

LIBRARY COPYRIGHT ALLIANCE

March 25, 2005

Mr. Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building
101 Independence Ave., SE.
Washington, D.C., 20540

Re: Orphan Works Notice of Inquiry

Dear Mr. Sigall:

The Library Copyright Alliance (LCA) is pleased to have the opportunity to respond to the Copyright Office's timely Notice of Inquiry concerning orphan works. The LCA consists of five major library associations – the American Library Association, the Association of Research Libraries, the American Association of Law Libraries, the Special Libraries Association, and the Medical Library Association. These five associations collectively represent over 80,000 individual librarians and thousands of libraries of all kinds throughout the United States. These five associations cooperate in the LCA to address copyright issues that affect libraries and their patrons.

The orphan work problem is one such issue. The inability to locate copyright owners to clear the rights in their works prevents libraries from providing broad public access to the information in their collections, and prevents library patrons from making transformative uses of these works. While orphan works have always existed to some extent, the problem has worsened significantly in recent years because of a convergence of several factors:

- Changes in U.S. copyright law over the past 30 years have extended the copyright term, eliminated copyright formalities, and offered retroactive protection to foreign works previously in the public domain. As a result, the

universe of works currently covered by U.S. copyright law, particularly older works and works by “amateur” authors who operate outside of the commercial copyright industry, has expanded dramatically.

- Digital technology has increased the demand for less commercially valuable works by significantly driving down the cost of dissemination. To fulfill their mission, libraries are keenly interested in digitizing and publicly disseminating works that previously were available only to scholars who could physically visit the library.
- The consolidation of companies in the copyright industry has complicated the rights clearance process. A person seeking permission to use an older work needs to untangle the complicated history of mergers and acquisitions of the original publisher to identify the corporation that now might own the rights to the work. This corporation, however, might not have adequate records concerning all the works to which it holds title. And since the person typically is seeking to use the work for at most nominal compensation, the corporation has no incentive to invest adequate resources in locating the records concerning the work.

LCA SURVEY RESULTS

In response to the Notice of Inquiry, the associations in LCA contacted their members to gather information concerning their experience with the orphan work problem. A sample of the responses is provided below.¹ These responses indicate that the problem exists at large research libraries affiliated with universities as well as local public libraries. Orphan works include published and unpublished works; literary works, photographs, illustrations, television commercials and musical scores; domestic and foreign works. The uses sought to be made include digitization for uploading on the Internet; inclusion of essays in anthologies, photographs in textbooks, graphs in online course materials, and articles in course packs; and the republication of out-of-print books. Because of their inability to locate the copyright owners, libraries and their patrons decide not to make these socially valuable uses.

- The A.R. Mann Library at Cornell University has been involved for ten years in digitizing The Core Historical Literature of Agriculture (CHLA). Approximately 1,000 titles needed to be searched for copyright status.

¹ Several libraries affiliated with LCA members have also submitted their own comments in response to the Notice of Inquiry.

397 monographs selected for the database were found to be still under copyright. The status of these titles is as follows:

- Number of titles for which Cornell received permission to digitize: 98
- Number of titles denied permission to digitize: 47
- Number of titles with unresolved copyright issues: 198

Of these 198 titles:

- No response from publisher/unable to locate author: 75
- Permission from author/no response from publisher: 38
- Author not located/publisher not identified: 13
- Publisher (only) contacted--no response: 35
- Author (only) contacted--no response: 6
- Author does not own/no response from publisher: 2
- Publisher does not own/no response from author: 9
- Publisher does not own/unable to locate author: 15
- No contact with author or publisher: 5

Because assignment of copyright does not require registration, in most cases the Cornell library contacted (or attempted to contact) both authors and publishers. The challenge in contacting authors involved locating the author or estate since most of the titles sought were published before 1950. Cornell used the addresses provided in the copyright renewal but most were out-of-date and the request letters were returned by the Post Office. Cornell then conducted follow-up searches to locate heirs or estates using a large number of biographical resources both print and online.

