

Copyright in Archives: An Instrument For the Safeguarding of Cultural Identity?

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ABSTRACT

In modern information society of today the increasing importance is given to the issue of access to information. There are series of laws and regulations that determine the ways and means of access. One of the important areas that also relates to the question of access to archives and information is the issue of copyright and related rights. We are talking about the field that has recently experienced a powerful and important development, both internationally as well as nationally. Copyright presents archivists with the difficulties. On one side there is a desire of the owner to protect the work and on the other the need of the users or society in general that wants to benefit of those works. Very often archivists have to deal with archival material that is still protected by copyright but for which the owner cannot be identified. This is a very difficult task for archivists, since they protect archival material for the benefit of the users and to make it available, with as possible as few restrictions, but very often they cannot serve the user because of the copyright provisions. The article is presenting international agreements governing copyright, the issues of copyright legislation with special emphasis to the Slovenian Copyright Act and deals with the limitations and exceptions for archives.

Key words: archives, copyright law, international conventions, Copyright and Related Rights Act, Slovenia

Il diritto d'autore negli archivi: uno strumento per la salvaguardia dell'identità culturale?

SINTESI

Nella moderna società dell'informazione una sempre crescente importanza viene data al tema dell'accesso all'informazione. Ci sono serie di leggi e regolamenti che determinano le modalità e gli strumenti dell'accesso. Una delle più importanti aree che pure afferiscono al problema dell'accesso agli archivi ed alle informazioni è quella del diritto d'autore e dei diritti ad esso collegati. Stiamo parlando del campo che di recente ha avuto uno sviluppo potente ed importante, sia a livello internazionale che nazionale. Il diritto d'autore e la proprietà intellettuale hanno subito molti cambiamenti e revisioni legislative a livello internazionale. Il diritto d'autore offre agli archivisti delle difficoltà. Da un lato c'è il desiderio del proprietario di proteggere il lavoro e dall'altro il bisogno dell'utenza in generale di poter beneficiare di quei lavori. Molto spesso gli archivisti hanno a che fare con materiale archivistico protetto dal diritto d'autore, ma del quale non è possibile identificare l'autore. Questo è un compito molto difficile per gli archivisti, dal momento che essi proteggono il materiale a beneficio degli utenti e per renderlo disponibile, con meno restrizioni possibile, ma molto spesso non riescono a servire l'utenza a causa delle disposizioni sul diritto d'autore. L'articolo presenta gli accordi internazionali che regolano il diritto d'autore, le problematiche della legislazione sul diritto d'autore con particolare riguardo alla Legge slovena sul diritto d'autore e tratta dei limiti e delle eccezioni per gli archivi.

Parole chiave: archivi, legge sul diritto d'autore, convenzioni internazionali, diritto d'autore e legge sul diritto correlato, Slovenia

Avtorske pravice v arhivih: orodje za varstvo kulturne identitete?

IZVLEČEK

V sodobni informacijski družbi se danes vse večji pomen namenja vprašanju dostopa do informacij. Obstaja vrsta zakonov in predpisov, ki določajo načine in sredstva za dostop. Eno od pomembnih področij, ki se nanaša tudi na vprašanje dostopa do arhivskega gradiva in informacij, je vprašanje avtorskih in sorodnih pravic. Govorimo o področju, ki je pred kratkim doživelo močan in pomemben razvoj, tako na mednarodni kot tudi na nacionalni ravni. Avtorske pravice arhivom povzročajo velike težave. Na eni strani je želja lastnikov, da zaščitijo

svoja dela in na drugi potrebe uporabnikov ali družbe na splošno, ki si želijo imeti koristi od teh del. Zelo pogosto se morajo arhivisti ukvarjati z arhivskim gradivom, ki je še vedno zaščiteno z avtorskimi pravicami, za katere pa ni mogoče identificirati lastnika. To je zelo težka naloga za arhiviste, saj varujejo arhivsko gradivo v korist uporabnikov, in jim omogočajo njegovo uporabo s čim manj omejitvami. Kljub temu pa večkrat uporabnikom ni mogoče ustreči prav zaradi določb o avtorskih pravicah. Članek predstavlja mednarodne sporazume, ki urejajo avtorske pravice, vprašanja zakonodaje v zvezi z avtorskimi pravicami, s posebnim poudarkom na Zakonu o avtorskih in sorodnih pravicah v Republiki Sloveniji ter z omejitvami in izjemami za arhive.

Ključne besede: arhivi, avtorske pravice, mednarodne konvencije, Zakon o varstvu avtorskih in sorodnih pravic, Slovenija

1 Introduction

In modern information society of today the increasing importance is given to the issue of access to information. There are series of laws and regulations that determine the ways and means of access. One of the important areas that also relates to the question of access to archives and information is the issue of copyright and related rights. We are talking about the field that has recently experienced a powerful and important development, both internationally as well as nationally. The copyright and intellectual property have undergone many changes and revisions of laws at the international level. It should be noted that their regulation has become much stricter and more controlled, however we cannot say that for Slovenia.

The issues of copyright are becoming increasingly important in the world, not only in the economic but also in other areas, including in the field of culture, since it is essential for the presentation of culture and creativity as well as an important instrument for the safeguarding of cultural identity. Copyright, regulated in Slovenia by the Copyright and Related Rights Act (Slovenian: Zakon o varstvu avtorskih in sorodnih pravic, Ur. l. št. 16/2007), is one of two major fields of intellectual property, to which international conventions and doctrines are adding other rights and legal relations.

2 International conventions governing copyright

2.1 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works (1886) is fundamental and the oldest but at the same time also the most important international copyright agreement. It was adopted in 1886¹, but has been revised several times to today². Up to now, 168 countries have indicated their adherence to the Berne Convention.

The main principles of the Berne Convention are the principle of national protection³, the principle of informality⁴ and the principle of minimal rights⁵.

The Convention provides the protection of works for the life of the author and fifty years after his death, or, in the case where the time of death is unknown, fifty years from first publication, but parties are free to provide longer terms.

1. The first version of the Berne Convention treaty was signed on September 9, 1886, by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the United Kingdom (see Solberg, 1908, p. 9).

2. Completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971; and amended on October 2, 1979.

3. The Berne Convention requires its signatories to recognize the copyright of works of authors from other signatory countries in the same way as it recognizes the copyright of its own nationals.

4. Copyright under the Berne Convention must be automatic; it is prohibited to require formal registration.

5. The agreement required member states to provide strong minimum standards for copyright law.

2.2 Universal Convention

World Universal Copyright Convention was adopted under the patronage of UNESCO in 1952 in Geneva and amended in 1971 since some countries, especially the United States, could not (or did not want to) join the Berne Convention because they did not fulfil its standards. The Universal Convention became their alternative to include in international treaties. It is based on similar principles as the Berne Convention, but its standards are much lower. The convention also ensures the reciprocal protection of copyrighted works, but it does not recognize moral rights and it allows formalities. The Convention provides the protection of works for the life of the author and twenty-five years after his death. However in 1989, the U.S. Berne Convention Implementation Act of 1988 was enacted, and the U.S. Senate ratified the treaty and United States became a part of Berne Convention (Molotsky, 1988). That made the Universal Copyright Convention nearly obsolete, as stated by Fishman (2011, p. 332).

2.3 World Intellectual Property Organization Copyright Treaty (WCT)

WIPO Copyright Treaty was signed in 1996 and represents an upgrade of the Berne Convention. The Convention does not deviate from the established principles of national protection, informality and minimum rights, because they are taken from the Berne Convention as part of the existing provisions. The Convention governs copyright in the digital environment and some new rights. For the first time it protects computer programs (article 4), databases (article 5) and home pages (article 6). Novelties are also the recognition of new exclusive distribution rights (which until then has not been recognized by any international convention in such a form), recognition of new exclusive rental right for computer programs, cinematographic and the content of phonograms and in particular the recognition of a new exclusive right of communication to the public. That is a response to the challenges of the Internet era and represents the end of the confusion that has reigned the way of protection in this environment. The Convention also to equalize the photographic works with other copyrighted works regarding the duration of copyright protection (Mežnar, 2008).

Article 10 of the Convention is especially important for archivists as it refers to “limitations and exceptions” and actually provides the “fair use”.

Up to now, 92 countries have indicated their adherence to the WIPO Copyright Treaty. Slovenia joined the treaty on December 12, 1997, and ratified it on November 11, 1999.

2.4 European Union Directives

The European Union comprises twenty-eight countries, and its Council issues directives that are developed and approved through a complex political process. When the European Union issues a directive, members usually have a certain period to enact conforming legislation.

Until now the European Union has issued several directives on the different subjects of copyright law as the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (2009), Council Directive 91/250/EEC on the legal protection of computer programs (1991), Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right (2004), Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art (2001), Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (2001), 96/9/EC of the European Parliament and of the Council on the legal protection of databases (1996), Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights (repealed) (2006), Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93), Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)(2006), Council Directive 92/100/EEC on rental right and lending right and on certain

rights related to copyright in the field of intellectual property (repealed) (1992) and Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products (1987).

