

CHAPTER 11

Digital treatment of African cultural heritage: Shifting landmarks and implications for copyright exceptions for archives in Nigeria

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Abstract

Developments in information and communication technologies have shifted the management of archival materials from paper to digital. This digital environment has created expectations and possibilities in access to and preservation of archival materials and records. Several legal initiatives have been proposed to address the emerging roles of archival materials and archival institutions. From a copyright law perspective, statutory copyright exceptions tend to be the go-to approach for addressing the copyright issues facing archival and other memory institutions.

In this environment, there are conversations around the roles of archival and other memory institutions and how the copyright law construct could design limitations and exceptions enabling those institutions to carry out their roles.

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Within these conversations, there remains a general adherence to the classic landmark (i.e., guiding light) of these institutions' role being to preserve, safeguard and provide access to materials as needed. This chapter argues that from the standpoint of implementing any agenda of mass digitization before or alongside the repatriation of cultural heritage materials, this landmark of preservation and access should be challenged. This chapter proposes a complementary landmark to guide policymakers in navigating the copyright limitations and exceptions landscape for archival and other memory institutions. Agency, along with restitution and the general practice of decolonization, becomes a more appropriate landmark in this chapter's description of how at institutional level, national archival institutions and other memory institutions might want to proceed in undertaking their planning for repatriating, receiving and managing repatriated items. Furthermore, incorporating agency as a complementary landmark would ready these institutions for the forthcoming transition to specific copyright limitations and exceptions.

Nchịkọta

N'oge gara aga, n'akwukwọ na n'ihe ndi a na-ahụ anya ka e ji a chikọta ma na-eche kwa omenala, ndu ndi mmadu, agwa ndi mmadu, na ndu na omume nke obodo di iche iche (Ha niile "ihe omenala"). N'oge ahụ, iwu kopiraiti nke na-enye ndi mmadu ihe onwunwe na ihe ha ji uburu ha na ako na uche ha cheputa nwere ihe ndi a gbahapuru ka ndi ulo nche kwa di iche iche nwee ike were cheekwa ihe omenala a. Ihe ndi a bu ihe a na-ele anya nwere ike i nyere aka chekwaa ma kpokota ihe omenala a.

Mana n'ogbo ohuru a, a na-eji teknoloji dijitalu na-ekpokota ma na-eche kwa ihe omenala. Digital na-alu olu n'ikuku. N'ihia ya, o naghị agwu dika akwukwọ na ihe ndi a na-ahụ anya si agwu. Ihe a ga-ejinwu dijitalu mee kariiri akari. Ima atu, a ga-ejinwu dijitalu see imirikiti ihe omenala foto gbaa ha na mkpo n'ikuku!

Mana dijitalu nwere ihe so ya. Ya mere, i na-eji otu iwu kopiraiti ahụ nke ejiri n'oge gara aga ga-eweta nsogbu! Nsogbu nke a ka njo na mpaghara Afrika ebe enwere omenala na asusu di iche iche. Afrika bu kwa obodo ebe ndi ocha si na Yurop (Europe) na mba ndi ozo bia mee mpu di iche iche ma ndi Afrika ha zuuru ihe omenaala ha ma ndi ha ji aghughu nara ya namaghi ama buru ha gaa mba Yurop (Europe). Afrika bu kwa ebe ndi ocha bira kwakoo isi na isi na obodo di iche iche n'ogbo onwe ha mee ha ka ha buru otu ka ndi ocha nwee ike ichi. N'ima atu, Nigeria bu obodo nwere mba, asusu na obodo nari abuo na iri ise di iche iche nke ndi ocha si ebe ha si kpokoo ha onu na otu obodo.

Ugbu a, ndi ocha di iche iche na-agba mbu n'udi iche iche inyeghachi ndi Afrika ihe omenala ha ha nwerebu. Mana, ndi ocha chorọ na tupu ha enye ndi Afrika ihe omenala ha, ha ga-ebu uzọ tinye ihe omenala na dijitalu!

Otu dijitalu si di, ndi isi na-ekwu ihe omenala a ga-etinye na dijitalu nwere ike itinye ma ihe ha kwesiri itinye ma ihe ha na-ekwesighi itinye. Ihe kpata

nke a bụ na ọ bughị omenala ha nke o ji abụ ihe gbasara ndụ ha ma ọ bụ ndụ ndị obodo ha.

Alo m na-atụ ebe a bụ na ọ dighị mma igupu ndị ọ bụ ihe omenala ha na ndị ọ bụ ndụ ha mgbe a na-ekpebi ma a ga-etinye ihe omenala na dijitalụ ma ọ bụ na a gaghị etinye. Alo ọzọ m na-atụ bụ ka aghara i bjakwa na ụwa dijitalụ gupụ ndị mba nọgasi n'ime obodo Afrika dị iche iche ọzọ. Kama, o di mkpa ka a kpọnye obodo na mba di iche iche di n'Afrika na nkata na kpebi a na-enwe banyere itinye ihe omenala ha na dijitalụ. Ọ bughị nani ikpọ obodo Afrika dika Naijiria (Nigeria) ma ọ bụ Senigalu (Senegal) ka ọ biri. A ga-akpọ ndi omenaala ha bu ihe a na-ekwu maka ya n'ime Naijiria (Nigeria). Ihe a kacha mkpa ebe a na-ekwu okwu imeghari iwu kọpiraiti nyekwuo ndi na-edobe akwụkwọ na ndi ụlọ nchekwa di iche iche ohere i tinye ihe omenala ha ji na dijitalụ. Mpu ọzọ eme la.

