

# Copyright and Accessibility in South African Research Archives

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## Abstract

Research archives aim to achieve a balance between preservation and access. Copyright law aims to achieve a balance between the interests of rightsholders and users. These aims sound broadly similar at first, but there are areas where the intersection can be problematic. This dissertation examines the problem of archival accessibility through three lenses: copyright duration, preservation, and third-party and orphan works.

Copyright assumes an author intends to exploit their work through some form of publication. Most of the works within a research archives are unpublished. One of the ways archives seek to make works more accessible to more people, is by placing them online. Unless the copyright has expired or been assigned to the archives, this requires permission from the rightsholder(s). In South Africa, many unpublished works have perpetual copyright. Determining when the copyright expires—if it expires—is complicated by more than publication status. Certain works require reference to otherwise repealed laws due to the transitional provisions that continue to apply to archival works long after the transition has taken place. The question of internet ‘publishing’ also needs to be considered.

In order to make works accessible in perpetuity, the works need to be preserved so that they continue to exist. To preserve works, archives need to reproduce them. The Copyright Regulations allow the creation of facsimile copies for preservation purposes without requiring the permission of the rightsholder(s). If the reproduction is not in facsimile form, then it is infringement without the rightsholder(s) permission. It is not clear if the format shifting that audiovisual and digital content requires is allowed when creating a facsimile. This material becomes inaccessible and is lost very quickly as format shifting is needed in order to keep the content accessible, as well as to preserve it for the long-term.

Many archival works, such as letters, are authored by third-parties—that is, someone other than the person or corporate body who created the bulk of the collection. Many of these become orphan works as identifying and locating the rightsholder(s) with limited information is very difficult. Works with perpetual copyright frequently become orphaned as tracing the author’s descendants and their subsequent heirs and any licences or assignments is a lengthy and difficult process. The inability to identify and locate rightsholders does not only impact on accessibility, but also preservation.

There are some simple solutions to these problems, but while suggestions for improvements are offered, most of these are not issues that can easily be dealt with.

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## List of Abbreviations

CA	Copyright Act 98 of 1978
CA-1965	Copyright Act 63 of 1965
CAB	Copyright Amendment Bill B13D—2017
CR	Copyright Regulations 1978
GLAM	Galleries, Libraries, Archives, and Museums
NARSSAA	National Archives and Record Service of South Africa Act 43 of 1996
NARSSAR	National Archives and Record Service of South Africa Regulations 2002
NLSAA	National Library of South Africa Act 92 of 1998
PDTMCA-1916	Patents, Designs, Trade Marks, and Copyright Act 9 of 1916
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017)
UCTL:SC	University of Cape Town Libraries: Special Collections
UCTL:SC:PC	University of Cape Town Libraries: Special Collections: Primary Collections
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation

# Chapter 1: Introduction

Archives and copyright have a fundamental purpose in common. Both aim to make the creative output of the human intellect accessible to the public in order to benefit society<sup>1</sup>.

Archives do this through the preservation of unique works, ensuring that they are available for consultation and exploration as and when necessary<sup>2</sup>. Copyright provides authors<sup>3</sup> with economic incentives so that they will continue to share their works, through restricting the ways others can use the works for a limited time period.

There is, however, a tension between the two, as copyright restricts what the archives can do with the material contained within them. The aim of this dissertation is to explore this tension in the context of the South African law and research archives. This chapter provides a brief overview of archives, followed by a brief overview of copyright, and then introduces the specific loci of difficulty that will be explored in the succeeding chapters. The scope and methodology of this dissertation, followed by a brief outline of the succeeding chapters concludes this one.

## 1.1 About Archives

*Archival institutions acquire, preserve, and make available for use records of enduring value.*

*Jean Dryden<sup>4</sup>*

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<sup>1</sup> Dryden, Jean (2010) What Canadian archivists know about copyright and where they get their knowledge. *Archivaria* 69:77-116, p. 77-78. *Hereafter*: Dryden 2010.

<sup>2</sup> ICA & UNESCO (2011) Universal Declaration on Archives. Available: [https://www.ica.org/sites/default/files/20190510\\_ica\\_declarationuniverselle\\_en\\_0.pdf](https://www.ica.org/sites/default/files/20190510_ica_declarationuniverselle_en_0.pdf). Accessed: 15 January 2023. *Hereafter*: ICA & UNESCO 2011.

<sup>3</sup> While the term 'creator' is more accessible to a general audience, as the law uses the term 'author' that is what I will use in this dissertation.

<sup>4</sup> Dryden, Jean (2011) Copyfraud or legitimate concerns? Controlling further use of online archival holdings. *American Archivist* 74:522-543, p.523. Available: <https://www.jstor.org/stable/23079049>. *Hereafter*: Dryden 2011.

An archives<sup>5</sup> is usually a physical repository much like a library, except for the fact that it mostly contains unpublished material that cannot be removed and is often of only limited interest<sup>6</sup>. Despite the seemingly obvious differences, there is in reality a large overlap in the types of items collected in what is commonly referred to as the GLAM sector—Galleries, Libraries, Archives, and Museums. All will have a varied proportion of art, published works, unpublished works, and objects<sup>7</sup> in their collections. The increasingly digital, online nature of life has required that the principles and practices of archival processing be adapted for digital archiving<sup>8</sup>. The International Council on Archives<sup>9</sup> is nearing the end of the process of creating a descriptive standard that is better equipped to handle the diverse media that archives are now faced with<sup>10</sup>.

Like libraries, there are also different kinds of archives. The most common is the administrative archive as most large companies and institutions will have one. This is the place where all the records end up, regardless of whether it is called an archives. While some of their records may be kept in perpetuity, many of them are only kept for a set period before being disposed of. The most well-known type of archives is what one might call an official or government archives. Official records are kept here, including such things as

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<sup>5</sup> An archive is a collection of records pertaining to or collected by a particular individual or institution. An archives is a repository that houses records pertaining to or collected by multiple individuals or institutions.

<sup>6</sup> Dryden 2011, p. 523; Sutton, David (2019) Background paper on archives and copyright. *WIPO Standing Committee on Copyright and Related Rights SCCR/38/7*, p.4-5. Available: [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_38/sccr\\_38\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_7.pdf) Accessed: 18 January 2023. Hereafter: Sutton 2019.

<sup>7</sup> Stobo, Victoria (2019) Archives, digitisation, and copyright : do archivists in the UK avoid risk through strict compliance when they digitise their collections? *PhD Thesis*: University of Glasgow, p. 19. Available: <https://theses.gla.ac.uk/73030/>. Hereafter: Stobo 2019.

<sup>8</sup> Motsi, Alexio (2017) Preservation of endangered archives: a case of Timbuktu manuscripts. *Journal of the South African Society of Archivists* 50:1-27, p. 5. Hereafter: Motsi 2017; Redwine, Gabriela, et al. (2013) *Born digital: Guidance for Donors, Dealers, and Archival Repositories*. Washington, DC: CLIR, p. 2-3, 6. Hereafter: Redwine 2013.

<sup>9</sup> International Council on Archives. Available: <https://www.ica.org/en>. Accessed: 18 January 2023.

<sup>10</sup> Cunningham, Adrian (2021) A global paradigm shift in archival description: the International Council on Archives' new conceptual model, *Records in Context*. Paper presented at the Australian Society of Archives' virtual conference: *Archives Amplified: Connect, Challenge, Reimagine*, 15 September 2021.

historic land deeds, probate documents, and more. Most countries will have a National Archives<sup>11</sup> of some sort, as well as more localised examples, such as the Western Cape Archives and Records Service<sup>12</sup>.

There are also research archives, which is what this dissertation will focus on, and these are usually part of, or associated with, a library. These archives will collect material that will have research value for their patrons. Collections within a research archives are generally acquired in one of three ways. The collection can be purchased, though this is rare in South Africa due to a lack of financial resources. Donation includes the transfer of the material as well as all intellectual property rights the donor holds in that material<sup>13</sup>. This is the method preferred by archivists as it makes dealing with requests far simpler. A deposit will transfer custody of the material to the archives, but the depositor retains the intellectual property rights<sup>14</sup>, thereby introducing delays and complexities to the archivists' primary task of making material available and accessible to researchers.

For example, if you were writing a biography of Olive Schreiner, you would find a large amount of her correspondence at UCT Libraries: Special Collections: Primary Collections(UCTL:SC:PC)<sup>15</sup>. If you want to see Queen Victoria's correspondence, you will need to consult the Royal Archives<sup>16</sup> in Windsor Castle. If your interest is in the history of the United Nations<sup>17</sup>, you will find that some of their records are unavailable until a certain

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<sup>11</sup> For example: National Archives and Records Service. Available: <http://www.nationalarchives.gov.za/>. Accessed: 18 January 2023.

<sup>12</sup> Provincial Archive Service: Overview. Available: <https://www.westerncape.gov.za/cape-archives>. Accessed: 18 January 2023.

<sup>13</sup> See Appendix A for an example of a Deed of Gift template.

<sup>14</sup> See Appendix B for an example of a Material Transfer Agreement template.

<sup>15</sup> AtoM@UCT. Available: <https://atom.lib.uct.ac.za>. Accessed: 18 January 2023.

<sup>16</sup> The Royal Archives. Available: <https://www.royal.uk/archives>. Accessed: 18 January 2023.

<sup>17</sup> United Nations. Archives and Records Management Section. Available: <https://archives.un.org/>. Accessed: 18 January 2023.

date or due to security concerns. You will need to apply to them to gain access or have the records declassified and might not be successful.

As these three examples make clear, one of an archives' major purposes is to serve as a repository for historical material. This includes manuscripts (handwritten documents), typescripts (typewritten or printed documents), drawings, paintings, maps, photographs, audiovisual recordings, and much more. The choice of which collections should be in which archives, if it even merits such retention<sup>18</sup>, is impacted by many factors. For administrative archives the issue is often legal, as regards financial records, etc.<sup>19</sup> For national, provincial, or other government archives, the collection is also usually determined by law, in that the legislation that creates the archives will also indicate which records it should collect. In South Africa, this is both national legislation<sup>20</sup> as well as provincial<sup>21</sup>. Consequently, most administrative archives will collect similar things to each other and the same is true for government archives.

Research archives, however, often have wildly varying collections. This is due, at least in part, to the nature of the parent institution and their influence on the collection development, as well as the simple fact that they can only accept—or in some cases purchase—what is offered<sup>22</sup>. There is no legislation that specifically applies to research archives, so the governing principles and practices are adapted from the National Archives

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<sup>18</sup> National Archives and Record Service of South Africa Act 43 of 1996. *Hereafter*: NARSSAA.

<sup>19</sup> For example: s. 134 of the Insolvency Act 24 of 1936, s. 13 of the National Payment System Act 78 of 1991, and s. 29 of the Tax Administration Act 28 of 2011.

<sup>20</sup> NARSSAA.

<sup>21</sup> For example: Gauteng Archives and Records Services Act 5 of 2013, Provincial Archives and Records Service of the Western Cape Act 3 of 2005.

<sup>22</sup> Op den Kamp, Claudy Wilhelmina Elisabeth (2015) *The go-between. The film archive as a mediator between copyright and film historiography. PhD thesis*: University of Plymouth, p. 24, 44. Available: <http://hdl.handle.net/10026.1/3378>. *Hereafter*: Op den Kamp 2015.

and Record Service of South Africa Act and the accompanying regulations<sup>23</sup>, and international standards with as little deviation as possible. All archival research is framed as much by what is lost or discarded as by what is kept<sup>24</sup>, and archives may be constructed in such a way as to privilege a specific interpretation<sup>25</sup>.

For a research archives, one of the basic principles that underpins everything they do is accessibility. Usually, the material housed in an archives consists of truly unique, one-of-a-kind items that are not available anywhere else<sup>26</sup>. Much of the work undertaken by archivists and other archival staff is aimed at making the material accessible to members of the public<sup>27</sup>. There is no value in material that is never consulted or referenced<sup>28</sup>.

Preservation status and the availability of necessary equipment are two other factors that impact accessibility<sup>29</sup>. For example, a wonderfully preserved collection of film reels may as well not exist if you do not have the projector needed to view them. The value of archival material lies in being used.

This can very quickly lead to the idea that the contents of the archives should be as freely and widely disseminated as possible, despite the very real ethical and legal concerns

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<sup>23</sup> National Archives and Record Service of South Africa Regulations 2002. *Hereafter*: NARSSAR.

<sup>24</sup> Appiah, Kwama Anthony (2011) Identity, politics, and the archive. In: Mangcu, Xolela (ed) *Becoming Worthy Ancestors: Archive, Public Deliberation, and Identity in South Africa*. Johannesburg: Wits University Press, p. 89-108, p. 99. *Hereafter*: Appiah 2011; Stoler, Ann Laura (2008) *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*. Princeton: Princeton University Press, p. 18, 26.

<sup>25</sup> Anderson, Jane (2005) Indigenous knowledge, intellectual property, libraries, and archives: crises of access, control, and future utility. *Australian Academic & Research Libraries* 36(2): 83-94, p. 86-89. *Hereafter*: Anderson 2005 ; Appiah 2011, p. 99-100.

<sup>26</sup> Sutton 2019, p. 4-5.

<sup>27</sup> Ngoepe, Mpho & Ngulube, Patrick (2011) Assessing the extent to which the National Archives and Records Service of South Africa has fulfilled its mandate of taking the archives to the people. *Innovation: Journal of Appropriate Librarianship and Information Work in Southern Africa* 2011(42): 3-22, p. 3-6, 14. *Hereafter*: Ngoepe & Ngulube 2011; Sutton 2019, p. 8-10.

<sup>28</sup> Ngoepe & Ngulube 2011, p. 5, 18-19; Tapfuma, Mass M & Hoskins, Ruth G (2019) Usage of institutional repositories in Zimbabwe's public universities. *Journal of Economic and Financial Sciences* 12(1): 1-9, p.1-2. *Hereafter*: Tapfuma & Hoskins 2019.

<sup>29</sup> Lukileni-lipinge, Hertha & Mnjama, Nathan (2017) Preservation of audio-visual records at the National Archives of Namibia. *Journal of the South African Society of Archivists* 50: 79-99, p. 80-81, 93-95. *Hereafter*: Lukileni-lipinge & Mnjama 2017; Op den Kamp 2015, p. 46, 57, 64, 70, 80.

inherent in making absolutely everything available online<sup>30</sup>. Archives are therefore required to balance the desire and value of accessibility with the rights of the donors and depositors; the copyright owners, who may be third parties; privacy rights; and the institutional mandates and policies they are bound by<sup>31</sup>. While this dissertation is concerned only with the accessibility issues South African research archives face as a result of the currently inadequate copyright law, there are many other facets that could be considered.

## 1.2 About Copyright

Copyright law provides the rightsholder, often the author, with a monopoly over the work in question for a certain time period. The point about the monopoly being for a limited length of time, after which the work enters the public domain and can be freely used, is of particular importance. The monopoly benefits the author and rewards their work and the fact that they have chosen to share it<sup>32</sup>. Placing the work in the public domain after the monopoly ends is intended to benefit all of society<sup>33</sup>. While the work is under copyright, it is generally illegal to reproduce, adapt, or disseminate the work without the permission of the rightsholder. There are a number of exceptions and limitations that apply<sup>34</sup>, though

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<sup>30</sup> Anderson 2005, p. 85; Dryden 2011, p.525, 530, 540-1.

<sup>31</sup> Behrnd-Klodt, Menzi L. (2008) *Navigating Legal Issues in Archives*. Chicago: Society of American Archivists, p. 40. *Hereafter*: Behrnd-Klodt 2008; Dryden 2011, p. 523-4.

<sup>32</sup> Giblin, Rebecca (2017) Reimagining copyright's duration. In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 177-211, p. 178, 180-1, 192-3, 198. *Hereafter*: Giblin 2017.

<sup>33</sup> Schumacher, Sara (2019) Unlocking the public domain. *VRA Bulletin* 46(1): 1-11, p. 2, 6, 10. Available: <https://online.vraweb.org/index.php/vrab/article/download/18/14>. *Hereafter*: Schumacher 2019; Rens, Andrew & Lessig, Lawrence (2006) Forever minus a day: a consideration of copyright term extension in South Africa. *The Southern African Journal of Information and Communication* 7: 22-31, p. 25, 28. *Hereafter*: Rens & Lessig 2006.

<sup>34</sup> Copyright Act 98 of 1978 ss. 12-19. *Hereafter*: CA; Copyright Regulations 1978. *Hereafter*: CR.

these can be difficult to interpret, which may result in a more conservative approach than is strictly necessary<sup>35</sup>.

Copyright law is intended to balance the competing interests of rightsholders and users<sup>36</sup>, though it has been criticised as giving primacy to the financial interests of juristic persons<sup>37</sup>. This balance is, in many ways, similar to the balance that archives strive for. The value in the work and the author's ability to benefit from it depends entirely on how well the work meets the needs and desires of society, and how much use they are able to extract from it<sup>38</sup>. Phrased in this way it is very easy to advocate for an increase in user's rights<sup>39</sup>. Yet, given the choice between survival and creation, few would choose to create<sup>40</sup>. Hence the need for balance. Each jurisdiction will balance the two sides slightly differently depending on their society, culture, and values.

The impact that intellectual property laws have on creativity and how creators and consumers view the works created has not been shown definitively<sup>41</sup>. This means that we

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<sup>35</sup> Dryden 2010.

<sup>36</sup> Coad, Samuel (2019) Digitisation, copyright, and the GLAM sector: constructing a fit-for-purpose safe harbour regime. *Victoria University of Wellington Law Review* 50(1): 1-32, p. 20, 22, 24, 29, 32. *Hereafter*: Coad 2019; Nicholson, Denise Rosemary (2022a) Copyright reform in South Africa from a librarian's perspective: a case study approach. In: Coates, Jessica; Owen, Victoria; & Reilly, Susan (eds) *Navigating Copyright for Libraries*: 319-348. Berlin: De Gruyter, p. 321-4. *Hereafter*: Nicholson 2022a; Schumacher 2019, p. 1-2; WIPO *Copyright Treaty* (adopted in Geneva on December 20, 1996). Available: <https://wipolex.wipo.int/en/text/295157>. Accessed: 11 July 2022. *Hereafter*: WCT.

<sup>37</sup> Fitzpatrick, Kathleen (2011) *Planned Obsolescence: Publishing, Technology, and the Future of the Academy*. New York: New York University Press, p. 80. *Hereafter*: Fitzpatrick 2011; Geiger, Christophe (2017) Copyright as an access right: securing cultural participation through the protection of creators' interests. In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 73-110, p. 74. *Hereafter*: Geiger 2017; Halbert, Debora J (2005) *Resisting Intellectual Property*. Abingdon: Routledge, p. 6-7, 25, 30, 35, 42, 67, 77, 80, 85, 152, 160. *Hereafter*: Halbert 2005; Pistorius, Tana (2016) Copyright law. In: Geyer, S et al. (eds) *Law of Intellectual Property in South Africa*. Durban: LexisNexis. p.177-314, p. 222. *Hereafter*: Pistorius 2016.

<sup>38</sup> Fitzpatrick 2011, p. 41, 104-6, 128; Rens & Lessig 2006, p. 28-9.

<sup>39</sup> Fitzpatrick 2011, p. 82, 83.

<sup>40</sup> Baloyi, JJ (2014) Demystifying the role of copyright as a tool for economic development in Africa: tackling the harsh effects of the transferability principle in copyright law. *Potchefstroom Electronic Law Journal* 17(1): 88-165, p. 92, 95-6, 101, 115. *Hereafter*: Baloyi 2014.

