendliness and collaboration, the current technological, political, and legal environment instead provides the conditions for opposition, with archives in the weaker position.

Archives can and should serve to receive and preserve the output of the cultural and creative sectors. Archives are also a potential source for the kind of rich content that creative industries need to be successful. However, the intellectual property regimes under which the creative world operates as an industry present fundamental barriers to archivists striving to provide not only that rich content but almost any other kind of material. As the technological revolution of the last 20 years has led to both new markets and new threats to publishing and entertainment, the creative industries have sought legal protections. Unfortunately, the overly broad sweep of those measures has had the unintended consequence of preventing archivists from being able to benefit from that very same technological revolution, which would enable us to preserve archives and make them more widely accessible.

Worse yet, the entrenched opposition of certain representatives of the creative industries to even modest public policy changes for archives is leading some in our profession to believe that faithfulness to inflexible intellectual property laws makes it impossible to fulfill the archival mission of proactively promoting wide access. Faced with the choice between the law and our mission, some archivists are saying that our mission must take precedence over a law that has long since become obsolete. The public is already skeptical of the legitimacy of copyright rules, and such an attitude by archivists will only reinforce it. Is this alienation of archivists something the creative industries can afford? Is this the kind of relationship we want between archives and the creative sector?

The rich technological environment that has evolved over the past 25 years should make collaborations possible and desirable, yet developments since the mid-1990s in the legal environment have resulted in protections for the economic interests of the industrial side of the creative sector while tightening a noose around the neck of archives everywhere. The result? We are prevented from fulfilling the aspirations of the UNESCO Universal Declaration on Archives to make archives accessible to everyone. A review of some basic facts, first about archives and then about creative content and copyright, will help clarify the source of the tension.

### **Archives Basics**

Whether one considers archives as repositories of governmental and administrative records or of documents of cultural heritage, the following tenets are so basic to our professional work that we rarely think twice about them even though the general public may be ignorant of them.

- Archives are filled with unique or nearly unique primary source material.
- In consequence, every archives repository is the documentary source of last resort for someone, potentially anywhere in the world.
- Absent significant travel funds, people off-site cannot benefit from archives unless archivists can make and send copies.

- Regardless of documentary format, but especially in the case of born-digital material, archives cannot be preserved without copying, and often copying multiple times.
- Regardless of format and regardless of barriers, archivists understand that copying is essential to our mission.

## **Creative Content and Copyright Basics**

- Although certain governmental and administrative documents may be very routine and uninteresting, the majority of documents in archives contain enough creativity to make them fall under copyright law.
- Even if not all archival documents are highly creative, it is not within archivists' mandate or competence to determine which are creative enough to be copyrightable and which are not.
- Documents containing creative expression exist in just as many different formats as any archives might hold whether written on parchment or born-digital.
- Commerce in documents with creative expression is enabled by law and regulations.
- From the mid-15th through the 19<sup>th</sup> century, an industrial model emerged whereby the authors of creative works would transfer those works to intermediaries who would then be responsible for duplication and distribution as a matter of commerce.
- In the midst of the 19<sup>th</sup> century's grand industrial era, authors and other creative artists came together to establish the 1886 Berne Convention, which instituted international rules for copyright.
  - At the core of Berne and subsequent conventions, and the resultant national copyright laws, is the principle that the originator of creative works has a monopoly in the work, i.e., exclusive rights.
  - Because Berne and its successors does not differentiate about types or original purposes of creative works, the contents of archives have been swept into their web of exclusive rights.
  - "Exclusive rights" means that without the owner's permission, there can be no copying, no distribution, no adaptation, etc.

Thus, as archivists, we are at the center of an inherent collision. If we are to fulfill our mission, we cannot do so without copying for preservation or for our users. But, doing so means we are in violation of Berne-protected rights and thus engaged in illegal activity. These conditions lead to uncertainty, caution, and downright fear in the archival world. The resultant paralysis does not serve our mission, our institutions, or the public. Although the rules established by Berne may have made sense in the 1880s, when steam engines and the telegraph were the primary technologies for transportation and communication, without adjustment they represent major obstacles to today's technologies for connecting people with archives.

For those archivists passionate about their mission, they may make and provide copies everyday, and it may even be without negative consequences, but that does not make it legal. As a profession we advocate good governance and accountability. Can we afford to just ignore the fact that we are violating laws relating to creative works? Oftentimes, archivists manage not to be caught because the material in question is quite old, but what about when the documents in question are not out of the marketplace that was created and enforced by Berne, such as materials less than 120 or those less than 50 years old? Or materials created for a market but with creators who are neither identifiable or traceable? What about audiovisual material that tells the story of the second half of the 20<sup>th</sup> century? So that we can better understand how

adherence to the letter of the law would stop a conscientious archivist from taking action in harmony with our mission, a few examples of 20<sup>th</sup> century materials will underscore why an international solution is needed.