With regard to locating and contacting publishers, it was first necessary to determine whether the publisher was still in business. For those publishers that were either acquired by or merged with another publisher, Cornell needed to determine if all imprints and subject areas were assigned to the new publishing entity.

Once the correct publisher was determined, contact was made first by email and then by phone or mail if there was no response to the email. The large publishing houses in particular were slow or lacking in response despite indications on their websites that they had subsidiary rights departments to whom to direct inquiries. For some publishers, even after contact had been established, frequent changes in personnel handling requests resulted in the need

for multiple callbacks and messages. In a number of instances, the entire request process had to be reinitiated.

Cornell Center for Labor-Management Relations has 350,000 unpublished photographs, but only 1% of them have any indication of the photographer.

- The University of Georgia attempted to clear rights in visual images for use in online courses. Sixty-four out of the 185 works could be classified as orphan works. For 17 works, the subject matter expert providing the image did not recall its source. 25 of the images were obtained from websites that provide a permission statement, but it was unclear whether the sites actually own the rights to the images. Occasionally these sites were shut down or in litigation when permissions were sought.
- The University of Michigan University Library recently wanted to digitize and make available 274 volumes still under copyright as part of its Preservation Reformatting program. For 263 of these volumes, the author is deceased or presumed dead (the birthdate of the author is more than 100 years ago). Contact information for heirs is extremely difficult to obtain. Additionally, the library was unable to locate contact information for the publishers of 88 of the volumes.
- The Scripps Archives at the University of California, San Diego, contain over 100,000 photographs made by participants on oceanographic voyages. The photographers for most of these images are unidentified. Because of the concern over copyright liability, the UCSD Libraries have uploaded only 4,000 of these images on the Internet.
- The Television News Archive at Vanderbilt University has copies of all the advertising that was part of news broadcasts since 1968. The news networks do not hold copyright to these ads, and many of the ad agencies may no longer exist. The actors and musicians who were part of each ad might hold some rights to their work in the ads, as could the companies whose products were being promoted by the ads. Vanderbilt has concluded that the cost of untangling the copyright issues would never justify the risk to it of disseminating the ads to scholars, even though these ads are rich resources for those studying popular culture.
- The University of Washington Library has initiated a number of digitization projects that have provided Web access to rare and valuable scholarly materials. The material that was digitized was either in the public domain or covered by

permissions obtained by the Library. There have been many potential projects, however, that never reached fruition due to the uncertain copyright status of material.

One project currently under consideration is the digitization of rare ethnomusicology 78rpm records. This project would take approximately 1200 records of indigenous folk music, digitize them, and make them Web accessible. Although the Library can legally make preservation copies in new formats, it would have to ascertain the copyright status to make the content available on the Web. Initial investigations indicate that the determination of the copyright status and ownership will involve a great deal of labor given that most of the record labels went out of business many years ago. This additional cost and workload will almost certainly limit the project to materials clearly in the public domain.

Another project that was severely constrained by copyright issues was the Ethnic and Community Press digital collection. The collection is an electronic compilation of newspapers that documents the history of ethnic and community newspapers published in the United States. The collection features newspaper stories that address significant events in U.S. history, including the American Revolution, World War II, Japanese relocation, and the civil rights movement. The full-page newspaper images were selected and digitized in order to reveal the mission of the newspapers, what was happening at the time of publication, and how the publication may or may not have supported its community. Of the 266 digitized newspaper images currently included in the collection, 114 were published before 1923 and 152 were published after 1923. Thus, the Library knows that over half of the collection could be protected by copyright. After considering the workload that would be required to identify and contact the copyright owners, it was decided not to place the material on the Web but rather to provide only local access to the material. Consequently, a valuable resource that could be used by a wide range of scholars and students remains limited to local university use.

- A librarian affiliated with Norwich Online Graduate Programs of Norwich University, Vermont, had significant problems obtaining permission for an article from the Journal of the Construction Division for use in a secured online classroom. The Journal is no longer published, and the publisher of the Journal, the professional society ASCE, claims that it does not own the rights to the article.