1. Introduction

The landscape within which archival institutions operate has changed in recent years.¹ Developments in information and communication technologies and the emergence of the Internet have shifted record keeping and management of archival materials from paper (material media) to digital. This digital environment has created expectations and possibilities in access to and preservation of information, including archival materials and records.² In this regard, several legal initiatives at the international and national levels have been put forward to address the new or emerging role, which archival materials and archival institutions occupy (Sutton 2019). In particular, and from the perspective of copyright law, statutory copyright exceptions and limitations tend to be the go-to approach for addressing the copyright issues facing archives and similar collecting and preservation institutions such as libraries, museums and galleries (Dryden 2017).

In 2019, over 100 scholars and practitioners working in the fields of intellectual property law and material and digital cultural heritage at universities, heritage institutions and organisations around the world supported and signed the 'Statement on intellectual property rights and open access relevant to the digitization and restitution of African cultural heritage and associated materials,' written by Pavis and Wallace (2019). The Statement was among a

¹ An early draft of this chapter was presented in 2021 at the Annual Workshop of the International Society for the History and Theory of Intellectual Property (ISHTIP) hosted by Bournemouth University under the theme, "Landmarks of Intellectual Property". The author wishes to thank the participants for their helpful comments especially the paper discussants, Peter Jaszi and Martin Fredriksson.

² Filosa, Gad & Bodard (Chapter 3 in this volume) offers a detailed analysis of how these expectations are met in practice in relation to digital editions of ancient text-bearing objects.

number of commentaries in response to the Sarr-Savoy Report (Sarr & Savoy 2018) which recommended the blanket digitization of African cultural heritage (including archival materials and records) prior to their repatriation to the respective African countries from which they were taken during the colonial era. In condemning the omission of consideration of the intellectual property, access and control issues relating to digitization, the Statement urged the return of the material cultural heritage and the active engagement and collaboration of African communities in every facet of the decision to digitise and the actual digitization process, including decisions as to the intellectual property rights potentially generated through the digitization process (Pavis & Wallace 2019). The key issue is that digitization involves making reproductions of cultural heritage materials including archival materials and, therefore, raises the question of how their outputs may be controlled.³ Such reproduction could involve taking new digital photographs of the cultural heritage materials and analog photographs, which may receive new copyright protections with the ownership vesting in the photographer unless there is an agreement to the contrary.⁴ Texts (in print and digital editions) involving commentary on and photographs of cultural heritage materials could also enjoy copyright protection as literary works and artistic works respectively.⁵ Accordingly, intellectual property law (especially copyright law) becomes directly relevant for addressing questions of ownership, incentives, control of access and any possible commercial exploitation of the results (Oruç 2020).⁶

Essentially, the Statement suggests that when cultural heritage materials are digitised, apart from the cultural heritage materials themselves, one would be dealing with a whole new 'object' (i.e., the digitised version) which may or may not enjoy copyright protection. However, beyond the question of whether those objects are eligible for copyright protection, there is still the question of control of and access to those objects. The Statement makes the point that in dealing with the material cultural heritage and in making a decision to digitise them, the repatriating jurisdiction must do so with the involvement and active participation of the countries to which material cultural heritage are to be repatriated, particularly where decolonisation is the premise or intention. This chapter takes this point further in arguing that within the receiving countries, there should be the involvement and active participation of the local communities

³ Kahn & Simon (Chapter 10 in this volume) highlight the need for guidelines to address the control and management issues that come with digitised collections and digitisation of cultural heritage materials, generally.

⁴ See section 108 Copyright Act, 2022.

⁵ Ibid.

⁶ This is quite apart from the ethical and reputational issues of such publications particularly where, as Filosa, Gad, & Bodard point out, certain scholars or editors are assigned "first-publication" rights for a body of texts on an excavation.

directly connected with the specific cultural heritage. Essentially, even or especially beyond the issue of possible copyright (and other intellectual property rights) issues, the question of control and agency remains self-evident. This chapter utilises the Statement calling for the involvement and active engagement of (and with) African communities in the repatriation and digitization process, and the manner in which it calls for the decolonization of African cultural heritage including archival materials, as a (new) lens with which to reconsider access and preservation that has represented twin landmarks of copyright law's governance of the activities of archival (and other memory) institutions. "Landmark" here is used in the dictionary sense of being both "a conspicuous object on land that marks a locality" (originally and especially as a guide to sailors in navigation) and "a structure such as a building of unusual historic and usually aesthetic interest" (Merriam-Webster Dictionary).⁷

