



Internationaler Archivkongress 2004
23.-29. August - Wien - Österreich

Archive, Gedächtnis und Wissen



International Perspectives on Archival Copyright

William J. Maher

David Sutton

Jean Dryden

INTERNATIONAL COPYRIGHT ISSUES FOR ARCHIVISTS

William J. Maher, University of Illinois at Urbana-Champaign

Revised (12 September 2004) from a paper presented at the XV International Congress on Archives, Vienna, Austria

ABSTRACT: Over the past few decades, new information technologies have given all archivists an international reach to connect the memory in archival documents with the public. Unfortunately, parallel trends in national laws and international copyright treaties limit how we can use the knowledge in our archives to contribute to global memory. Recent developments in the World Intellectual Property Organization, European Union, and economic interests in the United States have come together to dictate the laws to which archivists of all nations must adhere. At the same time, the Internet's instantaneous international reach requires archivists to consider how the digital delivery of documents relates to the laws of other nations. This paper examines recent developments in international copyright for archivists and suggests a copyright policy agenda for archivists, both nationally and internationally.

William J. Maher is University Archivist and Professor of Library Administration at the University of Illinois at Urbana-Champaign (United States). He is a past-President and Treasurer of the Society of American Archivists, and he is the author of one book and over 20 articles on archival administration and copyright law.

Twenty-four years ago when the ICA met in London, many of my American archival colleagues had a dream. Witnessing the power of mainframe computers and hearing of the impending arrival of personal computers, we fantasized about how these machines might liberate our archives, so we could be involved in actively connecting our archives to users and potential users—students, scholars, and the general public. While most thought in terms of automating finding aids and indices, a few dared to imagine that new technologies might also allow us to store, retrieve, and deliver the full text of archival documents. The notion that somehow the desktop computers could be linked to a network to enable even small archives to “broadcast” archival documents world-wide was quite frankly beyond imagination. Where was the technology, the infrastructure, and the mass market to implement such a system?

In light of all we have experienced since the World Wide Web burst onto the scene and since the advent of ever cheaper and ever more powerful “personal” computers, it seems clear that ours was a failure of imagination. But, what we also failed to imagine in those years right after a rewriting of copyright law had freed the U.S. from the bounds of pre-World War I technology and international isolation, was that copyright issues would emerge as infinitely greater barriers to the dream of making our records broadly and freely available.

In fact, what has happened is that the whole machinery of copyright law has turned into a sort of Frankenstein's monster. Fragments of country-specific copyright law have been combined, sometimes forcibly, and enforced by various trade treaties and organizations to create something that, instead of facilitating the worldwide dissemination of information, today threatens to control access to the very creative work and scientific progress that copyright is supposed to encourage. Looked at from the perspective of individual citizens of separate countries, copyright, on the international scale seems to have become a monster that is taking on a life of its own.

In the decades since the London ICA meeting, the global information economy has become predominant. Information is more than just a means of social and economic operations—it has become an object of value in and of itself. In fact, one form of information, entertainment, has become such a preponderant part of the consumer economy that measures for its protection have been pushed to the front of the public policy agenda. Even information previously locked in formats that prevented or impeded duplication and communication can now be quickly gathered and disseminated. Thus, economic value now attaches to quite trivial and worthless information because that information can be aggregated, communicated, and associated.¹ Through intellectual property, as Rosemary Coombe notes, culture has become commodified with legal protection regimes that create significant

¹Anne Wells Branscomb, *Who Owns Information: From Privacy to Public Access*. (New York: Basic Books [Harper Collins], 1994): 1, 3.

legal, intellectual, and cultural tensions.²

In the midst of these major changes, archivists still represent only a small and generally not very influential community in the national and global forums where copyright is defined and shaped. Instead, we have traditionally been little more than agents who must implement copyright policies written for the benefit of others, even if those policies mitigate against the core archival mission. Given recent trends, however, it is clear that if we do not begin to identify public policy positions and coalition partners to influence the development of intellectual property law in favor of our users, then our archival mission will suffer at the hands of this Frankenstein's monster.