- The comments provided by the University of California, Los Angeles Library discuss in great detail the orphan works problem in connection with the Frontera Collection, which consists of more than one hundred thousand recordings and thirty thousand performances of Mexican folk music. Most of the collection is covered under copyright and the library is unable to locate the copyright owners. Accordingly, the Library cannot make the collection available outside UCLA, e.g., by interlibrary loan.
- The performing arts section of the Library of Congress has great difficulty clearing the rights for old music scores. In many cases, the publishers are no longer in business and the rights cannot be traced. The photocopy service at the Library refuses to reproduce the scores in the absence of written permission from the copyright holder.
- The music librarian at Florida International University tried to clear the rights in two choral compositions: "My Lord's Always Near" by Arnold K. Williams and an anthem in the "John Raymond Choral Series." The publisher, Plymouth Music Co. Inc. of Fort Lauderdale, FL, is no longer in business, and there is no one to contact about the rights.
- A librarian for Slavic Languages & Literatures at the University of Illinois at Urbana-Champaign has experienced great difficulty obtaining permissions from other countries, particularly those in Eastern Europe. The copyright clearing-houses ostensibly established to help users get permissions do not always function. Even the Russian Author's Society, which claims to be a copyright clearance agency, does not have contact information or procedures outlined on its website. Rights clearance, therefore, involves tracking down a publisher, former publisher, individual author, or author's heirs--something that is impossible to do from the U.S. Physical presence is required. Furthermore, the legal succession of organizations, agencies, and businesses, in the former USSR and Eastern Europe, presents its own difficulties. It is often very hard to tell which organizations have succeeded the former Communist organizations, and which might be able to assist in locating a copyright holder.
- The library at American University in Washington, D.C., has a large collection of rare audio recordings (mostly LPs) of folk music that were collected by John Hickman and used on his radio program at WAMU. The library would like to digitize these materials and make them available, but there are a large number of recordings, and locating copyright holder and obtaining permissions is difficult if not impossible. Accordingly, the library is unlikely to proceed.

- The Duke University Libraries do not provide public digital access to orphan works. The libraries often avoid digitizing significant resources for scholarship if clearance cannot be obtained conclusively. When “orphaned works” on deteriorating film or magnetic tape are preserved using digital techniques, the complexities of the clearance process virtually prohibit the libraries from making such preserved resources available for scholarship. If the libraries decide to provide digital access to “orphan works” through electronic reserve systems, the library is forced to administer complex and expensive technologies that limit access to students enrolled in specific classes and that produce redundant and duplicate digitization processes across campus.
- When it began planning for digital access to its collection, the Carnegie Mellon University Libraries considered providing access to orphan works for which it expended reasonable effort with due diligence to locate the rightsholder, without success. The libraries would have removed the material from the web if sometime later the copyright holders objected. University counsel ultimately vetoed this plan. Accordingly, the CMU libraries do not digitize and provide access to orphan works.
- The Johns Hopkins University Press has experienced difficulties when putting books online. For example, the book *Walker’s Mammals* had gone through several editions, and many of the illustrations were provided decades ago by friends of the original author. However, there are no records of who provided the illustration, or if there are, the person cannot be tracked down.
- The Center for Teaching and Learning with Technology at Johns Hopkins University is developing online course materials. For one course, it wanted to use 150 objects (images, graphs, charts) that do not have sources. Because of copyright concerns, the Center decided not to use most of those objects for which it could not get copyright clearance. If certain objects are essential for lectures, the Center plans on recreating them or finding replacements.
- Eugene N. Ziegler wrote *A Renaissance Spirit: Florence*, and assigned the copyright to the publisher, Community Communications, Inc. There is demand for a new printing, but the publisher went bankrupt and no longer is operating. The author turned to the South Caroliniana Library of the University of South Carolina for help, but the library has been unable to locate the former president of the publisher or anyone else affiliated with the publisher.