There are conversations around the role and functions of archival institutions and other memory institutions and how the copyright law (and to some extent, other intellectual property laws) construct could and should provide limitations and exceptions enabling those institutions to carry out their role and undertake their functions. Within these conversations, there remains a wide and general adherence to the classic landmarks of these institutions' role being to preserve materials, safeguard them and provide access to those materials as needed. However, this rhetoric of preservation and access has been abused in colonial practice and has often functioned as a smokescreen for looting, theft and other objectionable processes of acquisition that has left many of the cultural glimpses of heritage and other memory materials more focused on Global North regions such as Europe and North America (Habersstock 2020; Turner 2015; Duarte & Belarde-Lewis 2015). This chapter suggests that perhaps from the standpoint of implementing the Sarr-Savoy Report and other reports or activities with a similar agenda of mass digitisation before or alongside repatriation, the landmarks of preservation and access should be challenged and questioned. This is particularly with specific reference to implementation of such reports in Nigeria. In essence, this chapter proposes a different (or at least complementary and additional) landmark to guide legislators and policymakers in navigating the copyright limitations and exceptions landscape for archival and other memory institutions. Agency, along with restitution and the general practice of decolonisation, becomes a complementary landmark in this chapter's description of how at institutional level, national archival institutions and other memory institutions might want to proceed in undertaking their planning for receiving and managing repatriated items. Furthermore, incorporating agency as a new landmark would

⁷ ISHTIP applied similar language in its call for papers for its 2021 Annual Workshop. See <https://www.ishtip.org/?p=1027> (accessed April 20, 2022).

ready these institutions for the forthcoming transition to specific copyright limitations and exceptions.

Copyright limitations and exceptions for libraries and archives became a separate item on the agenda of the World Intellectual Property Organisation's (WIPO) Standing Committee on Copyright and Related Rights (SCCR) in 2011 (Dryden 2017).⁸ Strikingly, one of the closing proposals within this agenda was to consider limitations and exceptions for archival materials rather than archival institutions, the rationale being that an institutional approach or focus would be too restrictive since other institutions, such as libraries and museums, also handle archival materials (Sutton 2019). These limitations and exceptions were limited to preservation, conservation and access for learning (Crews 2019). By virtue of their statutory position, national archival and other cultural heritage institutions are at the forefront of receiving and subsequently managing restituted cultural heritage and engaging with digitization decisions and processes. While there is merit in considering the institutional mandates of archival and other memory institutions from the perspective of the (archival) materials they handle and the need for public access to those materials, it is also imperative to pay attention to the nature of such institutions. This is especially so, given that these institutions would be operationalizing the benefits of specific copyright limitations and exceptions as they fulfil their institutional mandates. In this environment, it is argued that agency, and specifically that of local communities, should be an alternative or at least, a complementary coequal landmark existing side-by-side with the landmarks of preservation and access. The discourse in this chapter focuses on Nigeria as one analogy for most of the countries on the African continent.

Three core arguments underpin this chapter. The first is that the decolonization of cultural heritage goes beyond repatriation and restitution to disentangling the repatriated cultural heritage from the clutches of colonial structures within the receiving countries. The second argument is that the cultural heritage decolonization process at the national level can only realise a fraction of agency and representation for previously colonised communities, which should not be mistakenly conflated with achievement of decolonization of institutional structures for cultural heritage management within African countries. The third argument is that existing and ongoing plans to establish special copyright limitations and exceptions for libraries, archives and other memory institutions should consider the nature of control that these institutions wield in determining who accesses and what materials are accessed in relation to cultural heritage. In many cases, the discourse on digitization of African cultural heritage including archival materials has mostly focused on the question of the

⁸ Currently, archival institutions undertake most of their functions through general copyright limitations and exceptions applicable to all users of copyright-protected materials and to libraries when they handle archival materials.

appropriate approach for the countries making restitution, repatriating African cultural heritage, or undertaking or supporting digitization prior to or after the return of the material cultural heritage without similar focus on the (nature of the) institutions in the receiving countries. Like other African countries with a colonial past, Nigeria is a product of a colonial and heteronormative social order (Ndlovu-Gatsheni 2015). The discourse on specific copyright limitations and exceptions for archival institutions and archival materials must take place within this broad context that recognizes that the African cultural heritage decolonization process goes beyond the approach of the countries repatriating African cultural heritage, or undertaking or supporting digitization prior to or after the return of the material cultural heritage, to the role and position of the African national institutions such as national archives, national libraries and national museums, that would receive and subsequently manage the material cultural heritage and/or digitised cultural heritage.

