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TO: SAA Officers and Council

FROM: William J. Maher

SUBJECT: Summary Report on SAA Representation at WIPO SCCR31

DATE: July 22, 2016

**Report on Service as Society of American Archivists NGO Representative
at the World Intellectual Property Organization's
Standing Committee on Copyright and Related Rights,
32nd Session, May 9-13, 2016**

BACKGROUND AND OVERVIEW

Faithful adherence to copyright law limits whether and how archivists can accomplish their mission of preserving and making records and manuscripts available, especially in a networked global environment. Because copyright laws are framed by international treaties, since 2011 the SAA has been attending sessions of the World Intellectual Property Organization (WIPO) to seek copyright exceptions that would support today's archival mission. Our presence at WIPO's Standing Committee on Copyright and Related Rights (SCCR) has been in close collaboration with the International Council on Archives and the International Federation of Library Associations and Institutions (IFLA) as part of an advocacy effort to create a treaty that establishes international norms for archives- and library-friendly exceptions. However, because of entrenched opposition by the publishing industries and the reproduction rights organizations (RROs), the work has been challenging. Further, given the seemingly arcane ways WIPO's committees operate, the work has been frustrating and progress slow. Although the Committee was able in 2011 to identify a working list of 11 topics to be considered as the facets of the copyright exceptions, over most of 2012 and 2013, it devoted little time to the library and archives issues. There was renewed attention in the three sessions attended by SAA between December 2013 and July 2014, but they were marked by obstinate roadblocks with little promise of development of a treaty.¹

¹As articulated in the December 2013 document SCCR 26/3, those themes/topics, are: 1) Copying for preservation or replacement; 2) Reproduction and distribution of a copy of a work to a library user, or to another library or archives; 3) Legal deposit of one copy of every work published in the country, 4) Library lending to a user, or to another library; 5) Parallel importation to allow purchase or acquisition of works from other Member States; 6) Cross border provision of copies shall be possible for allowed uses; 7) Orphan works and works out of commerce may be reproduced and made available; 8) Limitations on liability when acting in

Developments at the December 2014 SCCR29 changed that perspective when a new comparative study highlighting the irregularities of exceptions within existing national laws became a basis for extensive discussion by the Committee of the actual problems faced by librarians and archivists. At the same time, the SCCR's Chair developed a longer-range plan to productively use an evidence-based discussion of the 11 topics to engaged the Committee in laying the foundation for creation of a text that could develop into a treaty text.

Subsequently, despite roadblocks from some rather predictable opponents, the Chair's plan to focus on the substantive issues rather than on process has resulted in productive sessions in June and December 2015 which saw progress on the Chair's plan. The most recent session (May 2015) leaves us seeing enough prospect for progress as to recommend continued engagement with the advocacy at WIPO at least through the next SCCR in in November, 2016.

OVERVIEW OF THE WEEK

Understanding what happens at an SCCR session and determining exactly what any of it means is very much a matter of contextual interpretation. Thus, the balance of this report is presented as narrative highlights of the week of SCCR32.

Overall SCCR32 was one of the most positive I have experienced yet. Although all that was adopted was the Chair Martin Moscoso's Summary rather than the "Committee Conclusions," as at sessions since late 2014, this approach has avoided SCCR's self-defeating habits, and it allowed progress on discussion of both the broadcasting and library/archives issues to narrow and focus deliberations. So while SCCR32 saw no direct work on drafting a text, Chair Martin Moscoso's method continues to offer the prospect of consensus building.

DELIBERATIONS ON COPYRIGHT EXCEPTIONS

Study on Exceptions for Education

Following the model of the past several SCCRs, Monday through Wednesday morning were devoted to technical discussions in plenary session of elements for a treaty to create a new exclusive right in broadcast signals. The discussion of exceptions was scheduled for Wednesday afternoon through Friday morning. Rather than turning first to archives and library exceptions, Wednesday afternoon was dedicated to an as yet incomplete 665 page study of the nature of education exceptions in the national laws of WIPO member states. Despite our fears that this study would overtake all free time for copyright exceptions at SCCR 32, that did not happen. Furthermore, beyond simply avoiding the loss of all discussion time, a bright spot was that, contrary to last December, no one suggested that the education exceptions be bundled with library and archives, thus slowing our item down. To emphasize the importance of not allowing the complexity of the issues involving potential exceptions for education and research to delay action on exceptions for archives and libraries, I conferred with, and presented, a short statement on behalf of the other three archival organizations present at SCCR32. (See Appendix A)