<sup>41</sup> Bachner, Bryan (2005) Back to the future : intellectual property rights and the modernisation of traditional Chinese medicine. In: Heath, Christopher & Sanders, Anselm Kamperman (eds) *New Frontiers of Intellectual*

have to make assumptions—the default assumption being that economic incentives increase creativity and innovation<sup>42</sup>, though there is little actual evidence to support this<sup>43</sup>. The reason that the law provides a limited-time monopoly in which the rightsholder is able to benefit financially is so that they will make their work public<sup>44</sup>. This should not be taken to imply that publication, dissemination, or some sort of exploitation is required for copyright to subsist<sup>45</sup>. Society's ability to access the work while it is under copyright allows for others to build on the work in many ways<sup>46</sup>, despite the restrictions placed on certain uses of the work. As discussed previously, the value of the work lies in the use society makes of it. Material that is placed in an archives is preserved in perpetuity because it is seen to have enduring value to society<sup>47</sup>. While some of this material will be the research and drafts that preceded a published work, much of the material will be work that has never previously been accessible to the public.

If, as stated above, copyright is intended to incentivise authors' sharing their work with the public, usually through some form of publication, on what basis do unpublished works receive copyright<sup>48</sup>? The work is considered to be the final version of the work. The version

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*Property Law : IP and Cultural Heritage, Geographical Indications, Enforcement, and Overprotection*. Oxford: Hart: 1-36, p. 2; Halbert 2005, p. 5-7, 9-10, 14, 21, 23, 25, 27-8, 35, 39, 65, 69, 77, 79-80, 83-5, 139-40, 152, 160.

<sup>42</sup> Rens & Lessig 2006, p. 24, 26; WCT.

<sup>43</sup> Baloyi 2014, p. 87-8; Plomer, Aurora (2013) The human rights paradox: intellectual property rights and the rights of access to science. *Human Rights Quarterly* 35(1): 143-175, p. 145. *Hereafter*: Plomer 2013.

<sup>44</sup> Elkin-Koren, Niva & Salzberger, Eli M (2013) *The Law and Economics of Intellectual Property in the Digital Age : the Limits of Analysis*. Abingdon: Routledge, p. 27, 69, 79, 237.

<sup>45</sup> *SABC v VIA Vollenhoven & Appolis Independent CC & Ors* (2016) 4 All SA 623 (GJ) p.635.

<sup>46</sup> Flynn, Sean (2015) Copyright legal and practical reform for the South African film industry: African intersections between intellectual property rights and knowledge access. *The African Journal of Information and Communication* 2015(16): 38-47, p. 38-40, 44. *Hereafter*: Flynn 2015.

<sup>47</sup> Dryden, Jean (2008) Copyright in the real world : making archival material available on the internet. PhD Thesis: University of Toronto, p. 9, 252. Available:

<https://www.collectionscanada.gc.ca/obj/thesescanada/vol2/002/NR57864.PDF>. *Hereafter*: Dryden 2008; NARSSAA s. 3.

<sup>48</sup> Dryden, Jean (2006) Is that copyright too strong? Copyright in archival material. *Journal of Canadian Studies* 40(2): 163-182, p. 166-7, 178. *Hereafter*: Dryden 2006.

that is ready to be exploited or utilised<sup>49</sup>. To receive copyright as separate works, interim versions of the work would need to differ from the final version in a way that meets the legal standard set out in the CA<sup>50</sup>. Copyright law requires that every work that is eligible for copyright, that meets the requirements set out in the law, will automatically receive copyright protection at the moment of creation, without the need for registration or any other formalities<sup>51</sup>. One of the rights that copyright provides is the right of first publication<sup>52</sup>. This right combined with disagreements over what exactly it means to publish something is one of the main hindrances to archival accessibility. Many issues are caused by the outdated nature of the South African Copyright Act (CA) and the accompanying Copyright Regulations (CR). While the South African law is particularly out-of-date<sup>53</sup>, that is a description that can probably be applied to the entire copyright system in general<sup>54</sup>.

### 1.3 Research Focus: Archives and Copyright

The main concern facing archives with regards to copyright is the way it impacts on accessibility<sup>55</sup>. In order for an archives to consider a collection they hold to be accessible; it needs to be possible for a researcher to: (i) easily discover that the collection exists and is

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<sup>49</sup> Dean, Owen Henry & Karjiker, Sadulla (2015) *Handbook of South African Copyright Law*. Juta, p. 1-31. Hereafter: Dean & Karjiker 2015.

<sup>50</sup> *Ibid.* p. 1-32.

<sup>51</sup> Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. Art. 5(2) Hereafter: Berne Convention.

<sup>52</sup> CA ss. 6(b), 7(b), 8(b).

<sup>53</sup> Harms, LTC (2013) "Originality" and "reproduction" in copyright law with special reference to photographs. *Potchefstroom Electronic Law Journal* 16(5): 487-513, p. 490, 507. Hereafter: Harms 2013; Nicholson 2022a.

<sup>54</sup> Geiger 2017, p. 104; Giblin, Rebecca & Weatherall, Kimberlee (2017a) If we redesigned copyright from scratch, what might it look like? In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 1-24, p. 1-2. Hereafter: Giblin & Weatherall 2017a.

<sup>55</sup> Sutton 2019, p. 6, 11-12, 20.

housed in a particular repository<sup>56</sup>; (ii) clearly understand the contents of the collection such that they can select relevant parts to view<sup>57</sup>; and (iii) reference or reproduce items as required by their research<sup>58</sup>.

This can easily be done for a document or drawing on a piece of paper. Audiovisual items on outdated carriers and digital files in outdated formats need to be format-shifted—reproducing and adapting the work—in order for the archivist to access and describe the contents, and for the researcher to view them<sup>59</sup>. Reproduction is also necessary to ensure the long-term preservation of the material, as all items degrade over time and with use<sup>60</sup>. Many archives choose to put digital versions of items in their collections online in an archival institutional repository in order for them to be widely available to as many researchers as possible, rather than restricting access to the few who have the funding to travel to the archives<sup>61</sup>. Placing the material online makes it available to anyone, anywhere in the world, most of whom are not subject to the same jurisdiction as the institution putting it online<sup>62</sup>.

The ability of the archives to reproduce and disseminate material is both governed by and hampered by copyright law, as briefly discussed above. There are a number of different ways in which this impacts on accessibility, and I will focus on three: copyright duration; preservation; and third-party and orphan works.

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<sup>56</sup> Hiribarren, Vincent (2016) Why researchers should publish archive inventories online. *History in Africa* 43:375-378, p. 377-8. *Hereafter*: Hiribarren 2016.

<sup>57</sup> *Ibid.*, p. 377.

<sup>58</sup> Flynn 2015, p. 39, 46.

<sup>59</sup> Lukileni-lipinge & Mnjama 2017, p. 83, 93-95.

<sup>60</sup> *Ibid.*, p. 93.

<sup>61</sup> Hiribarren 2016, p. 378; Tapfuma & Hoskins 2019, p. 1-2, 9.

<sup>62</sup> Padfield, Tim (2015) *Copyright for Archivists and Records Managers*, 5<sup>th</sup> ed. London: Facet Publishing, p. 12, 122. *Hereafter*: Padfield 2015 ; Visser, Coenraad (2004) Applicable law in online copyright disputes: a proposal emerges. *SA Mercantile Law Journal* 16(4): 765-778, 766-7, 769-70, 774-6. *Hereafter*: Visser 2004.

### 1.3.1 Copyright Duration

Copyright duration impacts archival accessibility both in terms of whether or not researchers can re-use the material in their own work, but also in terms of what the archives can do with it. This is a matter of great concern to an archives as virtually everything within it is unpublished with limited commercial value<sup>63</sup>, and a common way to increase accessibility is to digitise items and place them in online repositories<sup>64</sup>. One of the major factors that affects copyright duration is publication status—and just what it is, exactly, that constitutes ‘publication’.

### 1.3.2 Preservation

Preservation is a key component in ensuring material remains accessible in perpetuity. Paper will last hundreds of years in the right environment, but other media—particularly AV and born-digital works—will not<sup>65</sup>. This is partly due to the natural degradation of the storage media over time, including the wear and tear of accessing and using the material, and partly due to technological obsolescence<sup>66</sup>. As the CR requires that preservation occurs through the creation of facsimiles<sup>67</sup>, we need to consider exactly what constitutes a facsimile given the need for format shifting of outdated carriers so that the content remains accessible.

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<sup>63</sup> Deazley, Ronan & Stobo, Victoria (2013) Archives and copyright: risk and reform. *CREATE Working Paper* 2013/3, p. 18, 25, 47-9. *Hereafter*: Deazley & Stobo 2013; Sutton 2019, p.12-13, 17-18.

<sup>64</sup> Conroy, Marlize (2006) Access to works protected by copyright: right or privilege? *SA Mercantile Law Journal* 18(4):345-354, p. 346. *Hereafter*: Conroy 2006; Dryden 2008, p. 1, 7, 241, 244.

<sup>65</sup> Cummings, James W (1950) Spontaneous ignition of decomposing cellulose nitrate film. *Journal of SMPTE* 54. Available: [http://www.brianpritchard.com/spontaneous\\_ignition.htm](http://www.brianpritchard.com/spontaneous_ignition.htm). *Hereafter*: Cummings 1950; Motsi 2017, p. 21-22.

<sup>66</sup> Lukileni-lipinge & Mnjama 2017, p. 95; Samaras, Evanthia & Johnston, Andrew (2019) Off-lining to tape is not archiving: why we need real archiving to support media archaeology and ensure our visual effects legacy thrives. *Leonardo* 52(4): 374-380, p. 375. *Hereafter*: Samaras & Johnston 2019.

<sup>67</sup> CR reg. 3(d-e).

### 1.3.3 Third-Party and Orphan Works

Almost every archival collection contains third-party works and the vast majority of these are orphan works. When a collection is placed in an archives, the vast majority—but not all—of that material emanates from a single person or organisation. These other items are what archivists refer to as third-party works, as they form part of the donor or depositor's collection but were created by someone else. Orphan works are those where the rightsholder cannot be identified or located. Without permission from this unidentified or impossible to locate rightsholder, the works cannot be included in the online repository, nor reproduced by the researcher, nor, depending on the type of work, can they be accessed by the archivist or researcher, which limits accessibility<sup>68</sup>.

## 1.4 Scope and Methodology

### 1.4.1 Scope

As indicated previously, the focus of this dissertation will be on the way that South African copyright law impacts the accessibility of research archives. The problem will be interrogated through the three lenses introduced in the preceding section: copyright duration, preservation, and third-party and orphan works. The aim is to identify the challenges posed by South African copyright law to the optimal functioning of research archives.

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<sup>68</sup> Purday, Jonathan (2010) Intellectual property issues and Europeana, Europe's digital library, museum, and archive. *Legal Information Management* 10(3):174-180, p. 177-8. *Hereafter*: Purday 2010.

While it certainly has an impact on archival accessibility, the problem presented by indigenous knowledge and oral history is far too broad to be addressed here<sup>69</sup>. Other factors that may impact on accessibility, such as privacy rights, will be noted where applicable but remain outside the scope of this dissertation.

Copyright encompasses both economic and moral rights. This dissertation chiefly focuses on issues that relate to the economic rights of reproduction, dissemination, adaptation, and publication. This is not to say that other rights that fall under copyright have no impact on archival accessibility, merely that the regulation of these four aspects presents the majority of the barrier to accessibility. As such, other economic rights and moral rights are considered to be outside the scope of this dissertation.

#### 1.4.2 Methodology

Actual archival practice has been shown to be inconsistent both within and between archives<sup>70</sup> and will feature only as examples to illustrate the difficulties that repositories face. A close reading of the CA will be informed by the way the CA, including the CR, interacts with other legislation. Other relevant legislation will be considered as necessary. There is not much in the way of directly applicable case law in South Africa, but this has been consulted where possible.

When local copyright law fails to provide what is required, international precedent can provide examples of how to deal with the issue in question. While not always useful, international precedent and the legislation of other countries in the arena of copyright is

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<sup>69</sup> Anderson 2005; Janke, Terri & Iacovino, Livia (2012) Keeping cultures alive: archives and indigenous cultural and intellectual property rights. *Archival Science* 12(2): 151-171. *Hereafter*: Janke & Iacovino 2012.

<sup>70</sup> Dryden, Jean (2016) Risky business? Issues in licensing copies of archival holdings. *Archivaria* 82:111-136, p. 113, 133. *Hereafter*: Dryden 2016; Garaba, Francis (2015) Disembodies archives: the disconnectedness of records and archives management practices within the Pietermaritzburg cluster of theological libraries, KwaZulu-Natal, South Africa. *Verbum et Ecclesia* 36(1): 1-20, p. 9.

frequently applicable across jurisdictions due to the long history of international treaties aimed at ensuring the harmonisation of these laws<sup>71</sup>, beginning with the Berne Convention in 1886. This is most likely to be successful when selecting a jurisdiction that gives a similar weighting to the various philosophical underpinnings of copyright<sup>72</sup>. Due to the close history between the two countries' copyright laws, South Africa often turns to British interpretation and case law<sup>73</sup> but their periodic attempts to harmonise their law with that of Europe has widened the gap<sup>74</sup>.

I will primarily consult the Canadian legislation<sup>75</sup> and literature where necessary. This jurisdiction was chosen due to their similarly close relationship to British copyright law and the comparative abundance of works examining their legislation in relation to archives. This jurisdiction will also be used to provide suggestions for improvements, along with the Copyright Amendment Bill<sup>76</sup>. Having been heavily discussed and debated<sup>77</sup> the CAB provides an indication of where South African copyright legislation may be heading and thus is a useful place to start when considering how the law could be improved. As will be shown in the later chapters, the enactment and enforcement of the CAB would solve most, if not all of the problems faced around preservation, but leaves many other gaps still open. At the beginning of September 2022, the CAB was approved by the National Assembly. It

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<sup>71</sup> Baloyi 2014, p. 111, 116; Halbert 2005, p. 30, 164.

<sup>72</sup> Pistorius 2016, p. 178.

<sup>73</sup> *Ibid*, p. 183-4.

<sup>74</sup> Harms 2013, p. 490, 496.

<sup>75</sup> Copyright Act, RSL, 1985, c. C-42. *Hereafter*: Canadian Copyright Act.

<sup>76</sup> Copyright Amendment Bill B 13D—2017. *Hereafter*: CAB.

<sup>77</sup> Low, Marcus (2015) Copyright bill will empower blind people. *GroundUp* 26 August 2015. Available: [https://www.groundup.org.za/article/copyright-bill-will-empower-blind-people\\_3245/](https://www.groundup.org.za/article/copyright-bill-will-empower-blind-people_3245/). Accessed: 23 September 2022. *Hereafter*: Low 2015; Nicholson 2022a; Nicholson, Denise Rosemary (2022b) New copyright bill will take South Africa into the 21<sup>st</sup> century at last. *GroundUp* 15 September 2022. Available: <https://www.groundup.org.za/article/new-bill-will-remedy-many-evils-of-current-copyright-regime/>. Accessed: 23 September 2022. *Hereafter*: Nicholson 2022b; Sithole, Siyabonga (2017) Coalition challenges copyright bill aspects. *The New Age* 27 July 2017.

was then sent to the National Council of Provinces for concurrence<sup>78</sup>, where it remains in January 2023, and so may become law in the near future.

## 1.5 Chapter Outline

Chapter 2 focuses on the legislation. Specifically, this chapter will cover the CA and CR, as well as relevant legislation relating to archives. The aim of this chapter is to identify what the South African law allows an archives to do in the course of its functions and where the gaps are, in the context of archival accessibility.

The next three chapters discuss the accessibility issues, with each one concentrating on a different focus area. First, copyright duration, then preservation, and finally third-party and orphan works.

Chapter 3 will consider the accessibility issues that relate to copyright duration. The most obvious, as well as the greatest, impact results from publication status. The question of what it means to publish something, as well as how one determines if an item has been published plays a large role in determining publication status. For this reason, the major focus of this chapter is on the way the CA requires one to calculate the duration of copyright for the various types of works likely to be found in a research archives and how one determines whether a work has been published or made available to the public. The definitions of those two terms are examined and the contentious matter of online publishing is explored.

Chapter 4 tackles preservation. This is where the matter of the CR rears its head, as the CA itself does not discuss the matter. While technological advancements have an

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<sup>78</sup> Nicholson 2022b.

impact on all three aspects under discussion, the matter of preservation, especially of non-textual material, and digital preservation are areas where the law's increasingly outdated language most hinders the work of the GLAM sector. A brief description of what preservation entails is followed by a consideration of the exceptions and limitations that make preservation possible under the current law. Where the exceptions and limitations do not apply the creation of preservation copies constitutes infringement and this leaves many works in precarious formats at risk. Once the problematic aspects of and the gaps in the current law have been identified, the CAB and other sources are consulted for solutions.

Chapter 5 similarly addresses the matter of third-party and orphan works. In order to carry out its functions, an archives needs the ability to reproduce, adapt, and/or disseminate a work. This requires permission from the rightsholder. As this chapter will show, the vast majority of third-party works are also orphan works, and as such the majority of this chapter will focus on how the CA fails to deal with orphan works and why the proposed amendments relating to orphan works in the CAB are problematic for archives, despite being in line with foreign jurisdictions<sup>79</sup>.

Each chapter will start with a consideration of the accessibility issue under discussion, examining the legislation, accompanied by an analysis of relevant literature, including case law where possible, and end with recommendations drawn from the CAB, other jurisdictions, and the literature. The concluding Chapter 6 aims to draw these separate strands back together, providing a recap of the issues and recommendations.

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<sup>79</sup> Hilty, Reto M & Nérison, Sylvie (eds) (2012) *Balancing Copyright—A Survey of National Approaches*. New York: Springer. *Hereafter*: Hilty & Nérison 2012.

## Chapter 2: South African Law and Archives

This chapter will consider the South African legislation, particularly the CA in some detail. While the aim is to examine the law in depth, this will be limited by focusing on the aspects of the legislation that are applicable to research archives.

In order to function normally, archives need to know if they can adapt, copy, and/or disseminate a particular work, or whether they need to obtain permission to do so beforehand. This chapter will show what archives can do, and when they need to obtain permission. There is more to both copyright and the other areas of law considered than is shown in this chapter, but as the excluded aspects play only a minimal role in archival accessibility, if they arise at all, they are outside the scope of this dissertation.

The chapter begins by considering the reasoning that underlies the existence of archives and then of copyright. Following these justifications is an extremely brief overview of copyright in South Africa, which serves mainly to trace the development of the copyright statutes and how they relate to foreign and international law. From there the current legislation is discussed. This serves as the basis for the three following chapters that focus on the archival accessibility issues in depth.

### 2.1 Justifications

#### 2.1.1 Justifying Archives

*...it stands there recorded in our National Archives to remind us of the awfulnesses we survived and of which we were capable. The records are crucial to hold us accountable.*  
Archbishop Desmond Tutu<sup>80</sup>

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<sup>80</sup> Tutu, Desmond (2003) Archives and Human Rights. Speech given at the 37<sup>th</sup> Annual CITRA Conference, 21 October 2003, transcribed by the International Council on Archives. Available:

In the wake of disasters, such as the fire that devastated UCTL:SC in April 2021, archivists need to justify both the needs and the existence of the archives beyond merely enumerating their treasures and find a way to put a monetary value on material that is irreplaceable<sup>81</sup>.

As can be seen from the quote above, the evidence of our history is found in archives. These institutions hold the records of how people lived, of what the government did—sometimes of what they chose to ignore— and as such they allow society to hold itself accountable and ensure a functioning democracy<sup>82</sup>. History is written, rewritten, and rewritten again and again as paradigms shift and perspectives change<sup>83</sup>. The primary sources that hold the raw, uninterpreted information used to produce these narratives are found in archives<sup>84</sup>. This requires that records with enduring value are preserved<sup>85</sup>.

Archives preserve the records of communities, of the human experience, of the significant moments, and of the mundanities that become significant in hindsight<sup>86</sup>. This is why ensuring that archives are accessible is so important<sup>87</sup>. Increased accessibility renders it unlikely that a particular interpretation will be privileged<sup>88</sup>. Archival accessibility is one of the ways in which society provides access to information and provides for knowledge to be

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[https://www.ica.org/sites/default/files/ICA\\_2003-10-21\\_Desmond-Tutu-speech\\_EN.pdf](https://www.ica.org/sites/default/files/ICA_2003-10-21_Desmond-Tutu-speech_EN.pdf). Accessed: 24 September 2022.

<sup>81</sup> Motsi 2017, p. 11, 19 ; Ngoepe & Ngulube 2011, p. 6, 18-19.

<sup>82</sup> Hiribarren 2016, p. 376; Llewellyn, Megan E & Buchanan, Sarah A (2020) Will the last archivist in Seattle please turn out the lights: value and the National Archives. *Journal of Western Archives* 11(1):7, p. 21, 24. Available: <https://digitalcommons.usu.edu/westernarchives/vol11/iss1/7>. Accessed: 24 September 2022; Roe, Kathleen D (2016) Why archives? *The American Archivist* 79(1):6-13, p. 7, 9-10. Hereafter: Roe 2016.

<sup>83</sup> Appiah 2011, p. 99-100; Motsi 2017, p. 3-4, 6-7.

<sup>84</sup> Diamant, Neil J (2010) Why archives? In: Carlson, Allen; Gallagher, Mary E; Lieberthal, Kenneth; & Manion, Melanie (eds) *Contemporary Chinese Politics: New Sources, Methods, and Field Strategies*. Cambridge: Cambridge University Press; Hiribarren 2016, p. 376, 378; Roe 2016, p. 9-10.

<sup>85</sup> ICA & UNESCO 2011; Motsi 2017, p. 4, 6-7; NARSSAA s. 3(a).

<sup>86</sup> Coad 2019, p. 1, 4-6; Samaras & Johnston 2019, p. 375, 378-9.

<sup>87</sup> ICA & UNESCO 2011; Motsi 2017, p. 6-7, 21; Ngoepe & Ngulube 2011, p. 4-6, 12-14, 19.

<sup>88</sup> Anderson 2005, p. 86-89; Motsi 2017, p. 3, 7; Rens & Lessig 2006, p. 28.

both produced and disseminated<sup>89</sup>. Thus, the accessibility of archival material supports the right of access to information<sup>90</sup>; the right to the benefits of scientific advancement<sup>91</sup>—which overlaps the right to health<sup>92</sup> through the arena of medical research; the right to culture<sup>93</sup>; the right to education<sup>94</sup>; and the right to freedom of expression<sup>95</sup>. These are all considered to be fundamental human rights<sup>96</sup>.

### 2.1.2 Justifying Copyright

Traditionally there are four theoretical arguments that copyright is based on: the cultural, economic, natural justice, and social arguments<sup>97</sup>. No argument presents greater justification than the others, but jurisdictions vary in how much weight they give to the individual arguments<sup>98</sup>.

The public—an ill-defined concept at best and a disturbingly impressive political obfuscation at worst<sup>99</sup>—and the nation are the beneficiaries in the cultural argument<sup>100</sup>. As works benefit the public and the nation, these should be encouraged by rewarding their authors<sup>101</sup>. The economic argument states that the author is entitled to recompense for their

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<sup>89</sup> Anderson 2005, p. 88, 90; Plomer 2013, p. 152; Tapfuma & Hoskins 2019, p. 2, 7, 9.

<sup>90</sup> Coad 2019, p. 2-9, 11, 14, 16, 20, 22, 24, 31; Constitution of the Republic of South Africa, 1996. *Hereafter*: Constitution. Chapter 2: Bill of Rights s. 32; Nicholson 2022a, p. 320, 321; WCT.

<sup>91</sup> Geiger 2017, p. 80-1; Plomer 2013, p. 144, 150; United Nations General Assembly (1948) The Universal Declaration of Human Rights. New York: United Nations General Assembly. *Hereafter*: UDHR. art. 27.

<sup>92</sup> UDHR art. 25.

<sup>93</sup> Coad 2019, p. 9, 11, 20, 22, 27, 31; Nwauche, ES (2010) Protecting expressions of folklore within the right to culture in Africa. *Potchefstroom Electronic Law Journal* 13(4): 49-92; Geiger 2017, p. 80-1; UDHR art. 27.

<sup>94</sup> Constitution. Chapter 2: Bill of Rights s. 29; WCT; UDHR art. 26.

<sup>95</sup> Nicholson 2022a, p. 320; UDHR art. 19.

<sup>96</sup> Geiger 2017, p. 80-1, 86-7; Oriakhogba, Desmond Osaretin & Adeola-Adedipe, Gloria Kanwulia (2021) Posthumous control of copyright, its limitation and the public interest. *Journal of Comparative Law in Africa* 8(2): 32-62, p. 34-5, 51, 53. *Hereafter*: Oriakhogba & Adeola-Adedipe 2021; UDHR.

<sup>97</sup> Giblin 2017, p. 180; Pistorius 2016, p. 178.

<sup>98</sup> Pistorius 2016, p. 178.

<sup>99</sup> Giblin & Weatherall 2017a, p. 3-9; Halbert 2005, p. 18-19, 21-7.

<sup>100</sup> Geiger 2017, p. 77-9; Giblin & Weatherall 2017a, p. 16; Oriakhogba & Adeola-Adedipe 2021, p. 34-5, 50.

<sup>101</sup> Giblin 2017, p. 178, 180; Oriakhogba & Adeola-Adedipe 2021, p. 34; Pistorius 2016, p. 178.

work, a return on what they have invested in it<sup>102</sup>. In natural law, the work is seen as an expression of the identity of the worker(s) who created it, and as such they have the right to control what happens to it<sup>103</sup>. The social argument suggests that social cohesion is a result of the wide dissemination of works and that this is only possible under copyright<sup>104</sup>. While this may have been the case when the social argument was first put forward, it is increasingly apparent that the widest dissemination is of works in the public domain<sup>105</sup>.

Justifications of copyright in the past, inform the justification used in many developing countries today in that it is not the existence of the protection that is questioned, but the scope and extent of that protection<sup>106</sup>, especially in light of pressure to conform to the standards set and used by developed nations<sup>107</sup>.

From this very brief overview, it is clear that the cultural and social arguments are the ones most likely to support the notion of archival accessibility, while the economic and natural justice arguments are the ones that most strongly underpin common and civil law respectively<sup>108</sup>. Given this, it is hardly surprising that South African copyright law presents problems for archival accessibility.

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<sup>102</sup> Baloyi 2014, p. 93, 101; Giblin 2017, p. 180-1; De Beer, Jeremy (2017) Making copyright markets work for creators, consumers, and the public interest. In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 147-176, p. 147-50, 153, 156, 162. *Hereafter*: De Beer 2017; Padfield 2015, p. 1; Pistorius 2016, p. 178.

<sup>103</sup> Geiger 2017, p. 82; Oriakhogba & Adeola-Adedipe 2021, p. 33-4; Padfield 2015, p. 243; Pistorius 2016, p. 178

<sup>104</sup> Giblin 2017, p. 186; Pistorius 2016, p. 178.

<sup>105</sup> Halbert 2005, p. 19-22; Giblin 2017, p. 187-8, 191, 194.

<sup>106</sup> Harms 2013, p. 507.

<sup>107</sup> Nicholson 2022a, p. 330, 338-9; Plomer 2013, p. 146; Rens & Lessig 2006, p. 23, 27, 31; Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017). *Hereafter*: TRIPs.

<sup>108</sup> De Beer 2017, p. 149; Padfield 2015, p. 1.

## 2.2 History of Copyright in South Africa

While plagiarism has always been a concern, copyright—literally the right to create a copy—only began to be a matter of concern once it was possible to print multiple copies with some ease<sup>109</sup>. South African law is formed from a mix inherited from the Dutch (civil law) and British (common law) colonisers. In civil law, legislation is written to cover as many eventualities as possible and needs to be amended and updated regularly to keep pace with developments. In common law, the legislation is interpreted in the courts and much relies on previous judgements, or precedence. In civil law jurisdictions copyright is split into author's rights and neighbouring or related rights for most works that do not have a clear author<sup>110</sup>. Copyright is far more impersonal in common law jurisdictions as the rights are not dependent on the author, but on the work<sup>111</sup>.

The Berne Convention—the first multinational treaty that required countries to provide reciprocal protection to all signatories—first came into being in 1886. Prior to the Berne Convention only bilateral treaties could be negotiated between nations leaving things in a complex and confusing state<sup>112</sup>. The issues of online publishing, cross-border collections, and perpetual copyright for unpublished works continues to leave reciprocity in a complex and confusing state<sup>113</sup>. Prior to unification in 1910, different parts of what would become South Africa had their own laws governing copyright<sup>114</sup>. After unification, the first copyright

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<sup>109</sup> Pistorius 2016, p. 177, 180.

<sup>110</sup> Baloyi 2014, p. 107-9.

<sup>111</sup> Padfield 2015, p. 1, 243; Pistorius 2016, p. 178-9, 182.

<sup>112</sup> Padfield 2015, p. 10-11.

<sup>113</sup> Sutton, David (2004) International perspectives on archival copyright. Paper presented at the 15<sup>th</sup> International Congress on Archives, Vienna, 23-29 August 2004. Available: [https://ica-new-validation.accelance.net/sites/default/files/SLA\\_2004\\_InternationalCongress\\_Paper\\_InternationalPerspectivesonArchivalCopyright\\_DSutton\\_EN.pdf](https://ica-new-validation.accelance.net/sites/default/files/SLA_2004_InternationalCongress_Paper_InternationalPerspectivesonArchivalCopyright_DSutton_EN.pdf). Accessed: 7 January 2023. Hereafter: Sutton 2004.

<sup>114</sup> Pistorius 2016, p. 182-3.

law South Africa promulgated—the 1916 Patents, Designs, Trade Marks, and Copyright Act<sup>115</sup>—followed the 1911 British legislation extremely closely<sup>116</sup>.

As a colony of the UK, the Berne Convention had applied to the various colonies that became South Africa. There was a Declaration of Continued Application that entered into force on 3 October 1928, by the Union of South Africa<sup>117</sup>. This covered the original Berne Convention and the 1896 Paris Additional Act, 1908 Berlin Act, and 1914 Berne Additional Act that amended it<sup>118</sup>. In 1935, South Africa acceded to the 1928 Rome Act, and it entered into force later that year<sup>119</sup>. The Brussels Act of 1948 was ratified by South Africa in 1950 and entered into force in 1951<sup>120</sup>.

Like the previous domestic legislation, the 1965 Copyright Act<sup>121</sup> was based on the British Copyright Act of 1956<sup>122</sup>. South Africa signed the 1967 Stockholm Act that amended the Berne Convention, but it never entered into force<sup>123</sup>. The most recent amendment, the Paris Act of 1971, was acceded to at the end of 1974 and entered into force in 1975<sup>124</sup>.

The current CA diverges from the established pattern, as it is based more on the Berne Convention than the British law<sup>125</sup>. While the CA has been amended somewhat since it was enacted in 1978, the rapid changes in technology have combined with the slow

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<sup>115</sup> Patents, Designs, Trade Marks, and Copyright Act 9 of 1916. *Hereafter*: PDTMCA-1916.

<sup>116</sup> Dean & Karjiker 2015, p. 1-4, 1-4E; PDTMCA-1916.

<sup>117</sup> WIPO (n.d.) WIPO-Administered Treaties: Contracting Parties > Berne Convention > South Africa. Available: <https://wipolex.wipo.int/en/treaties/parties/remarks/ZA/15>. Accessed: 25 September 2022. *Hereafter*: WIPO n.d.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Copyright Act 63 of 1965. *Hereafter*: CA-1965.

<sup>122</sup> Pistorius 2016, p. 183; Rens & Lessig 2006, p. 25-6.

<sup>123</sup> WIPO n.d.

<sup>124</sup> *Ibid.*

<sup>125</sup> Pistorius 2016, p. 184.

legislative process to leave it increasingly out-of-date<sup>126</sup>. The most recent attempts to amend the current law are not only aimed at improving the CA's efficacy in the digital world but would implement provisions required in order to ratify the WCT<sup>127</sup>, the WPPT<sup>128</sup>, and the Marrakesh Treaty<sup>129</sup>.

## 2.3 Copyright Act 98 of 1978

### 2.3.1 Eligibility

In order for a work to be eligible for copyright, it has to have certain attributes. First, it needs to fall into one or more of a set of categories of works. Once it is established that the work falls into one of these categories, it must be examined to determine whether or not it meets certain criteria. These are that the work is original, that it is fixed in a material form, and that it was created by a qualified person or was first published in South Africa. The CA also sets out a restriction whereby certain works that would ordinarily receive protection under the law are denied this.

#### 2.3.1.1 Types of Works

The types of works eligible for copyright protection are artistic works, broadcasts, cinematograph films, computer programs, literary works, musical works, programme-carrying signals, published editions, and sound recordings<sup>130</sup>. Of these, it is artistic works,

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<sup>126</sup> Harms 2013, p. 507.

<sup>127</sup> Karjiker, Sadulla (2022a) Hyperlinking and copyright. *South African Law Journal* 139(1): 181-204, p. 190-1. Hereafter: Karjiker 2022a.

<sup>128</sup> WIPO Performances and Phonograms Treaty, 1996. Available: <https://wipolex.wipo.int/en/text/295477>. Accessed: 10 September 2022.

<sup>129</sup> Low 2015; Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted in Marrakesh on June 27, 2013). Available: <https://wipolex.wipo.int/en/text/301019>. Accessed: 10 September 2022; Pistorius 2016, p. 184, 190-3.

<sup>130</sup> CA s. 2(2).

cinematograph films, literary works, musical works, and sound recordings that are most likely to be found in an archives.

Artistic works are defined as *'irrespective of the artistic quality thereof—*  
(a) *paintings, sculptures<sup>131</sup>, drawings<sup>132</sup>, engravings, and photographs<sup>133</sup>;*  
(b) *works of architecture, being either buildings or models of buildings; or*  
(c) *works of craftsmanship not falling within either paragraph (a) or (b) '134*

Cinematograph films are defined as *'any fixation or storage by any means whatsoever on film or any other material of data, signals, or a sequence of images capable, when used in conjunction with any other mechanical, electronic, or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a soundtrack associated with the film but shall not include a computer program'<sup>135</sup>*

Literary works are defined as including *'irrespective of literary quality and in whatever mode or form expressed—*

- (a) *novels, stories, and poetical works;*
- (b) *dramatic works<sup>136</sup>, stage directions, cinematograph film scenarios, and broadcasting scripts;*
- (c) *textbooks, treatises, histories, biographies, essays, and articles;*
- (d) *encyclopaedias and dictionaries;*
- (e) *letters, reports, and memoranda;*
- (f) *lectures, speeches, and sermons; and*
- (g) *tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program'<sup>137</sup>*

Musical works are defined as *'a work consisting of music, exclusive of any words or action intended to be sung, spoken, or performed with the work'<sup>138</sup>*

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<sup>131</sup> Defined in CA s. 1(1) as including 'any cast or model made for purposes of sculpture'.

<sup>132</sup> Defined in CA s. 1(1) as including 'any drawing of a technical nature or any diagram, map, chart, or plan'.

<sup>133</sup> Defined in CA s. 1(1) as 'any product of photography or of any process analogous to photography, but does not include any part of a cinematograph film'.

<sup>134</sup> CA s. 1(1) 'artistic work'.

<sup>135</sup> CA s. 1(1) 'cinematograph film'.

<sup>136</sup> Defined in CA s.1(1) as including 'a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film'.

<sup>137</sup> CA s. 1(1) 'literary work'.

<sup>138</sup> CA s. 1(1) 'musical work'.

Sound recordings are defined as ‘any fixation or storage of sounds, or data, or signals representing sounds, capable of being reproduced, but does not include a soundtrack associated with a cinematograph film’<sup>139</sup>

The CA is retrospective<sup>140</sup>, and as archives are repositories of history, knowing how and when the law applies to older works is important for archivists. For a work created between 11 September 1965 and 31 December 1978 one should consult CA-1965 to determine if copyright subsists, and if so, who owns it and when it expires. However, the CA broadened the definition of a number of works and created new types of works, thus where a work would receive protection under the 1978 category or definition, but not the one from 1965, the current CA takes precedence<sup>141</sup>. If there are other conflicts in the provisions determining whether or not copyright subsists in the work, then it is the provisions from CA-1965 that are considered<sup>142</sup>.

Works that were created between 1 January 1917 and 10 September 1965 are more complex, as one must consult both CA-1965 and PDTMCA-1916. First it is necessary to establish whether or not copyright subsisted under PDTMCA-1916 and then one consults CA-1965—either to determine whether the copyright continues to subsist or whether copyright was conferred on the work retrospectively<sup>143</sup>. If the work was granted copyright under PDTMCA-1916, those are the provisions that govern duration and ownership, similarly, CA-1965 is consulted for duration and ownership if the protection was granted

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<sup>139</sup> CA s. 1(1) ‘sound recording’.

<sup>140</sup> CA s. 43.

<sup>141</sup> Van Tonder, Liani Taljaard (2020) Re-interrogating the application of the transitional provisions of South African copyright law to pre-1979 works. *LLM Thesis*: University of Pretoria. *Hereafter*: Van Tonder 2020.

<sup>142</sup> Van Tonder 2020.

<sup>143</sup> Van Tonder 2020.

under that Act<sup>144</sup>. Works that did not qualify for protection under either of the older Acts remain in the public domain<sup>145</sup>.

This is of particular importance for audiovisual archivists as cinematograph films—considered dramatic works under PDTMCA-1916 and created as a non-retrospective type of work under CA-1965<sup>146</sup>—are an exception to the process outlined above<sup>147</sup>. A further exception worth noting is that for works where the copyright expired prior to 22 June 1984<sup>148</sup>, the CA will extend it<sup>149</sup>.

The PDTMCA-1916 makes provision for works that existed at the time the law was enacted<sup>150</sup>—this covers all eligible works created prior to 1 January 1917—. If a work was published in that time frame, then it is likely to be in the public domain now. If it is unpublished, it is likely to be the recipient of perpetual copyright under South African law<sup>151</sup>.

### 2.3.1.2 Criteria

Once it is established that a work falls under one of the types of works eligible for copyright, it needs to meet certain criteria in order to receive protection.

#### 2.3.1.2.1 Originality

The work needs to be original<sup>152</sup>. ‘Original’ is not defined in the CA, but should not be taken to mean unique, or even novel<sup>153</sup>. The expression is protected, but the idea is not<sup>154</sup>.

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<sup>144</sup> Van Tonder 2020.

<sup>145</sup> Van Tonder 2020.

<sup>146</sup> Van Tonder 2020.

<sup>147</sup> CA s. 43(c); Van Tonder 2020.

<sup>148</sup> This being the date of commencement of the Copyright Amendment Act 52 of 1984.

<sup>149</sup> CA s. 43(d).

<sup>150</sup> PDTMCA-1916 s. 151.

<sup>151</sup> See Chapter 3 below.

<sup>152</sup> CA s. 2(1).

Multiple expressions of the same idea may be considered original. They may also be considered reproductions. The line between the two seems to vary depending on the type of work—photographing Table Mountain from the same point is very different to writing a fictional account of murdering a relative to gain power. Inspiration, a causal connection, may suggest that a work is a reproduction, or a partial reproduction, but it may still qualify as original<sup>155</sup>.

For the purposes of copyright, originality is about where the expression originates from<sup>156</sup>. Provided that the work originated from the author(s) it is eligible for copyright<sup>157</sup>. Different jurisdictions require different degrees of originality. In South Africa a work is considered original if the author applies their knowledge, labour, and skill to the work<sup>158</sup>, a fairly low standard<sup>159</sup>. This standard, generally known as the ‘sweat-of-the-brow’, was previously in place in the United States, but they have increased the degree of originality required<sup>160</sup>. Canada, while agreeing that the sweat-of-the-brow is too low a standard, feels that the creativity required in the US goes too far in the other direction<sup>161</sup>.

#### 2.3.1.2.2 Fixation

The requirement for fixation is expressed in almost every definition of the types of work that are eligible for copyright<sup>162</sup>. The definitions of a broadcast and a programme-

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<sup>153</sup> *Feist Publications Inc v. Rural Telephone Service Co.* 499 US 340 (1991): p. 346. Hereafter: Feist 1991; Karjiker, Sadulla (2022b) Is South African copyright law out of fashion? The problem with section 15(3A) of the Copyright Act 1978. *Journal of South African Law* 2022(2): 246-264, p. 248.

<sup>154</sup> *Galago Publishers (Pty) Ltd & Another v. Erasmus* 1989 (1) SA 276 (A): p. 278. Hereafter: Galago 1989; Padfield 2015, p. 6, 18-19; WCT.

<sup>155</sup> CA s. 2(3); Galago 1989, p. 280; Harms 2013, p. 501-2.

<sup>156</sup> Dean & Karjiker 2015, p. 1-21; Padfield 2015, p. 20-3; Rens & Lessig 2006, p. 25

<sup>157</sup> Feist 1991, p. 345.

<sup>158</sup> Dean & Karjiker 2015, p. 1-22.

<sup>159</sup> Harms 2013, p. 494-5.

<sup>160</sup> Feist 1991, p. 341; Harms 2013, p. 494-5.

<sup>161</sup> *CCH Canadian Ltd v. Law Society of Upper Canada* (2004) SCC 1: p. 351-352.

<sup>162</sup> See 2.3.1.1 Types of Works, above, for examples.

carrying signal do not include a need for fixation, but this is found in CA s. 2(2). Only the fixed expression in material form is protected by copyright, not the idea behind it<sup>163</sup>.

#### 2.3.1.2.3 *Qualified Person*

In order to receive copyright protection in South Africa, the work must have been first published in South Africa<sup>164</sup> or must have a qualified person as an author. In order to be a qualified person, a natural person must be a South African citizen, or they must be either domiciled or resident in the country<sup>165</sup>. For juristic persons, in order to be considered a qualified person, it must be a body incorporated under South African law<sup>166</sup>.

The CA extends the definition of a qualified person to other countries based on whether or not both South Africa and that country are party to a copyright-related international convention, or some other form of reciprocal agreement<sup>167</sup>. As archival works are often older, the question of whether or not the author is a qualified person is more relevant than it would be in other spaces. While there are only a handful of countries that are not currently party to the Berne Convention, this was not always the case. The vast majority of works in South African research archives will have been created by local people and institutions, but there will always be a portion that were not, such as international correspondence. It will be necessary to determine whether the author of those works was considered a qualified person at the time the work was created on a case-by-case basis.

While the South African government of the time considered Bophuthatswana, Ciskei, Transkei, and Venda to be independent nations, the wider world did not. Depending on when and where (and by whom) a work was created, the author might not be considered a

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<sup>163</sup> Galago 1989, p. 278; Padfield 2015, p. 6, 18-19; WCT.

<sup>164</sup> See 2.3.1.2.4 First Publication, below.

<sup>165</sup> CA s. 3(1)(a).

<sup>166</sup> CA s. 3(1)(b).

<sup>167</sup> CA 2. 37(3).

qualified person under the CA<sup>168</sup>. This matter was dealt with in 1996 by the Intellectual Property Laws Rationalisation Act<sup>169</sup>, which caused these territories to be considered part of South Africa retroactively.

#### 2.3.1.2.4 *First Publication*

Works that do not have a qualified person as an author can still receive copyright protection in South Africa. Generally, these are works that are first published in South Africa<sup>170</sup>, or are published in South Africa within 30 days of first being published elsewhere<sup>171</sup>. As broadcasts and programme-carrying signals are not published in the ordinary sense, their 'publication' must originate in South Africa in order for the work to qualify for South African copyright protection<sup>172</sup>.

#### 2.3.1.3 Statutory Ineligibility

Certain works, though apparently eligible for copyright protection, are explicitly denied it in the CA. These works are official texts or translations of an administrative, legal, or legislative nature, political speeches, speeches delivered as part of legal proceedings, and news of the day, being mere items of press information<sup>173</sup>.

### 2.3.2 Scope of Copyright Protection

#### 2.3.2.1 Exclusive Rights

The CA provides the owner of the copyright with the exclusive right to undertake certain acts in respect to a work. The owner may assign or licence some or all of these

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<sup>168</sup> Dean & Karjiker 2015, p. 1-29, 1-30.

<sup>169</sup> Intellectual Property Laws Rationalisation Act 107 of 1996.

<sup>170</sup> CA s. 4(1)(a), (d-f).

<sup>171</sup> CA s. 1(5)(c).

<sup>172</sup> CA s. 4(1)(b-c).

<sup>173</sup> CA s. 12(8)(a).

rights to one or more persons or organisations and may bequeath them on their death<sup>174</sup>, a particularly necessary aspect when the protection expires based on the author's death<sup>175</sup>.

The restricted acts depend on the type of work. I will only discuss the types of works common in research archives, though the CA provides restrictions for all types of works<sup>176</sup>.

The common exclusive rights are adaptation, certain forms of dissemination, and reproduction. As discussed in Chapter 1, these are all acts that an archives needs to perform as part of its day-to-day operations. Undertaking these acts without being the rightsholder or having their permission constitutes infringement<sup>177</sup> and is subject to both civil<sup>178</sup> and criminal<sup>179</sup> remedies.

#### *2.3.2.1.1 Artistic Works*<sup>180</sup>

Restricted acts in respect of artistic works are reproduction, first publication, using the work in a broadcast for television or in a cinematograph film, transmitting a programme containing the work via a diffusion service except under certain circumstances, adapting the work, and undertaking any of the previously listed acts on an adaptation of the work.

Of these restricted acts, reproduction, first publication, and adaptation are the ones that are likely to be undertaken in an archives, if uploading material online constitutes publication. Additionally, these three as well as the others may be undertaken by users of an archives.

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<sup>174</sup> CA s. 22; Oriakhogba & Adeola-Adedipe 2021, p. 33.

<sup>175</sup> Oriakhogba & Adeola-Adedipe 2021, p. 33, 49.

<sup>176</sup> CA ss. 6-11B.

<sup>177</sup> See 2.3.2.4 Infringement, below.

<sup>178</sup> CA ss. 24-25.

<sup>179</sup> CA s. 27.

<sup>180</sup> CA s. 7.

#### 2.3.2.1.2 Cinematograph Films<sup>181</sup>

The restricted acts in respect of cinematograph films are reproduction, including the creation of still images, causing the work to be seen and/or heard in public, broadcasting the work, transmitting the work in a diffusion service except under certain circumstances, adapting the work, undertaking any of the previously listed acts on an adaptation of the work, and publishing the work.

In an archives, the restricted acts likely to be undertaken are reproduction, causing the work to be seen and/or heard in public, and adapting the work. Publication of an unpublished cinematograph film is unlikely to be an act undertaken by an archives, as this requires 'the sale, letting, hire, or offer for sale or hire, of copies'<sup>182</sup> of the work.

#### 2.3.2.1.3 Literary and Musical Works<sup>183</sup>

The restricted acts in respect of literary and musical works are reproduction, first publication, public performances, broadcasting the work, transmitting the work in a diffusion service except under certain circumstances, adaptation, and undertaking any of the previously listed acts on an adaptation of the work.

In an archives, the restricted acts likely to be performed are reproduction, first publication, and adaptation, if placing the work online constitutes publication. Users of the archives are likely to want to perform all the restricted acts.

#### 2.3.2.1.4 Sound Recordings<sup>184</sup>

The restricted acts in respect of sound recordings are the creation of a record that embodies the sound recording, publication, broadcasting the work, transmitting the work in

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<sup>181</sup> CA s. 8.

<sup>182</sup> CA s. 1(5)(b).

<sup>183</sup> CA s. 6.

<sup>184</sup> CA s. 9.

a diffusion service except under certain circumstances, and communicating the work to the public.

In an archives, the likely acts to be undertaken are the creation of embodiments of the recording and communicating the work to the public, but not publication, as, like with cinematograph films, this requires a commercial transaction<sup>185</sup>.

### 2.3.2.2 Moral Rights<sup>186</sup>

The exclusive rights listed above are economic rights. The CA also provides moral rights, which apply regardless of the type of work. The first of these is the right of the author of the work in question to be acknowledged as such, regardless of who owns the copyright or any assignment or licensing that may have taken place. The author also has the right to prevent usage of the work that would damage their honour or reputation. If the work is exploited in an authorised manner, however, the author cannot prevent modifications to the work that are necessary in order for the exploitation to take place. The duration of moral rights is a matter of some contention<sup>187</sup>. Moral rights do not impair an archives' ability to function optimally, which is why this dissertation focuses on the economic rights of adaptation, dissemination, and reproduction.

### 2.3.2.3 Exceptions and Limitations

The CA provides an extensive list of exceptions to and limitations on the exclusive rights that it provides<sup>188</sup>. As with exclusive rights, the exceptions and limitations depend on the types of work, and I will once again only consider the types commonly found in research archives.

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<sup>185</sup> CA s. (1)(5)(b).

<sup>186</sup> CA s. 20(1).

<sup>187</sup> Oriakhogba & Adeola-Adedipe 2021, p. 45, 49-50; Pistorius 2016, p. 234.

<sup>188</sup> CA ss. 12-19B.

#### 2.3.2.3.1 *Literary and Musical Works*<sup>189</sup>

As the exceptions and limitations for the other types of works are based on the exceptions and limitations for literary and musical works, I have excerpted the full section from the CA in Appendix C for ease of reference. There are additional exceptions for musical works<sup>190</sup>, but these are chiefly aimed at manufacturers of sound recordings that embody musical works and are of little relevance to most research archives.

#### 2.3.2.3.2 *Artistic Works*<sup>191</sup>

CA s. 12(1-5), (9-10), and (12-13) applies, taking necessary changes into account, to artistic works. There are also provisions that apply only to artistic works. Artistic works may be used in cinematograph films, etc., provided that the use is incidental or in the background, or if the 'work is permanently situated in a street, square, or a similar public place'<sup>192</sup>. The copyright of architectural drawings<sup>193</sup> is not infringed by reconstructing the building in the original place and style.

#### 2.3.2.3.3 *Cinematograph Films*<sup>194</sup>

CA s. 12(1)(b-c), (2-4), and (12-13) applies, taking necessary changes into account, to cinematograph films. Additionally, a separate sound recording of the soundtrack to the film does not infringe the copyright of the film. It is important to note that only incidental or background use of artistic works is permitted (see above). Especially in the case of documentaries, broadcasts, sound recordings, and other cinematograph films may appear

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<sup>189</sup> CA s. 12.

<sup>190</sup> CA s. 14.

<sup>191</sup> CA s. 15.

<sup>192</sup> CA s. 15(3).

<sup>193</sup> As well as the copyright of the buildings themselves, though these will not be found in research archives.

<sup>194</sup> CA s. 16.

incidentally or in the background but would be infringement without permission from the rightsholder<sup>195</sup>.

#### 2.3.2.3.4 *Sound Recordings*<sup>196</sup>

CA s. 12(1)(b-c), (2-5), and (12-13) applies, taking necessary changes into account, to sound recordings. There are no additional exceptions and limitations listed for this type of work.

#### 2.3.2.3.5 *Reproduction*

CA s. 13 provides general exceptions for reproducing works. Reproduction is allowed provided that it does not conflict with the ordinary exploitation of the work by the rightsholder and that it is not unreasonably prejudicial to the copyright owners' legitimate interests.

Chapter 1 of the CR, the Reproduction Regulations, applies as part of this section. Reg. 3, Reproduction by library or archives depot, is particularly relevant. These provisions are discussed in detail below, in the section on the CR.

#### 2.3.2.4 *Infringement*

Copyright infringement takes place when someone undertakes an act that falls under the exclusive rights of the copyright owner without their permission, provided that this usage does not fall under one of the exceptions and limitations listed in the CA<sup>197</sup>. The infringement of moral and economic rights are dealt with in the same way, except that in the case of moral rights the author is always considered the copyright owner<sup>198</sup> until their

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<sup>195</sup> Flynn 2015, 38, 40, 44.

<sup>196</sup> CA s. 17.

<sup>197</sup> CA s. 23(1) ; For more on how courts test for infringement, substantial parts, etc., see for example: Galago 1989, p. 280; *Moneyweb (Pty) Ltd v Media24 Ltd and Another* 2016 BIP 326 (GJ): p. 353-354; and *Quad Africa Energy (Pty) Ltd v The Sugarless Co (Pty) Ltd and Another* 2020 BIP 426 (SCA): p. 427.

<sup>198</sup> CA s. 20(2).

death. The question of whether moral rights can be bequeathed to the author's heirs is a matter of debate<sup>199</sup>.

As demonstrated above, archivists need to adapt, disseminate, and reproduce works in the ordinary course of their duties. Without permission from the rightsholders, this is infringement, as the exceptions provided in the CA, above, and CR, below, do not make allowance for this.

### 2.3.3 Authorship and Ownership

The previous sections have made repeated reference to the author(s) of a work and the owner(s) and/or holder(s) of the copyright. Sometimes these are all the same person, but often an author is not the owner, and another person entirely may hold some or all of the rights owned.

#### 2.3.3.1 Authorship

Who the author of a work is can be determined easily. As per the CA: '*author*', in relation to—

- (a) *a literary, musical, or artistic work, means the person who first makes or creates the work;*
- (b) *a photograph, means the person who is responsible for the composition of the photograph;*
- (c) *a sound recording, means the person by whom the arrangements for the making of the sound recording were made;*
- (d) *a cinematograph film, means the person by whom the arrangements for the making of the film were made; ...*<sup>200</sup>

The difficulty comes in identifying the author with a particular natural or juristic person. There may be multiple authors, the work may be anonymous, or the author may have used a pseudonym. The identity of the author matters for a number of reasons.

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<sup>199</sup> Pistorius 2016, p. 254.

<sup>200</sup> CA s. 1(1)'author'.

The author owns the moral rights and, in some cases, the economic rights. For certain types of works, the copyright duration is calculated based on the author's death date<sup>201</sup> and thus being able to identify them is of great importance to archives.

### 2.3.3.2 Ownership

The author(s) of a work owns the copyright in the work, except under certain circumstances outlined in the CA<sup>202</sup>. If the work has multiple authors, then all of them will own the copyright equally<sup>203</sup> unless they make a contractual agreement to the contrary<sup>204</sup>.

If the author created the work as part of their employment by a periodical, such as a newspaper or journal, then the proprietor of that periodical owns the copyright in the work in all ways relating to publication in any periodical, but the author owns the rights in all other respects<sup>205</sup>. For certain types of works—cinematograph films, drawn or painted portraits, gravures, photographs, and sound recordings—if the work is created due to a commission, then it is the commissioner who owns the copyright in the work<sup>206</sup>. If the work is created in the course of the author's duties while under a contract of employment or service, then the copyright in the work belongs to the employer<sup>207</sup>. In all these cases, any contractual agreement that stipulates copyright ownership takes precedence over the CA<sup>208</sup>. The copyright in works created under the control of direction of the state or any prescribed international organisations belongs to the state or organisation<sup>209</sup>.

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<sup>201</sup> See Chapter 3 below.

<sup>202</sup> CA s. 21(1)(a).

<sup>203</sup> CA s. 21(1)(a).

<sup>204</sup> Oriakhogba & Adeola-Adedipe 2021, p. 34, 46, 48.

<sup>205</sup> CA s. 21(1)(b).

<sup>206</sup> CA s. 21(1)(c).

<sup>207</sup> CA s. 21(1)(d).

<sup>208</sup> CA s. 21(1)(e).

<sup>209</sup> CA s. 21(2).

The owner of the rights is not always the rightsholder. As mentioned above, the rights owner may assign or licence some or all of the rights in the work. Copyright is considered to be an incorporeal movable property<sup>210</sup>. Copyright can be bequeathed through a testamentary disposition on the owner's death<sup>211</sup>, in whole or in part<sup>212</sup>. If the 'material on which a work is first written or otherwise recorded'<sup>213</sup> is bequeathed to someone, it should be assumed to include any copyright in the work that the deceased held, unless otherwise stated<sup>214</sup>. This provision is of particular relevance to archivists, as some collections are obtained through bequests<sup>215</sup>.

An assignment or exclusive licence must be in the form of a written agreement<sup>216</sup>, though non-exclusive licences may be tacit or verbal agreements<sup>217</sup>. In some jurisdictions the rights revert to the owner at or after death<sup>218</sup>, but in South Africa the inheritor(s) of the rights are bound by the existing agreements<sup>219</sup>. While it is usually necessary to obtain permission for a restricted act from the owner of the copyright, if the rights have been assigned or licenced to someone else, that person should be consulted<sup>220</sup>.

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<sup>210</sup> Dean & Karjiker 2015, p. 1-1, 1-147, 1-148, 1-156.

<sup>211</sup> CA s. 22(1).

<sup>212</sup> CA s. 22(2).

<sup>213</sup> CA s. 22(6).

<sup>214</sup> CA s. 22(6).

<sup>215</sup> Behrnd-Klodt 2008, p. 41.

<sup>216</sup> CA s. 22(3).

<sup>217</sup> CA s. 22(4).

<sup>218</sup> De Beer 2017, p. 166-7; Dryden 2016, p. 117-8; Hilty & Nérison 2012.

<sup>219</sup> CA s. 22(7).

<sup>220</sup> CA s. 22(8).

## 2.4 Copyright Regulations, 1978

The CA makes provision for ‘...any matter required or permitted by this Act to be prescribed by regulation...’<sup>221</sup> and the CR was first promulgated in the same year. It was last amended in 1985. Consequently, the CR are far more outdated than the CA.

### 2.4.1 Reproduction

The reproduction regulations fall under s. 13 in the CA. This relates to general exceptions for reproduction that apply to all types of works. Any reproduction undertaken by virtue of this section and the accompanying regulations should not be prejudicial to the rightsholders’ legitimate interests and should not conflict with the normal exploitation of the reproduced work<sup>222</sup>.

#### 2.4.1.1 Reproduction by Library or Archive Depot

As stated above, the most relevant part of the CR is reg. 3<sup>223</sup>: Reproduction by library or archive depot. The CR does not define a library but defines an archives depot in reference to the repealed 1962 Archives Act<sup>224</sup>, which was replaced with NARSSAA in 1996<sup>225</sup>. NARSSAA refers to an archives repository, rather than an archives depot, and the definition is quite loose<sup>226</sup>. However, both pieces of legislation seem to indicate that the CR should be considered to apply only to archives under the control of the National Archivist, as in both cases the definition refers to the collection of public records<sup>227</sup>.

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<sup>221</sup> CA s. 39(a).

<sup>222</sup> CA s. 13.

<sup>223</sup> For ease of reference, this can be found in Appendix D.

<sup>224</sup> Archives Act 6 of 1962.

<sup>225</sup> NARSSAA s. 19.

<sup>226</sup> Motsi 2017, p. 5.

<sup>227</sup> Defined as a work that is ‘created or received by a governmental body in pursuance of its activities’ in NARSSAA s. 1 ‘public record’.

That would mean that the CR does not apply to research archives as, though the National Archives may determine that certain non-public records are better placed in another repository<sup>228</sup>, it does not give any form of oversight of these non-public record repositories to the National Archives. This is highly problematic. It also seems to be an issue that has rarely been addressed, presumably because common sense suggests that the CR applies to all archives. Of course, if that is the case, one wonders why the CR includes a definition at all, let alone such an exclusionary one. There is, however, a loophole. In South Africa, many research archives form part of a university library and so may make use of the CR on the grounds that they are at least part of a library, since the CR does not define this.

Much of the day-to-day work of an archives is able to take place because of this regulation. The problems arise through the failure of the law to keep up with technological innovation. Reg. 3(d) refers to the reproduction of unpublished works for the purposes of preservation. This requires that the reproduction be in 'facsimile form'. The CR does not define what this means. A facsimile is an exact duplicate of a work in every respect<sup>229</sup>. Copyright applies only to fixed expressions<sup>230</sup> and it can therefore be said that the form the work takes is inextricably linked to the copyright protection it holds<sup>231</sup>. The argument has been made that it is the medium that has received the copyright protection and not the content by itself<sup>232</sup>.

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<sup>228</sup> NARSSAA ss. 3(d), 14(2).

<sup>229</sup> OED Online (2022) *facsimile*, n. Oxford University Press. Available: <https://www.oed.com/view/Entry/67476?rskey=3OE1fd&result=1>. Accessed: 28 October 2022. Hereafter: OED 2022.

<sup>230</sup> CA s. 44.

<sup>231</sup> Pistorius 2016, p. 216-17.

<sup>232</sup> Arnold, Richard (2005) Copyright in photographs: a case for reform. *European Intellectual Property Review* 27(9): 303-305, p. 303.

Such an argument suggests that format shifting is not allowed when creating facsimiles for preservation. A completely inaccessible copy on an outdated carrier is much the same as no copy at all. If one makes the argument that the form of the work constitutes the choices made in the way the work is expressed, rather than the physical format of the item, then format shifting would be allowed when creating preservation copies. In this case the identical content is the facsimile form, and the format of the carrier is merely the way one accesses the work. If format shifting is considered adaptation rather than reproduction of the content of the work, then only a limited portion of an archives can be preserved legally under the CR.

#### 2.4.1.2 Multiple Copies

The CR makes provision for the creation of multiple copies by a library or archives under specific circumstances only<sup>233</sup>. Preservation is not one of these circumstances. This is problematic as digital preservation requires the creation of multiple copies<sup>234</sup>. When copying and disseminating a work for preservation<sup>235</sup> or replacement<sup>236</sup> purposes, the exception applies to all types of works. In all other cases under reg. 3, copying and dissemination is only allowed in respect of literary works and, in certain cases, the diagrams or illustrations, etc., that accompany them<sup>237</sup>. This restriction appears under the regulation around the creation of multiple copies. It is therefore reasonable to assume that the restriction only applies to the creation of multiple copies.

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<sup>233</sup> CR reg. 5.

<sup>234</sup> See Chapter 4 below.

<sup>235</sup> CR reg. 3(d).

<sup>236</sup> CR reg. 3(e).

<sup>237</sup> CR reg. 5(2).

## 2.4.2 Authorship

Chapter 3 of the CR, Authors of cinematograph films, falls under the CA s. 26(6).

Determining who the author of a cinematograph film is, requires one only to determine who is responsible for arranging to have the film made<sup>238</sup>. This could be the director, or the producer, or perhaps a production company, etc. It may be someone else entirely, depending on any contracts that may apply. Regs. 17 and 18, however, assign authorship based on what is indicated on the film itself. While that natural or juristic person is only considered the author for the purposes of infringement proceedings<sup>239</sup>, it provides a useful place to start when trying to identify the author of a cinematograph films for other purposes.

## 2.5 The National Archives Act and Regulations

### 2.5.1 The National Archives and Record Service of South Africa Act 43 of 1996.

This Act repealed the 1962 Archives Act<sup>240</sup> and established the post-apartheid National Archives. The primary focus is on governmental archives under the control of the National Archivist, but, as there is no general archival legislation, research archives use and adapt what they can. As a government institution, the National Archives are primarily concerned with public records. While they may collect some non-public records, they are responsible for determining whether those records are better placed in other repositories<sup>241</sup>

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<sup>238</sup> CA s. 1(1)'author'(d).

<sup>239</sup> CA s. 26(6).

<sup>240</sup> NARSSAA s. 19.

<sup>241</sup> NARSSAA ss. 3(d), 14(2).

and maintaining a register of the country's non-public records across such institutions<sup>242</sup>.

Accessibility is a concern of the legislation<sup>243</sup>. It recognises the need for the archives to be made visible to society through various forms of promotional activities and advocacy<sup>244</sup>.

## 2.5.2 The National Archives and Record Service of South Africa

### Regulations, 2002<sup>245</sup>

NARSSAR falls under NARSSAA<sup>246</sup> and repealed the 1997 regulations<sup>247</sup>. Part IV: Access and Use<sup>248</sup> is commonly followed by other archives. These are the guidelines that archives use for their interactions with researchers and members of the public. These regulations allow the archives to make the contents of the archives accessible<sup>249</sup> and, like the CR allow the reproduction of records in order to supply them to the researcher<sup>250</sup>. This does not specifically allow for the format-shifting that is required to supply copies of born-digital or other obsolete formats. It is about making the material accessible to the public, but only in terms of access to the archives on-premises. It does not cover remote or online accessibility, nor the needs the archivists may have beyond allowing members of the public to consult the material.

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<sup>242</sup> NARSSAA ss. 3(f), 14(5).

<sup>243</sup> NARSSAA ss. 3(b), (h-i), 5(1)(c).

<sup>244</sup> Ngoepe & Ngulube 2011, p. 4-7, 10, 12-13, 18-19.

<sup>245</sup> NARSSAR.

<sup>246</sup> NARSSAA s. 18.

<sup>247</sup> NARSSAR preamble.

<sup>248</sup> NARSSAR reg. 9.

<sup>249</sup> NARSSAR regs. 9(1), (5-6), (7)(b-c).

<sup>250</sup> CR regs. 3(f), (h); NARSSAR reg. 9(8)(b)(ii).

## 2.6 The National Library of South Africa Act 92 of 1998<sup>251</sup>

NLSAA is the legislation responsible for establishing the National Library under the post-apartheid government. The functions of the National Library include maintaining and extending their own and other collections of Southern African and related material. As NLSAA refers to unpublished works and information services, it suggests that a research archives falls under the aegis of the National Library as well as the National Archives. This supports the view that the CR may apply to research archives as libraries even they do not qualify as archive depots as discussed above.

## 2.7 The National Heritage Resources Act 25 of 1999<sup>252</sup>

NHRA is an extensive piece of legislation that establishes the South African Heritage Resources Agency<sup>253</sup> and establishes what the various types of heritage resources are and how they should be dealt with. This does apply to archives as information resources, other than public records as defined in NARSSAA, are considered part of the national estate<sup>254</sup>. This principally relates to material that has been declared a heritage object<sup>255</sup>, which requires listing in SAHRA's register<sup>256</sup>. As such, research archives should consider the provisions of NHRA in the management of their collections. NHRA does not, however, impact on archival accessibility issues that relate to copyright.

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<sup>251</sup> *Hereafter:* NLSAA.

<sup>252</sup> *Hereafter:* NHRA.

<sup>253</sup> *Hereafter:* SAHRA.

<sup>254</sup> NHRA ss. 3(2)(i), (vii).

<sup>255</sup> NHRA s. 32(1).

<sup>256</sup> NHRA s. 32(7).

## 2.8 Summary

Both archives and copyright strive to provide a balance between making works accessible and protecting them. Archives aim to make the content accessible and protect the original expression of the work whereas copyright seeks to make the fixed expression accessible and protect the content of the works. This tension can be seen in the differing justifications. Copyright law in South Africa has developed slowly, heavily influenced by the colonial history and international agreements. Knowledge of this history is important for archivists as the transitional provisions in the CA<sup>257</sup> require that prior legislation is consulted for older works. The CA restricts what can be done to a work, as well as providing exceptions to and limitations on this, including a set specifically for libraries and archives in the CR. These allow archivists to undertake certain aspects of their work, without being concerned about infringement, but technological advancements have not yet been addressed and this causes problems and confusion in practice. While there is no South African legislation that specifically addresses research archives, parts of some cultural and heritage laws can be applied. None of these, however, give research archives the ability to avoid copyright infringement when undertaking certain functions.

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<sup>257</sup> CA s. 43.

## Chapter 3: Issue 1: Copyright Duration

In this chapter I will consider the problem of copyright duration from the perspective of the accessibility of archival material. Once the copyright has expired, the archives can make the work widely accessible in any number of ways. Unfortunately determining when the copyright expires is not always easy or straightforward. First, I establish exactly what the CA says about copyright duration for the types of works that may be found in research archives. Alongside this, any impact that archival work may have on the copyright duration will be considered. I will then consider the matter of publication, and the question of material placed online, as this is the main way that archival accessibility may be involved in determining the term of protection. Recommendations for ways in which the situation could be improved are sourced from the CAB, Canadian Copyright Act, and the academic literature.

### 3.1 Copyright Duration in the Law

The issue of copyright duration is dealt with in s. 3 of the CA. For most research archives, there are only four categories of works that need to be considered: (i) literary, musical, and non-photographic artistic works; (ii) cinematograph films and photographic works; (iii) sound recordings; and (iv) anonymous and pseudonymous works. Each category is made up of a number of the types of works defined in the CA and these groupings are based on how copyright duration is calculated. While there may be some overlap, I will consider the problems caused for each category of works separately.

### 3.1.1 Literary, Musical, and Non-Photographic Artistic Works

Copyright expires at the end of the 50<sup>th</sup> year after the author's death<sup>258</sup>. However, if the author dies before the work is published, performed in public, recorded and offered for sale to the public, or broadcast, the copyright expires at the end of the 50<sup>th</sup> year after that action<sup>259</sup>.

There are a number of reasons this creates a problem for archival accessibility. If the work is unpublished at the time of the author's death, and none of the four specified actions takes place in the following 50 years, the law implies that the work remains under copyright protection until one of those actions does occur<sup>260</sup>. The wording in question is 'the term of copyright shall *continue to subsist* for a period of fifty years from the end of the year in which the first of the said acts is done'<sup>261</sup> (emphasis added). In order for the period of protection to continue, it cannot expire beforehand, suggesting perpetual copyright for works of this nature in the archive. International precedent shows that where the legislation has previously provided perpetual or near-perpetual copyright to unpublished works, amendments have been passed to correct this<sup>262</sup>.

As copyright is intended to be a time-limited monopoly, one can make the argument that if none of the listed acts takes place prior to the end of the 50<sup>th</sup> year after the author's death, then it enters the public domain on 1 January of the following year. This has not

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<sup>258</sup> CA s. 3(2)(a).

<sup>259</sup> CA s. 3(2)(a).

<sup>260</sup> Dean 2015.

<sup>261</sup> CA s. 3(2)(a)(iv).

<sup>262</sup> Canadian Copyright Act s. 6-7; An Act to Amend the Copyright Act, SC, 1997, c.24; Stobo 2019, p. 34; Sutton 2019, p. 14-15.

been tested in court and, where the matter is considered, it seems the literature takes the position that the law mandates perpetual copyright for unpublished works<sup>263</sup>.

One of the ways by which archives strive to increase accessibility is by placing digital copies of their holdings in publicly accessible online repositories<sup>264</sup>. If placing the work online is considered publication<sup>265</sup>, a public performance, or a broadcast, then this would start the countdown to the work entering the public domain and being more accessible. This assumes that the relevant right has been assigned or licenced to the archives. If it has not, then the copyright continues to be perpetual.

### 3.1.2 Cinematograph Films and Photographic Works

Photographic works are technical works, similar to cinematograph films and are treated in much the same manner by the law, despite being considered artistic works<sup>266</sup>. For cinematograph films and photographic works the term of copyright is 'fifty years from the end of the year in which the work (i) is made available to the public with the consent of the owner of the copyright; or (ii) is first published, whichever term is the longer'<sup>267</sup>. There are only 50 years for that to happen, though, otherwise copyright expires at the end of the 50<sup>th</sup> year after the work was created.

In many ways this is quite good for an archives. The vast majority of the cinematograph films and photographic works in their holdings will be unpublished and should therefore enter the public domain slightly more than 50 years after creation. Sometimes this is easy to determine, but not all of the items in an archives are dated. This depends on the documentation and/or metadata provided by the donor or depositor of each collection.

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<sup>263</sup> Dean & Karjiker 2015, p. 1-49.

<sup>264</sup> Conroy 2006, p. 346.

<sup>265</sup> See 3.2 below.

<sup>266</sup> Harms 2013, p. 490-2, 496, 503.

<sup>267</sup> CA s. 3(2)(b)

Without a definite date of creation some works may have their copyright extended as one has to estimate the last possible date of creation based on what is known of the author, and when technologies became obsolete.

If the archives uploads the work to their online repository or website, an action particularly common in the case of photographs, before the work enters the public domain, they have lengthened the period of protection, regardless of whether placing the work online is considered publication as it definitely constitutes making the work available to the public. For certain cinematograph films found in the archives this would provide an end to another case of perpetual copyright. Due to the transitional provisions<sup>268</sup> cinematograph films created prior to 1979 have to have been either published or approved by one of the specified certification boards<sup>269</sup> in order for their copyright to have an expiry date. Unpublished footage created prior to 1979 has perpetual copyright<sup>270</sup>.

### 3.1.3 Sound Recordings

In South Africa it appears that unpublished sound recordings have perpetual copyright. S. 3(2)(c) states that copyright lasts for ‘...fifty years from the end of the year in which the recording is first published’. There are no provisions for cases where the work remains unpublished.

For a research archives, it would be unusual to find published sound recordings in their holdings. Portions of a recording may have been used as part of an audiovisual work—legally this would be considered part of the audiovisual work rather than a published

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<sup>268</sup> CA s. 43.

<sup>269</sup> The Board of Censors under the Entertainments (Censorship) Act 28 of 1931, the Publications Control Board under the Publications and Entertainments Act 26 of 1963, or any committee under the Publications Act 42 of 1974.

<sup>270</sup> CA-1965 s. 14(c).

sound recording<sup>271</sup>—or transcripts of an interview may have been published, but rarely is the full recording itself published.

This is another time where uploading an item to the archival repository could decrease the term of copyright. Though this would require some sort of paywall under the current definition of publication as, in order to be considered published, a sound recording needs to be sold, let, hired, or offered for sale or hire<sup>272</sup>. Unfortunately, that requires the digitisation of the item. Given the costs associated—staff, equipment, server space, etc.—it is rarely possible for an archives to digitise all their holdings. Preference tends to be given to items that can be put online without risks<sup>273</sup>, leaving many sound recordings undigitised as they have become orphan works. This prohibits the archives from digitising the work and placing it online as the rightsholders' permission is required for both actions and the older these become, the more likely these are to be orphaned<sup>274</sup>.

Copyright is not the only risk to be considered in the case of interviews. Privacy rights, where the interviewees are still alive<sup>275</sup>, need to be considered as well. Ideally the interviewer would provide the archive with release agreements, but research ethics and practices have altered over time, and these are not always available.

### 3.1.4 Anonymous and Pseudonymous Works

Anonymous and pseudonymous works are problematic as many of these works are intentionally orphaned at the moment of creation. The rights still belong to someone, and the work is still protected, but the author has chosen to hide their identity.

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<sup>271</sup> CA s. 1(1)'cinematograph film'.

<sup>272</sup> CA s. 1(5)(b).

<sup>273</sup> Dryden 2008, p. 53, 162, 173, 178, 190; Stobo 2019, p. 31, 35.

<sup>274</sup> See Chapter 5 below.

<sup>275</sup> Protection of Personal Information Act No. 4 of 2013, s. 1'personal information'.

If the author's identity is revealed before the work enters the public domain, then the duration of copyright is calculated by the provisions for the particular type of work it is<sup>276</sup>. For works that remain anonymous or pseudonymous there are two ways of calculating the duration of copyright protection, and whichever term is shorter is the one that applies. The first option calculates 50 years from the end of the year that the rightsholder consents to make the work available to the public. The second option is 50 years from the end of the year in which one can reasonably assume the author died<sup>277</sup>.

Newspaper clippings are a frequent source of anonymous and pseudonymous works in an archives. In that case it is usually easy to establish the publication year, add 51, and determine if the item is in the public domain. If it is not, it is usually easy to identify the owner of the rights, as it is generally the proprietor of the newspaper. Unpublished works in this category present another problem entirely, as they require one to make assumptions about the author that are extremely difficult and subjective and need to be justifiable.

## 3.2 Publication Status

As shown above, the publication status of a work is instrumental when determining the duration of copyright. South African law supports perpetual copyright for many types of unpublished works. Determining publication status, however, is not always straightforward<sup>278</sup>.

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<sup>276</sup> CA s. 3(3)(b).

<sup>277</sup> CA s. 3(3)(a).

<sup>278</sup> Dryden 2008, p. 32-3.

### 3.2.1 Publication Under the Act

The first section of the CA is about eight pages long and consists almost entirely of definitions. 'Publication' is essentially defined as there being enough copies issued to the public, with the rightsholder's consent, to meet the needs of the public<sup>279</sup>. For cinematograph films and sound recordings, publication requires '...the sale, letting, hire, or offer for sale or hire, of copies...'<sup>280</sup>.

Specifically excluded from publication are '(i) a performance of a musical or dramatic work, cinematograph film, or sound recording; (ii) a public delivery of a literary work; (iii) a transmission in a diffusion service; (iv) a broadcasting of a work; (v) an exhibition of a work of art; [and] (vi) a construction of a work of architecture'<sup>281</sup>.

The last two exclusions do not apply to archival material, and the first two apply only in certain cases. Transmission in a diffusion service and broadcasting, exclusions (iii) and (iv), however, are the closest the current CA comes to the internet. This suggests that something that is exclusively 'published' online is not published at all in terms of copyright, and that an archive 'publishing' material in its online repository has no effect on copyright duration whatsoever.

For literary, musical, and artistic works, however, one merely needs to issue sufficient copies to the public<sup>282</sup>, and due to the nature of creating, storing, and distributing items electronically, the provision of an electronic copy automatically results in the creation of

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<sup>279</sup> CA s. 1(5)(a); Baloyi, J Joel (2012) To publish or not to publish: a critical consideration of the role of the music publisher today: analyses. *SA Mercantile Law Journal* 24(2)218-232. Hereafter: Baloyi 2012.

<sup>280</sup> CA s. 1(5)(b).

<sup>281</sup> CA s. 1(5)(d).

<sup>282</sup> CA s. 1(5)(a).

multiple copies<sup>283</sup>. This could mean that any of those types of works placed online are indeed published under South African law<sup>284</sup>. Cinematograph films and sound recordings, however, require some sort of financial transaction (or possibility thereof) and as such the works would require some sort of paywall before they could be considered as published, rather than merely disseminated. The distinction between publication and dissemination matters because while the law protects both the right to publish and the right to disseminate a work, the effect on copyright duration is not the same. Dissemination has no impact on the duration of copyright in unpublished sound recordings but can for unpublished cinematograph films<sup>285</sup>.

In Canada, uploading material to the internet falls under the communication right<sup>286</sup>. Canadian case law, however, has found that when a user is able to obtain a permanent copy of a work that they are able to keep for themselves, the work should be considered as published<sup>287</sup>. As such, it follows that making a work available to the public for download would be considered the point at which the work was published<sup>288</sup>. Given that the WCT originally proposed that placing material online should be considered publication, but the provision failed to make the final version of the Treaty<sup>289</sup>, it is clear that there is a disturbing lack of legal clarity on this issue, which affects copyright in multiple ways.

On top of all this, it is possible that older works by non-qualified persons could be placed online in archival repositories. Even if the author is not considered a qualified

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<sup>283</sup> Dryden, Jean (2017) The meaning of publication in Canadian copyright law: an archival perspective. *Archivaria* 83:1-34, p. 18, 21. Hereafter: Dryden 2017; Stobo 2019, p. 28.

<sup>284</sup> Padfield 2015, p. 188; Visser 2004, p. 768-9.

<sup>285</sup> See 3.2.2 Made Available to the Public, below.

<sup>286</sup> Dryden 2017, p. 4, 11.

<sup>287</sup> *Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors, and Music Publishers of Canada and CMRRA-SODRAC Inc., et al.* (2012) SCR 31: p. 241; Visser 2004, p. 768-9.

<sup>288</sup> Dryden 2017, p. 4, 16, 21, 23, 29-30.

<sup>289</sup> *Ibid.*, p. 4.

person, a work first published in South Africa is eligible for copyright protection. If an archives places a previously unpublished work online, and this is considered publication, is South Africa then the country of publication<sup>290</sup>? It is not clear how one would determine the country of origin. It could be based on the country of upload, where the website server sits, where the author is from, or other possibilities<sup>291</sup>.

### 3.2.2 Made Available to the Public

The copyright duration of literary, musical, and non-photographic artistic works, as well as of sound recordings requires one to know whether or not the work has been published and when. While cinematograph films and photographic works can also have their copyright duration affected by whether or not they have been published, both this category and that of anonymous and pseudonymous works may need to calculate the period of protection based on the year the work was 'made available to the public'. This option first appears in the CA, and so does not apply to works where the previous acts would need to be consulted to calculate duration.

The CA does not define this phrase. It is clearly distinct from publication or s. 3(2)(b) would not include both options. Since the actions the CA considers to constitute publication are not encompassed by this phrase, should it be understood to mean the actions that the CA excluded from publication? The phrase is also used in Canadian copyright law, and they do not provide a proper definition either, though there it is specifically related to telecommunication and falls under the communication right for some types of works<sup>292</sup>.

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<sup>290</sup> Visser 2004, p. 769-70.

<sup>291</sup> Padfield 2015, p. 68, 191; Visser 2004, p. 769-70, 776.

<sup>292</sup> Dryden 2017, p. 29-31.

Perhaps then, the phrase should be understood to embody the communication right<sup>293</sup>, rather than something more analogous to the right of first publication.

To an archivist, this phrase is concerning—the entire point of an archive is to make their holdings available to the public. It could certainly be said that placing material in a publicly accessible archive makes the work available to the public, though that has never yet affected the copyright duration of any works. Some have even gone so far as to argue that merely placing the work in an archives constitutes publication<sup>294</sup>, though this is patently ridiculous and does not meet the South African threshold for publication. It could be argued that placing material in an archives falls under the distribution right<sup>295</sup> as a work becomes more widely accessible once it enters an archives.

As shown in the preceding section, uploading material into online repositories is somewhat of a legal grey area when it comes to publication status. Online access, however, certainly makes the works available to the public<sup>296</sup> regardless of whether the work is considered published.

### 3.3 Case Study: Bleek and Lloyd

In chapter 1 I stated that one of the aims of copyright was to incentivise creators and reward them for making their works available to the public, generally through some form of publication<sup>297</sup>. This is one of the reasons that unpublished works are dealt with in such a haphazard manner in the CA. The creator has not held up their end of the deal. As long as

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<sup>293</sup> Karjiker 2022a, p. 191; Padfield 2015, p. 105.

<sup>294</sup> Dryden, Jean (1975-6) Copyright in manuscript sources. *Archivaria* 1(1):39-47, p. 42. Hereafter: Dryden 1975-6.

<sup>295</sup> Dryden 2017, p. 23.

<sup>296</sup> Conroy 2006, p. 346; Tapfuma & Hoskins 2019, p.1-2, 7, 9.

<sup>297</sup> Fitzpatrick 2011, p. 80.

the work remains unpublished, it is inaccessible to most and society does not benefit in any way<sup>298</sup>.

Archives make works available to researchers both on-site at the archives, and virtually through the online archival repository, which is able to reach far more researchers than could ever consult the original, physical material<sup>299</sup>. In this chapter I have shown how placing previously unpublished material in an online repository is dealt with by the South African law. In this section I will consider the specific case of the Bleek and Lloyd Collection, partially housed in UCTL:SC:PC.

Wilhelm Bleek, Dorothea Bleek, and Lucy Lloyd died in 1875, 1948, and 1914 respectively. Based on these death dates, Wilhelm Bleek's published literary, musical, and non-photographic artworks should have entered the public domain on 1 January 1926; Dorothea Bleek's on 1 January 1999; and Lucy Lloyd's on 1 January 1965. Unpublished works that were posthumously published prior to these dates have their copyright limited to the end of the 50<sup>th</sup> year after publication. A work by Dorothea Bleek that was first published in 1970 will consequently only have entered the public domain on 1 January 2021. While the extended length of copyright is unfortunate from the archivist's perspective, it still upholds the deal between creators and society. Society gains access to the work and the creators, or their heir(s), and publisher(s) are rewarded for doing so.

If the same work had instead been placed in an online archival repository in 1997, and this was considered publication, the copyright would only expire on 31 December 2047.

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<sup>298</sup> Geiger 2017, p. 93.

<sup>299</sup> Purday 2010, p. 175-6.

Unlike in the preceding example, however, this copyright extension defeats the aim of placing the work online. The work is more accessible, but it is less useable<sup>300</sup>.

To date, many of the Bleek and Lloyd works remain unpublished. All of these works should now be in the public domain. The Digital Bleek and Lloyd<sup>301</sup> showcases digitised versions of otherwise unpublished material from the Bleek and Lloyd Collection<sup>302</sup>. The Centre for Curating the Archive<sup>303</sup> began uploading these in 2007. The copyright status of these works is unclear. Either they have been published by this project, or they remain unpublished. Without clarity in the law, it is unclear if the works enter the public domain based on when they were uploaded to the website, or if the works remain under perpetual copyright. This includes the photographs, as under PDTMCA-1916, these are protected by copyright until the end of the 50<sup>th</sup> year after publication and so have perpetual copyright until they are first published.

## 3.4 Recommendations

### 3.4.1 Perpetual Copyright

Perpetual copyright should not exist, as the entire point of legislating the matter is to provide a time-limited monopoly. The 1710 Statute of Anne, the first copyright law in England, was intended to prevent publishers from holding a perpetual monopoly over their publications<sup>304</sup>, showing that this limitation in time was the original intent. For this reason, the CA needs to be amended to deal with the term of protection for unpublished works in a

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<sup>300</sup> Purday 2010, p. 179.

<sup>301</sup> Digital Bleek and Lloyd. Available: <http://lloydbleekcollection.cs.uct.ac.za/>

<sup>302</sup> Fonds BC151—Bleek and Lloyd Collection. Available: <https://atom.lib.uct.ac.za/index.php/bleek-collection>. Accessed: 21 July 2022.

<sup>303</sup> Centre for Curating the Archive. Available: <http://www.cca.uct.ac.za/>

<sup>304</sup> Baloyi 2012; Rens & Lessig 2006, p. 25-6.

comprehensive manner. Sound recordings that remain unpublished should enter the public domain at the end of the 50<sup>th</sup> year after they were created, in line with the law that applies to cinematograph films and photographic works. For literary, musical, and non-photographic artistic works, the law should clearly state that a work that remains unpublished, unbroadcast, unperformed, and unrecorded and not offered for sale at the end of the 50<sup>th</sup> year after the author's death, enters the public domain.

These are relatively simple amendments that can easily be implemented. Somewhat more complex in terms of amendments is the issue of the transitional provisions. Ideally the transitional provisions would become less relevant over time as older material moves into the public domain. As long as the South African law allows perpetual copyright, it will be necessary to consult these provisions and the repealed legislation. The law needs to be amended such that perpetual copyright under PDTMCA-1916 and CA-1965 is also ended. The CAB does not contain any amendments of this sort, unfortunately.

### 3.4.2 Online 'Publishing'

The internet plays an increasingly large part in the way archives make content accessible. More and more works are being placed in online repositories. There needs to be consensus on whether this constitutes publication, and for which types of works.

Additionally, consensus on how to determine the country of origin is necessary—especially for older works that currently receive perpetual copyright.

The CAB does not update the definition of publication to include uploading material to the internet. What it does do is amend the sections addressing the nature of copyright in the various types of works to include 'communicating the work to the public by wire or wireless means; making the work available to the public by wire or wireless means, so that

any member of the public may access the work from a place and at a time chosen by that person<sup>305</sup>. The exclusive right to communicate a work to the public comes from the Berne Convention<sup>306</sup> and was previously included in the CA by reference to specific technologies, rather than the more generalised 'by wire or wireless means' that the CAB uses.

This means that whether or not a work is placed online or not explicitly requires the rightsholders consent. This also suggests, however, that uploading to the internet is not considered to be publication under South African law and would therefore only impact copyright duration when the term is affected by something being made available to the public, ie: cinematograph films, photographic, and anonymous and pseudonymous works. This is in line with other jurisdictions.

It would be much clearer if the law were amended such that publication took uploading to the internet into account explicitly, regardless of whether it included or excluded it. Some examples of what the CA means when it states 'made available to the public' would also be helpful in determining both the copyright status and the term of protection for archival material.

### 3.5 Summary

Copyright duration causes a number of problems for archival accessibility. Determining whether something has been published or made available to the public is not straightforward when it comes to archival holdings and yet they are both important aspects of determining when copyright expires for each item. Further amendments to the CA are needed to ensure that the copyright of unpublished sound recordings has an expiry date,

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<sup>305</sup> CAB ss. 4(a)—amending CA s. 6, 6(a)—amending CA s. 7, 8—substituting CA s. 8, 10(b)—amending CA s. 9.

<sup>306</sup> Berne Convention art. 11*bis*.

and that perpetual copyright cannot be inferred for other types of works. Further clarity is needed on the matter of online 'publishing', both locally and internationally, though both foreign case law and common public perception suggest that this should legally be considered publication and the CA amended accordingly.

While the copyright system is understandably biased towards published material, the increasingly online, digital nature of contemporary life requires that greater attention is given to how unpublished works are handled, and what it really means for something to be published or made available to the public.

## Chapter 4: Issue 2: Preservation

This chapter considers the problem of archival accessibility through the lens of preservation. The CA makes no provision for preservation and thus we must consult the exceptions and limitations in the CR, as discussed in Chapter 2. In many cases, actions taken to preserve works may be considered infringement without the permission of the rightsholder despite what the CR allows. Though there are many current barriers that copyright presents to preservation, the CAB would manage to alleviate these if it were enacted, as will be shown below.

Material that does not exist cannot be used. Use causes damage<sup>307</sup>. Damaged materials cannot be easily accessed, and this results in information being lost<sup>308</sup>. Preservation can be physical, digital, or both. Physical preservation involves repairs to the actual item, or the creation of facsimiles<sup>309</sup>, which are required by definition<sup>310</sup> to be in the same format. Digital preservation, however, involves format shifting, regardless of whether the item is already digital<sup>311</sup>. Preservation encompasses format shifting of audiovisual, born-digital, and digitised material to ensure continued access<sup>312</sup>; restoration of paper-based items<sup>313</sup>; acid- and rust-free containers; climate-controlled stores<sup>314</sup>; and much more.

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<sup>307</sup> Motsi 2017, p. 9, 22-23.

<sup>308</sup> Lipinski, Tomas A; Britz, Johannes, J; & Barczyk, Ewa (2016) Legal impediments to cultural preservation: copyright, contract, and global information policy. *Innovation: Journal of Appropriate Librarianship and Information Work in Southern Africa* 53: 73-88, p. 76, 83. Hereafter: Lipinski et al. 2016.

<sup>309</sup> CR reg. 3(d-e).

<sup>310</sup> OED 2022.

<sup>311</sup> Matlala, Emmanuel (2019) Long-term preservation of digital records at the University of KwaZulu-Natal archives. *Journal of the South African Society of Archivists* 52: 95-109: p. 96, 100-101. Hereafter: Matlala 2019; Stobo 2019, p. 41.

<sup>312</sup> Lukileni-lipinge & Mnjama 2017, p. 83, 93-95; Samaras & Johnston 2019, p. 377-8.

<sup>313</sup> Motsi 2017, p. 17.

<sup>314</sup> Cummings 1950; Schüller, Dietrich & Häfner, Albrecht (eds) (2014) *Handling and Storage of Audio and Video Carriers*. (IASA-TC-05). London: International Association of Sound and Audiovisual Archives.

## 4.1 Case Study: The African Film Collection

Preservation requires that a work is reproduced<sup>315</sup>. If format shifting is required to obtain a copy that is accessible, this requires that the work is adapted. Sometimes this reproduction can be done legally, due to the CR<sup>316</sup>. There is an expectation that everything within an archives will be digitised and digitally preserved<sup>317</sup>, which requires format shifting. If format shifting is not allowed under the CR and the archives does not have permission from the rightsholder, this is infringement.

That the CR stipulates the need for facsimiles<sup>318</sup> is problematic. As discussed in Chapter 2, it is not clear whether altering the physical format is allowed when creating a facsimile. Given the rapid descent technology makes into obsolescence, format shifting is frequently required simply to access the work<sup>319</sup>. Unless the creation of a facsimile allows for format shifting when this is necessary to provide continued access to the work, the CR can only be used in preserving paper-based materials and other items where the physical carrier does not impede access to the content.

Archival preservation requires that works are reproduced but concerns about rights often hinders this. For example, consider the ramifications of the 18 April 2021 fire that destroyed UCT's historic Jagger Library, where UCT Libraries' Special Collections were held. The African Film Collection, kept on DVD, was entirely destroyed<sup>320</sup>. Though these

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<sup>315</sup> Sutton 2019, p. 8-9.

<sup>316</sup> CR reg. 3(d).

<sup>317</sup> Dunlop, Janine (2021) 'Hopefully it's all been digitised...' *Mail and Guardian* 29 April 2021. Available: <https://mg.co.za/education/2021-04-29-hopefully-its-all-been-digitised/>. Hereafter: Dunlop 2021.

<sup>318</sup> CR reg. 3(d-e).

<sup>319</sup> Samaras & Johnston 2019, p. 377-8.

<sup>320</sup> Shoba, Sandisiwe (2021) UCT's Ujala Satgoor: I think it's the worst nightmare for any director to see a library go up in flames. *Daily Maverick* 25 April 2021. Available: <https://www.dailymaverick.co.za/article/2021-04-25-uct-ujala-satgoor-i-think-its-the-worst-nightmare-for-any-director-to-see-a-library-go-up-in-flames/>. Accessed: 11 January 2023.

were published films, and held in a library rather than an archives, the matter is relevant. Some of these had been converted from VHS, and those tapes were retained in the Jagger Basement on legal advice<sup>321</sup>—thus escaping the fire but suffering water damage. These may be recoverable, but it depends both on the severity of the water damage and the condition of the item beforehand. Along with the Audiovisual Archive, these are the focus of a digital preservation project in 2022.

The VHS tapes, represent around a quarter of the collection<sup>322</sup>. The restricted access to the collections resulting from the covid pandemic enabled a small number of the DVDs to be digitised due to user requests<sup>323</sup>. This may constitute infringement if the regulation restricting reproduction and dissemination to primarily literary works<sup>324</sup> applies to all reproduction and dissemination by archives and libraries and not only when creating multiple copies.

Members of the public seemed to think that everything in the library would be digitised, but that is prohibitive for a number of reasons<sup>325</sup>. Discussions about digitising the African Film Collection had been undertaken, especially as it became harder to locate material on DVD and the Reading Room's latest computers came without DVD drives<sup>326</sup>. Copyright and accessibility were the two major stumbling blocks. As these were commercial publications, the general consensus was that digitising them would be illegal without the publisher's permission.

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<sup>321</sup> Walker, Andrea & Angus, Bev (2023) Fragments of the African Film Collection survived the fire. *Memory@UCT: UCT Libraries Special Collections in Focus*. 16 January 2023. Available: <http://blogs.uct.ac.za/memory/2023/01/fragments-of-the-african-film-collection-survived-the-fire/>. Accessed: 16 January 2023. Hereafter: Walker & Angus 2023.

<sup>322</sup> *Ibid.*

<sup>323</sup> CR regs. 3(f), (h).

<sup>324</sup> CR reg. 5(2).

<sup>325</sup> Dryden 2008, p. 7; Dunlop 2021; Ngoepe & Ngulube 2011, p. 13, 19; Nicholson 2022b; Padfield 2015, p. 14.

<sup>326</sup> Walker & Angus 2023.

Even the creation of the DVDs may have been illegal and constituted infringement. Even if the DVDs were considered facsimile copies of the VHS tapes, they were not created for the purpose of preservation, but in order to continue to provide access to the content. Moreover, the regulation allowing reproduction for preservation applies only to unpublished works<sup>327</sup>, excluding most of the African Film Collection. While the CA does allow one to create a copy for personal or private use<sup>328</sup>, this exception is not extended to cinematograph films<sup>329</sup> and would not apply to a library or archives despite research being one of the personal or private uses allowed.

An argument could be made that these were replacement copies, in which case a library or archives can reproduce published works<sup>330</sup>. This requires that a replacement copy cannot be bought at a reasonable price<sup>331</sup>, which is certainly possible with older cinematograph films. The regulation also requires that all the VHS copies were damaged, deteriorating, lost, or stolen. Technological obsolescence could allow the argument that the content was lost, though not the physical item<sup>332</sup>. This is unlikely to receive much support as the content was accessible when converting the format to DVD and the Jagger Reading Room had a working VHS player at the time of the fire—more than a decade after the conversion took place<sup>333</sup>.

A more convincing argument would be that the tapes were deteriorating. Not only does the tape deteriorate over time, they deteriorate with use<sup>334</sup>. This suggests that the

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<sup>327</sup> CR reg. 3(d).

<sup>328</sup> CA s. 12(1)(a).

<sup>329</sup> CA s. 16(1).

<sup>330</sup> CR reg. 3(e).

<sup>331</sup> CR reg. 3(e).

<sup>332</sup> Lukileni-lipinge & Mnjama 2017, 83, 93-95.

<sup>333</sup> Walker & Angus 2023.

<sup>334</sup> Lukileni-lipinge & Mnjama 2017, p. 93.

VHS to DVD conversion could have been allowed by the legislation if the DVDs are considered facsimile copies. If not, the library is liable for infringement.

Such concerns around the legality of format shifting for preservation are not new. Canadian archivists were faced with it when wishing to microfilm some of their collections prior to the promulgation of their current act<sup>335</sup>. This is a problem common in countries where legislation has not been updated for the digital age<sup>336</sup>, of which South Africa is one<sup>337</sup>. Due to the need to prioritise in order to maximise the benefits gained from their resources, archives will default to digitising and preserving works that are in the public domain, or where the rightsholder has clearly provided permission, excluding many published and orphaned works<sup>338</sup>. The risk-averse nature of librarians and archivists is well-known and frequently leads to more cautious choices than the law necessarily warrants<sup>339</sup>.

## 4.2 Multiple Copies

Another concern is a lack of technical understanding<sup>340</sup>. There seems to be an assumption that creating a back-up copy is the same as preserving an item, rather than a function within a preservation system<sup>341</sup>. Preservation is not a single act; it is an ongoing process<sup>342</sup>. Ongoing preservation is required to ensure that material can continue to be

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<sup>335</sup> Canadian Copyright Act s. 30.1; Dryden 1975-6, p. 46.

<sup>336</sup> Lipinski *et al.* 2016, p. 75, 78.

<sup>337</sup> Harms 2013, p. 490, 507.

<sup>338</sup> Giblin 2017, p. 189-90; Lipinski *et al.* 2016, p. 75-6; Stobo 2019, p. 16, 52, 54, 79, 124.

<sup>339</sup> Dryden 2008, p. 186, 190; Ncube 2017; Stobo 2019, p. 31, 54 124.

<sup>340</sup> Matlala 2019, p. 95, 105.

<sup>341</sup> *Ibid*, p. 101, 104, 106.

<sup>342</sup> Mason, Sarah (2022) Advanced workflows and integrations. Presentation given at the NRF Introduction to Archivematica Workshop, 16 November 2022. *Hereafter*: Mason 2022; Samaras & Johnston 2019, p. 375, 377-9.

accessed and used by researchers—especially for audiovisual, born-digital, and digitised material<sup>343</sup>.

Both the hardware and the software quickly become outdated due to the pace of technological development<sup>344</sup>. Skills are lost, equipment in working order becomes scarce, and fairly soon material is inaccessible and can only be retrieved at great cost<sup>345</sup>. This includes retrieving a back-up copy, which is just as susceptible to this technological obsolescence. LTO is a common off-line tape format used for long-term storage due to their lifespan of around 30 years<sup>346</sup>. Unfortunately, LTO tapes and machines also continue to develop, but remain backwards compatible with only one or two previous versions<sup>347</sup>.

On top of this, one must ensure that the new version is identical to the old in everything except the format. These skills are more generally found in IT departments than archives<sup>348</sup> and it is important to ensure that staff across these departments are able to communicate effectively. Both IT and archives speak of files, folders, and items, but they do not necessarily mean the same thing.

Preservation requires the creation of multiple copies<sup>349</sup>. The standard is generally taken to be one copy on-site, another off-site, and a third far enough away to not be impacted by local environmental, political, or social problems<sup>350</sup>. Those are the master files. There is also a low-res access copy<sup>351</sup>—which may be considered either an adaptation as the content has been altered somewhat or a reproduction as the content is identical aside from the

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<sup>343</sup> Matlala 2019, p. 96, 98, 100.