The structure of this chapter is as follows. Part 2 outlines the access and preservation landmarks of copyright limitations and exceptions for archival and other memory institutions against the backdrop of the decolonization process represented by repatriation; Part 3 explores the character of the postcolonial archival institution—the National Archives of Nigeria (hereafter, National Archives) vis-à-vis the implementation of copyright limitations and exceptions relating to archival materials, exposing one of the myths of decolonization. The next part (4) argues for the institutional reform of the National Archives as a way to ready the institution for specific copyright limitations and exceptions which will help them discharge their functions more efficiently. In doing so, Part 4 highlights how an archival institution with vestiges of colonialism can be problematic for specific copyright limitations and exceptions and how this problem may be addressed using agency as a guiding principle. Part 5 concludes.

2. Understanding the copyright landmarks of access and preservation vis-à-vis decolonization

Copyright law grants a bundle of exclusive rights to authors of copyright-protected works such as literary, musical and artistic works, sound recordings, cinematograph films, expressions of folklore (in some jurisdictions) and broadcasts. As a result of the exclusive nature of copyright protection, any person wishing to use copyright-protected works in any manner covered by the copyright protection would require permission or licence from the author or relevant copyright owner. However, for specific activities covered by copyright limitations and exceptions, one would not require permission or licence from the author or relevant copyright owner. Under the copyright law in many jurisdictions, archival and other memory institutions are accorded copyright exceptions that permit them to reproduce copyright-protected materials without

needing to procure a licence or permission. For instance, section 25 of the Nigerian Copyright Act provides an exception for archives and other memory institutions allowing them to make (i.e., reproduce) and distribute copies of works as part of their ordinary activities, including for purposes of back-up, preservation, and replacement. This is an expanded exception from the previous section 15(2) of the Copyright Act 2004 which provides that the reproduction of a copyright-protected work stored in the National Archives under the National Archives Act would not amount to copyright infringement if made in pursuance of the National Archives Act. Exceptions such as these that permit reproduction for archival and other memory institutions for purposes of preservation and conservations are also obtainable in other jurisdictions. Archival institutions under UK laws, may be permitted by copyright exceptions or statute to make a single copy at the request of a private user but require the user to be resident in the country where the institution is domiciled. Copyright exceptions can require that only unpublished archival materials may be copied or restrict the copying exception to specific kinds of works (Deazley & Stobo 2013). Digitization becomes problematic in this environment because of its ability to transcend physical borders. As such, the problems with the preservation and access landmarks persist across borders.

For archival and other memory institutions, one of the underlying rationales for according these exceptions is to preserve these works and, thereby, facilitate access to them. For material or physical cultural heritage, preservation would necessitate keeping and maintaining such materials in their original form whereas access may necessitate digitisation. In this regard, these institutions require access to the work in order to make copies (even digital copies) for preservation. However, current copyright exceptions are couched in a manner that requires these institutions to obtain a licence or permission from the copyright owners of the works which are digitised in order to distribute or make the digitised copies available to the public. Essentially, the laws conceive the purpose of digitisation in that sense to be preservation by the memory institutions and not necessarily access to the public. These are some of the copyright implications that have been distilled from the management of archival materials including their digitization (Deazley & Stobo 2013). Further, the uncertainty as to copyright subsistence and ownership status of some archival materials makes it risky to digitise without ascertaining ownership and seeking the requisite licence (Sutton 2019). By extension, there is doubt regarding the new copyright status of a digital surrogate of a public domain work i.e., a public domain work that has been digitised (Wallace 2018). These issues with the current landscape of copyright exceptions for archival and other memory institutions contributed significantly to the ongoing discourse and steps at the international level to craft specific copyright limitations and exceptions that will enable archival and other memory institutions to more effectively engage in their mission of access and preservation. But, as this chapter argues, digitisation in the context of cultural heritage is more than just making copies for

purposes of preservation and protection, and increasing access to cultural heritage including archival materials.⁹ As a process, digitization in relation to any given material, involves decisions as to what to leave out, what to include, how to include it, the why of inclusions and exclusions, how to explain inclusions and exclusions, the language of communication and explanation, and more. These decisions are influenced by, *inter alia*, the perception and wielding of statutory power. Viewed through this lens, making digitisation permissible for archival institutions such as the National Archives of Nigeria whose statutorily permitted holdings are diverse, and therefore reflective of the over 250 ethnic groups in Nigeria, requires deeper reflection on issues of agency (including autonomy) of cultural heritage communities.

The concept of “colonial difference” recognizes that there is a dichotomy between imperial values and the histories and values of ex-colonized nations and that these values (imperial and colonised) collide in the process of colonisation resulting in various responses such as adaptation, adoption, integration, etc. (Ndlovu-Gatsheni 2012a). Colonial difference, according to Ndlovu-Gatsheni is also the space where “coloniality of power” reproduces the current asymmetrical global power structure in the world—the US and the rest of the European world at the apex controlling gender and sexuality; authority and power; labour and economy; religion and rituals, as well as all other social aspects of human existence in favour of the Western world, with Africa and its peoples at the bottom. These concepts lead to questioning postcolonial discourse and realising that colonialism did not end with the transfer of juridical-political powers to African nations (Grosfoguel 2007). Instead, the character of postcolonial African states, particularly the continuing refusal to properly engage with tribal groups in the name of “national interests” reveals that apart from the transfer of juridical-political power to African states, decolonization remains a myth in so many ways.

