

### SHRAB MEETING HELD IN HELENA

The first of the Montana SHRAB's biannual meetings was held in Helena on June 10, 2002, at 1:00 pm. All Board members were present except Judy Ellinghausen, who could not make it due to the late spring snowstorm.

The first item discussed was Board membership. Kathy Mosdal-O'Brien resigned her position on the Board. Replacements were discussed. Membership for all members must be renewed in September of this year. As all members indicated their desire to remain on the Board, all will be reappointed, with the exception of Mosdal-O'Brien.

The next item for discussion was the effort to build alliances with other organizations interested in the preservation of Montana's historic records. State Coordinator, Molly Miller, spoke with the board of the Montana State Genealogical Society. The Board discussed other groups to contact and ways in which to build alliances. Suggestions were made to contact the Western Heritage Center, the Montana Library Association, and the Montana Preservation Alliance.

The Board then discussed updating and printing additional copies of the "Self-Assessment

Manual" developed for the Traveling Archivist grant. Jodi Allison-Bunnell will look at writing a Preservation Assistance Grant to fund the publication.

The next item discussed was the annual workshop sponsored by the SHRAB in conjunction with the annual Montana History Conference. Ideas for this year's and future conferences were discussed. Molly Miller will look into the possibility of scheduling the workshop for this year.

Next, the Board discussed ideas for future grants to the National Historical Publications and Records Commission. Ideas were discussed for rewriting the Traveling Archivist grant to focus on specific types of records creators, such as local government offices, community colleges, or tribal archives. A suggestion was made that perhaps local government offices would be the most successful. Anne Foster and Molly Miller will explore the possibilities and report back to the committee. The grant would not be submitted until 2003.

The Board adjourned at 3:30 pm, after setting the next meeting date for October 24, 2002, in conjunction with the annual Montana History Conference, which will be held in Havre.

### JOINT MIROFILMING PROJECT PROGRESSING

The joint microfilming project between the Genealogical Society of Utah and the Montana Historical Society has entered its tenth month. The volunteer microfilmmers have completed filming of selected records of the Clerk and Recorder and Clerk of District Court for Lewis and Clark County and various records of the MHS Archives. They are currently working at Broadwater County. This project will microfilm, with a mind to both preservation and access, records of the Clerk of District Court and Clerk and Recorder in each county in the state. The project is anticipated to take approximately five years to complete. Once the project is complete, it will be one of the largest

collections of local government records in one repository in the state. The MHS anticipates that the microfilm will allow the public increased access to local government records and the ability to use them without endangering their preservation. The Genealogical Society of Utah is donating a master copy of the microfilm to the MHS. For questions on the project or for more information, please contact the MHS Archives at 444-7482 or [archives@state.mt.us](mailto:archives@state.mt.us).

#### CONTENTS:

|                |   |
|----------------|---|
| Copyright      | 2 |
| Events         | 6 |
| Resignation    | 5 |
| NHPRC          | 5 |
| COSHRC Meeting | 5 |

# COPYRIGHT: THE ARCHIVIST AND THE LAW

*Compiled by Becca Kohl, Photograph Archivist*

*Copyright: The Archivist and the Law*, an SAA workshop conducted by William Maher, University Archivist at the University of Illinois-UC campus, was recently attended by northwest-area archivists and records managers. Maher's reputation for explaining the law, and clarifying its ramifications for the archivist, drew 20 participants; all eager to provide access, all aware of the complexity of copyright principles. Maher makes it very clear that he is not a lawyer and is not offering legal advice (though three of the participants are attorneys!) Still, Maher assures us that we should familiarize ourselves with copyright law and recognize when it is necessary to consult with legal counsel for specific cases.

The American Library Association–Society of American Archivists Joint Statement on Access reads, "Whenever possible a repository should inform a researcher about known copyrighted material, the owner or owners of the copyrights, and the researcher's obligations with regard to such material." And, adds Peter Hirtle, SAA Council member and copyright guide, in order to be able to meet this obligation, it is important that archivists are conversant in copyright law. We need to know that violation of copyright may result in financial or criminal penalties and we must understand those risks to protect our repositories and ourselves.

