Agenda Item V.B.3.

Society of American Archivists
Council Meeting
November 8-10, 2015
Chicago, Illinois

Issue Brief: Archivists and the Term of Copyright

(Prepared by the Intellectual Property Working Group and Reviewed by the Committee on Advocacy and Public Policy)

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda[1] (approved by the SAA Council in May 2015): "To make accessible evidence of the diverse and complex elements of the human experience, SAA will:

- Oppose any attempt to restrict further the very limited exceptions in Section 108 of the U.S. Copyright Act and work to update the law to reflect the realities of the digital world in which we live.
- Support legislation that would more appropriately balance copyright owners' interests with the diligence incumbent upon users in cases of "orphan works" (i.e., situations in which the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.
- Support revision of the length of current copyright protection."

The Intellectual Property Working Group prepared this issue brief for Council review and approval. The Committee on Advocacy and Public Policy has reviewed and recommends approval.

RECOMMENDATION

THAT the following issue brief on Archivists and the Term of Copyright be approved:

[1] http://www2.archivists.org/initiatives/saa-public-policy-agenda

SAA Issue Brief:
Archivists and the Term of Copyright

SAA POSITION

SAA supports all efforts to reduce the term of copyright. Further extensions of copyright term do not achieve the desired results.

To mitigate some of the harms caused by overly-long copyright terms, SAA urges the adoption of the following measures:

- Remove the restriction in 108(b) that limits access to digital copies of unpublished works to the premises of the archives or libraries. Authorized users who have agreed to the rules of the repository (including the requirement to respect copyright and privacy when engaging in the general publication of a work) should be able to have remote access to collections in digital form.
- Amend Section 108(h) of the Copyright Act to include unpublished works. This would permit a library or archives to reproduce and distribute both published and unpublished works for purposes of preservation, research or scholarship during the last twenty years of the copyright term if the work is commercially dormant.
- Amend the Copyright Act so that Section 108 applies to pre-1972 sound recordings.
- Amend Section 108(h) to apply to sound recordings in the last 45 years of their copyright term (rather than the last 20 years, as is currently the case with other works) provided that the works are not commercially available or an unused copy cannot be obtained at a reasonable price.

SAA will:

- Closely monitor and participate in U.S. Copyright Office consultations related to possible amendments to copyright term;
- Work with other organizations that are concerned with extension of copyright term;
- Advocate against amendments that extend the term of copyright; and
- Advocate for amendments to the Copyright Act that facilitate making archival material available for research and use.

THE ISSUE

Overlong terms of copyright protection inhibit the growth of the public domain, to the detriment of the public interest. In 1998 the Sonny Bono Copyright Term Extension Act extended the term of copyright by twenty years. On the day on which the law was enacted, published works prior to 1923 were in the public domain. Since then no other published works have entered the public domain. Copyright in works published in 1923 will not expire until 2019. Copyright in unpublished works was extended to life of the author plus 70 years (from 50), or 120 years from the date of creation if the author is not known or it is a corporate work. Now, almost twenty years later, the Society of American Archivists anticipates that corporate publishers and producers will once again mount a campaign to extend the term of copyright. Leaks from the secretive Trans-Pacific Partnership treaty discussions, for example, suggest that terms as long as life plus 100 years have been under consideration by negotiators.[2]

[2] http://www2.archivists.org/statements/saa-opposes-trans-pacific-partnership-agreement-provisions?

Proponents of term extension argue that it presents a greater incentive for authors to create new works. However, studies have produced no credible evidence that term extension results in increased creation (particularly when the authors are already dead). Copyright protection should last long enough to enable creators and publishers to recoup their investment, but not extend into near-unlimited terms. Not only does term extension do nothing to encourage the creation of new works, it also actively hampers the entry of works into the public domain. A robust public domain is an essential feature of the copyright system that provides a rich source of raw material for new creative works.

The holdings of America's archives represent particularly valuable raw materials for the general public, journalists, students, and scholars. Timely entry of such material into the public domain makes it easier to use and share. However, because much of this material was never created for commercial purposes, it is largely unpublished and often it is difficult to ascertain copyright ownership. Archival holdings contain many of these so-called "orphan works" whose copyright owners cannot be identified or located to obtain permission for use. Term extension exacerbates this problem by adding further generations of heirs who may (unknowingly) be copyright owners. Tracking the chain of copyright ownership is time-consuming and often fruitless. The Internet provides exciting opportunities to make archival holdings available to a much wider audience, but faced with the laborious task of obtaining permissions, archivists have selected for online access only those materials in which they own copyright or in which copyright has expired (Dryden, 2008). Overlong copyright terms present barriers that prevent the sharing of the rich cultural treasures in America's archives and disrupt the balance between public and private interests.

SAA supports all efforts to reduce the term of copyright. Copyright law should move intellectual property into the public domain as soon as possible, and not be a mechanism to ensure near-perpetual income from creative effort long since expended. If shorter terms are not realized, Congress can take alternative actions to mitigate some of the harms that accompany long copyright terms. The simplest would be to remove the restriction in 108(b) that limits access to digital copies of unpublished works to the premises of the archives or libraries. Section 108(b) was adopted to increase the availability to researchers of unpublished material using the most advanced distribution technology of the time, microfilm (Hirtle, 2006). Congress recognized that allowing scholars access to copies of unpublished work for research purposes would not affect the potential market for published and edited versions of those works. The same would be true for digital copies of unpublished works made available to registered researchers in a "virtual" reading room.

In addition, SAA urges the amendment of Section 108(h) of the Copyright Act to include all types of works. Currently Section 108(h) allows a library or archives to reproduce and distribute a published work for purposes of preservation, research, or scholarship during the last twenty years of the copyright term if the work is commercially dormant, but the provision explicitly excludes unpublished works. Extending the scope of Section 108(h) to include unpublished works would still require extensive research by archivists to establish when the last twenty years of copyright protection might begin. But this provision would be valuable when more general access to unpublished material (than would be allowed under a modified Section 108[b]) is desired.

For some media routinely found in archives, long copyright protection terms threaten their very survival. The extreme fragility of audiovisual recordings often requires archivists and librarians to intervene to preserve works long before the copyright expires. For these works, SAA endorses the recommendation of the Library of Congress's National Recording Preservation Plan. The plan urges that pre-1972 sound recordings be added to the scope of Section 108 and argues that Section 108(h) should apply to sound recordings in the last 45 years of their copyright term (rather than the last 20 years, as is currently the case with other works), provided that the works are not commercially available or an unused copy cannot be obtained at a reasonable price.

BACKGROUND

The Society of American Archivists has long advocated a term of copyright of the life of the author plus 25 years (Boyd, 1965). Unfortunately the Berne Convention, an international treaty that binds the U.S., mandates a minimum copyright term of life of the author plus 50 years, in most cases. SAA continues to advocate for a shorter term, for the reasons stated above.

The desire of the U.S. to become a signatory to the Berne Convention resulted in a significant change to the term provisions in the U.S. Copyright Act. Starting in 1978, the general term for copyright protection was based on the life of the author rather than a fixed term based on the date of publication. In 1998, that term was extended by 20 years as a result of the Sonny Bono Copyright Term Extension Act (CTEA), sometimes called the "Mickey Mouse Act" because of Disney's heavy lobbying to prevent the imminent expiration of copyright in early Disney works. The constitutionality of the CTEA was challenged in *Eldred v. Ashcroft*. The Constitution requires that copyrights be granted "for limited times." However, in a 7-2 decision, the U.S. Supreme Court found that Congress had broad discretion to choose copyright terms and to retroactively extend them as it saw fit. So long as the terms remained finite, the Court held, they satisfied the "limited times" requirement. But if Congress keeps extending the terms to successively longer periods of time, the copyrights effectively become unlimited.

ADDITIONAL RESOURCES

- Dryden, Jean. "Copyright Issues in the Selection of Archival Material for Internet Access," *Archival Science* 8:2 (June 2008): 123-147.
- Hirtle, Peter. "When Is 1923 Going to Arrive and Other Complications of the U.S. Public Domain," *Searcher*, 2012. http://www.infotoday.com/searcher/sep12/Hirtle--When-Is-1923-Going-to-Arrive-and-Other-Complications-of-the-U.S.-Public-Domain.shtml
- Hirtle, Peter. "Digital Access to Archival Works: Could 108(b) Be the Solution?" Copyright & Fair Use web site, Stanford University Libraries (24 Sept. 2006) http://fairuse.stanford.edu/commentary_and_analysis/2006_08_hirtle.html.
- Library of Congress, National Recording Preservation Plan, CLIR Publication 156, December 2012. http://www.clir.org/pubs/reports/pub156/pub156.pdf
- Boyle, James P. "The Second Enclosure Movement and the Construction of the Public Domain," *Law and Contemporary Problems* 66 (Winter/Spring 2003), 33-74. http://www.law.duke.edu/ournals/66LCPBoyle.

Support Statement: In support of SAA's Public Policy Agenda, the issue brief provides members and other prospective audiences with SAA's considered opinion on the topic of archivists and the term of copyright, in order to support the greatest possible public access to records.

Relation to Strategic Priorities: Addresses Goal 1. (Advocating for Archives and Archivists), Strategy 1.2. (Educate and influence decision makers about the importance of archives and archivists), and Strategy 1.3 (Provide leadership in ensuring the completeness, diversity, and the accessibility of the historical record).

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.