At the heart of decolonization is the return of agency and autonomy to persons and communities to whom these were denied as part of the nature of colonialism. But, an examination of the colonial states in Africa, which were transformed at independence to the present postcolonial states, show that they are (still) rooted in colonial structures and institutions. These postcolonial states, in many cases, retained the destruction or transformation of African Indigenous civil societies such as age groups, elders’ councils and the like (Ndlovu-Gatsheni 2012b). Postcolonial Nigeria for instance was shaped by colonialism into a sole political and national entity that brought under one national umbrella over 250 ethnic and tribal groups. This state of affairs extends across several legal protection frameworks including copyright and cultural heritage protection frameworks such as National Commission for Museums and Monuments (NCMM) Act 1979 (Adewunmi 2013).

⁹ Cf. Filosa, Gad & Bodard (Chapter 3 in this volume).

The next part of this chapter engages the character of a postcolonial archival institution—the National Archives of Nigeria, its duties, functions and responsibilities regarding the control and management of archival materials and uses that to highlight and/or illustrate the challenges with providing for specific copyright exceptions to such receiving institutions without taking cognizance of the control that such institutions wield.

3. The character and power of postcolonial African archival institutions—an illustration with the National Archives of Nigeria

Agency has always been central to decolonization and cultural heritage restitution/repatriation. It is at the forefront of previous and recent attempts by former colonialist countries and well-meaning individuals and organisations to undertake the restitution and repatriation of cultural heritage to African communities (specifically, national cultural heritage institutions). One of the major related questions is how the repatriating institutions ensure complete decolonization in the manner in which the repatriation and restitution is made to the receiving national cultural heritage institutions. Related to this is also the question of the role of the receiving national cultural heritage institution in ensuring that in receiving and managing repatriated cultural heritage, they recognize and amplify the agency of the local communities directly affected by the repatriated cultural heritage materials (Geyer 2017; Sindane 2020). An examination of the relevant provisions of the National Archives Act, including in terms of its statutory holdings (i.e. the archival materials it holds), institutional leadership and management infrastructure, obligations for companies and individuals, shows that the National Archives of Nigeria is not presently in a position to enable or promote agency, inclusiveness and autonomy of local communities of origin in the decision-making, access to and management of their own digital cultural heritage.

The National Archives of Nigeria is a public office established under the National Archives Act of 1992 to have permanent custody, care and control of all papers, registers, printed matters, books, maps, plans, photographs, microfilms, cinematographic films, sound recordings, or other documentary material regardless of physical form or characteristics belonging to the Federal Government of Nigeria, made or received by public or State offices, or by business houses or companies, private bodies or individuals in pursuance of their legal obligations or in connection with the transaction of their proper business (National Archives Act s.1).¹⁰ These records however do not “include library or museum material made or acquired solely for reference or exhibition purposes,

¹⁰ This definition accords with the perception and description of materiality. See Carmen 2009.

extra copies of records kept only for convenience of reference or stocks of publications" (National Archives Act s.52). Such reference materials would include atlases, bibliographies, indexes, and other sources of background information and these usually within the ambit of libraries.

The Director of the National Archives has the responsibility under the Act to carry out the institutional mandate of the National Archives. In this regard, the Director would provide advice to government, private bodies and individuals on all matters relating to their records and archives, appraise, select, repair, prepare, publish and preserve any and all archival materials (National Archives Act, s.2(2)(a-f)). The Director is also responsible for promoting the advancement of knowledge of the contents of the Nigerian archives through establishing and maintaining a research library, controlling access thereto by archival institutions and persons; organising seminars, visits and the likes (National Archives Act, s.2(2)(g)). They are also responsible for conducting research into the contents of the archives, reproducing and duplicating archives and records; and lending archival materials to exhibitions and other displays (National Archives Act s.2(2)(h)-(m)). By virtue of Section 23, the Director shall take necessary steps to acquire and have returned to Nigeria any public records or records of historical value to Nigeria which may have been exported from Nigeria prior to 1992.

The Director is also required to inspect records and historical documents of private bodies and advise on their safe custody, preservation and care (National Archives Act s.34). Further, the Director is required to keep a register of such records and documents and upon entry in the register, such records assume the status of private archives (National Archives Act s.35(1) and (5)). Such a status requires the owner to preserve the contents of the archives and work with the Director of the National Archives to open the archives for public use, make arrangements for the publication of the contents of the archives, etc. (National Archives Act s.36). Disposal of such private archives is only permitted with the written consent of the Director and no sales or transfer of the private archives may be made without the knowledge of the Director (National Archives Act s.37). Further, private archives are prohibited from being exported out of Nigeria (National Archives Act s.38). The Director may also compulsorily transfer private archives that are in his opinion, in danger of loss, dispersal, deterioration or destruction (National Archives Act s.41). Such transfer requires the approval of the Minister charged with responsibility for National Archives and is subject to the payment of compensation to the owner or holder of such private archives. Once transferred, the archives assume the status of public archives (National Archives Act s.41(2)).