The skeptical need only look at the record. In just the past few years, we have seen the move from a regime under which copyright focused on the control of copies to one where it is aimed at control over the technology for copying and access. For decades, the Berne Convention has defined how most nations (though not the United States) dealt with copyright, and it wisely allowed for differences in each nation's copyright laws. In 1996, however, Berne was amended—or rather supplemented—by the World Intellectual Property Organization copyright treaty, which has had the overall effect of tightening control and enforcing more restrictive interpretations of exceptions and limitations. WIPO's key provisions called for consenting states to pass national laws that would create legal protections for copy protection technology. To address shortcomings in the legislation of some nations, it reinterpreted the notion of an author's right of distribution to make clear that the authors held the exclusive right to post works in digital form on wired and wireless networks. These are fine themselves, but WIPO also mandated legal protections for anti-circumvention (i.e., copy protection) technology and called for legal remedies against persons who removed or altered "electronic rights management information" (i.e., digital rights management [DRM]).³

Nearly simultaneously, the Uruguay Round of the General Agreement on Tariffs and Trade called for a Trade-Related Aspects of Intellectual Property Rights agreement, or TRIPS in 1994.⁴ On the positive side, TRIPS extended the minimum standards of the Berne Convention to all those World Trade Organization (WTO) members that had not yet signed on to Berne, but it also established a radical new regime. Any nation that now wants to join the WTO, even if only to export traditional manufactured or agricultural goods, must be TRIPS-compliant. That means that if a country does not now have the appropriate legislation to be compliant, then it must create the national legislation and bureaucracies needed to protect patents and copyrights in accordance with TRIPS.

What does this mean for developing countries that may have few marketable copyrighted works of their own—in other words, countries that are net importers of intellectual property? It means they must invest significant amounts of money to create and maintain the infrastructure necessary to protect not their own intellectual property, but that of the net exporters—namely, the highly-developed countries of Europe and North America. The public policy consequences of TRIPS compliance are notable. Take just one example—Mexico—which has had to spend more than \$30 million to upgrade its intellectual property laws to become TRIPS-compliant. Similar examples exist for other countries. Perhaps a rising country like Mexico can locate \$30 million to spend on a legislative initiative, but with the many other public needs facing it, one doubts whether other developing countries would choose on their own to spend their money on intellectual property laws. Given a choice between spending national funds on such pressing problems as the AIDS pandemic or spending it on intellectual property, how does a country justify the cost of this enforced compliance? The answer has serious social, economic, and ethical repercussions. A

²Rosemary J. Coombe, *The Cultural Life of Intellectual Property: Authorship, Appropriation and the Law*. (Durham, N.C.: Duke University Press, 1998) 6 and 31. These political overtones can also be seen in an analysis of the rhetoric of recent copyright debates: Hugh C. Hansen, "International Copyright: An Unorthodox Analysis," 29 *Vanderbilt Journal of Transnational Law* (1996): 579-93.

³WIPO Press Release 106, 20 December 1996 at: www.wipo.int/documents/en/diplconf/distrib/press106.htm and www.wipo.int/documents/en/diplconf/distrib/94dc.htm See also Selena Kim, "The Reinforcement of International Copyright for the Digital Age," 16 *Intellectual Property Journal*, (2002) 93-122.

⁴TRIPS' implementation dates were staggered—1996 for developed nations, 2000 for developing nations, and 2005 for the least developed nations.

further unpleasant fact is that while TRIPS compliance is often described as only a minimum requirement, in reality it has forced many countries, even industrial ones, to reduce the rights of their own citizens in favor of the intellectual property rights of the providers, who, more often than not, are part of huge multinational corporations.⁵