**Example One:** As with all former colonies, important parts of the documentary record of a certain central African country reside not in that country but in the capital city of its former colonial parent. Unfortunately, periodic political upheavals have resulted in destruction of the country's own copies of birth, marriage, and death records from the colonial period. Because the now independent country's copyright laws lack any archives exceptions and because the European country's copyright laws do not allow copying of works except for on-site use, citizens of this independent country need to travel thousands of miles to Europe just to obtain their own basic vital records.

**Example Two:** Presently the US has one of the most comprehensive and best sets of copyright exceptions for archives and libraries, yet in today's interconnected era, they are insufficient to the world's needs. One example shows why—the personal archives of a radio journalist from a developing country which lacks any archives or library exceptions. For over four decades, this man was a primary source of news and cultural programs in his country. Audiotapes of his programs, now held at an American archives, are unstable and will disintegrate soon if they are not digitally copied. US law allows this copying, and the journalist's family supports the work. Unfortunately, without an international instrument to support cross-border access, this material cannot be made available to the people of the country where it matters most. Instead, they must pay for travel to the U.S. if they want to access it.

**Example Three:** A few months ago, my archives, which operates under U.S. law, received an e-mail from a historical museum in a former Warsaw Pact state. They were interested in our collection of US posters promoting Radio Free Europe in the 1950s and '60s. To connect with their own displays on their country's Soviet Era emigration, the museum sought images to reflect the anti-communist message enticing the East European population to emigrate. Their first question—do we have any such posters—was easily answered by a resounding yes, but their follow-up questions were not. Their e-mail request read: "If you have such posters, is there any way for us to research them? Can you send preview photos? How do we obtain copies and a license for our exposition?" Even though our copyright law would allow provision of such copies within the US, without international norms on the right to provide copies to users, we are unsure of the legal environment for us to provide the documents across borders to help the museum meet its mission and us ours.

Buried in archivists' current professional practices is the fact that the copying and distribution of archival documents is an activity quite different from the copying and distribution that concerns the creative industries. Yet rules devised for the cultural marketplace make no allowance for the space that the archival universe needs just to do its work. In fact, what archivists do is to facilitate the use of creative content for purposes quite different from those for which the

marketplace of Berne exists. In short, we are doing specialized work that is deserving of legal recognition via exceptions and limitations. One would think that the law would provide working room for our mission, but the law fails us, leaving us operating without a map.

Some countries do have special provisions in copyright law giving archives and libraries exceptions to allow what would otherwise be illegal. But these provisions do not exist in all countries and are very inconsistent where they do. Indeed, the findings of a recent study have shown that the general absence and inconsistent provisions leave a framework that is totally inadequate for archives in today's digital world (Crews, 2008). This situation is the equivalent of taking a railroad journey where one must change trains at every border because the railroad tracks are a different size from country to country. In other words, locally-based, nation-specific solutions are inadequate in today's interconnected world and serve only as prohibitive barriers to the global role archivists should play. This is clearly an international problem that needs an international solution.

It should be easy to solve this. All that is needed is a reasonable set of archives and library copyright limitations and exceptions that all nations accept. These were placed on the agenda of the World Intellectual Property Organization (WIPO) in 2010 and 2011, but progress has been blocked. Now, the WIPO national delegates need to rise above the vested interests of the publishing industries and complete a treaty that provides consistent exceptions and limitations for libraries and archives. Easier said than done. In fact, to make this case, we need archivists worldwide to contact the ministers responsible for intellectual property in their own country to impress upon them how important these exceptions are to the archival mission in their countries. In particular, we need to convince the national archivists to reach out to their IP ministries, to further the cause.

Our mission for the information needs of the world's population is an important one and should make a compelling case to international policy makers. That is why it so disheartening that we face a stubborn, anti-intellectual, and anti-human-welfare resistance from major spokespeople who think of copyright reform only in terms of how to extend the Berne monopolistic regime. That may have made sense in the steam era when it was created, but not in the 21<sup>st</sup> century. We are not advocating the elimination of exclusive rights or taking the bread from the mouths of the children of artists and authors, as has often been implied by the other side when we present the archives and library case in Geneva. What we seek is simply enough breathing room to fulfill our mission in a way that is befitting to the 21<sup>st</sup> century.

## **Bibliography**

CREWS, Kenneth D. (2008). *Study on Copyright Limitations and Exceptions for Libraries and Archives*. (Geneva: World Intellectual Property Organization, Standing Committee on Copyright and Related Rights. Available at:  
[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf)