



New York
Public
Library

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By Electronic Submission

Karyn Temple Claggett
Associate Register of Copyrights
Director of Policy and International Affairs
United States Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20559

**Re: Reply Comments to Orphan Works and Mass Digitization: Notice of Inquiry (77 F.R. 204)
(Docket No. 2012-12)**

Dear Ms. Claggett:

The New York Public Library, Astor, Lenox and Tilden Foundations (“NYPL”) is pleased to submit these Reply Comments in response to the Copyright Office Notice of Inquiry on Orphan Works and Mass Digitization. We thank the Copyright Office for undertaking this important inquiry.

NYPL is virtually unique in that it combines both a world-class research library and a network of community libraries. NYPL serves, without charge, a broad and diverse public ranging from toddlers to seniors, and from persons acquiring literacy skills to post-graduate scholars, many of whom may be unaffiliated with academic institutions. Our research collections include more than 44 million items, including published books, archival materials, family photographs, sound recordings, and ephemera. NYPL’s mission is to collect and preserve information and to democratize access to knowledge.

Increasingly, our patrons reach us online, generating 31 million visits to our website and 127 million images viewed in our Digital Gallery¹ in FY11. As our patrons have moved online, we have shifted our practices and expanded our focus to make sure we can continue to meet our patrons’ needs. Over the last decade, we have ramped up our digitization capabilities and have partnered with others to expand online access to our collections.

Orphan Works

As many of the initial comments describe, “orphan works”—works for which the rights holder(s) cannot be located—are prevalent in libraries, museums and archives. For NYPL, orphans are pervasive in our manuscript, print, photograph, audio recording and moving image holdings. Orphans are especially prevalent in our archival collections that contain diaries, correspondence and personal photographs.

The orphan works issue has been exacerbated over the last century by changes to copyright law. First, the extension of the copyright term has created a situation where the current copyright owner(s) of a

¹ NYPL’s Digital Gallery provides free and open access to over 800,000 images digitized from our vast collections. It is available at: <http://digitalgallery.nypl.org>.

work may be generations removed from the original author, making identification of the rights owner(s) very challenging, especially in the case of archival material. Second, the elimination of copyright formalities and the automatic renewal of copyright in certain works has greatly expanded the number of works protected by copyright—even works where the author created the work without the intention or incentive of financial benefit. For example, personal letters in NYPL’s collections that are now of research or historic value typically were not created with any commercial interest in mind, but they are nevertheless given the same protections as works whose purpose is to generate revenue.

While orphan works are pervasive in NYPL’s collections, the problem has become more manageable for NYPL since the Register’s 2006 Report on Orphan Works and proposed legislation in 2008. NYPL has dedicated additional staff resources to review rights issues and to conduct good faith and reasonable searches for rights holders to support its important initiatives in digitizing collection materials and using them in mission-focused ways. Moreover, in making digitization decisions, NYPL is guided by fair use considerations and other important provisions of the Copyright Act applicable to its work, including sections 108, 110, 121 and other limitations and exceptions. In addition, NYPL has noted the development of voluntary community-driven efforts to create best practices for identifying rights holder(s), taking into account the nature of the particular material at issue, including the Society of American Archivists’ 2009 statement of best practices,² as well as general guidance such the *Code of Best Practices in Fair Use for Academic and Research Libraries*,³ developed by the Association of Research Libraries. NYPL has also been following various academic viewpoints, including Jennifer Urban’s article on fair use and orphan works.⁴ Further, we are following with interest the development of crowd-sourcing as a potential means for identifying the owners of works believed to be orphaned. Finally, we applaud the projects the Copyright Office has underway to digitize its historic copyright records and to upgrade its registration and recordation systems.

As just one example of a digitization project that NYPL has undertaken in recent years that involves orphan works, we describe below NYPL’s digitization of materials from its New York World’s Fair 1939-1940 collection and related development of our free, award-winning app for the iPad that added new educational material to the collections materials

The New York World’s Fair 1939-1940: A Case Study

The New York World’s Fair of 1939 and 1940 (the “Fair”) was held in Flushing Meadows in Queens. At the conclusion of the Fair, the corporation in charge of the Fair dissolved and donated a large amount of material to NYPL. The corporation donated over 2,500 boxes of records and documents, as well 12,000 promotional photographs. These records document an important event in history and are heavily used by researchers and the public.