Lest you think Dr. Frankenstein's monster only rears its head in the arcane world of global trade agreements, one should consider the eight efforts of the European Union (EU) since 1982 to require its member states to harmonize their various copyright laws.⁶ The EU's 2001 Copyright Directive seeks, among other things, to eliminate the fair dealing exemption from library copying if the use is research for a commercial purpose. For at least one country, the United Kingdom, this has created a substantial burden for the management of library copying, adding significantly to the cost of operations and reducing the scope of service.⁷

Perhaps the best example of pressure exerted on nations by outside forces is the effect the EU has had with its move to harmonize the length of copyright term among European countries at life-plus-70 years.⁸ Since the enforcement of this extension in 1993, the guideline has had a cascading effect not only in Europe, but also in the United States and elsewhere. In the U.S., 1997/98 proponents of the longer term specifically based a significant part of their argument on the simple fact that the E.U. had already lengthened its term. This, for them, trumped the fact that Article I, Section 8 of the U.S. Constitution explicitly states limits on the grant of Congressional authority to create copyright monopolies. The term extension momentum has subsequently threatened Canada and succeeded in Australia, where the term was extended through a February 2004 trade deal with the U.S.⁹

Another example of an EU directive with worldwide implications is the one dealing with database protection. In 1996, the European Commission mandated that its members create an intellectual property right in the content of databases. Because U.S. law, especially after the 1991 Supreme Court ruling in *Feist v. Rural Telephone*, does not accept the notion that facts or data per se can be copyrighted, EU members were to deny American firms database protection within the EU unless the United States followed suit. Thanks to strong resistance from librarians, scientists, and other interested parties, no such database bill has yet passed the U.S. Congress, but this is

⁵For information on costs: J. Michael Finger, "The WTO's Special Burden on Less Developed Countries," 19 *Cato Journal* (2000): 427 and 430. "The Right to Good Ideas," 359 *Economist* (23 June 2001): 21. Hannah E. Kettler and Chris Collins, "Balancing Health Needs and Drug Research Incentives," *Cooperation South* (2002): 10-36.

For examples of other countries see: "Pakistan: Intellectual Property Protection: Review of New Patent Law and Current Trademark Rules," 23(12) *Middle East Executive Reports* (December 2000); "Oman: Comprehensive Reform, Extension of Intellectual Property Legislation," 23(10) *Middle East Executive Reports* (October 2000); and "Lebanon's Copyright Law Paving the Way to Global Integration," 22(6) *Middle East Executive Reports* (June 1999).

⁶Julian Rodriguez Pardo, "Highlights of the Origins of the European Union Law on Copyright," 23 *European Intellectual Property Review* (2001): 238-43. The eight EU directives are: topographies of semiconductor (before 1988); computer programs (1991) 91/250/EEC; rental rights, lending rights and main neighboring rights (1992) 92/100/EEC; satellite broadcasting and cable retransmission (1993) 93/83/EEC; duration of protection (1993) 93/98/EEC; legal protection of databases (1996) 96/9/EEC; resale rights of artists (2001) 2001/84/EC; and EUCD-harmonization of copyright and related rights in the information society 2001/29/EC. See: Markus Schneider, "Legal Aspects of Digital Rights Management in Europe," 74 *CTI Working Papers*, Center for Tele-Information, <http://www.cti.dtu.dk/publications/workingpapers/ctiwp74.pdf> (citation verified 28 June 2004).

⁷Sandy Norman, "From Harmony to Discord? Implications of the EU Directive on Copyright," 3:1 *Legal Information Management* (Spring 2003):25-28; and Graham Coult, "Implementation in the UK of EU Directive 29/2001 on Copyright," 3:1 *Legal Information Management* (Spring 2003):215-24.

⁸Julian Rodriguez Pardo, "Highlights of the Origins of the European Union Law on Copyright," 238-43.

⁹"Libraries Caught in Copyright Changes," *The Age* [Melbourne], 11 February 2004, p. 5. "Fury at FTA Copyright Extension," *Australian Financial Review*, 11 May 2004.

certainly not the final word, for various commercial interests continue to pursue this matter vigorously.¹⁰

This, then is a quick view of the Frankenstein's monster that copyright law has become. Whether it be an underdeveloped Third World nation or a wealthy industrialized country, all states now find themselves confronting an information environment not quite of their own making yet enforced by their own legislation. In this new world, it seems to be the content providers, not the nations themselves, who are seeking unilateral or multilateral means to expand their control, and most nations seem powerless to stop it.

Not that this has happened overnight—far from it. It has actually been a gradual, decades-long change from the reasonably attainable copyright thresholds as outlined by the Berne Convention to the current WIPO and TRIPS era of copyright harmonization, which seeks to enforce a much higher standard of control. It is this new set of controls designed for the producer, with little regard for the consumer, except as a possible infringer, that characterizes the past ten years of copyright developments. Indeed, the language of harmonization has actually been more of an excuse for net exporters of intellectual property, such as the United States and Europe, to replicate the commercial protections of their own laws in other countries.¹¹

Two key practical consequences flow from this move away from copyright as a balancing mechanism between users and producers towards copyright as a means to provide protection of economic interests. First, there is less flexibility or possibility for national development to reflect local cultural and economic conditions. Second, each nation, regardless of size, has only one vote when it comes to setting international laws, and the system of advocacy and policy-making provides an even stronger voice for the large players, especially the media content providers and their client states. Even worse, within the WTO, agreements are made not through voting but through negotiations, often behind closed doors and with no accountability. The result is an inherently undemocratic process creating rules that are then promulgated across the globe.¹²

So, this is the brave new world that archives and archivists find themselves in today. It constitutes a major challenge to our profession whose purpose is to be the purveyors of recorded knowledge, whose core mission is to ensure that the knowledge created and accumulated by past generations be made available to present researchers so they may construct a new body of knowledge. Our ultimate goal, of course, is for that new knowledge to be available for all of society to use to build a better future for the world at large. We accomplish this through the traditional archival functions of appraisal, arrangement, description, preservation and user access, all aimed at making accessible an authentic record of the government, institutions, organizations, and peoples of our world.¹³

We believe that our work must result in an ultimate utility, which can only happen if the contents of our archives and manuscript repositories are copied, quoted, published, performed, broadcast, and otherwise disseminated, whether in hard copy or via the Internet. Without the ultimate possibility of such distribution, the valuable storehouses of knowledge we manage will become rather like Stradivarius violins being hermetically sealed in museum cases, and we do not want to see that heritage silenced. In other words, we need to be able to support research work that disseminates historical information using the latest information technology, and even engaging in such dissemination ourselves whenever possible.

If a core purpose of archival work is to promote the use and dissemination of information in our custody,

¹⁰Stephen M. Maurer, P. Brent Hugenholtz, Harlan J. Onsrud, "Europe's Database Experiment," 294 *Science* (October 2001): 789-90.

¹¹And some would argue that there has not been very effective harmonization and simplification: Sandy Norman, "From Harmony to Discord?" p. 26. Graeme B. Dinwoodie, "The Integration of International and Domestic Intellectual Property Law Making," 23 *Columbia VLA J. L. & Arts* (2000) 309-12. Matt Jackson, "Harmony or Discord? The Pressure Toward Conformity in International Copyright," 13 *IDEA The Journal of Law and Technology* (2003): 611, 640-41.

¹²Peter M. Gerhart, "Why Lawmaking for Global Intellectual Property is Unbalanced," 22 *European Intellectual Property Law Review* (2000) 309-313.

¹³William J. Maher, "Lost in a Disneyfied World: Archivists and Society in Late Twentieth Century America," *American Archivist* 61 (1998) 259-65.

we are faced with a fundamental barrier when we examine the nature and operation of copyright law in today's technologically driven world. Because copyright operates by providing authors with long-term, post-mortem exclusive rights over the use of the expression within their works, archivists who want to take copyright seriously are faced with a dilemma—how can they promote the dissemination and use of archival materials that include copyrighted expression without trampling on the rights and interests of the authors?