The most important directive for archives is The Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

The directive mandates many changes in the copyright laws of European Union countries. In other respects, the directive makes some changes optional. Most of the copyright exceptions listed in the directive are only optional, including the library exception. The directive also permits countries to extend these exceptions to the distribution right.

3 Copyright law and its jurisdiction

Areas covered by copyright legislation are copyright and related rights “... *the right of authors to their works of literature, science and art* (Copyright and Related Rights Act (hereinafter ZAPS), 2007, article 1, paragraph 1), *the rights of performers, phonogram producers, film producers, radio and television organizations and publishers* (ibid., article 1, paragraph 2) as well as *individual and collective administration of copyright and related rights* (ibid., article 1, paragraph 3).” Copyright exists only for authorial works, because without these there is no copyright. Copyrighted work is the creation expressed in any way, and designed with a series of criteria that define the copyrighted work. These criteria are the creation, areas of creativity, spirituality, individuality and expression (Trampuž, Oman and Zupančič, 1997, pp. 30). As copyrighted works are considered individual intellectual creations in the field of literature, science and art, which are expressed in any manner, among them spoken works⁶, written works⁷, musical works⁸, theatrical works, choreographic and pantomime works, photographic works⁹, audio-visual works, works of art, architectural works¹⁰, works of applied art and industrial design, charts¹¹, and presentations with scientific, educational or technical nature (ZAPS, 2007, article 5). It should be noted that ideas, principles, discoveries, juridical and administrative official texts and folk’s literature and art are not protected by copyright (ibid, paragraph 9).

According to the valid Copyright Act the copyright last for the life of the author and seventy years after his death (ibid, article 59). If the copyrighted work was a product of more than one author, the copyright lasts until the death of the last author (ibid, article 60). After expiry of these deadlines, copyrighted work is no longer protected. However, the copyright is an indivisible right that includes moral and material rights.

Moral rights protect the author’s intellectual and personal ties to the work and include a right of first publication, the right to recognition of authorship, the right to respect for labour and the right of withdrawal (ibid, Articles 16-20).

Material rights protect the property interests of the author. The author is a sole person who can

6. The most significant examples of spoken works are speeches, sermons and lectures. The spoken part is not “trapped” in a media, as than they could become a written works, etc..

7. It is the creation, where the content is expressed in the form of characters in a particular medium (e. g. Paper), like literary works, articles, manuals, scientific theses, studies, and computer programs. Under special circumstances, copyright is recognized for advertising leaflets, personal letters and personal diaries.

8. This category includes all kinds of sounds with text or without. One should mention also all kinds of musical arrangements and musical improvisation. Under certain conditions, also all kinds of music are copyrighted.

9. The photos are still images produced on surfaces that are sensitive to light or other radiation, irrespective of the technical nature of the process of formatting (Principles of UNESCO/WIPO, p. 271). However, copyright law protects only those photos that are individual spiritual creations of the photographer. Even with photographic services, the assumptions of individuality, spirituality, creation, expression, literature, science or art must be completed. At the very beginning, the photographic works were not recognized as author’s creations, but later the protection was confined. Today they are fully assimilated with the other categories. Not all photos, of course, are recognized as works of authorship, including average amateur photos (family videos, holiday photos), But in many practical cases, they become protected by copyright.

10. Slovenian Copyright and Related Rights Act is the first and one of the few in Europe that deals with architectural work independently, taking into account all phases of work (drawings, plans, implementing facilities) as well as all three main architectural fields (architecture, urbanism, landscape architecture).

11. In the cartographic work only so-called “Cartographic manner”, is protected because otherwise charts are linked to topographic features, which are not be protected.

authorize or prohibit the use of the work. Otherwise, the application is only possible if the author properly transferred the copyright (*ibid.*, article 21). Material rights include the use in physical, not physical or modified form including the rights of reproduction, distribution, rental, the right of public performance, the right of public transmission, the right of public performance with phonograms and videogames, the right of public display, the right of broadcasting, right of rebroadcasting, the right of secondary broadcasting, the right of recovery and the right of audio-visual adaptation (*ibid.*, Articles 21-33, 104).

Of course, there are some restrictions of copyright that determine legal licences and free use (*ibid.*, articles 46-57). With the regard to the Article 37 of the Copyright Act, the reproduction of already published works is free for private use if only three copies are made. The free reproduction is granted by the Act for public archives, libraries and educational and scientific institutions, if it is made from their own copy without the purpose of gaining direct or indirect economic profit (*ibid.*, Article 50, paragraph 3). Reproduction is not permitted in the case of the whole book, of databases and computer programs (*ibid.*).

