

Minutes of the Intellectual Property Working Group meeting
 Society of American Archivists annual meeting
 San Diego, CA, August 8, 2012

Attendance

Members: Heather Briston (chair), Jean Dryden, Cathy Henderson (minutes), Peter Hirtle (via phone), Aprille McKay, David Sutton

Absent: Mark Greene, Bill Maher

Guests: Missy Brown, Library @ Brooklyn Museum,
 Patty Neal from Bacardi Corporation archives

Agenda item 1—SAA 2013 panel proposal ideas

Program proposals are due October 5; IPWG can only recommend two programs

Peter reported that Bob Spoo, who spoke at SAA in Chicago, would be interested and speaking again and has travel money to support his participation. Cathy and Peter will work with Spoo to refine a session proposal. Cathy will approach the Manuscript Repository and RAO sections to see if they would wish to include him in a session and/or become a co-recommender.

Peter proposed a copyright legislation and litigation update session (HathiTrust case, Google Books decision, Georgia State fair use decision, Copyright Office orphan works and 108 legislation that will be introduced in January 2013, etc.). Aprille will take the lead. Peter contacted Elizabeth Townsend Gard as outside member for this session and she has agreed to participate.

Agenda item 2—Proposal to Delmas Foundation for SCCR funding

While it has not covered this sort of thing in the past, Delmas is open to considering a request to cover 2013 expenses to attend SCCR. Request is due in the fall.

Step 1—heads up to Nancy Beaumont and Council

Step 2—Heather will prepare the draft, based on earlier proposal to the Sloan Foundation, for review

Step 3—send it to Delmas

It was suggested we look into possibility of NHPRC funding (if Council approves); Peter suggested Arcadia Foundation a possibility; Heather to check for contacts with colleagues at UCLA.

Heather will confirm that our request for permanent observer status is in to WIPO; decision will be taken at September or October 2012 WIPO meeting.

In a discussion about how IPWG might persuade SAA to support costs of SCCR advocacy, David suggested we take portfolio of successes to SAA council and ask them

for support. Another idea was to encourage a gift to the SAA Foundation that can be earmarked for advocacy support. [Not allowed under non-profit rules] Jean favors making a specific push for long-term advocacy support. Aprille suggested the group craft an article for *Archival Outlook* about the challenges of funding advocacy efforts. Nancy Beaumont is being given more leave to focus on advocacy.

Agenda item 3—ICA Committee on Copyright, SCCR update (Sutton)

David provided background on ICA for the sake of our visitors. Copyright was made an unfunded mandate by ICA in 2004; then funded in 2010 leading to SCCR 23. In David's view it is simply important to be there and to assert the archival perspective which might otherwise be subsumed into the preoccupation of librarians. This tactic to date has changed the way WIPO thinks with Bill Maher, Tim Padfield, and Martin Berendse (Netherlands) serving as the archival voices. SCCR 24 outcomes (see Tim Padfield on YouTube) are somewhat unpredictable but ICA/SAA joint representation very helpful; can ask Bill to wear two hats if Tim cannot also be in attendance; ICA very keen to work together with SAA; the simple fact of an archival presence in Geneva is very important; more and more scope for cooperation; SAA provides intellectual content and meat; ICA meetings more superficial; but ICA brings extraordinary global membership (199 countries) and reach. The combo makes a really strong team.

Heather asked David if there are other things IPWG could do to foster the work of the ICA Committee on Copyright? David recommended we refer back to Bill's research agenda, (see his email of April 15th) and focus on orphan works and exemptions. A discussion about the distinction between *droit de divulgation* and moral rights led to agenda item 4.

Agenda item 4—WIPO research to do (examples and faceted response re orphans)

Heather recommended IPWG start putting together position papers based on research resulting in a set of prepared responses circling back to the value of archival collections for the public benefit.

Have our position statements prepared with substantive back-up documentation, for example Bill's concise prepared remarks for 2011 WIPO meeting.

Aprille suggested that SAA membership needs to know what might happen if SAA's voice (through IPWG) is not heard at WIPO.

David recommended that orphan works is really a good generalist issue that speaks to all audiences. The differences between national approaches to orphan works, e.g. Canada, France, UK, might be an area of exploration. Peter said that there was not much discussion at a Berkeley meeting about international approaches, the focus being primarily American. Take-aways from the Berkeley Orphan Works Symposium meeting included the recommendation that we call them *hostage works* rather than orphan works. Another participant at the Berkeley symposium, Ariel Katz says that fair use is our defense and that we don't need orphan works legislation after all. Copyright Office may

just redraft orphan works legislation to remove elements that met with the fiercest opposition.