Perhaps looking at the roots of copyright will help us answer that question. Although one can trace aspects of copyright back to ancient Egypt, China, or Renaissance Italy, it is essentially a creature of the intersection of printing technology, the Industrial Revolution, and the development of bourgeois culture of the nineteenth century. It is largely a western and European creation, but because of the sheer volume of copyrighted works emanating from the United States, the interests of American rights holders have taken on a very influential role in the formation of recent copyright law.¹⁴

Such was not always the case, however. After it won its independence from England in the late 18th century, the new American republic needed to foster the local development of industries, literature, and education. One of the ways it went about doing that was to use the 1787 Constitution to authorize Congress to grant exclusive or monopolistic rights to American creators as part of a formula to generate new works and inventions beneficial to society—a matter of positive social law. This protection, however, did not cover works published abroad, and so, over the course of the nineteenth century, U.S. publishers reprinted thousands of unauthorized editions of foreign works and offered them for sale at prices significantly below the European market. The extent of this so-called “piracy” was so great that in 1837, several prominent British authors petitioned the U.S. Congress to extend U.S. copyright protection to foreign authors. Congress ignored their pleas. This isolationist attitude still prevailed a half century later when the United States refused to sign the 1886 Berne Convention.¹⁵ It continued as a net importer of literary and scientific creations with a utilitarian view of copyright, which in effect meant copyright only upon publication, not upon creation. This did not change until the 1976 overhaul of the U.S. Copyright Act, which brought the United States closer to the universalist-natural rights side of the issue. In other words, in terms of copyright the first 200 years of the United States were those of international isolation at best, and piracy at worst, but always with a strong focus on disseminating information as widely as possible.¹⁶

Meanwhile, copyright laws had emerged in 18th century in France, and then on the 1793 French model in other countries such as Prussia (1870), Austria (1895), and Japan (1899), and other civil law countries that grounded copyright in a natural law concept that conferred on natural authors an inalienable property right in their works upon creation.¹⁷ With the ratification by ten European countries of the Berne Convention in 1886, and especially with the various amendments over the next ninety years, this natural-law concept spread. Thanks to the Convention's set of minimum supranational norms, signers of the convention obtained a guaranteed minimum of international uniformity and predictability. In this way, Berne created a framework by which each member country could secure protection for its own authors in other member states while still maintaining most of their own laws and customs

¹⁴The factors contributing to greater or lesser protection or “respect” for intellectual property among nations are more complex than simple economic or development status. See: Donald B. Marron and David G. Steel, “Which Countries Protect Intellectual Property? The Case of Software Piracy,” 38 *Economic Inquiry* (2000): 159-74.

¹⁵Todd M. Rowe, “Global Technology Protection: Moving Past the Treaty,” 4 *Marquette Intellectual Property Law Review* (2000): 111.

¹⁶Edward Samuels, *The Illustrated History of Copyright*, (New York: Thomas Dunne Books, 2000): 231-32.

¹⁷For a good review of the universalist/natural rights vs. objectivist/utilitarian philosophical underpinnings of copyright in Europe in the late 18th century, see Carla Hess, “The Rise of Intellectual Property 700 BC-AD 2000,” 131 *Daedalus* (2002) 26-45, especially, 34-39. For a commentary on the notion of the *droit moral* not as a natural/universalist deduction, but as a practical historical artifact, see David Saunders, *Authorship and Copyright* (London: Routledge, 1992) as discussed in Matt Jackson, “Harmony or Discord? The Pressure Toward Conformity in International Copyright,” 610-16.

regarding copyright.¹⁸

While U.S. law has come closer to the universalist-natural rights side of the theory of copyright, the theoretical tensions between the U.S. constitutional grounding for copyright and the principles of Berne have never been fully resolved. Regardless, with the advent of the Internet and its enabling of wholesale creation and mass distribution of works, for the U.S. the real implications of the differences between the natural law and societal justification for copyright have only just become apparent. In the digital age, the delivery of works can occur without a formal process or structure. Because copyright inheres automatically on creation, the public is left without a mechanism for effective tracking ownership of works so that the societal benefits of the exclusive rights of copyright can be managed in the market place.