Copyrighted work is a creation of the author expressed in any manner, as already stated and copyright is indivisible right to the work that includes moral and material rights of the author. However, in case when an author creates a copyrighted work as a part of a working process or according to the directive of the employer, than copyright and other rights are transferred to the employer for a period of ten years from the completion of the work. After this period, the rights belong to the author, unless the employer demands the rights back and paying the fee to the author (ZASP, Articles 100-101).

Specific provisions of copyright are applicable in the case of computer programs (*ibid.*, Articles 111-117).

4 Archives and protection of copyright

Protection of copyright in the archives is differently regulated around the world, from the wide variety of rules, the strict protection or a complete neglect of this issue. There are countries where the copyright is so strictly controlled that in many cases it even hinders the access to the archives. Restrictions imposed by law may constitute substantial limitations in relation to material preserved by archives and given on the use of researchers.

Copyright laws of many countries often explicitly mention archives and that proves that policy and lawmakers start to understand that archives are serving the public interest. In serving the public archives face, many problems related to the copyright issues especially the need to make copies of documents for research, preservation or other purposes, like brother dissemination of archives among the public. More recently, archives are facing many problems concerning copyright in digital media i.e. electronic records and digitized material published on internet (see International Study on the Impact of Copyright Law on Digital Preservation, Part 1.4.3, 2008; Besek, 2003).

Many of copyright laws around the world contain the provisions on limitations and exceptions for archives, but they are mostly focusing on reproduction of copyrighted works. As stated by Crews (2008) the reproduction right may be most often affected as libraries make copies for preservation, research, or any other purpose. When libraries give copies to users for their study or research, the library is also implicating the distribution right. When libraries allow users to watch an audio-visual work or view images that are stored on a networked server, the service raises questions of “display” or “performance” or “making available.” One could say the same for the archives (Crews, 2008, p. 27).

Kenneth Crews elaborated in 2008 the Study on Copyright Limitations and Exceptions for Libraries and Archives¹². The study captured 184 countries members of WIPO of which three have no copyright law however, 149 usable Copyright Acts have been examined. Study showed that 128 countries have a library (archives) exception and twenty-one countries have no library exception. Countries with no exceptions are in Africa, the Middle East and South and Central America.

12. The study was commissioned by WIPO Standing Committee on Copyright and Related Rights.

One can fully agree with Crews, that the lack of a library and archives exception does not necessarily mean that libraries and archives in these countries have no lawful means to make copies or other uses of copyrighted works. The copyright laws may include provisions on fair use or fair dealing, or more common are statutes that permit individual copies for personal use (Crews, 2008, p. 30).

Copyright is also an issue of the debate within the International Council on Archives by the Working Group for Intellectual Property (ICA/WGIP)¹³. They presented the archival community with the document entitled Current issues in copyright for archives in which they explained the issue and its development. As they have stated in the document, “*it is not a guide to copyright, but it seeks to draw the attention of archivists to the importance of copyright and the copyright issues that affect them*” (Current issues, p. 1).

Copyright law changes all the time and there are several reasons for this like new kinds of protected works, expanding terms of protection, changing jurisdictions, content as power in the information society etc. Therefore, it is very important for archivists to understand the issues of copyright. The fact is, as the ICA document states, that “*virtually everything that was created in the last century preserved in an archival repository could be protected by copyright. In some parts of the world, even older works are still protected, depending on the provisions for duration in those countries*” (Current issues, p. 3)

That is the reason why archivists have to balance between the legal rights of copyright owners and demands of users that are growing from day to day. Users very often forget, that they are obliged to respect the copyrights what confronts archivists with big problems. Therefore, archivists have to be aware of the development of copyright law at the national, regional and international levels.

Because all of this the WIPO Standing Committee on Copyright and Related Rights started in 2011 to consider proposals for a new treaty that would define minimum standards for copyright exceptions and limitations in favour of archives and libraries. For the first time archives and libraries have been recognised as important in serving public.

A new treaty could:

- **permit archivists to make preservation copies** of works in their custody, regardless of format, as often as required. This is particularly essential for photographs, films, sound recordings, not to mention digital media which must be copied every few years due to format obsolescence;
- **permit archivists to make single copies for researchers** for private, study purposes only. Users frequently need to consult documents again after they have left the repository. Many more users cannot attend a particular repository at all, perhaps because it is on the other side of the world. An international treaty that required member states to permit the cross border supply of such limited copies, in digital or analogue formats, would enable archivists to provide their services more freely and would encourage the development of information rich societies throughout the world;
- **limit the liability of librarians and archivists** for infringements occurring as a result of their activity as intermediaries between rights owners and use (Current issues, p. 4).