Unpublished orphan works are addressed in the UK orphan works proposal but not in orphan works statements from other countries. Requirements would include a diligent search, a possible register of deemed orphan works, and possibly a fund to compensate subsequently identified copyright holders.

David highlighted the importance of comparing notes across borders; Council of the EU working on orphan works; outlined what his Saturday program is going to be.

Heather recommended IPWG start laying out a white paper based on Bill's concise statement for WIPO. Heather will start a Google doc to use as a place to start building out an outline.

Agenda item 5—DMCA wording proposal

Peter's draft wording is based on Canadian archivists proposed legislation. We are years away from this, since we are still awaiting LC's response to the last call for proposed exceptions. We can structure our submission based on the arguments LC accepts in the current round. It will be especially important to see how the Copyright Office treats fair use exemptions.

Peter recommends we ask for an exemption for "Original works of authorship fixed in a digital medium of expression that are currently in the collection of a library or archives of the type described by clause (2) of subsection (a) of 17 USC § 108 when circumvention is accomplished for the sole purpose of managing, maintaining, and preserving its collection pursuant to 17 USC § 108" and questioned whether we also wanted to reference 17 USC § 107.

Aprille recommended we go big and add 17 USC § 107 even if it attracts more resistance. Jean agrees if only that we can eventually educate them to our way of thinking.

Peter: first describe a class of work, using the definition already in 108; could ask to have this inserted as an amendment to any 108 legislation that may get introduced into January; suggested we go ahead and try to get it introduced into January legislation; send Peter the text that we think is right; Heather to put this text together and circulate to group.

Agenda item 6—IPWG web page

Aprille hasn't updated it since end of April, but she puts up agendas and approved minutes immediately. Aprille will ask Brian Doyle to suppress or purge the old page which still shows up with some searches.

Aprille is disappointed with traffic on the IPWG site. Is there some way to push it out more? Is there a way to make it an RSS feed so people would subscribe to it? Add a blog component?

Use A&A (Archives & Archivists) listserv as a forum for questions IPWG may have of membership. And a way to determine what the actual questions and concerns of practicing archivists are.

Agenda item 7—Schedule for Google hang-outs

We agreed to have a late September hang-out ahead of the program proposals due date. Use them for working meetings to discuss white paper drafts. We'll continue with Doodle-poll to schedule hang-outs every other month-ish.

Agenda item 8—New IPWG chair

Aprille's offer to become chair in 2013 accepted enthusiastically and unanimously.

Agenda item 9—guidelines to add to standards portal or to endorse

Jean provided background on what we added to the portal as useful guidelines; RLI no. 279 report and model deeds of gift—to be added to the bibliography page, although it was noted that the Standards Portal attracts better traffic.

Jean mentioned another risk assessment document—OCLC's Capture and Release: Digital Cameras in the Reading Room document. Jean says this is one to endorse. IPWG will take it up as an agenda item for a Google hang-out.

Heather is giving a presentation on the ARL best practices, noting that it is too easy to accept them as what the law is, when it is just one interpretation, and an edgy one at that.

Heather to send links to article(s) by Jennifer Rothman who is generally skeptical of fair use best practices.

Agenda item 10—Info share/discussions items

Orphan works and 108 legislation is to be proposed in fall for formal introduction to Congress for legislative action in January 2013. Peter worries that opening up 108 may give rightsholders an opportunity to make things worse. IPWG/SAA is likely to have to take up aggressive advocacy in the fall and spring terms.

Any first-sale legislation is likely to be introduced after the Supreme Court decision in *Kirtsaeng v. Wiley*. Oral arguments scheduled for October 29. Peter forwarded the link to the briefs: <http://www.scotusblog.com/case-files/cases/kirtsaeng-v-john-wiley-sons-inc/>. We'll want to include this case in the Litigation and Legislation update.

Jean is proposing an SAA workshop on rights and permissions policies; pull apart copyright issues from attribution issues (copyfraud workshop proposal).

Aprille provided an update on the IPWG panel proposal on privacy that did not make it into the formal session. It's still getting used as a presentation at the Privacy & Confidentiality Roundtable.

David reported that SCCR, at its meeting November 19-23, 2012, is trying to go for a marked agenda. Tim will pretty definitely go on behalf of ICA. Delmas funding would only kick in for the two 2013 meetings.

Peter sent the group a draft of his article "When is 1923 going to arrive?"