- A librarian at the University of North Carolina, Charlotte attempted to assist a student working on her thesis. The student wanted to include the Adult Career Concerns Inventory in her thesis. According to a database, Psychologist's Press was the publisher. When the librarian contacted the publisher, the publisher informed her that it was no longer selling the test and the copyright had reverted back to the authors. The librarian attempted to track down the authors only to discover they were all deceased. The librarian has no idea who holds the copyright now.
- A professor in the History Department of the University of Delaware attempted to clear the rights in an illustration that had appeared in a book published before 1950. After the professor spent months tracking down the relevant parties, the publisher claimed that the artist had the copyright, while the artist claimed that the publisher had the copyright. The professor gave up and did not use the illustration. He also attempted to clear the rights in illustrations that appeared in books published between 1940 and 1960, but the publishers had all gone out of business. Once again, the professor did not use the illustrations.
- A faculty member in the Chemical Engineering Department at the University of Minnesota is trying to create a DVD for recruiting in state high schools. He would like to include content produced by Bell Labs in the 1960s. Bell Labs cannot locate any records about the production and thus is not sure that it can give permission to the University of Minnesota.
- A student at New York University wishes to include in his dissertation, as an appendix, a document from an Arabic language book, published in Jordan in 1983. This excerpt makes up about 17 pages of the roughly 200-page dissertation. The author of the book is deceased. Inclusion of the document might prevent publication of the dissertation by the entity that typically distributes all U.S. dissertations.
- The Enders Ornithology Collection, housed in the Watkinson Library at Trinity College in Hartford, Connecticut, recently purchased a series of painted illustrations of kingfishers on 18 plates. These original paintings by Anglo-Australian artist Lilian Medland were intended for a projected book on Australasian kingfishers with the text by Medland's husband, Tom Iredale. Ms. Medland died in 1955 and Mr. Iredale never completed a text; he is now deceased as well. The couple does not seem to have had children. These paintings remain unpublished. The library would like to publish the paintings,

but does not know how to find the owner of copyright. The library contacted the Australian dealer from whom it bought the paintings, but has received no reply.

- The Bob Jones University Press recently searched for the copyright information for a specific historical image of the V2 rocket that it wanted to use in its high school Earth Science textbook. It spent three months writing vendors and waiting for responses. It checked with the National Archives in London, the Imperial War Museum, NASA, and several other sources, only to come to a dead end with all of them. Accordingly, the Press is not sure if the image is under copyright and whether it would be safe to use in the textbook.
- A librarian at Concordia Theological Seminary in Fort Wayne, Indiana, would like to digitize Luther's Small Catechism Annotated by Edward W. A. Koehler. (Ft. Wayne: Concordia Theological Seminary Press, 1981) The original catechism in German by Martin Luther is in the public domain. The translation is copyrighted by Concordia Publishing House for the Lutheran Church--Missouri Synod. Some of the notes are by Edward Koehler. The rest are copyrighted by Concordia Theological Seminary Press. Edward Koehler died in 1951, and the librarian does not even know where to look for grand or great-grandchildren to get a release.
- Collins Library, part of McSweeney's Books, specializes in reissuing obscure literature. For four years, the editor has been searching for the copyright owners for *Cabbage in the Grass* by Leopold Louth, a 1957 novel issued in the United Kingdom; and *Bed and Breakfast* by Coralie Hobson, a 1923 novel. The editor has contacted their publishers, looked up their renewal notices, posted newspaper queries and made genealogy searches. The lack of known heirs has effectively prevented the reissuing of these long out-of-print works.
- Kevin Cooper, a part-time instructor at Los Angeles City College and the Guitar Artist-In-Residence at Whittier College, recently published a book of folk and children's songs called *Snakes, Snails, and C Major Scales* (Dayton: Lorenz Corporation, 2005) and was forced to omit several important songs. The original draft of the book offered a variety of multicultural pieces that could educate children about the worth of various cultures through music. It included Native American, Jewish, Russian, French, Japanese, and Mexican songs. Because of difficulty identifying and locating the copyright owners, it only has the Russian, French, and Japanese songs, as well as several songs from the United States. It no longer has an original Native American song, a Hanukkah song to balance the Christmas song, or a Spanish language song. Therefore, it resembles the

multicultural music education materials of the past with an imbalance of songs from mostly white, European cultures and superficial songs written about cultures but not by the cultures themselves, like "Ten Little Indians." While current music education scholarship encourages the daily inclusion of music from all cultures, copyright laws inhibit the creation of suitable source material.