When deciding whether to digitize this collection and make it available online, we conducted a thorough, good-faith search for rights holders. We started by trying to determine the copyright status for the nearly ten tons of works in the collection. The publication status of much of the material was difficult to determine and was, therefore, treated as if it were in copyright. Because the material may be in copyright, we shifted our focus to find a copyright owner. We spent days combing through the legal records of the Fair to determine whether the Fair’s copyright was ever assigned to a third party. We also tried to determine whether copyrights were assigned at the dissolution of the corporation, but could not find an answer in the archive. When the records of the Fair did not help, we searched for rights holders utilizing other methods, including searches on Google, the Copyright Office records, and other relevant sources. This search was time-consuming and, ultimately, fruitless.

² SOCIETY OF AMERICAN ARCHIVISTS, ORPHAN WORKS: STATEMENT OF BEST PRACTICES (Rev. Jun. 17, 2009), available at <http://www.archivists.org/standards/OWBP-V4.pdf>.

³ ASSOCIATION OF RESEARCH LIBRARIES ET AL., CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (Jan. 2012), available at <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>.

⁴ Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (forthcoming 2012), available at <http://ssrn.com/abstract=2089526>.

We could not locate a rights holder who owned the rights to the material in the collection. Having found no owner after our good-faith and reasonable search and guided by fair use considerations, we nevertheless determined to move forward with digitization⁵ of certain portions of the collection after balancing the educational benefit of the undertaking against the risk that a rights holder might subsequently surface. We also created a free iPad application to feature the digitized content and contextualize it using original essays and innovative design.⁶ The application was named one of Apple's "Top Education Apps" of 2011.

So far, no rights holder has contacted us to ask that we limit the uses of works from the Fair collection. If a rights holder wished to contact us about our uses, we have made our contact information available online and in the iPad application. We welcome any new information about the rights holder of this collection.

Potential Legislation

While orphan works remain a challenging issue for NYPL, on balance, NYPL does not believe legislation on orphan works or mass digitization is needed at this time. Should the Copyright Office and the Congress determine to move forward with legislation, we strongly urge that any such legislative approach:

- Not attempt to prescribe search criteria by statute but rather allow differentiated approaches to develop depending on the types of materials at issue (e.g., a published book as opposed to a personal letter) and the proposed use;
- Limit remedies available under the Copyright Act when, under the facts and circumstances, a good faith reasonably diligent search was undertaken, including elimination of statutory damages and legal fees;
- Not require extended collective licensing or other licensing schemes;
- Include an explicit savings clause recognizing that a use that does not meet provisions of any new orphan works legislation nevertheless may be a fair use (or may qualify for other exceptions and limitations such as sections 108, 110 and 121); and
- Consider introduction of certain copyright formalities (in a manner consistent with international conventions) so that the number of orphan works will not continue to increase.

Conclusion

Because of the prevalence of orphan works in the collections of NYPL and other collecting institutions as well as the increasing imperative that we meet our patrons online, we appreciate the efforts of the Copyright Office to address this issue. For the reasons described above, however, NYPL does not believe legislation is needed at this time. If legislation is proposed, we recommend that it address the points outlined above.

Thank you for the opportunity to share these comments about an important issue for NYPL and other libraries and collecting institutions. We look forward to continuing to participate in this important discussion.

Respectfully submitted,

Ann Thornton
Andrew W. Mellon Director of The New York Public Libraries

⁵ See New York World's Fair 1939-1940 Records, N.Y. PUB. LIBR., http://digitalgallery.nypl.org/nypldigital/dgtitle_tree.cfm?title_id=359208&level=1&imgs=20&snum=0 (last visited Mar. 6, 2013).

⁶ See NYPL *Biblion: World's Fair for iPad on the iTunes App Store*, <http://itunes.apple.com/us/app/nypl-biblion-worlds-fair/id433418206> (last updated Jul 11, 2012).