<sup>344</sup> Fitzpatrick 2011, p. 131, 133, 142, 149.

<sup>345</sup> Lukileni-lipinge & Mnjama 2017, p. 94-97.

<sup>346</sup> Samaras & Johnston 2019, p. 378.

<sup>347</sup> Samaras & Johnston 2019, p. 378.

<sup>348</sup> Matlala 2019, p. 95, 105.

<sup>349</sup> Matlala 2019, p. 104.

<sup>350</sup> Stobo 2019, p. 41; Sutton 2019, p. 9.

<sup>351</sup> Mason 2022.

resolution, which is a technical aspect and does not impact the intellectual aspect of the content. Finally, there is the service copy, which is a high-res ‘cleaned up’ copy<sup>352</sup>—again, possibly an adaptation, possibly a reproduction—which is used by researchers who intend to reproduce or publish the item in some way.

The CR allows the creation of multiple copies of all types of works for preservation purposes<sup>353</sup>, but these must be in the form of facsimiles<sup>354</sup>. Leaving aside the matter of format shifting, the creation of a facsimile precludes adaptation and alteration by definition<sup>355</sup>. The access and service copies are created as part of the preservation process in order to prevent use of the master files<sup>356</sup>. In the physical realm, use results in wear and tear. In the digital realm, use increases the risk of file corruption. The creation of access and service copies are intended to preserve the integrity of the master files<sup>357</sup>. It is still infringement under the current law unless one has permission from the rightsholder.

An additional concern arises when the third master file is housed on servers in another country—or multiple other countries, which is sometimes the case with material kept in the cloud. These may be perfectly legal copies of public domain works in South Africa. In the country where the server is, however, the work may still be under copyright protection, making these infringing copies. Who is liable for this infringement? The institution and its employees did not commit infringement when creating the copy. South African law only applies in South Africa, and it would therefore depend on the laws of the country or countries where the hosting server is. Under Canadian law the owner of the server would

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<sup>352</sup> Mason 2022.

<sup>353</sup> CR reg. 5(2).

<sup>354</sup> CR reg. 3(d).

<sup>355</sup> OED 2022.

<sup>356</sup> Mason 2022.

<sup>357</sup> Mason 2022.

not be liable<sup>358</sup> but this may not be the case in countries where the legislation does not include any sort of safe-harbour for internet service providers<sup>359</sup>.

### 4.3 Technical Protection Measures<sup>360</sup>

An additional problem for preservation is the existence of TPMs. In order to preserve material, it is necessary to copy the content and often to transfer it from one media format to another. TPMs prevent this, along with a number of other acts that are otherwise allowed under the CA<sup>361</sup>. TPMs are not mentioned in the CA. They are found in the Electronic Communications and Transactions Act<sup>362</sup>.

Specifically, under South African law it is considered a form of cyber-crime merely to have a TPM circumvention device or program in one's possession, as well as designing, creating, or selling such a tool<sup>363</sup>. Using a circumvention tool to 'unlawfully overcome security measures designed to protect such data or access thereto' is also considered an offence<sup>364</sup>. The use intended may be perfectly legal, such as the creation of a preservation<sup>365</sup> or replacement<sup>366</sup> copy, but it is impossible for the archives or library to do so as owning a tool to circumvent TPMs is illegal<sup>367</sup>.

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<sup>358</sup> Canadian Copyright Act s. 31.1(4).

<sup>359</sup> Coad 2019, p. 4, 21.

<sup>360</sup> Hereafter: TPMs.

<sup>361</sup> Conroy 2006, p. 352-3; Jansen, M (2006) The protection of copyright works on the internet—an overview. *The Comparative and International Law Journal of Southern Africa* 38(3): 344-353, p. 350, 352. Hereafter: Jansen 2006; Lipinski et al. 2016, p. 77; Nicholson 2022a, p. 327-9.

<sup>362</sup> Electronic Communications and Transactions Act 25 of 2002. Hereafter: ECTA.

<sup>363</sup> ECTA s. 86(3).

<sup>364</sup> ECTA s. 86(4); WCT.

<sup>365</sup> CR reg. 3(d).

<sup>366</sup> CR reg. 3(e).

<sup>367</sup> ECTA s. 86(3).

Assuming that there exists a device or program primarily intended for some other purpose, that just also happens to be able to circumvent TPMs<sup>368</sup>, it should then be legal to use it as a circumvention tool to access, adapt, disseminate, and reproduce protected material in a way consistent with the exceptions and limitations found in the CA and CR<sup>369</sup>. It is not clear, however, that this is the case, and it is generally accepted that any circumvention would still be illegal under the current laws<sup>370</sup>.

TPMs are applied to copyright works for the purpose of preventing the unauthorised reproduction and dissemination that has become so easy in the digital sphere<sup>371</sup>. Unfortunately, they also prevent unauthorised use that is lawful<sup>372</sup>. The need to adapt and/or reproduce works for preservation is hindered by the use of TPMs to restrict access to copyrighted materials<sup>373</sup>.

## 4.4 Recommendations

In section 20, the CAB lists a number of exceptions and limitations related to preservation:

- (5) *A library, archive, museum or gallery may make a copy of —*
- (a) any work in its collection for the purposes of back-up and preservation;*
  - and*
  - (b) a publicly accessible website for the purposes of preservation.*

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<sup>368</sup> This is unlikely, but it is the only case whereby the tool is legal as per ECTA s. 86(3).

<sup>369</sup> Conroy 2006, p. 351-3.

<sup>370</sup> *Ibid.*, p. 352-4; Pistorius, Tana & Mwim, Odirachukwu S (2019) The impact of digital copyright law and policy on access to knowledge and learning. *Reading & Writing* 10(1): 1-7. *Hereafter*: Pistorius & Mwim 2019; Visser, Coenraad (2006) Technological protection measures: South Africa goes overboard. *Overboard. The Southern African Journal of Information and Communication* 7: 54-63. *Hereafter*: Visser 2006.

<sup>371</sup> Conroy 2006, p. 346, 351, 353; Jansen 2006, p. 346-8; Pistorius & Mwim 2019.

<sup>372</sup> Nicholson 2022a, p. 327-9; Pistorius & Mwim 2019; Visser 2006.

<sup>373</sup> Lipinski et al. 2016, p. 77.

*(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.*

*(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from aging or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.*

*(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research or any other legal use.<sup>374</sup>*

Not only is this more extensive than the CR, it explicitly makes provision for format shifting. Through the use of neutral, non-specific language, it also makes an attempt at incorporating future, unknown technologies. Enacting this will make matters of preservation simpler and clearer. In its reference to making the works accessible, it removes the risk of being held liable for infringement when creating access and service copies. While it is not explicitly referred to as an internet service provider safe-harbour, the CAB provides an exception for electronic storage facilities<sup>375</sup>, which would include servers that host material in South Africa.

As the CAB applies this to the GLAM sector as a whole, there would no longer be a need to be concerned about infringement by institutions that are unnecessarily excluded from making use of the CR's exceptions and limitations due to its restrictive definitions.

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<sup>374</sup> CAB s. 20(5-7), (11)—inserting CA s. 19C.

<sup>375</sup> CAB s. 13—inserting s. 12B(2)(c).

## 4.5 Summary

Preservation is a necessary process to ensure archival accessibility in perpetuity. Copyright restriction of the reproduction right hinders this process, as preservation requires the creation of copies. Happily, the enactment of section 20 of the CAB is all that is required to ensure that the preservation work conducted in the GLAM sector is entirely legal.

## Chapter 5: Issue 3: Third-Party and Orphan Works

This chapter discusses the difficulty of archival accessibility resulting from orphan and third-party works. Both of these are problematic for the same reason—identifying and then locating the rightsholder is near impossible. As third-party works very quickly become orphan works, the bulk of the chapter will discuss the lack of provision for this in current South African law. Guidance from the CAB and foreign jurisdictions will be sought, but these present their own problems. In the end, solutions are sought from the literature.

The difference between the author of the work and the owner of the copyright was discussed in Chapter 2, as was the matter of the owner assigning or licencing some or all of the rights to one or more rightsholders. Furthermore, the owner of a work is usually not one of these people. This is most obvious in the case of publications where many different people own an identical copy of the work. Archives may own the only copy of the work, but they are unlikely to be the author or the owner of the copyright, though they may be the rightsholder if the donor or depositor has assigned some or all of the rights to them.

### 5.1 Third-Party Works

Third-party works are probably the single greatest source of orphan works in an archives. The rightsholder is often not the person in possession of the physical items<sup>376</sup>. Correspondence is probably the best example<sup>377</sup>. The letter belongs to the person who received it, but the copyright belongs to the person who wrote it<sup>378</sup>. While it may be

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<sup>376</sup> Behrnd-Klodt 2008, p. 49.

<sup>377</sup> *Ibid*, p. 50.

<sup>378</sup> CA s. 3(1).

possible to trace the authors of some of the letters, the identities of the vast majority will remain unknown<sup>379</sup>.

Material only comes to the archives when it is no longer needed or wanted for regular use by the donor or depositor<sup>380</sup>. The holdings in a single collection can stretch back for decades<sup>381</sup>. It is near impossible to identify and locate the rightsholder of a 60-year-old letter signed only 'Mary'—particularly if the donor or depositor is deceased or corresponded internationally.

These items become orphan works and are not made accessible online by the archive<sup>382</sup>. Not only does this limit how much of the collection is easily accessible<sup>383</sup>, if the donor has requested that the collection be digitised and placed online, they are often unaware of issues relating to intellectual property, which may impact on their relationship with the institution as they do not understand why this is not possible. In order to identify and locate the rightsholders of these third-party works, the archives or researcher need to investigate the matter. Occasionally there is success, but these works tend to end up as orphan works<sup>384</sup>.

## 5.2 Orphan Works

An orphan work is one in which the owner of the copyright is either unknown or cannot be located. The current South African legislation does not provide a means of dealing with these works. This means that orphan works located in an archives cannot be used fully. As

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<sup>379</sup> Behrnd-Klodt, p. 50.

<sup>380</sup> Motsi 2017, p. 7-8, 22.

<sup>381</sup> Dryden 2006, p. 167.

<sup>382</sup> Purday 2010, p. 177-8.

<sup>383</sup> Stobo 2019, p. 31, 54, 124.

<sup>384</sup> Sutton 2019, p. 17-18, 20.

the entire point of placing items within an archives is for them to be used, this is extremely problematic for archivists.

While third-party works, as shown above, are an obvious source of orphan works, many works where the rightsholder should be easily identifiable or contactable eventually end up as orphan works. Most archives are faced with a perpetual processing backlog<sup>385</sup>, primarily due to staffing and time constraints. When the material becomes accessible, the donor or depositor may have died leaving their heirs unaware of the items in the archives<sup>386</sup>. This is a particular problem with the older, less-frequently used collections<sup>387</sup>.

Another problem more commonly found with older collections that can result in orphan works is a lack of an agreement or contract. As stated in chapter 1, material enters a research archives in a limited number of ways. This process, known as accessioning, has vital documentation associated with it. If the material has been purchased there should be invoices and receipts, along with other documentation outlining the archival history of the material<sup>388</sup>. Due to funding constraints, South African research archives rarely obtain material in this way.

The far more common accession documents are the Deed of Gift<sup>389</sup>, for donations, and the Material Transfer Agreement<sup>390</sup>, for deposits<sup>391</sup>. Each archives will have a basic template that it uses for these, but negotiations with the donor or depositor will result in

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<sup>385</sup> Greene, Mark & Meissner, Dennis (2005) More product, less process: revamping traditional archival processing. *The American Archivist* 68(2): 208-263; Trace, CB (2022) Archival infrastructure and the information backlog. *Archival Science* 22: 75-93.

<sup>386</sup> Deazley & Stobo 2013, p. 27; Sutton 2004; Sutton 2019, p. 17-18.

<sup>387</sup> Anderson 2005, p. 91; Op den Kamp 2015, p. 25.

<sup>388</sup> Behrnd-Klodt 2008, p. 42-3, 52-8.

<sup>389</sup> See Appendix A for an example.

<sup>390</sup> See Appendix B for an example.

<sup>391</sup> Behrnd-Klodt 2008, p. 41-3, 52-8.

each individual collection having different requirements and allowances<sup>392</sup>. The idiosyncratic detail of which, if any, intellectual property rights are signed over to the archive will be detailed in these documents<sup>393</sup> and can result in the rightsholders being able to determine who is able to access the material they place in the archive<sup>394</sup>.

Older accession documents may not include the relevant information that is now required. In some cases, there may be no accession documents at all—whether because they never existed<sup>395</sup> or because they have been lost, such as in the partial destruction of UCTL:SC:PC’s administrative files in the devastating fire of 18 April 2021. Only the fact that the heat welded shut the metal filing cabinets that housed the documents managed to save those that remain<sup>396</sup>. The fact that copyright is a bundle of rights that can all be licensed or assigned separately increases the possibility of a work being orphaned for certain uses, but not others<sup>397</sup>.

Other jurisdictions make provision for the use of orphan works, and most provide a similar requirement to the Canadian law: the user is expected to make a reasonable effort to locate the copyright owner in order to avoid infringing their rights<sup>398</sup>. Should the rightsholder be identified or located at a later time, the user is required to pay a reasonable royalty to them for the use of their work. If placed online, the archives may be required to take it down, if the rightsholder requests this. The problem with this Canadian law is that there are only four types of works this applies to: ‘(a) a published work, (b) a fixation of a

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<sup>392</sup> Dryden 2016, p. 117.

<sup>393</sup> Behrnd-Klodt 2008, p. 41, 47; Dryden 2011, p. 523.

<sup>394</sup> Anderson 2005, p. 84.

<sup>395</sup> Dryden 2008, p. 178, 239.

<sup>396</sup> Singer, Michal (2021) Recovering the archive. *Memory@UCT: UCT Libraries Special Collections in Focus*. 23 September 2021. Available: <https://blogs.uct.ac.za/memory/2021/09/after-the-salvage-recovering-the-archive/>. Accessed: 11 January 2023.

<sup>397</sup> De Beer 2017, p. 148, 153-60; Dean & Karjiker 2015, p. 1-141; Stobo 2019, p. 182.

<sup>398</sup> Canadian Copyright Act s. 32(5).

performer's performance, (c) a published sound recording, or, (d) a fixation of a communication signal<sup>399</sup>. This completely excludes the vast majority of works in Canadian archives, preventing their reproduction and publication, including those that would otherwise be placed in online archival repositories<sup>400</sup>.

In the CAB there has been an attempt to address the matter of orphan works<sup>401</sup>, though the process required to obtain a licence to use an orphan work is so arduous as to be prohibitive<sup>402</sup>. The Bill is, however, one of the few places that actually details what the legislators consider to be a 'reasonable effort':

- (a) Conducted a search of the database of the register of copyright maintained by the Commission that is available to the public through either the internet or any other means relevant to identifying and locating a registered copyright owner;*
- (b) conducted a search of reasonably available sources of copyright ownership and ownership information and where appropriate, licensor information;*
- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;*
- (d) conducted a search using any other database available to the public, including any database that is available to the public through the internet; and*
- (e) undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search, including—*
  - (i) actions based on facts known at the start of the search and facts uncovered during the search;*
  - (ii) actions directed by the Commission; and*
  - (iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyright owner.<sup>403</sup>*

Archives do not have the capacity to undertake the process<sup>404</sup>, which means that their orphan works cannot be displayed online in their repository and so limits accessibility.

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<sup>399</sup> Canadian Copyright Act s. 77(1)(a-d).

<sup>400</sup> Dryden 2006, p. 177.

<sup>401</sup> CAB s. 24—inserting CA s. 22A.

<sup>402</sup> Flynn 2015, p. 39, 45.

<sup>403</sup> CAB s. 24(6)(a-e)—inserting CA s. 22A.

## 5.3 Recommendations

### 5.3.1 Registration

While formalities are explicitly excluded as a requirement for copyright<sup>405</sup>, the existence of a registry would make finding and locating rightsholders far easier<sup>406</sup>. If a creator wishes to profit from their work, it should be their responsibility to make themselves available to those who might wish to licence it. The CAB's current outline of a reasonable effort, detailed above, is not remotely reasonable in my opinion. There are few institutions and even fewer researchers that would be able to undertake this for each orphan work they wished to reproduce<sup>407</sup>.

For this reason, I would suggest a registry on both sides. A database of rightsholders and their contact details, which they are responsible for keeping up-to-date, paired with a database of orphan works and the contact details of those who have used them. The government could still levy a fee for the use of orphan works and use that to fund the necessary staff and systems. This would easily allow creators to identify their orphaned works, register their contact details, and benefit from the use of their work, while at the same time it takes the responsibility of identifying and locating the rightsholders off the users<sup>408</sup>. As an example, WATCH: Writers, Artists, and Their Copyright Holders, a joint

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<sup>404</sup> Dryden 2006, p. 170-1.

<sup>405</sup> Berne Convention; TRIPs; WCT.

<sup>406</sup> Baloyi 2014, p. 94; Gangjee, Dev S (2017) Copyright formalities: a return to registration? In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 213-252. Hereafter: Gangjee 2017.

<sup>407</sup> Flynn 2015, p. 39, 45.

<sup>408</sup> Gangjee 2017.

initiative of the Universities of Reading and Texas provides contact details for individuals believed to be the rightsholders of various works<sup>409</sup>.

Registration was an onerous task with little visible benefit previously but would be far easier to coordinate in the current digital world<sup>410</sup>. Given the differences in infrastructure and the accessibility of services between the developed and developing parts of the world, a hybrid system would be necessary<sup>411</sup>. Incorporating registration into the requirements for copyright would result in a more robust public domain, as works without commercial value are unlikely to be registered<sup>412</sup>. Such an enhancement of the public domain is beneficial to society as public domain works are both more widely disseminated and give rise to more derivative works than those under copyright protection<sup>413</sup>. The question of copyright for anonymous and pseudonymous works would need to be considered carefully, as a registration requirement would place all these works into the public domain automatically. It would be necessary to amend the Berne Convention in order to allow registration to be mandatory, which would not be a simple or easy process<sup>414</sup>.

As such, any jurisdictions choosing to create registries are required to make them almost entirely voluntary. In the United States it is necessary to register copyright prior to suing for infringement<sup>415</sup> except in certain cases<sup>416</sup>, and as such it should be possible to make registration a requirement in order to benefit from the use of orphan works. Ideally,

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<sup>409</sup> WATCH. Available: <https://norman.hrc.utexas.edu/watch/>. Accessed: 7 January 2023.

<sup>410</sup> Gangjee 2017, p. 230.

<sup>411</sup> Ncube, Caroline B (2017) Calibrating copyright for creators and consumers: promoting distributive justice and Ubuntu. In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 253-281. *Hereafter*: Ncube 2017.

<sup>412</sup> Gangjee 2017; Giblin 2017, p. 204, 208.

<sup>413</sup> Giblin 2017, p. 187-8, 191-2, 194.

<sup>414</sup> Giblin, Rebecca & Weatherall, Kimberlee (2017b) A collection of impossible ideas. In: Giblin, Rebecca & Weatherall, Kimberlee (eds) *What If We Could Reimagine Copyright?* Acton: ANU Press: 315-332, p. 322. *Hereafter*: Giblin & Weatherall 2017b; Ncube 2017, p. 273.

<sup>415</sup> Besek 2003; Copyright Act of 1976, 17 USC § 411(a). *Hereafter*: 17 USC

<sup>416</sup> 17 USC § 411(a), (c).

such a database would also be used to record licence agreements, a necessity for those attempting to locate rightsholders for permissions or licences of their own<sup>417</sup>. Such a system would be biased towards published material, as with everything else under copyright, but the inclusion of uploading a work to the internet in the copyright bundle would require the inclusion of archival works, unless registration became a requirement for copyright<sup>418</sup>.

As the lack of publication suggests that there is not likely to be any commercial rewards associated with the unpublished works<sup>419</sup>, this is fairly reasonable. It is also highly problematic as it would place previous drafts, raw footage, and other components of publications into the public domain. A compromise could be to continue to grant an initial, shorter period of automatic protection, with registration required for continued protection thereafter<sup>420</sup>, or differing levels of protection to works<sup>421</sup>. In the meantime, active support of databases such as WATCH should be encouraged.