Further, recent technology has thrown a monkey-wrench into what had been a fairly workable set of guidelines. In particular, the wide availability of low-cost digital computers, combined with a universally accessible international network that allows them to communicate, has resulted in three major trends that today shape both copyright and archival work. First, the new technology enables broad access to high-quality, low-cost, and nearly limitless copying of all kinds of works for both infringing and non-infringing purposes. Second, the new technologies enable us to overcome one of the defining conditions of archives—the use of the unique documents we hold is no longer limited to only those who can travel and examine them in one place at one time. These two trends are both very exciting. The third trend, however, is more troubling. The new technology creates a means to control and monitor copying through so-called digital rights management devices, meaning that an individual's ability to read or listen, and to do so in private, can be abridged rather easily. Taken together, these three trends have collided. Commercial content owners now are attempting to limit financial losses caused by wholesale copying of their products. Private citizens and non-profit institutions, on the other hand, seek to use the technology for greater reach and power.

Enter now yet another complicating factor—globalization. Rather than copyright remaining a matter of how nations regulate the literary property of their authors, or a matter of striking a balance between a limited monopoly on works and the public's ability to use works for further development, the international trade agreements have pulled copyright directly into the maelstrom of international trade. Now copyright works are on a par with any other commodity traded across international borders, like steel or corn, because copyright laws constitute a principal means by which content providers, such as authors, publishers, producers, and performers, can enforce their control over the market for copies of their works. The result, as we have seen, has been to reduce or eliminate local or national flexibility in shaping copyright law to a country's own needs.

When a handful of creative works, such as music, movies, software, and video games, become central to the economies of several highly developed nations, should we be surprised to find trade agreements having elements added to them that bring the control of intellectual property within the mandate of international trade treaties? While many have lamented this trend, the *realpolitik* is that the developed nations have the inherent advantage of being able to set the rules, which end up benefitting the exporters of intellectual property, who are—you guessed it—the developed nations.¹⁹ And yet, as unpleasant as some of these trade-driven outcomes have been, one must acknowledge that some new rules are needed. After all, information flowing along the Internet cannot be stopped at the customs desks of every nation's border. How then do we promote access but ensure that creators receive the compensation that is their due?²⁰

The unfortunate effect of all these trends is a much more complicated world for the archivist. We in the United States, for example, are hamstrung by our government's rigid implementation of the 1996 WIPO agreements. Article 10 of that agreement specifically allowed for appropriate national exceptions, but when our Congress went to

¹⁸Jane C. Ginsburg, "International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code," 47 *Journal of the Copyright Society of the U.S.A.* (2000) 265-89.

¹⁹Neil Cantwell, "More Bodies Buried in the Desert," 7 *Japan Observer* (Summer, 2002); and Arvind Panagariya, "Developing Countries at Doha: A Political Economy Analysis," 25 *World Economy* (2002): 1205-33.

²⁰Matt Jackson, "Harmony or Discord? The Pressure Toward Conformity in International Copyright," 627.

implement the WIPO anti-circumvention measures, it did not create the flexible base approved by WIPO. Instead, thanks to lobbying pressure from the likes of the motion picture and recording industries, it came up with something more severe—the 1998 Digital Millennium Copyright Act (DMCA). Congress justified it by saying it was mandated by the WIPO treaty.²¹ Would the home countries of those non-U.S. programmers who have been caught in the DMCA’s dragnet agree that WIPO harmonized has led to a workable, harmonized law that is consistent with technological innovation?. Probably not.²²

