

TOPIC EIGHT: Limitations on Liability, 17 November 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. Current technology enables us to have global impact, but the risk of litigation holds us back from the digital age.

"Archives" are a mystery to most people. Once people recover from the shock that we are not gnomes trolling around in the dark, they usually ask: "What is your most important document?" We dread this question because everything we have is valuable to someone, somewhere. Although most archives have a few valuable treasures, they are not central to our responsibilities. Rather, archives exist to preserve everyday letters, reports, photos, computer files, etc. They are not locked away as treasures. Instead, they are openly available for research and study.

It is these everyday items, such as soldiers' letters home in wartime, that collide with copyright's monopoly. As professionals, archivists are committed to protecting other people's rights, but we know that strict adherence to copyright undermines the reason we have such collections, i.e., research access. As stated in UNESCO's Declaration on Archives: "Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life." That's why we need an international legal regime to

limit liability for doing what we must to fulfill the mission that society has assigned to us.

Archivists do not seek a free rein, but simply assurance that doing our basic work will not expose us to costly legal fees or penalties, thus exhausting our meager budgets and preventing us from curating today's records for use by tomorrow's citizens. Without exceptions, we have only two unacceptable options: abandon concern for copyright or excessive caution. Both undermine our mission.

We need a safe harbor so that we can perform our work in good faith. The core tool would provide a limit on litigation, freedom from criminal liability, and limiting civil remedies to injunctions. Accounting for rights holders' and archivists' interests, such a tool should: 1) provide a baseline definition of eligible archives; 2) limit the exception to non-commercial activities; and 3) require a basic assessment for the presence of works subject to normal commercial exploitation.

Archivists are at a crossroads. We all worry about copyright, but many archivists are ready to just ignore it, figuring the chance of a lawsuit is slim. It's as if you awoke to find a bat in your bedroom. The chance that you had been bitten while sleeping would be incredibly small, but the consequences of being wrong would be immense-namely rabies and death. A rabies injection would protect against that scenario. Similarly, limitations on liability for archival work would free us from facing risks that block our mission.

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