### 5.3.2 Agreements

Third-party works generally end up as orphan works, as explained above. There is no easy way around this issue, but in some cases a comprehensive set of agreements that are included in the collection's administrative file can make a huge difference. For the archives, written documentation detailing who makes the decisions about who can use the material, and for what purposes is essential. As an example, a depositor may say that the archives may grant permission for academic, research, or teaching uses, but they must be contacted for commercial use. If a corporation, or multiple owners are involved, a written agreement

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<sup>417</sup> Besek 2003; Gangjee 2017.

<sup>418</sup> Gangjee 2017.

<sup>419</sup> Dryden 2008, p. 9, 23, 43, 112; Rens & Lessig 2006, p. 27, 29; Sutton 2019, p. 12-13, 17-18.

<sup>420</sup> Gangjee 2017; Rens & Lessig 2006, p. 28-30.

<sup>421</sup> Ncube 2017.

stating who is required to give consent can be included in the accession documents but will likely need updating over time.

Many research projects include a series of interviews. The donor or depositor should provide the archives with a detailed list of the research participants and any agreements made between them, especially as regards any restrictions or conditions placed on the material, such as anonymity. While the copyright belongs to the researcher and not the interviewee<sup>422</sup>, the agreement between them may include some form of licence over some or all of the rights. As the donor or depositor should be able to identify most of the third-party rightsholders in their collection, they can be consulted as necessary<sup>423</sup>. This becomes problematic when the donor or depositor is deceased. For some collections, it may be worth having the donor or depositor provide a list of third parties, and their contact details where possible, as an annexure to the accession documents.

### 5.3.3 Copyright Duration

One of the reasons that there are so many orphan works in archives is the very long term of protection<sup>424</sup>. Rightsholders contact details, as well as the identities of the rightsholders, are likely to change multiple times before the rights expire, given the prevalence of perpetual copyright in South African law. Rightsholders may forget about or be unaware of works placed in an archives due to the rarity of usage that would generate income<sup>425</sup>. In most cases a work will generate income most when first created, or more realistically, first published, and the income will taper off over time<sup>426</sup>. Few works continue

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<sup>422</sup> CA s. 1(1)'author'; Janke & Iacovino 2012, p. 158-60.

<sup>423</sup> Redwine 2013, p. 6-7.

<sup>424</sup> Fitzpatrick 2011, p. 80, 147.

<sup>425</sup> Coad 2019, p. 14-15, 20, 23, 26; Giblin 2017, p. 187; Rens & Lessig 2006, p. 27, 29.

<sup>426</sup> Giblin 2017, p. 178, 182-4, 196, 199.

to generate income near the time their copyright expires<sup>427</sup>. Shorter copyright periods would cause works to enter the public domain earlier and prevent these works from being orphaned<sup>428</sup>. A combination of shorter automatic initial copyright periods and registration being required for continued protection would address other problems inherent in requiring registration—those presented by anonymous and pseudonymous works, and unpublished raw footage, for instance.

## 5.4 Summary

There are many orphan works within archives, a large proportion of which are third-party works. The current CA makes no provision for them. International precedent and the CAB place the burden of identifying and locating the rightsholder on the user, requiring an onerous ‘reasonable effort’. This essentially leaves these works as inaccessible as when there is no provision for them. While the works can be consulted at the archives, they cannot be made accessible in an online repository limiting their research value. Suggestions for solving the matter include decreased terms of copyright protection, registration for those who wish to benefit from their works, and more robust agreements between the archives and their donors and depositors.

Practically speaking, these are little more than wishful thinking. Lobbying by corporations in the global north has seen copyright duration extended and as long as this is profitable, they will continue on this path<sup>429</sup>. The amendments required to make registration a requirement would require what amounts to a global consensus, and this is extremely

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<sup>427</sup> *Ibid*, p. 178, 182-4, 196, 199.

<sup>428</sup> *Ibid*, p. 202.

<sup>429</sup> Rens & Lessig 2006, p. 23, 27-8, 30-1.

unlikely to occur<sup>430</sup>. The problems presented by unpublished preliminary works, associated materials, and unfinished works is not insurmountable, but it is considerable. More comprehensive agreements will go some way to helping in some cases, but many donors and depositors would likely balk if expected to provide the information that would be required. As such, we should expect orphan works to continue to present a problem to archival accessibility.

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<sup>430</sup> Ncube 2017, p. 273; Giblin & Weatherall 2017b, p. 322.

## Chapter 6: Conclusion

*Making more ... documentary heritage available online at the cost of minor copyright infringement in which the rightsholder is unlikely to know or care would 'recalibrate' the balance in archival practice by seeing copyright as something that does not need to be so restrictive.*  
Jean Dryden<sup>431</sup>

The mandate of an archives is to balance the public's need to access their holdings with the preservation needs of the material in order to ensure that the material remains accessible in the long-term. The mandate of copyright is to balance society's need to access the work, with the protection of the author's rights over their work. Given the similarity in their mandates, copyright should not be a barrier to the work of an archives.

The chief reason underpinning the problem copyright represents to archival accessibility is the assumption that work that has value to the public will be published. Copyright's provisions for work that remains unpublished are inconsistent and insufficient, and thus fail to meet the needs of the archives. The major aspects of copyright that impede archival accessibility are the way in which we calculate the duration of copyright, the preservation of material, and third-party and orphan works.

Determining the expiry date of copyright protection depends largely on when the work was published or made available to the public—sometimes a simple and straightforward matter but given changes in technology outstripping the pace of legal change, and a lack of clear definitions, this becomes increasingly complex over time. While the CA defines publication, neither it nor the CAB take online publishing into account. That this has not been addressed in the CAB indicates that placing material online does not constitute

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<sup>431</sup> Dryden 2008, p. 249.

publication and therefore only impacts on the rights of reproduction and broadcasting/diffusion. What it means to make something available to the public remains unclear, aside from it being distinct from publication. If placing material online does not constitute publication, it certainly constitutes making it available to the public. Including the online environment as either published or unpublished in the CA's definitions will make it much simpler to deal with unpublished work that is uploaded to archival repositories within the window of time that impacts on copyright duration.

The type of work determines if and when publication or making the work available to the public will impact on copyright duration. For unexploited literary, musical, and non-photographic artistic works, posthumous publication is required in order to avoid perpetual copyright. Placing such material online may have the same effect if that is considered a public performance or broadcast under the current law. The internet is covered in the CAB as communicating to the public by either wire or wireless means, distinct from a broadcast, and which would not affect copyright duration. For cinematographic films and photographic works the work has 50 years to be published or made available to the public, at which point the term restarts. Uploading a work to the internet makes it available to the public and so impacts the copyright duration of these types of unpublished works created since 1979. For cinematograph films and photographs created pre-1979, there is perpetual copyright unless they are published, or in the case of the films, have been approved by a specified group. Unpublished sound recordings remain under copyright until they are published, at which point the protection gains an expiry date. The fact that uploading material to the internet is not considered publication means that archives can place sound recordings online without impacting copyright duration.

This is a glaring oversight in the legislation that should be amended as soon as possible. Copyright is a time-limited monopoly for a reason. The rights should not linger on forever simply because the author chose not to publish the work.

Currently the exceptions and limitations allowing for preservation are found in the CR. This is problematic mostly due to technological developments that are not accounted for in the law. The CAB addresses exceptions and limitations for the GLAM sector in a comprehensive manner and in such a way that future technological developments are less likely to be as problematic. This is achieved through the use of relatively vague language, as the CAB talks of ‘technologies’ rather than specific ways of producing, disseminating, and accessing works.

Most third-party works become orphan works very quickly. Older unpublished works are also orphaned as rights change hands over time. The current law makes no provision for orphan works, but the CAB’s onerous requirements are in line with many other jurisdictions. The most effective solutions to this problem require extreme changes to both local and international law that are extremely unlikely to occur. As a result, these works will continue to be problematic for the foreseeable future.

The burden remains on the user to track down the rightsholder. If the rightsholder wishes to benefit from the work, the onus should be on them to make themselves easily contactable. The simplest method of accomplishing this would be a registry, which would need to be voluntary in order to comply with the Berne Convention. Even simpler would be for donors and depositors to assign the rights to the archives, at their death if not when

placing the material in the archives. This, however, prevents the rightsholder from benefitting from their work and so is likely to remain the minority position. This assignment, unfortunately, would not impact on third-party works in any way.

This thesis has shown that the current copyright law in South Africa raises significant barriers to the accessibility and usability of archival material. While the provisions in the CAB go some way to alleviating the identified problems, it does not go quite far enough. Increased awareness and understanding, resulting in better negotiations of donor and depositor agreements will result in fewer orphan works. Further amendments to the law are required to address the issue of copyright duration. While the GLAM sector was clearly involved in drafting the CAB, given the improvements it could provide to the way the sector contends with matters of copyright, especially in matters of format shifting and preservation, there is still a long way to go. This is likely to require increased involvement in the legislative process from across the sector, including researchers and other patrons.

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## Appendix A: Deed of Gift template



### DEED OF GIFT

#### **\*TITLE OF COLLECTION\***

I, \_\_\_\_\*name of depositor\*\_\_\_\_, hereby donate the xx Collection (hereafter 'the Collection') to the University of Cape Town for inclusion in the Special Collections of the University Libraries.

I, \_\_\_\_\_\*name of depositor\*\_\_\_\_\_, as the sole owner of the Collection, have donated the Collection to the University of Cape Town. Custodianship of the collection is entrusted to UCT Libraries.

Title to the Collection shall pass to the University upon receipt of them by the University's authorised representative.

To the extent that I, \_\_\_\_\*name of depositor\*\_\_\_\_, hold copyright to the Collection, I hereby assign copyright in this material to the University of Cape Town.

Permission for research workers to consult the Collection shall be granted at the discretion of the Manager of Primary Collections at the University of Cape Town Libraries, and there is no need to refer to the depositor.

A research worker who is permitted to consult the Collection may quote, publish, or photocopy sections of it as part of his/her research project, if he/she acknowledges the source of his/her information and that the Collection is in the Special Collections of the University of Cape Town Libraries.

I acknowledge that the Collection will be preserved, organised, and made available for scholarly purposes in accordance with the Libraries' policies.

I authorise the University to display any of the Collection in not-for-profit exhibitions or on the Libraries' web site.

Donor name: .....

Donor signature: .....

Address: .....

Date: .....

Acceptance by the University:

The University holds donated material that it wishes to retain as if holding it “in trust”. The above gift of the Collection accepted on behalf of the University, on the conditions set out above.

.....

.....

Signed (University Librarian)

Date

# Appendix B: Material Transfer Agreement template

## Material Transfer Agreement

entered into between

University of Cape Town (through UCT Libraries)

and

\_\_\_\_\_ (hereafter referred to as or the “Depositor”)

### Preamble:

The Material Transfer Agreement, is a contract that governs the physical/digital transfer of original research materials to the sole custodianship of UCT. The material transfer involves physical property rights only and the parties agree that:

1. the Depositor retains all intellectual property rights in the deposited materials;
2. Custodianship of the deposited materials is transferred to UCT.

The parties to this agreement agree as follows:

### 1. MATERIAL

A detailed and numbered interim inventory of the material to which this agreement applies is set out in the Appendix to this Agreement. A revised and corrected version will be attached once the material has been checked and shelved.

### 2. DELIVERY OF MATERIAL

The material referred to in Clause 1 will/has been delivered to the University of Cape Town Jagger Library for storage in Special Collections: Primary Collections (MSS & Archives). Upon delivery, UCT Libraries will issue a signed receipt for the delivery, which will be sent to the Depositor.

### 3. STORAGE OF MATERIAL

- 3.1. UCT Special Collections: Primary Collections shall become the custodial repository for this collection.
- 3.2. In accordance with this agreement, material kept at UCT (in UCT Libraries) shall be stored according to internationally accepted archival standards.
- 3.3. UCT Libraries, Special Collections is responsible for the archival preservation and research driven access to Unique Collections. UCT is not a third party/commercial agency and therefore does not hold Collections that are duplicated with other agencies or institutions. If copyright is retained by the donor, all commercial requests will be referred directly to the depositor or representing agency.

#### 4. OWNERSHIP

The depositor agrees to deposit the materials as set out in the annexed inventory, to UCT, for a period of 10 years, after which it will be permanently stored at UCT unless the depositor delivers written notice of withdrawal of the materials 30 days prior to the expiration of the 10 year period. Accordingly the agreement will expire at the end of the 10 year period should such notice be given.

The material transfer involves physical property rights only and the parties agree that

1. the Depositor retains all intellectual property rights in the deposited materials;
2. Custodianship of the deposited materials is transferred to UCT.

#### 5. ACCESS TO AND USE OF MATERIAL

- 5.1. Special Collections: Primary Collections shall list, catalogue and curate the deposited materials in accordance with standard library and archival procedures.
- 5.2. The Depositor shall have guaranteed access to its material stored in the Special Collections: Primary Collections by prior arrangement with staff.
- 5.3. Notwithstanding 5.6 below, permission for bona fide researchers to consult these collections may be granted at the discretion of Special Collections: Primary Collections. Access by such researchers shall be under supervision of Special Collections staff.
- 5.4. UCT Libraries may store and exhibit the materials on the on-line gallery and archival retrieval system of UCT Libraries; Including: Creation of digital masters and derivatives of part or all of the collection for research and/or teaching purposes and/or preservation purposes.
- 5.5. If there are any restrictions placed on all or part of the collection, these must be clearly stated and include what year the restriction will be lifted. (*We are unable to accept material with a permanent restriction.*)
- 5.6. If permission is required from the donor or authorised person before we allow access to the collection, clearly indicate the details of the contact person and when such permission will no longer be required.

Postal address:

Physical address:

Telephone:

Email:

Requirement ceases on:

#### 6. COSTS AND FEES

- 6.1. The materials are deposited at UCT by the Depositor, at no initial cost to UCT.

- 6.2. If only Material transfer rights are transferred to UCT Libraries, the Depositor is encouraged to assist in the accessioning and archival custodianship of the deposited materials through:
- 6.2.1. Providing inventories and metadata for deposited material.
  - 6.2.2. Provide financial assistance through an endowment or donation. This shall be calculated on the formula of archival time spent to arrange, size of collection, storage—physical/digital, IT usage, pay classes, etc, and take into account that UCT absorbs research, scarce skill, and access costs.
  - 6.2.3. Notwithstanding clause 4 above, should the Depositor wish to remove the materials prior to the 10-year period, notice shall be given and UCT reserves the right to levy a termination fee. Due to the high costs and intellectual rigour of archival preservation and migration, removal from custodianship prior to the term as set out herein, shall carry a base cost implication. These costs shall be consistent with the Universities calculations of archival storage, IT usage, pay classes, etc, and take into account that UCT absorbs research, scarce skill, and access costs. This termination fee is in line with the University wide service guide which includes different base costs for users (Educational/NGO/commercial).

## **7. REPRESENTATIONS, WARRANTIES AND INDEMNIFICATION**

- 7.1. Unless otherwise indicated, the Depositor represents and warrants that, (a) it possesses ownership of the materials, or it possesses all rights in the deposited material necessary to deposit the materials, and (b) it is authorised to deposit the materials with UCT. The Depositor further represents and warrants that it has caused this Agreement to be executed by an authorised representative.
- 7.2. UCT Libraries represents and warrants that it shall only use the deposited material in the manner specified in Clause 5 of this Agreement.

## **8. TERM**

The agreement shall commence upon signature by both parties and shall endure for an initial period of 10 years and thereafter indefinitely until terminated in terms of this agreement.

## **9. GOVERNING LAW, MEDIATION AND ARBITRATION**

- 9.1. This Agreement shall be interpreted and construed according to, and governed by the laws of the Republic of South Africa, as applicable, excluding any such laws that might direct the application of the laws of another jurisdiction.
- 9.2. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be referred to the Chief Executive Officers (CEOs) and/or Directors of the Depositor and UCT Libraries who shall jointly strive to resolve the dispute amicably, and if not achieved, engage a mutually agreed-to mediator.

## **10. NOTICES**

All notices given pursuant to this Agreement shall be in writing and sent to following Notice Addresses:

UCT Libraries

Postal address:

Physical address:

Telephone:

Email:

The Depositor

Postal address:

Physical address:

Telephone:

Email:

## 11. MISCELLANEOUS

- 11.1. This Agreement constitutes the entire agreement of the parties and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written. No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorised representatives of UCT Libraries and the Depositor.
- 11.2. Nothing contained herein shall be deemed to create an agency, joint venture, or partnership relationship between the parties.
- 11.3. Neither party shall be liable in damages or have the right to cancel this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control.
- 11.4. Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

Signed in duplicate at..... On .....

.....

UCT designate

.....

Depositor

## Appendix C: Copyright Act 98 of 1978, section 12

### 12. General exceptions from protection of literary and musical works

1. Copyright shall not be infringed by any fair dealing with a literary or musical work—
  - a. for the purposes of research or private study by, or the personal or private use of, the person using the work;
  - b. for the purposes of criticism or review of that work or of another work; or
  - c. for the purpose of reporting current events—
    - i. in a newspaper, magazine or similar periodical; or
    - ii. by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

2. The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.
3. The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.
4. The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.
5.
  - a. The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work.
  - b. Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for

broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.

6.
  - a. The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose.
  - b. The author of a lecture, address or other work referred to in paragraph (a) shall have the exclusive right of making a collection thereof.
7. The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.
8.
  - a. No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.
  - b. The author of the speeches referred to in paragraph (a) shall have the exclusive right of making a collection thereof.
9. The provisions of subsections (1) to (7) inclusive shall apply also with reference to the making or use of an adaptation of a work.
10. The provisions of subsections (6) and (7) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.
11. The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.
12. The copyright in a literary or musical work shall not be infringed by the use thereof in a *bona fide* demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment.
13. An authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film.

## Appendix D: Copyright Regulations 1978, regulations 2 and 3, and copyright warning

### Permitted reproduction

2. The reproduction of a work in terms of section 13 of the Act shall be permitted—
  - (a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work; and
  - (b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

### Reproduction by library or archive depot

3. Subject to the provisions of regulation 2, a library or archives depot or any of its employees acting within the scope of their employment may, after reproduction of a copy of a work, distribute such copy on the following conditions:
  - (a) The reproduction or distribution shall not be made with any intention of deriving direct or indirect commercial advantage;
  - (b) the collections of the library or archive depot shall be open to the public or available to researchers affiliated to the library or archive depot or to the institution of which it is a part, and to other persons doing research in a specialised field;
  - (c) the reproduction of the work shall incorporate a copyright warning;
  - (d) the rights of reproduction and distribution shall apply to a copy of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit, for research use, in another library or archive depot: Provided that the copy reproduced is to be placed in the collection of the library or archive depot;
  - (e) the right of reproduction shall apply to a copy of a published work duplicated in facsimile form solely for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost, or stolen: Provided that the library or archive depot has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price;
  - (f) the rights of reproduction and distribution shall apply to a copy, made from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, of not more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work: Provided that the copy shall become the property of the user and the library or archive depot has had no notice

that the copy would be used for any purpose other than for private study or the personal or private use of the person using the work;

(g) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6;

(h) the rights of reproduction and distribution shall apply to the entire work, or to a substantial portion of it, copied from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, if the library or archive depot has first determined, on the basis of a reasonable investigation, that an unused copy of the copyrighted work cannot be obtained at a fair price: Provided that—

(i) the copy shall become the property of the user, and the library or archive depot has had no notice that the copy would be used for any purpose other than private study or the personal or private use of the person using the work; and

(ii) the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of regulation 6.

## Copyright warning in terms of regulation 6

The Copyright Act, 1978, governs the making of photocopies or other reproductions of copyrighted material. Under the provisions of the Act libraries and archive depots are authorised to supply photocopies or other reproductions. One of these provisions is that the photocopy or reproduction is not to be used for any purpose other than private study or personal or private use.