Twenty-five years is the period prescribed for companies to mandatorily operate an archives division for the preservation and proper documentation of their organisation, functions, policies, procedures and transactions (National Archives Act s.45). State governments may establish State archives and may assign the preservation of its archives (National Archives Act s.33(1)). Where a

state government assigns the preservation of its archives to another organisation, such archives would be regarded and managed as part of the archives of the Federal Government and subject to the provisions of the National Archives Act (National Archives Act s.33(3)).

The Director of the National Archives is a civil servant and their appointment is only required to be in accordance with the provisions of the law relating to the appointment of officers in the civil service of the Federation of Nigeria. There is no requirement that necessitates the consideration or representation of cultural heritage communities. Further, the Director is a member of an advisory council, again constituting members who are not appointed for their community membership or participation. This means that for instance, a director who is from one ethnic group may take decisions regarding collection and preservation of archival materials from another ethnic group without recourse whatsoever to that ethnic group. Contrast this scenario with the provisions of South Africa's Intellectual Property Laws Amendment Act 2013 (IPLAA). The IPLAA recognizes the significance of the cultural diversity of the South African nation and defines "indigenous communities" as a "recognizable community of people" originated or historically settled in a geographic location with social, cultural and economic conditions distinct from those of the national community who "*identify themselves*" and "*are recognised by other groups as a distinct collective*".¹¹ Under this statute, these indigenous communities require a community protocol, which they must develop to describe their structure and claims to cultural heritage. This approach is a common one in South Africa's protection models for matters involving indigenous communities given South Africa's recognition of customary laws. Legal rules allow communities autonomy in identifying their structure and claims to cultural heritage. Indigenous communities must identify themselves and must be recognised by other groups as a distinct collective in order to effectively participate in the cultural heritage space (Nwauche 2015).

In identifying the South African example, there is recognition of the dilemma of how to negotiate the governance framework for digitisation of material cultural heritage, especially the interaction between recognition of customary law and cultural heritage communities and the traditional/conventional intellectual property (copyright) framework. The South African example is not a static situation. Instead, it is one that is dynamic and changing as the country's governance frameworks interact and grapple with how local communities deal with the recognition of their agency. In essence, the debate in South Africa, unlike the situation in Nigeria described in this chapter, is not dwelling on the

¹¹ There are problems identified with this definition still particularly because of its premise on geographical locations. Civilization and urbanisation result in migration of individuals and groups who should otherwise qualify as part of an indigenous community. See Sidane 2020.

question of whether local communities are involved or whether their agency is recognised. There is statutory recognition of their agency as far as matters of cultural heritage are concerned in South Africa. The conversation in South Africa has shifted to how those communities deal with each other, and also within themselves as organisations composed of individuals who are at different levels of creative and productive processes and capacities. By contrast, the situation in Nigeria presently requires deciphering how to kickstart the dialogue that the national government must have with cultural heritage communities including how to make the dialogue take place. The situation also requires ensuring that the outcomes of such dialogues and the recognition of the agency of cultural heritage communities are evident in the institutional design and processes of archival (and other memory) institutions that deal with cultural heritage material in any form. When the agency of cultural heritage communities is recognised, Nigeria would then move to where South Africa is currently in exploring how cultural heritage communities interact within themselves and with other communities, so that such inter-community interactions do not end up becoming a barrier to surmount in addressing the relationship between national governments and cultural heritage communities.

By extension, the issue of the agency landmark would affect the National Archives' implementation of the benefits of copyright limitations and exceptions. Archival institutions require copyright limitations in order to preserve archival materials in their care; reproduce materials for study and research; provide access to its archival materials for consultation with other institutions within and outside national territories; etc. (Dryden 2017). In order to undertake such preservation, archival institutions need to make copies of the relevant material.

For the reproduction and publication of archival materials in the National Archives presently, the public is permitted to make copies of or extracts from any public archives which have been made available to them. However, publication can only be made with the written permission of the Director in the case of public archives and written consent of the depositor, in the case of archives voluntarily deposited by private bodies or individuals (National Archives Act s.29(1) and (2)). Nevertheless, both reproduction and publication are subject to copyright laws (National Archives Act s.29(4)). Without copyright exceptions, such copying would likely infringe copyright protection (where the material is subject to copyright protection). This is also the case with reproducing archival materials for members of the public who may need it for further study or for research. Within the Act, free access to the public archives is neither automatic nor guaranteed. Instead, free access is only available where such public archives enjoyed free access when they were in the custody of the public office from which they had been transferred, where the public archives is 25 years or more, or in the case of archives relating to the private life of individuals, with the written permission of such individuals or their heirs, if known (National Archives

Act s.27). Public access to the National Archives and the archival materials under its control is subject to regulations as the Minister charged with responsibility for National Archives may make (National Archives Act s.49(a)).