- Microfilm of the local paper in McAlister, Oklahoma, is held by the Oklahoma state historical society. The historical society is hesitant to make a copy of the microfilm of the years between 1957 and 1966 for the McAlister Public Library. The microfilm was originally made by Microphoto, Inc. of Cleveland Ohio. Microphoto was sold to Bell and Howell and then it became Proquest. Proquest does not offer these years for sale nor is it able to find the Microphoto records indicating who owns the copyright in the microfilm.
- A drama teacher in a high school in Tacoma, Washington, could not locate the copyright holders of a musical titled *Scrooge*. She wrote to the publisher but received no response. She unsuccessfully attempted to find a phone number for the publisher and to find the author, lyricist, and composer. She never cleared the rights for performance before a paying audience.
- A regional public library in southeastern Minnesota has had difficulty when families have wanted to include professionally taken photographs in family memoirs or reunion committees have wanted to publish reunion booklets. The photography studios no longer exist or the individual photographers are dead, and there is no way to trace ownership of copyright.
- The librarian for Divine Savior Holy Angels High School in Milwaukee, Wisconsin, has not been able to clear the rights with respect to the writings of deceased authors affiliated with religious orders (*e.g.*, Hans Urs von Balthasar). The writings were to be included in course packs.
- The public library in Jackson County, Indiana, decided to organize a central photographic collection of historic photographs of the county. Residents donated 3000 photographs of local landmarks, events, and people. Because the photographs had been passed from one person to another over the years, in many cases the donor did not know who owned the copyright in the photograph. The library digitized the photographs for preservation purposes, but warns people that they use the photographs at their own peril because their provenance is unknown.

- A freelance permissions editor for a publisher of anthologies sought to clear the rights on an essay that had appeared in *Popular Electronics* forty-five years previously. The editor could not locate the author, and the magazine had ceased publication. The editor was not able to identify the corporate successor of *Popular Electronics* prior to the publication deadline for the anthology. Accordingly, the selection was not included.

The same editor tried to clear the rights in a classic essay by a deceased author, to be included in an anthology of climbing stories. The original publication date was about twenty years previous, and the author had been dead a few years. Rights had reverted to the author before his death, and his original publisher could give no information about an estate. It was known that he had no living relatives, and the editor could find nothing on the Internet pointing to an estate. The editor resorted to asking the other contributors to the collection if they knew anything about the estate. One contributor suggested that the most likely candidate for a literary executor would be one of the dead author's close friends, who was known for his eccentricity. The potential executor did in fact turn out to be difficult. Over the course of several telephone calls and email exchanges, he avoided saying whether he was or was not his friend's executor. The discussion was so protracted that the publisher dropped the selection from the book—an important loss to the collection, and a lacuna that would be obvious to any reader well versed in the great adventures of climbing.

RECOMMENDATIONS

All of the uses described above – which are just a small sample of the uses libraries seek to make -- would significantly benefit the public without harming the copyright owner. And yet, the copyright law as currently drafted inhibits these uses. Even if some of the uses might arguably qualify as fair uses, the uncertainty inherent in Section 107, when combined with the possibility of significant statutory damages notwithstanding the absence of actual damage, have caused various “gatekeepers” – typically publishers or in-house counsel at universities – to forbid the uses. For this reason, the Copyright Act must be amended to address the orphan work problem.

The Copyright Office undoubtedly will receive many different proposals on how to fix the problem. In formulating a proposal to recommend to Congress, the Copyright Office should make it sufficiently broad to address the problem comprehensively. At the same time, the Office should not make it so broad that it will attract opposition that will prevent its adoption.

