

SAA Representative to WIPO
Statement on Archival Issues Involved in “Orphan” Copyrighted Works
Standing Committee on Copyright and Related Rights

William J. Maher (w-maher@illinois.edu)

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The issue of copyright and orphan works is more than a legal problem for archives- it is an existential one. Archives document all parts of society, and our purpose is to make our materials available so that the future can learn from the past. Unlike libraries, however, most archives are not based on collections of published works by known authors, but archives focus on unique documents created as part of everyday life by persons who are rarely traceable. And it is this characteristic that poses a major challenge for whether we can fulfill our mission in the current copyright environment.

For instance, just recently, an anonymous donor gave us a small album identified as nothing more than 'Aunt Martha's missionary work in India.' It contains over 150 pre-1920s photographs of rural India showing village and agricultural life, all from the parochial perspective of a white, protestant American, thus providing candid insights into two societies. South Asian specialists who have seen the album have noted the material's rarity, but because of the circumstances of the donation, we have no place names or dates. Crowd-sourcing by digitizing and placing the material on the internet would likely yield the contextual information to make this item a valuable cultural resource. Clearly these are orphan works, but a simple reading of copyright without exceptions would say we cannot do that. Common sense, indeed the archival mandate, on the other hand, would say absolutely yes.

Or take the case of a mid-20th century anthropologist whose papers include his studies of Andean native communities during the Colonial Era in Latin America. There are also unpublished ethnographic and anthropological studies on topics such as cottage weaving in Ecuador, Peruvian mythology and folklore, and the effect of land reform on the native population of Chiapas Mexico, all done by third parties. While those authors' names may be known, most of them are untraceable. Does the law allow us to make copies of these third-party documents to send to an individual in Peru, Ecuador, Mexico, or even Belgium or France? Archivists are not experts in international copyright law; we cannot be expected to make such decisions, but we do know what our mission is.

In fact, a number of recent studies have found that rights clearance procedures meant for published works impose prohibitive burdens on archives to the point that

implementing these procedures far outstrip the costs of digitization and even the monetary value of the works themselves.

Thus, antiquated copyright laws prevent us from making the world's cultural heritage available to users everywhere. We cannot wait forever for official solutions to the problem of orphan works. The need is immediate, and it will only get bigger and more difficult the longer we wait. After all, everything will become archives someday, even, potentially, those tweets you're sending right now about what I am saying. Without expeditious action from SCCR, copyright may well end up being not just a hindrance to the needs of archives, but an irrelevance to the profession.