

Society of American Archivists (SAA)
Feedback on Toolkit on Access (SCCR 47/13)
IPWG Revised Draft March 8, 2026

Please note that, for archivists, “access” may involve more rights issues than just the economic rights central to common law-style copyright as reflected in the Toolkit and in the mandate of the WIPO Standing Committee on Copyright and Related Rights itself. Archivists also engage with Indigenous archives, community-controlled collections, and archives that are governed by custom rather than by law. These collections represent a growing sector of the archival field, one where governance structures and access philosophies differ materially from those assumed in the Toolkit and the comments below.

We thank the authors for their work in preparing this document, through many drafts and under challenging circumstances. But with greatest respect to the authors, the Toolkit sidesteps what is really needed: a binding international instrument that sets out the basic legal standards for the preservation of, and access to cultural heritage materials. However, we understand the limitations of the authors’ mandate and hope our comments will assist in bringing this project to a satisfactory conclusion.

We commend the authors for making it clear that the beneficiaries of the proposed access exceptions are the cultural heritage institutions (CHIs) themselves, rather than individual users. Their traditional role as trusted institutions makes them responsible managers of the appropriate balance among multiple stakeholders. These include the archives’ own mission to support their users’ research, education, and enjoyment; the legitimate economic interests of copyright owners (p. 18, ¶ 1; p. 19, ¶ 3); and the legal, contractual, and customary rights and expectations of the people or peoples the collections represent. The reason for that trust could be bolstered by noting (perhaps on p. 11 Part I A ¶ 1) that CHIs do not generally operate for profit, even when they are part of for-profit institutions.

We also support the connection with the Toolkit on Preservation, although the Access Toolkit would be far more useful if it were expanded to undertake a “full statutory provision” similar to that in the Preservation Toolkit.

However, we do have some concerns, and we offer the following suggestions in hopes that they help to clarify and enrich the content.

Access Mission of Archives

We understand that the Toolkit is aimed at CHIs, whose mission is to acquire, preserve, and provide access to cultural heritage in various forms. However, archives have a somewhat broader role based on the fundamental purpose of their preservation and access functions—*i.e.*, the preservation of, and access to, records that support transparency, and aid citizens in asserting their rights, and holding institutions accountable. Providing access is not just a means or mechanism of archival work (pp. 13 ¶ 1 & 12 ¶ 2)—it was the driving purpose behind the development of the archival profession, and it remains the most important purpose of many archives. The International Council on Archives’

concern with “access” (p. 12 ¶ 2) should also reference the ICA/UNESCO Universal Declaration on Archives.¹

The discussion of Access as a means of preservation (Part I(D)(2) p. 13) must be more strongly stated. As was noted in the 2015 (Paris) UNESCO recommendation on preservation of and access to documentary heritage in digital form, “The provision of access is visible evidence and justification of public expenditure on preservation.”² Archives, however, require “independence in preserving and providing access to documentary heritage, so as to sustain public trust in the scope of material selected.”³ Thus, a copyright law that allows preservation copying without access (*e.g.*, storing preservation copies in a “dark archive” as some have suggested) is effectively pointless, because without access it is impossible to justify the significant expense involved in preservation activities.

Digital technologies and remote access

The deployment of digital technologies to further the mission of cultural heritage institutions is considered “an imperative,” (p. 14 Part II(2)), but the Toolkit inadequately addresses what is needed to achieve that reality: *remote* digital access. Archival works are unique and, unlike library holdings, cannot be borrowed by users. Unless archives are permitted to provide digital copies of their holdings to researchers, the researchers will continue to be required to travel, often great distances, and to incur great costs, not to mention having to clear sometimes intractable customs and immigration hurdles—just to consult the archives’ materials. Making digital copies available on dedicated terminals (p. 9) on the premises of the holding institution does nothing to address this problem. It ignores the potential offered by modern digital technologies and archives’ global responsibility to provide content needed by researchers regardless of where they live in the world.

Global and equitable access requires copies to cross borders. Addressing access issues in any one country is of limited value unless national laws have a built-in automatic exchange of rights to exceptions from one jurisdiction to another. That was the goal of a proposal from Argentina in 2016 (SCCR/33/4). It would be helpful if the Toolkit offered suggestions for how national laws might be written to achieve the interoperability imagined in the Argentine proposal. Further, while we support the concept of the virtual reading room (p. 23 ¶ 2), many of the proposed controls are inappropriate for access to archival works and are far more restrictive than reading room access, which the virtual reading room should replicate.