Deliberations on Archives and Library Exceptions

Once the education study was efficiently dispatched at the close of Wednesday afternoon,

good faith; 9) Circumvention technological protection measures for allowed exceptions; 10) Contractual provisions shall not overwrite the limitations and exceptions; and 11) Right to translate works.

Thursday could be devoted to continuing progress from last December's SCCR discussion of the 11 topics into which our concerns had been organized many sessions ago. The goal was to get through the next three or maybe four of the eleven topics. In the event, the committee moved through 5 (parallel importation), 6 (cross-border uses), and 7 (orphan works).

In the background is the fact that the chief counsel for the International Federation of Reproduction Rights Organisations (IFRRO), an NGO promoting fee-based licensing systems, had written an article in the April WIPO magazine saying that in today's network world, it was not the libraries, but publishers and RROs that made information accessible and findable. Licensing schemes made it possible for anyone to get just about anything—of course he conveniently failed to note that all of this comes with a fee that lines some pretty posh pockets.

Meanwhile, we heard that some of the resistance in WIPO by Group B (highly developed nations) to library and archives exceptions has been based on their perception that we have not presented examples of any problems within the current system sufficient to require a treaty for copyright exceptions. They do not see anything wrong with the existing international legal framework because licensing provides a solution for each of the problems we have mentioned. Of course their logic is absurd and out of touch with how archives and libraries operate, but that is why being engaged in such advocacy is important. Once we learned of their perception, we made relevant last minute revisions to our statements.

Interventions on Archives and Library Exceptions

Because topic 5 did not seem of relevance to archives, none of the four archivists present commented on it, and we left it to the librarians and publishers to contest.² The main focus of their interventions was a back-and-forth as to whether parallel importation was a matter of trade policy or copyright. . As to topics 6 and 7, three archivists spoke on cross-border uses, and four spoke on orphan works. Overall, the archivists' interventions, made a strong case for exceptions and were particularly well-focused on why the existing system frustrated rather than supported our work.

As with prior SCCR interventions, the prepared remarks I presented on behalf of SAA used examples of specific collection content and types of uses of archives to reinforce our policy needs for exceptions and limitations. My approach has been rendered a bit more complex because recently the Chair has asked us to avoid polemics and general policy statements and instead focus on "principles, concerns, and tools/solutions." My statement on Topic 6 (Cross-border Uses) was carefully constructed to do just that, with only a modest use of archival examples. (See Appendix B) From what we learned later, it was positively received by the Chair.

My statement for Topic 7 (Orphan Works) was more archival, and admittedly more polemical. (See Appendix C) However, I have since followed up with a supplemental written submission to the WIPO Secretariat indicating the key principles SAA IPWG seeks in a treaty regarding orphan works.

²In addition to SAA, archivists were also represented by the International Council on Archives (Tim Padfield), Archives and Records Association of the UK (Susan Corrigan), and Scottish Council on Archives (Victoria Stobo).

Meanwhile, the fact that my orphan works statement gave weight to examples and polemics turned out to be fortuitous because that made it easier to emphasize the last minute revisions to zero in on how neither the existing or any conceivable licensing system could address the kind of works that predominate in archives.

In the event, chance afforded the SAA an golden opportunity to make this point in a particularly emphatic way. Because there is no predictable order in which the NGOs are called upon to present their statements, one never knows when the red light at your desk will go from flashing to “on,” your microphone will be live, and your image will appear on the oversize monitors throughout the assembly hall. However, given my modified text, I paid close attention to the remarks of the IFRRO representative whose statement contained the same arguments as at several the prior SCCRs, contending that licensing and the content industry can solve all of the problems we have. Of course he made virtually no reference to the fees involved other than a passing comment that the licensing model provided compensation to the authors.