In fact, the DMCA does not just limit the circumvention of a technological device with the purpose or effect of infringing copyright—it also prohibits circumvention *per se* without allowing the usual exemptions otherwise supported in U.S. law, such as to read an underlying public domain work.²³ By contrast, Japan in 1999 and Australia in 2001 took a path more closely tuned to the minimum required by WIPO. Japan did not extend protection to technological measures that prevent a user from gaining access to a work, and in Australia, fair-dealing exemptions were extended into the electronic environment.²⁴ In the end, however, one suspects that the relative dominance of the United States in the world of intellectual property will likely mean that the tough standards enacted by the United States may become the *de facto*, if not *de jure*, mandate for the rest of the world. In actuality, though, it does not really matter which country is the initiator of the push to tighten controls, for it is reasonable to assume that their strongest advocates are the content industries. This unfortunate fact of life is rather unlikely to be counterbalanced by opposing pressure from users of copyrighted materials, whose loss is incremental and rarely tangible during the legislative process.

This fact of life illustrates archivists’ difficult position. We are the ones who hold the records, manuscripts, photographs, sound-recordings, and audio-visual works that are supposed to provide some ultimate utility to society. The scope of our work is such that we are more tied to user access than to creators’ control, yet all the trends seem to be going in the direction of establishing tighter and tighter control over the means of examining and copying works. Thus, what are we to do about what seems to be an inexorable slide towards using copyright as a means to control not just copying, but access itself?

Clearly, for most of us, the formulation and adoption of international treaties is quite removed from the scope of daily archival work, but as this review of the ten years since the Uruguay Round has shown, our daily work is intimately affected by their provisions. Therefore, our first responsibility is to familiarize ourselves with the copyright law in our own countries. Further, through the offices of the ICA, we can monitor the formulation of an archival perspective, if not an actual policy position, on copyright in upcoming international treaties. The article by Gary Peterson in *Comma* is particularly worthwhile in this regard.²⁵ Further, the ICA’s Committee on Archival Legal Matters (CLM) continues to monitor the rapidly changing laws and treaties regarding copyright, as well as

²¹Of course this was largely a ruse, since the US Trade Representative went to the 1996 WIPO meeting with an industry agenda and spent considerable effort at WIPO to have that agenda enacted. Pamela Samuelson, “The Digital Agenda of the World Intellectual Property Organization: The U.S. Digital Agenda at WIPO,” 37 *Virginia Journal of International Law*, (1997) 369-439. Jessica Litman, *Digital Copyright* (Amherst, New York: Prometheus Books, 2001) 122-150.

²²Mia K. Garlick, “Locking up the Bridge on the Digital Divide - a Consideration of the Global Impact of the U.S. Anti-circumvention Measures for the Participation of Developing Countries in the Digital Economy” 20 *Santa Clara Computer and High Technology Law Journal* (2004): 941-90.

²³Kim, “The Reinforcement of International Copyright,” 106 and Jacqueline Lipton, “Copyright in the Digital Age: A Comparative Survey,” 27 *Rutgers Computer & Technology Law Journal* (2001): 333-69, at 369-61.

²⁴Selena Kim, “The Reinforcement of International Copyright,” 103-05, 110-12, and 121-22. See also: Simon Fitzpatrick, “Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty,” 22 *European Intellectual Property Review* (2000): 214-28 at 222-25.

²⁵Gary M. Peterson, “New Technology and Copyright: the Impact on the Archives,” *Comma: International Journal of Archives*, (2001)69-76.

provide training on copyright for archivists. In addition, we should reach out to UNESCO groups involved in copyright as an aspect of global cultural diversity.

In regard to their own countries, it is imperative that all archivists familiarize themselves with their country's own national copyright law. In particular, they should inform themselves of the scope of works covered, the extent of exclusive rights, and the special exemptions provided. Archivists need to have a firm grasp of their country's notion of fair use or fair dealing that allows limited use or quotation from copyrighted works in the creation of new works. Equally important are any archival and library exemptions for preservation or for copying materials for use by off-site researchers.

Secondly, archivists should urge their national archival organizations to provide continuing education to broaden the circle of archivists who are knowledgeable about copyright so that they can respond quickly to public policy or legislative developments. One device that the Society of American Archivists has found particularly effective has been to write policy positions on key copyright issues well in advance of legislative proposals.²⁶ This enables the SAA to take action quickly when new bills appear in Congress or when cases appear in the courts.