A solution that applies only to uses made by libraries and other non-profit institutions, while certainly a step in the right direction, simply does not go far enough. Such an approach might permit the digitization and public accessibility of library collections. But, as the survey reveals, librarians often assist patrons – be they professors, students, or freelance authors – in clearing the rights for materials they seek to incorporate in new, socially useful works. A solution that did not apply to the uses by library patrons would be incomplete. And since library patrons include the public at large, the solution must apply to all users.

It certainly would be tempting to propose a solution that would permit free use of a work if the copyright owner did not file a notice of intent to continue to exercise rights in the work on a website maintained by the Copyright Office for this purpose. This solution would provide a user complete certainty that she could use a work not posted on the website.² But any solution that places an affirmative burden on copyright owners to preserve their rights is almost certain to encounter significant opposition from copyright owners.

Moreover, it is a broader solution than necessary to address the problem. The vast majority of uses of orphan works are highly unlikely to lead to liability. This is because most owners will not be aware of, or object to, the use. Corporate owners of the copyright, to the extent they know of the copyright, will have long lost interest in the work. The author's heirs also may have no knowledge of or interest in the work. If the author were still alive, he probably would be pleased that his work is once again in circulation. But even though the risk that any particular use of an orphan work will lead to liability is small, the gatekeeper mentioned above will prohibit its use because of fear of an orphan work "landmine:" a cantankerous owner demanding the full measure of statutory damages as well as injunctive relief. This is particularly the case if the user proposes to include a large number of orphan works.

Thus, all that is necessary to solve the orphan works problem is to defuse the landmine – to limit the remedies when a user has engaged in a reasonable, but ultimately unsuccessful, search for the copyright owner. With the landmine defused –


² This approach would provide certainty only if the user wishes to use the work after the date she knows to be the date by which the owner would have had to file the notice, but did not. However, for some works the user might not know that date. For example, if the owner needed to file the notice twenty years after publication, but the date of publication is not on the user's copy of the work, the user would have no way of knowing whether sufficient time had elapsed for this safe harbor to apply.

with the risk of significant statutory damages and injunctive relief removed – the gatekeeper most likely will permit the use.

A remedies-based approach that applies to all works and all users who have conducted a good faith search for the owner is sufficiently broad to address the problem but not so broad as to ensure its political demise. A remedies-based approach has the additional benefit of not placing any burdens on the Copyright Office or copyright owners. Finally, a remedies-based approach will not provide our trading partners with an opportunity to argue that the United States is imposing formalities in violation of treaty obligations. This is particularly important given that so many of the orphan works are of foreign origin. The Copyright Clearance Initiative proposal developed by the Glushko-Samuels Intellectual Property Clinic of American University's Washington College of Law is such a remedies-based approach. We believe that it represents the correct framework for an amendment to the Copyright Act dealing with orphan works.

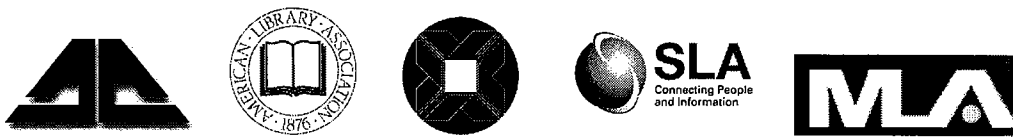
We are grateful that the Copyright Office has seized the initiative on this important issue, and look forward to working with the Office as this matter progresses.

Sincerely,



Miriam M. Nisbet
Legislative Counsel
American Library Association
1301 Pennsylvania Ave. NW - #403
Washington, D.C. 20004-1701

On behalf of the Library Copyright Alliance: the American Association of Law Libraries, American Library Association, Association of Research Libraries, Special Libraries Association, and the Medical Library Association (contact information for each association is attached)



LIBRARY COPYRIGHT ALLIANCE

The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

<http://www.aall.org/>

The American Library Association (ALA) is a nonprofit educational organization of over 65,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

<http://www.ala.org/>

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service. <http://www.arl.org/>

The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,700 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. <http://www.mlanet.org/>

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. <http://www.sla.org/>