No sooner had I realized that he had just provided the perfect target for my late revisions in the orphan works statement than my red light and microphone when on. Because this gave me a chance to make an immediate retort, I ignored worries about making the statement fit within 3 minutes, and instead took the time necessary to add extra emphasis on the patent absurdity that licensing could offer a solution to archival orphan works since, by definition, identifying their rights holders was impossible. While such logic is obvious to archivists, it must have been a shock to the IFRRO representative because as soon as I finished speaking, I took advantage of my top row seat to check his expression only to find him Googling his computer to find out exact who or what SAA is.

The same point of the total absurdity of the RROs position was later reinforced by the statements from the International Council on Archives which emphasized that by standing regulatory definition, no extended collective licensing organization could ever be established for archival material. Also, the representative from the Archives and Records Association of the UK illustrated the uselessness of a licensed-based orphan works solution as she referred to the failure of the recently instituted UK plan which requires use of licensing.

It should also be noted that the orphan works discussion, perhaps because it focused attention on actual problems faced by users of archives and libraries, was the point at which the MS delegates became most animated and interested. This caused the the IFLA leaders to suggest elevating the orphan works exception from the low-middle priority they had been giving it since 2014 to possibly being the central target in advancing a treaty. While this was encouraging to hear, I have become more sanguine about assigning a priority to the orphan works topic, largely because it is vulnerable to absolutist opposition from moral right countries where the *droit de divulgation* (right of first release) is cited as a reason that no library or archives could ever be allowed to release unpublished works. Considering the “moral” rights issues, a better policy position would be to follow the suggestions of the Scottish Council on Archives to deal with orphan works via general limitation on liability for good-faith archival copying.

The discussion of exceptions for parallel importation, cross-border uses, and orphan works absorbed nearly all of the Thursday time allocated for discussion of archives and library exceptions. Rather than moving on to one of the next set of topics (four remain: limitation on liability, technological protection measures, non-preemptive contracts, and translation), the Chair

deferred those to November. It may be that he does not want the SCCR to finish the remaining topics too quickly—once 8-11 are treated, the process is vulnerable to being stopped unless there is a clear plan that the Chair can convince the committee to accept even if there are still holdouts against “text-based work.”

CLOSING SESSION

The week’s closing day was devoted to a rather broad discussion of the long-standing proposal “Limitations and exceptions for education, research, and persons with other disabilities.” However, as with prior SCCRs, the lack of an organized group of NGOs to identify what specific exceptions are needed meant that the deliberations did not do much more than repeat encomiums for how important access to copyrighted material is for education and how the publishers and RROs could provide all the solutions

The “Other Topics” on Friday’s agenda included two items that had been put forward by MS at prior meetings but have not yet been elevated to be formal SCCR agenda items. The first, titled: “Proposal for Analysis of Copyright Related to the Digital Environment,” was originally presented at the December 2015 meeting by GRULAC, and it contains an extended critique of the current system in which individual creators, especially musicians, are not getting their fair share from either the producers or the aggregators. The second was the proposal from Senegal and Congo for an artist’s resale right, first presented in April/May 2014. We will have to stay tuned on this item because if not written carefully, it could have a negative effect on archives and manuscripts. The US delegation is opposed to the resale right, but one never knows when a discussion in SCCR or outside might result in horse-trading.

Friday’s session also dealt with the all important discussion of SCCR’s future work, especially whether there should be a special “intersessional” meeting to work on the broadcasting issue so that it can advance enough to call for a diplomatic conference (i.e., treaty negotiation) in 2017. Interestingly, and with some implications for the archives exceptions, even strong broadcasting proponents, such as the EU feel that work is not advanced enough to schedule an intersessional in summer 2016. Related to this, as part of internal balancing there has been the suggestion to hold “Regional Consultations” on archives and libraries to create some grass roots support as well as develop some further case examples to help illustrate the problems. Ultimately, neither the intersessionals nor the regional consultations were approved. Nevertheless, when “regionals” are scheduled, ICA will have to move with warp speed to make sure that archival voices are present, and SAA will need to do the best it can to assist in that effort.