The International Federation of Library Associations (IFLA) prepared with the ICA assistance, a draft treaty dealing expressly with libraries and archives and together they have tried to achieve the changes to the copyright provisions regarding limitations and exceptions for archives and libraries.

The negotiations were very productive until 2014 when they broke down at the 27th meeting of the WIPO Standing Committee on Copyright and Related Rights, after the European Union (EU) attempted to block future discussion of copyright laws to aid libraries and archives fulfil their missions in the digital environment (see Internet 1). Until now, libraries and archives did not find a joint solution regarding an international copyright instrument for libraries and archives since the discussions again collapsed at the 28th meeting from Monday 30 June - Friday 4 July. Member States finally “agreed to disagree” on any conclusions on copyright exceptions for libraries and archives, as well as a draft treaty for broadcasting (see Internet 2, Internet 3 and Internet 4)¹⁴.

13. Members of the working group are Anne Bast, Abdelmadjid Chikhi, Sarah Choy, Paul Dalglish, Jean Dryden, Sharon Alexander Gooding, Bill Maher, Juliane Mikoletzky, Milovan Misić, Kouamé Henri N'Dri, Tim Padfield, Bathie Seck, Kwibusu Si, David Sutton, Dominique Taffin and João Vieira.

14. The next meeting of the SCCR takes place in December 2014, after the WIPO General Assembly in September 2014.

5 Copyright in Slovenian archives

The copyright issues in Slovenian archives are still not very well covered. In practice, the provisions of the copyright law are still not considered sufficiently by users when using archives as well as not by archivists regarding acquisitions and the records and other material created in the archives as the product of the work process and publishing activities of the institution.

Slovenian Archival Act (2006, amended 2014) explicitly states in Article 9 that the user has to acquire all adequate permissions for material which is a subject to all intellectual rights (including copyright) by himself before using the archives. In practice Archives does not assume any responsibility in case of copyright abuse. The only liable for abuse is the author.

The Copyright and Related Rights Act, which is in regard to Archives Act "lex specialis", determines in its Articles 48-57 the free use of works, which also provides free use of the material kept in public institutions, explicitly stating Archives (ZASP, 2007, Article 50). The article states that the reproduction of a published work is free "for own use within the public archives, public libraries and educational and scientific institutions, under the condition that the reproduction is made from their copy." The Act also determines that it is necessary to quote the source and authorship of a used work. Indication of the source is always required, but it is not determined what it comprehends. It must comprehend at least the basic information according to which the work can be found.

At this point I would like to mention very shortly also three important material rights, which are important for the of film material (see Rau Selič, 1999), namely the right of distribution (ZASP, 2007, Article 24), right of rental (ibid., Article 25) and public lending right (ibid., Article 37).

Another set of problems arises in the field of unpublished works, anonymous works and copyright within the private archives. The study of the acquisitions of private archives in Regional Archives Maribor, for example, revealed that in the contracts, which were concluded with private holders, not even a single Article or condition is specifically determined, that would specially govern the copyright. That clearly shows, that owners of private archives have insufficient awareness of their rights they have as owners or authors of the material.

Archives as publishers of their in-house production are insufficiently aware of the copyright as well, and this is one of the areas, where many problems arise.

The most and the biggest problems related to copyright arise however in the field of digital archives. In the era of internet archivist are daily confronted with problems like publishing archival material on internet what can be very tricky and can lead to a huge complications regarding copyright.

Of course, there are much more outstanding issues in this area; however, they cannot be addressed at this point due to lack of time. The fact is that it is an important area that needs to be regulated as soon as possible for the benefit of copyright owners, as well as archives and in particular users.

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SUMMARY

Internationally and nationally copyright and intellectual property have been the subject of many reviews and treaties. Copyright protects the rights of an author in the field of literature, science and art, rights of performers, producers of phonograms, film producers, Radio and Television organisations and publishers. The creator of the work generally owns copyright. Copyright is one of the laws, that controls the way the archival records may be dealt with and it can cause a big limitations for researchers regarding the use of archives. That is the case in some countries, where the provisions of the law are very strict. On the other hand, there are countries, where the copyright in archives is not considered at all. In many countries, archives have a very low awareness of intellectual property right. They lack a sufficient understanding of the importance of the protection of the intellectual property rights. There are some question that will need a profound consideration as: How can we protect the rights of copyright owners in archives without to discredit users and researchers? and what can we do for better understanding and implementation of Copyright into archives?

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