In these circumstances, providing for specific copyright exceptions for such institutions even with the intent of preservation and access risks inadvertently denying agency to indigenous communities where they are the source or origin of these materials. This is even more so when the materials are digitised or to be digitised.

4. Readyng archival institutions for specific copyright exceptions

Between 2017 and 2019, the WIPO commissioned various studies aimed at exploring whether the current state of copyright exceptions and limitations in copyright law are fitted so as to enable specific institutions—libraries, archives and museums to carry out their mandates. For archives, as with libraries and museums, there is consensus that the manner in which copyright protection and copyright limitations and exceptions are currently structured impede the work of these institutions in conserving, safeguarding, providing access to, using and enabling the use of various materials in their custody. To address these issues, it was concluded that there was a need to not only strengthen the international understanding of the need to have adequate limitations but more significantly, to move towards international agreement regarding specific exceptions or limitations.

For archival institutions and archival materials particularly, the WIPO's Standing Committee on Copyright and Related Rights (WIPO-SCCR) has devoted much attention to this matter including the changes that are necessary. These reforms would expectedly trickle down to African states as they ratify and domesticate them into national laws. In the face of the impending repatriation of African cultural heritage and ongoing digitization plans for Africa's cultural heritage, particularly Nigerian cultural heritage, national cultural heritage institutions need to evolve in order to be ready to support the decolonisation process in their management of material and digitised cultural heritage. Focusing solely on using copyright limitations and exceptions to empower these institutions to carry on the work of preservation of and access to cultural heritage materials loses sight of the power and control that these institutions wield.

In this regard, undertaking copyright limitations and exceptions and cultural heritage protection across national lines and by regulatory institutions reminiscent of colonial and global 'grouping', and one which obliterates or severely limits the participation of tribal (and indigenous) communities in the protection framework is extremely problematic (Eichler 2020; Nwauche 2017; Beardslee

2016).¹² Within this environment, the repatriation of African cultural heritage to Africa including the active engagement of African nations in the decision to digitise and the digitization process does not complete the decolonization process given that the African institutions involved are products of the colonial era. This is also the case where the statutory mandate of such institutions does not envisage the involvement and participation of the tribal and indigenous communities who are the direct sources and “originators” of cultural heritage. More specifically for copyright law purposes, the landmarks of access and preservation are insufficient to guide the design of specific copyright exceptions.

Therefore, it is imperative to look beyond the perspective of the repatriating institution or State and for purposes of crafting specific statutory copyright limitations and exceptions, to look beyond access and preservation rationales to the nature and character of the institutions that would implement such exceptions. This shift requires fundamentally that the institutions managing such archival materials need to pursue, establish and preserve the agency and autonomy of the local communities who are the actual source of cultural heritage including related archival materials.

One of the key questions arising from the above description of the way forward is that related to the fate of the current landmarks of preservation and access. Put differently, in proposing agency and autonomy as complementary landmarks to guide, is the existing landmark of access and preservation to be obliterated? From the foregoing paragraphs of this chapter, there is an obvious or at least potential tension between the guiding principles of decolonization and the promotion of agency which spills over to the discussion regarding institutions that handle or would handle both material and digitised cultural heritage materials. This relates particularly to the extent to which the often abused but still widely referenced ‘enlightenment’ idea inherent in the landmark of preservation and access remains in the picture.

It is argued that the proposed agency and autonomy landmarks should stand as a separate but coequal landmark with the current preservation and access landmarks to guide the institutional processes of archival (and other memory) institutions, as well as the establishment of specific copyright limitations and exceptions for those institutions. Think about these two real-life illustrations. In 2013, several member states of WIPO adopted the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled (“Marrakesh Treaty”). The main goal of the Marrakesh Treaty is to establish a set of mandatory copyright limitations and exceptions for the benefit of the blind, visually impaired or otherwise print disabled persons.

¹² This is even more challenging where the present region of origin for some objects cannot be established with certainty due to the ceding and recalibration of territories. For example, Ethiopia and Eritrea (as pointed out to me by Daria Elagina); Nigeria and the Bakassi Peninsula of Cameroun.