A long standing SCCR tradition is for the committee’s Friday sessions to dissolve into a *Waiting-for-Godot*-esque moment over “conclusions” often until the wee hours of Saturday morning. Fortunately, the current Chair has established his own tradition of not attempting Committee Conclusions and instead issuing a Chair’s Summary, a document which he emphasizes is neither amendable nor debatable. Perhaps another sign of progress that the exceptions might be coming to be accepted as an eventuality was the fact that no one, not even the EU offered any comments on the paragraphs of the Chair’s summary related to libraries and archives. The closest they came was some quibbling about how regional conferences were referenced in the discussion of future work.

Unlike last summer’s session there was no draft committee workplan for submission to this fall’s General Assembly. SCCR30 faltered on that matter, and no committee recommendations went

forward in Fall, 2015. Nothing of the kind was submitted to SCCR32's closing session. Apparently, Chair Moscoso believes that the existing agenda is sufficient to continue discussion of the main topics of broadcasting and exceptions. While, as with the Chair's Summary replacing the Committee conclusions, this approach means no stalemate and being able to end before midnight, it could be just kicking the problem down the road, meaning that there could be total gridlock once SCCR finishes with the review of the current 11 topics.

CLOSING COMMENT

It is difficult to see if we should be optimistic or pessimistic on prospects once the discussion of the 11-topics concludes in November. Reasons for overall optimism after SCCR32 include: the Committee proceeded through three more of the topics; the archives and library community had very organized and articulate interventions; there were four archivists actively involved; the publisher NGOs continued in their slump; and the Chair continues to have a plan to get something out of this entire process. Meanwhile, a further reason for cautious optimism is that a mid-summer, New York City strategy meeting in which SAA and ICA participated has developed a high-level plan of contingencies to maintain momentum after November.

**Archivists' Statement to:
WIPO Standing Committee on Copyright and Related Rights
on Agenda Item SCCR/32/4
*"Draft Study on Copyright Limitations and Exceptions for Educational Activities"***

May 11, 2016

The archives community welcomes the presentation of Professor Daniel Seng's monumental draft study on copyright exceptions for educational activities. Its detailed charts on provisions in eight categories of educational uses in various national laws resonates with the purposes to which archives patrons regularly apply the results of their archival research. Because archivists see such users and uses as fulfilling the ultimate purpose of our work in acquisition and preservation, we are pleased to see that many countries provide exceptions to support such downstream life for what we manage.

Despite being part of the same continuum of creation, preservation, accessibility, and use of historical documentary works, we take this occasion to note an important difference between SCCR's work on the education topic and its work on the archives/library topic. In the case of the archives/library topic, what is at question is a more limited and definable cohort of actors and beneficiaries. Before educators and students can utilize archival material, whether for private study or for published research, archives must identify and acquire it, copy it for preservation, sometimes extract it from electronic systems, create index tools for it, and make study copies of it for users world wide. These are carefully defined activities following an organized set of professional practices.

The many discussions of archives and libraries at SCCR over the past 8 years have focused consideration on a set of topics for exceptions and limitations. We believe it important that the current work to refine the eleven topics on archives and libraries exceptions proceed expeditiously.

William J. Maher (Society of American Archivists) with the concurrence of
Tim Padfield (International Council on Archives),
Susan Corrigall (Archives and Records Association of the UK) and
Victoria Stobo (Scottish Council on Archives).

**Statement of SAA Representative to WIPO
Standing Committee on Copyright and Related Rights
William J. Maher (w-maher@illinois.edu)**

TOPIC SIX: Cross-Border Uses of Archives

As Presented 12 May 2016

The Society of American Archivists, North America's largest professional archival organization, congratulates you on your leadership and thanks the Secretariat for its work in preparing these meetings. SAA's members manage billions of primary source works from across the globe. They care about copyright but are keenly aware that the copyright system fails to recognize the 21st-century needs of our users.

How does it fail them? Whether through wars or natural disasters, the cultural and political documents of one nation often reside thousands of miles away. Internet access can solve this problem, but today's copyright laws make most cross-border delivery of such documents illegal. If you cannot travel internationally, your own country's heritage may be inaccessible. The existing quasi-international legal framework is not working.