Though the following information should not be construed as legal advice, Maher and Hirtle offer some guidelines to ensure that providing access to material in your collections is done within the legal and moral context suggested by the copyright law of the United States (Title 17, U.S. Code.)

In the past, most reproductions in archives were made at the request of and for researchers. Today, however, many archives are interested in publishing archival materials directly on the Web. In effect, archives have themselves become users of materials and must meet the same obligation to satisfy copyright regulations that formerly were the responsibility of researchers.

Prior to 1976, copyright in unpublished materials was governed by common, not federal, law, and the term of copyright was perpetual. For most unpublished works, the only sure way to enter the public domain was to be published. With

publication, federal statutory copyright protection began and would eventually expire. The passage of the Copyright Act of 1976, which became effective in 1978, ended perpetual common-law copyrights and replaced them with federal statutory copyrights.

Why is the copyright status of unpublished works important? The law reserves to the copyright owner certain rights, including the right to reproduce, distribute, or prepare derivatives of the work. By providing to authors a limited monopoly over the use of their works, the copyright law seeks to encourage creativity. Federal law provides for stiff penalties for infringement of the rights reserved to the copyright owner. At the same time, copyright law recognizes that the public has an interest in using, learning from, and building on the work of others, and so provides several limitations on the rights of copyright owners. These include provisions for limited copying by libraries and archives, and for "fair use" of copyrighted material. [For more information, see article on fair use on page 3]

For archivists and researchers, the biggest challenge has been to identify the copyright owner of a work in the archives. Who among the many descendants of Abraham Lincoln, for example, have a share in the copyrights of the President? For the myriad of lesser-known figures, how could archivists ever determine who actually owned the rights in the materials? The bulk of the records in archives are "orphan" works. Their copyright is owned by someone, but identifying that someone is an almost impossible task. The Sonny Bono Copyright Term Extension Act of 1998 changed the terms of most copyrights to the life of the author plus 70 years. Specifically, the unpublished personal works of authors who died before 1933 will enter the public domain on January 1, 2003.

A different set of rules applies to published works. The date when published works enter the public domain is complicated, and depends on when the work was created, whether it was published with notice, and other factors. (See chart on page 5.) All that can be said with certainty is that works published before 1923 are in the public domain.

*(cont. on p.3)*

## COPYRIGHT (cont.)

Slightly different copyright treatment is given to anonymous and pseudonymous works and “Works made for Hire.” These are protected for 95 years from date of publication or, if unpublished, 120 years from date of creation, whichever expires first. Unpublished works created before 1883 will move to the public domain on January 1, 2003.

While we can be confident that some material will enter the public domain on January 1, 2003, for material that remains under copyright protection alternative strategies must be found in order to make it as freely available as possible. Archivists can still rely on the exemptions found in Sections 108 (“Reproduction by Libraries and Archives”) and 107 (“Fair Use”) of the Copyright Law in order to make copies of documents for patrons and possibly to make documents available electronically. Archivists should, in conjunction with legal counsel at their own institutions, develop policies that will ensure that the full right of fair use is permitted. We should as well document as much as possible the copyright status of the materials in our collections. While most unpublished materials are copyrighted, works of the federal government are not, and hence are in the public domain. Furthermore, photographs and documents that have been published under the authority of the copyright owner but without proper notice may have entered the public domain.

Just as the copyright law strives to strike a balance between the interests of copyright owners and the public, so too must archivists strive to strike a balance in our approach to copyright. We have a duty to avoid copyright infringement and liabilities, both out of respect for authors and to protect our institutions. At the same time, we have a duty to make our collections as useful as possible. All archivists should seek to develop policies that optimize the potential for use while respecting the rights of copyright owners.

For copyright question consult your legal counsel. For a bibliography on copyright or questions about this articles, please contact Becca Kohl, Photograph Archivist at the Montana Historical Society, at [bkohl@state.mt.us](mailto:bkohl@state.mt.us).

## FAIR USE & COPYRIGHT

Fair Use is a flexible doctrine to be tested and adapted for changing circumstances. The law provides no clear and direct answers about the scope of fair use and all of us must evaluate four factors to reach creative and responsible conclusions about the lawfulness of our activities. The factors to consider are: **purpose, nature, amount, and effect on the market.**

Educational use alone is not enough to constitute fair use; absence of financial gain is not enough to constitute fair use.

Speaking of fair use, the material used in these articles is from Peter B. Hirtle’s article in *Archival Outlook*, January/February 1999. “Recent Changes to the Copyright Law: Copyright Term Extension and from the SAA workshop *Copyright: The Archivist and the Law* by William J. Maher, ©2002. For further discussion on fair use, contact your legal counsel. There are also several excellent web sites available if you search for “fair use.”

### THE FAIR-USE STATUTE

#### Section 107 of the Copyright Act of 1976.

#### Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.

## CORNELL INSTITUTE FOR DIGITAL COLLECTIONS

When Works Pass Into the Public Domain in the United States: Copyright Term for Archivist<sup>1</sup>

Published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," *Archival Outlook*, Jan/Feb 1999.

### UNPUBLISHED WORKS

| <i>Type of Work</i>  | <i>Copyright Term</i>   | <i>What will become public domain on 1 January 2003</i>                              |
|--|---|--|
| Unpublished works  | Life of the author + 70 years   | Works from authors who died before 1933.   |
| Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship) | 120 years from date of creation   | Works created before 1883.   |
| Unpublished works created before 1978 that are published before 1 January 2003               | Life of the author + 70 years or 31 December 2047, whichever is greater | Nothing. The soonest the publications can enter the public domain is 1 January 2048. |
| Unpublished works created before 1978 that are published after 31 December 2002              | Life of the author + 70 years   | Works of authors who died before 1933.   |
| Unpublished works when the death date of the author is not known <sup>2</sup>                | 120 years from date of creation <sup>3</sup>                            | Works created before 1883. <sup>3</sup>  |

### PUBLISHED WORKS

| <i>Time of Publication in the U.S.</i> | <i>Conditions</i>  | <i>Public Domain Status</i>  |
|--|--|--|
| Before 1923                            | None   | In public domain   |
| Between 1923 and 1978                  | Published without a copyright notice                             | In public domain   |
| Between 1978 and 1 March 1989          | Published without notice, and without subsequent registration    | In public domain   |
| Between 1978 and 1 March 1989          | Published without notice, but with subsequent registration       | 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation |
| Between 1923 and 1963                  | Published with notice but copyright was not renewed <sup>4</sup> | In public domain   |
| Between 1923 and 1963                  | Published with notice and the copyright was renewed <sup>5</sup> | 95 years after publication date  |
| Between 1964 and 1978                  | Published with notice  | 95 years after publication date  |
| After 1 March 1989                     | None   | 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation |

<sup>1</sup> These two charts are based in part on Laura N. Gasaway's chart, "WHEN WORKS PASS INTO THE PUBLIC DOMAIN," at <http://www.unc.edu/~unclng/public-d.htm>, and similar charts found in Marie C. Malaro, *A Legal Primer On Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156.

<sup>2</sup> These works may still be copyrighted, but certification from the Copyright Office is a complete defense to any action for infringement.

<sup>3</sup> Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.

<sup>4</sup> A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For textual material (including books), the figure was even lower: 7%.

<sup>5</sup> A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334.

## WHAT'S THE CONNECTION? NHPRC & THE MONTANA SHRAB

The National Historical Publications and Records Commission (NHPRC), a statutory body affiliated with the National Archives and Records Administration, supports a wide range of activities to preserve, publish, and encourage the use of

*"to ensure understanding of our nation's past by promoting, nationwide, the identification, preservation, and dissemination of essential historical documentation." – NHPRC Mission Statement*

documentary sources relating to the history of the United States. Established by Congress in 1934, the Commission is a 15-member body, chaired by the Archivist of the United States, and composed of representatives of the three branches of the Federal government and of professional associations of archivists, historians, documentary editors, and records administrators. Through its grant program, training programs, research services and special projects, the Commission offers advice and assistance to individuals and non-Federal agencies and institutions committed to the preservation and use of America's documentary resources.

Each year the NHPRC receives an appropriation from Congress from which it makes grants. The Commission meets in November and in May to establish policy and to recommend to the Archivist of the United States grants it believes should be funded. The Commission's administrative staff at the National Archives and Records Administration implements its policies and recommendations, provides assistance and advice to potential applicants, and advises the Commission on proposals.

NHPRC has statutory authority through fiscal year 2005 to receive up to \$10 million in annual appropriations for grants. Broad categories of grant projects that are funded include archival grants, education programs and fellowships, electronic records, publications grants, and state coordinator and boards grants.

State Historical Records Advisory Boards (SHRABs), which are chaired by a coordinator who is the head of the state archival program or agency, provide advice and assistance to prospective applicants for records proposals and advise the Commission on funding. *(continued on p. 4)*

## COSHRC MEETING HELD IN DENVER

The Council of State Historical Records Coordinators (COSHR) held its annual meeting in Denver, Colorado, on July 14, 2002, in conjunction with the National Association of Government Archivists and Records Administrators. COSHR is a professional organization composed of the State Coordinator of every State Historical Records Advisory Board currently in operation.

The Council heard reports from NHPRC regarding the current and future state of funding available for grants to SHRABS as well as individual agencies. New regulations for grants will go into effect on January 1, 2003. Also, NHPRC will try to take into account current budget conditions when considering matching funds for grants.

Reports were also given regarding current COSHR projects. The Web Needs Assessment will be completed by July 30 and a final copy will be forwarded to each state coordinator. The National Forum on Archival Continuing Education report has been completed and will also be provided to each coordinator. Both projects have compiled much needed information regarding the current state of the archival profession.

COSHR then discussed and adopted new by-laws, which incorporate the Council as an independent entity. A new dues structure was implemented to support the Council's financial independence from NHPRC. Members of the new Board, which replaces the Steering Committee, were elected.

Under new business, Council members discussed forming alliances with other granting and professional agencies, such as the Institute for Museum and Library Services and the American Library Association. COSHR staff also reported that there are negotiations currently underway to make the University of Wisconsin—Milwaukee the official repository for the Council's archives.

The next meeting of COSHR will be held in Providence, Rhode Island, in July of 2003. The meeting will be a joint meeting with NAGARA.

**IF YOU HAVE** an article or announcement you would like to include in the next *Montana Archivist*, please contact Molly Miller at 444-7482 or momiller@state.mt.us.

# Montana Archivist

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Records Advisory Board

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## NHPRC & SHRAB (cont.)

In addition, Commission grants fund state planning efforts examining the conditions of records, providing vital information about records holdings and needs throughout the country, and identifying shared challenges and opportunities. States seeking grant support from NHPRC will need to demonstrate a commitment to sustaining an active state board

Any non-federal institution or organization that wishes to apply for grant funds is eligible, provided their project falls under NHPRC's current strategic plan. For more information on these and other available grants, please contact, Molly Miller, Montana's State Coordinator, at (406) 444-7482 or momiller@state.mt.us. Additional information on NHPRC and its grant programs can be found at [www.archives.gov](http://www.archives.gov).

## MOSDEL-O'BRIEN TO RESIGN

After many years of service, Kathy Mosdal-O'Brien, of the University of Montana, Billings, announced her resignation from the Montana SHRAB, effective in June. Mosdal-O'Brien cited increased job pressures and other board appointments as the reason for her resignation. The Board regrets her loss and wishes her the best of luck with her new pursuits. New Board members are currently being considered for appointment.

## MHS LIBRARY & ARCHIVES HOURS

Due to the recent budget cuts and personnel vacancies, the Montana Historical Society Library & Archives has had to reduce the number of hours it is open to the public. New hours are Monday through Friday, 9am to 12pm and 1pm to 5pm, Saturday 9am to 1pm. These hours will be in effect until further notice. The Photograph Archives is open from 1pm to 5pm, Monday through Friday.

## EVENTS IN & AROUND MONTANA

- Aug 19-25: SAA Conference, Birmingham, AL
- Aug 23: ARMA workshop on disaster recovery, Red Lodge
- Sep 5-6: EAD workshop, Seattle, WA
- Sep 16-18: Annual Micrographics Conference, Cheyenne, WY
- Sep 20-21: Montana State Genealogical Society Conference, Sheridan
- Oct 24: SHRAB meeting, Havre
- Oct 24-26: Montana History Conference, Havre (sponsored by the Montana Historical Society)