One of the relevant key provisions of the Marrakesh Treaty is its establishment of so-called 'authorised entity' defined in Article 2(c) as an entity "authorised or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis" including "a government institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations". Within the Marrakesh Treaty, only print disabled persons and entities qualifying as authorised entities are permitted to: enforce the copyright limitations and exceptions through making an accessible format copy of a work; supply those copies to the beneficiaries of the Treaty by any means (Article 4); distribute accessible format copies in cross-border exchanges (Article 5); import an accessible format copy for the benefit of the beneficiaries of the Treaty (Article 6); etc. In essence, these entities (i.e., authorised entities) are considered co-custodians of the specially created limitations and exceptions because of the authorization or recognition of government. While entities need not fulfil any formalities to be recognized as an authorised entity, they need to fulfil specified conditions regarding their use of copyright-protected materials. For instance, authorised entities are required to take steps to ensure that only the beneficiaries of the Treaty will enjoy access to accessible format copies (Article 4(2)(a)(iii) and to undertake the conversion to accessible format copies and its distribution on a non-profit basis (Article 4(2)(a)(iv). More importantly, the beneficiaries of the Treaty (or someone acting on their behalf) have coequal power and authority (at least in terms of active participation) with these authorised entities to undertake any changes necessary to make copyright-protected materials in an accessible format for persons with print disabilities (Article 4(2)(b).¹³ Access is still a landmark—a guiding principle and the goal of the Marrakesh Treaty but access coexists with the objective of active participation of visually impaired or otherwise print-disabled persons in cultural and social life (Ikeda, Ribeiro, and Teixeira 2021; Beyene, Mekonnen, and Giannoumis 2020).

The second real-life example relates to a mountain fire that erupted in Cape Town, South Africa in early 2021. This fire spread to part of the University of Cape Town resulting in the destruction of a large section of the university's Jagger Library which housed several material cultural heritage of South Africa (Wroughton 2021).¹⁴ In the aftermath of the fire, there were several comments

¹³ Beneficiaries of the Treaty are also permitted to distribute accessible format copies in cross-border exchanges (Article 5), and import an accessible format copy (Article 6).

¹⁴ According to reports, the Jagger Library had "printed and audiovisual materials on African studies; 1,300 sub-collections of unique manuscripts and personal papers; and more than 85,000 books and pamphlets on African studies, including up-to-date materials and works on Africa and South Africa printed before 1925".

on what would have been the national (and international) mood had the materials in the Jagger Library been digitised so that despite the fire, the public could still have access to the materials albeit in intangible form. It is argued here that juxtaposed with the preservation and access premise or landmark for digitization is the question of the material cultural heritage themselves and the value in those materials “as is” as opposed to the digitised materials and who makes the decision on how and what to digitise. Essentially, digitisation is not preservation in and of itself—digital materials must (also) be preserved so they can remain accessible by future generations under future technologies and formats. It should therefore follow that the tension between the preservation and access landmarks and the (cultural heritage communities’) agency and control landmarks should encourage their coequal existence and consideration in archival institutional processes and in proposing specific copyright limitation and exceptions.

5. Conclusion

For the purposes of this chapter, the proposed digitisation of material cultural heritage and open licensing mechanisms as indicated in the Sarr-Savoy report is used as a take-off point to highlight the shift in and the implications of the shift in the guiding landmarks of specific copyright limitations and exceptions for archival and other memory institutions. However, there are several other lenses through which the landmarks of specific copyright limitations and exceptions for archival and other memory institutions may be viewed. Kahn and Simon’s exploration of the implications of the absence of guidelines for handling digital surrogates of human remains in museums in this volume and the analysis by Filosa, Gad and Bodard of the need to record both context and text in digitisation processes for ancient text bearing objects are good examples.¹⁵

In highlighting the agency of cultural heritage communities as new landmarks for specific copyright limitations and exceptions for archival and other memory institutions, this chapter does not refute the significant benefits of digitization. As Filosa, Gad and Bodard amply demonstrate in this volume, digitization makes information more explicit and allows multiple uses of material in ways that are not feasible with physical objects (including printed materials). With digitization, translations of texts in diverse languages and in a manner that serves diverse audiences become more feasible. Instead, the chapter argues that when ensuring control by an agency for indigenous communities is a goal, (not necessarily *the* goal), policymakers would be better positioned to factor these into crafting specific limitations and exceptions. In this regard, specific copyright exceptions could come with guidelines and standards whether in the form of hard law or soft law that require repatriating and digitising entities

¹⁵ See Filosa, Gad & Bodard (Chapter 3 in this volume) and Kahn & Simon (Chapter 10). See also Pavis & Wallace 2020.

to collaborate with and involve cultural heritage communities to contribute to more accessible, more inclusive and more transparent digitization outcomes. The pre-repatriation digitization 'project' remains enmeshed in coloniality of power and colonial power structures. By extension, the cultural heritage institutions such as the National Archives who are the implementing institutions for copyright limitations and exceptions designed to control and manage digitization outcomes are equally entrapped. The Statement written by Pavis and Wallace and supported by over 100 scholars offer an opportunity to consider a coequal landmark to guide both the repatriation and digitization project and the consideration of copyright limitations and exceptions for archival (and other memory) institutions.

The purpose underlying cultural heritage repatriation and digitization means that every element of how archival institutions such as the National Archives manage and control records and archival materials need to adapt and shift. Their current statutorily-enabled practices, principles and institutional organisation undermine the benefits of repatriation in Africa, particularly in Nigeria. In this context, the National Archives of Nigeria and every other archival institution across Africa and beyond, must radically reimagine their practice to meet the agenda of returning agency and autonomy to cultural heritage communities. To do this, a starting point is to reform the ways in which archival materials are acquired, managed, preserved and controlled.

6. References

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