Orphan Works

The Toolkit articulates a very limited understanding of the extensive problems that orphan works (OW) present to archives in particular. An indication of the vast extent of OW would be far more

¹ <https://www.ica.org/resource/universal-declaration-on-archives-uda/>

² § 3.1. <https://www.unesco.org/en/legal-affairs/recommendation-concerning-preservation-and-access-documentary-heritage-including-digital-form>

³ *Id.*

compelling than the trivial example in the call-out box (p. 18).⁴ OW are not “a means for addressing uncertainty” (p. 18); rather, they illustrate the *need* for measures to address uncertainty. Attempts to address OW through legislation have had limited success. Urgently needed is an orphan works exception to address the vast volumes of unpublished/never-in-commerce material for which the authors/rights holders are unidentifiable, unlocatable, or both. A fuller discussion of risk management may be merited, given the low monetary risk when making many orphan works available (combined with a take-down notice if a rights holder emerges). This is not only because of the difficulty in obtaining permission from copyright holders, but also because much archival material is of little financial value.

Licensing

Part III(B) (pp. 21–22) suggests that licenses are an alternative to statutory exceptions. While some licenses (*e.g.*, Creative Commons and other open licensing solutions) facilitate access and use, licenses are quite different from exceptions. That distinction must be made clearer.

Further, for archival materials that for the most part have never been in commerce, licensing (p. 22) is a non-starter. Use of a collective licensing system when a rightsholder cannot be identified or located is illogical and might be regarded as akin to “copyfraud” because licensing fees will never go to the rights holders. Users of archival materials should not have to pay licensing fees for material that was never created with the expectation of compensation, and whose rights holders may not be identifiable or locatable. For commercial uses of works, CMO licensing (where it exists) can function on its own without the Toolkit embedding licensing into model legislation.

Public domain

The public domain and materials covered by a Deed of Gift incorporating a transfer of rights are quite different things that should not be treated together (Part III(A)(6) p. 20). Furthermore, the reference to a “domaine payant” does not provide enough context to understand how or where this could apply.

Institutions should make public domain works available in a way that does not imply ownership.

Standards of professional practice

Archivists recognize and implement industry-wide protocols that exceed statutory requirements and which ensure archival use does not conflict with other rights, including privacy or indigenous cultural property rights, such as those recognized by the UN Declaration on the Rights of Indigenous Peoples.⁵ The conclusion’s emphasis on institutional checklists, guidelines, and policies (pp. 30–31) strays into

⁴ For example see: Naomi Korn, *In from the Cold An Assessment of the Scope of ‘Orphan Works’ and Its Impact on the Delivery of Services to the Public*, Research report prepared for: Strategic Content Alliance Collections Trust (UK), 2009, accessed March 2, 2026, https://naomikorn.com/wp-content/uploads/2020/09/SCA_CollTrust_Orphan_Works_v1-final.pdf; and the US Copyright Office's report on OW and Mass Digitization (2014 p. 36).

⁵ *See, e.g.*, Art. 31 “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage . . . maintain, control, protect and develop [and] their intellectual property over such cultural heritage[.]”:
https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf

professional standards of practice,⁶ which cultural heritage professionals are well-equipped to develop and implement, and which legislators and WIPO are not.

We suggest that the Toolkit focus on statutory solutions in expanded charts.

Appendix

The appendix should be more robust. The three examples are very narrow and require the reader to refer to the Preservation Toolkit. It would be far more useful as a stand-alone “full statutory provision” that included examples of statutory language from various jurisdictions reflecting a variety of options for making digital copies available to researchers.

⁶ For examples see: Society of American Archivists’ *Orphan Works: Statement of Best Practices*. Available at <https://www2.archivists.org/sites/all/files/OrphanWorks-June2009.pdf>. In August 2018, the SAA adopted the *Protocols for Native American Archival Materials* as an external standard. First Archivist Circle, *Protocols for Native American Archival Materials*, 2007, accessed March 8, 2026, <https://www2.nau.edu/libnap-p/protocols.html>