Third, both as individuals and as members of their archival associations, archivists must look outside their field for potential allies on copyright issues. In my country, the most obvious coalition partners have been librarians and library associations, but we have also seen our interests coincide with computer industry groups and companies, users of cable and satellite television services, general consumer groups, and free speech advocates. Only if we join archival concerns with those of external and larger groups can we obtain the breadth of scope necessary to gain attention for our concerns on behalf of the users of archival material.

As to specific responses to legislative or regulatory proposals, archivists should exhibit informed skepticism of any claim that is advanced by vested-interest parties in legislatures or commissions, especially if they assert that additional controls on copyright are required by international treaties. As we have seen in the United States with the DMCA, it contained notably stricter limits on users and consumers than required by the WIPO treaty the bill claimed to implement. Of course, it did not help that Congressional attention was, at the time, focused on the sideshow of a presidential sex scandal, and that proponents were willing to play the trade and economic welfare card to obtain entirely new rights and controls.

Finally, insofar as much of what has affected national copyright in the past decade has come through international treaties, it is essential that both individual archivists and national archival associations work with ICA leadership to determine how the ICA, as the international voice of the world's archivists, can take a more active role in those international organizations or meetings where copyright reforms are conceived, vetted, and approved. Securing a seat at the international copyright table may at first seem a fanciful idea, but unless the archival perspective gets considered, whether directly or through coalition partners, archivists and their users throughout the world will never be able to move beyond being victims of successive waves of rights regimes crafted to protect the vested interests of media content providers. We will end up with a system that guarantees the profitability of Mickey Mouse in perpetuity but which undermines public and scholarly use of the archives and memory of society.

Despite the lack of success in obtaining the attention of E.U. national archivists in regard to the 2001 harmonization directive, we should look to the ICA's Committee on Archival Legal Matters to take the first steps. The Committee should identify the core issues and principles on which international archivists can agree and on which we might want to collectively or individually assert a policy voice, whether these issues be for international or multinational action. A particularly appropriate agenda item for the ICA would be to advocate for the establishment of a fair-dealing/fair-use exemption focused on non-commercial, scholarly and public use of material from the "orphaned works" that constitute such a large portion of international archives. The ICA is not a body accustomed to taking on a broad range of policy initiatives, but with the help of the Committee, perhaps it can adapt so that it can tackle these fundamental issues so important to our ability to fulfill our archival missions.

The copyright issues facing archivists, their users, and consumers at large are daunting, but they are critically important to society at large and to our ability to provide memory and support accountability. We must

²⁶"Copyright, Archival Institutions, and the Digital Environment: The Society of American Archivists Position on Proposals to Amend the 1976 Copyright Act," *Archival Outlook*, (September/October, 1997): 6-7.

not lose sight of the rather worrisome trends in national and international law. These issues are not solely matters of texts and authors—they affect basic political rights of citizens as a whole.²⁷ For it is not too farfetched to say that we may be entering a world where control over access, not just copying, will be placed in the hands of commercial content providers, where the access control mechanisms themselves, and not copyright, will come to regulate the use of creative works.²⁸

Most likely, we will see these efforts to establish greater control over intellectual property couched in the language of trade, economic development, and harmonization of law through treaties—all rhetorical flourishes that mask the underlying vested economic interests, with little concern for facilitating and promoting learning, memory, or archives. As archivists, our position is quite different. Our position is as the ally of the unvested interests of users worldwide and of society as a whole. As such, we must be prepared to take an activist role or find ourselves lurching to and fro to avoid the ravages of Dr. Frankenstein's monster.

²⁷Carla Hess, "The Rise of Intellectual Property 700 BC-AD 2000," 45.

²⁸Thomas Heide, "Copyright in the E. U. And the United States: What Access Right," 23 *European Intellectual Property Review* (2001) 469-77, at 476.