

UNIVERSITY OF MINNESOTA

Twin Cities Campus

*Office of the University Librarian
University Libraries*

*Wilson Library
309-19th Avenue South
Minneapolis, MN 55455*

May 20, 2014

The University of Minnesota Libraries maintains a historically rich collection of materials that are of value for scholarship and teaching, and also often of general public interest. Despite limited financial resources, we are dedicated to digitizing materials from our collections -- especially the unusual, unique, and rare items -- in order to preserve fragile physical objects, and to make the materials more accessible to individuals around the world.

In some instances, the University Libraries have partnered with outside organizations to contribute to larger-scale digitization projects that increase public access to knowledge and cultural resources. In other instances we partner with independent cultural organizations in our region to provide expertise and resource coordination for collaborative digitization projects to increase access to their collections.

In all of these efforts, orphan works present challenges. One common example would be the collected papers of a scholar from our institution; such collections often contain copyrightable materials that originated with the scholar, but also other materials about which we have far less information. Another example would be the collections of a rural historical society, containing a wide variety of items documenting life in that region often all of unclear rights status. Many times, such collections are of greatest value when digitized intact, as the relationships of the items to one another (e.g., the collected correspondence of an individual, items relating to a particular event in a town's history) are important to preserve.

Although some individual orphan works present particularly thorny challenges, the evolution of fair use jurisprudence in the last several years has generated an overall increase in the comfort at our institution and in many of our partner institutions with providing access to digitized orphans in some contexts. Decisions in several courts have upheld digitization as fair use for a variety of transformative technological, social, and educational applications. Many library digitization projects match with those applications. Similarly, since most of the materials in library and archive collections that present orphan works problems really do have no rightsholders currently selling copies or licenses, there is often no market to harm with a library digitization project. In general, we would prefer to continue to develop policies and practices for digitization of orphan works within the established and evolving parameters of fair use, and would prefer that specific legislation related to orphan works not be put forward.

While one primary aim of projects digitizing materials in our collections or those of local partner organizations is to provide public access, another primary goal of these projects is to learn more about

these materials and to interconnect with related materials held by other institutions or with individual community members who have additional relevant information. Therefore, we appreciate the expansion of information available about creators and rightsholders that has been in progress within the Copyright Office (especially the Office's efforts to provide greater access to historical registration and renewal records) and, to a lesser extent, elsewhere online. We already make active use of available search resources and hope that efforts to expand access to existing government records continue. We also make active use of available search technologies and hope that innovation continues in that field. Innovations that would increase the availability of rightsholder information, such as a renewal of rightsholder registration with the Library of Congress, and/or incentives to rightsholders to participate in such a system, would be of great assistance in our work, and for other potential users as well.

If any orphan-works-specific legislative reform does proceed related to diligent searching for rightsholders, libraries and archives will always invest effort into learning more about materials in our collections when we have the opportunities and resources to do so. That said, our resources are always limited, and for many of the most valuable items in our collections, no amount of searching will ever reveal a rightsholder's identity. The variety and volume of items in our collections, as well as the variety of uses to which those works may be put, require a flexible and adaptable approach to information-searching. We would not welcome any articulated, bright-line rule delineating required search efforts by users of orphan works, or other additional registration or regulatory burdens on users of orphan works. In many cases, a strong fair use case exists for digitizing a collection intact, and any requirement for an item-by-item analysis (much less intensive search requirements) would present a major barrier to libraries, resulting in no public access to materials despite recognized public value.

We do not believe images and photographs should be treated separately from other types of copyrightable materials. In the types of archival materials most likely to present orphan works issues in our collections, photographs and other images are some of the richest resources of both scholarly and public interest. While the removal of identifying metadata from recently-created images with active rightsholders is a challenging problem online, it is not the same problem as that of true orphan works, and most users of orphan works deplore the loss of such valuable metadata.

Finally, many of the orphan materials that present copyright challenges for us and other research libraries are *true orphans* - rightsholders *simply do not exist*, due to processes such as dissolution of corporations and other organizational entities, or inheritances escheating to states. Many other of the orphan materials in our collections have rightsholders who will never be aware that the rights exist. Therefore, we strongly oppose the idea of extended collective licensing as a solution to the problem of orphan works. Paying licensing fees in escrow for rightsholders who do not exist or will never receive them is an exercise in waste. Moreover, due to the limited budgets of libraries, extended collective licensing would create a concrete barrier to digitization in the service of the public interest.

Wendy Pradt Lougee
University Librarian and McKnight Presidential Professor