This no longer makes sense. As the U.S.'s "Objectives and Principles" state, archives enable citizens to "participate meaningfully in public life." The first principle for archives is that we must make our materials available. In today's world, if materials are not available digitally, they might as well not exist.

The second principle is that most archival materials were never created for commercial purposes despite being valuable cultural and scientific documents. Because of the very nature of such records, there can be no viable collective licensing for the billions of virtually anonymous authors found in today's archives.

The third principle is that archives, by definition, hold rare or unique works available nowhere else. Thus, we must make them globally accessible, usually through digital tools. To do otherwise betrays the public's trust.

These principles put us in copyright jeopardy when it comes to cross-border sharing of archives. For instance, my university holds the archives of a Dutch anthropologist who was the leading 20th-century expert on pre-Columbian Incan society. He also made extensive microfilms of local church records in the Chuschi district of Peru when researching intermarriage between colonizers and the native population. Because many of those churches and their original records were destroyed by later civil wars, his microfilms now may be the only copies existing anywhere. Where would a licensing collective find the rights for these records? Yet, as their custodian, I must be able to ensure that these apparently unique records can reach their rightful constituents half a world away. Their information needs are borderless.

The necessary technological tools have existed for over 25 years, but national copyright laws have not kept pace, and it would be absurd to argue that licensing can fill the gap. Without the kind of cross-border exceptions only an international treaty can provide, we cannot help the millions of people worldwide who need archives for preservation and heritage. Answering user requests and placing out-of-commerce documents on websites must be permissible across borders.

Archivists want to fulfill our mission without being deemed criminals. Copyright was not meant to lock up material never created for the commercial market. Cross-border exceptions are nothing more than common sense. Why should anyone deny this?

**Statement of SAA Representative to WIPO
Standing Committee on Copyright and Related Rights
William J. Maher (w-maher@illinois.edu)**

TOPIC SEVEN: Orphan Works

12 May 2016

“Orphan works.” What an appropriate name for the stuff of everyday life we all create—diaries, business memos, and photos we don’t bother marking with our names, most of it created with no commercial intent. However, these are the very documents that make archives invaluable for research. They are what we must copy and distribute to meet our preservation and access missions. Yet, to follow copyright law, archives must track down the creators just as if they were commercial writers. But how, and at what cost?

Two recent studies show why a copyright exception is needed for archival orphan works. One US university attempted to identify 3,400 authors in the correspondence files of an early 20th-century politician, then determine death dates, then locate descendants of those who died less than 70 years ago, then request permission. After two years and thousands of dollars, most remained untraceable. Only four descendants were found. The archivists crossed their fingers and digitized anyway.

Another US university, working with AIDS-related material from the 1980s through 2005, experienced the same cost-prohibitive searches even though the material was quite recent. In this case, 1,377 persons held the copyright but the works of nearly one-third of them could not be displayed because rightsholders failed to respond to inquiries or could not be identified or located. Few of these documents were of a commercial nature, but reaching this result took 85 percent of the project’s time. Unlike the other university, these archivists’ risk aversion resulted in de facto censoring of materials where a contact could not be found or was unresponsive. Even if an archival item was originally created for the marketplace, it can still become an orphan. For instance, we hold an unpublished photo of a Puerto Rican sports team marching under the US flag at the 1950 Pan American Games, two years after the team had marched under Puerto Rico’s own flag. Despite knowing the Guatemalan photographer’s name and address, we could not trace him—the name was too common and multiple regime changes had altered street names and addresses. Should this clear orphan status prevent us from making the photo available? Archivists are not experts in international copyright law; we should not be expected to make such decisions.

No licensing scheme could equitably solve this problem. If an author is unknowable or untraceable, how can they be represented in a collective, and where would the licensing fees go? It certainly wouldn’t go to the orphan authors because they can’t be found.

The problem is that copyright, like licensing, was conceived with the marketplace in mind, but it fails to adapt for the dilemma of works that were never in commerce or have drifted out of commerce with no trace. For these, finding a copyright holder can be nearly impossible. A one-size-fits-all “diligent search” requirement is unlikely to find rightsholders for archival orphans, but it certainly will create unsustainable costs. Without exceptions, the world loses access to this huge treasure of historically important material.