

Comments of the Library of Congress
In Response to the
Copyright Office Notice of Inquiry
“Orphan Works”

Submitted March 25, 2005

The Library of Congress welcomes this opportunity to address the very important and complicated issues regarding “orphan works.” The Copyright Office’s Notice of Inquiry is a well-articulated description of the problems associated with such works and the reasons that those problems have been increasing.¹ These problems have been recurring ones for the Library. The Library thus offers this comment in its role as an institution charged with the collection, preservation, and service of the nation’s cultural heritage. The comment provides examples of the Library’s experience dealing with “orphan works.” The comment does not necessarily reflect the views of the Copyright Office.

The Library hopes for a solution that balances the interests of rights holders and users. As explained herein, the Library would like any definition of “orphan works” to focus on whether the owners of copyright-protected works can reasonably be located. Any definition should consider including unpublished works and works of any age. The solution should consider offering some recognition of good faith efforts to locate copyright owners and should consider offering some safe harbors for users where those efforts have demonstrably been made and failed.

I. About the Library

The Library is the nation’s oldest federal cultural institution. It is also the largest library in the world, with nearly 128 million items on approximately 530 miles of bookshelves. The collections include more than 29 million books and other printed materials, 2.7 million recordings, 12 million photographs, 4.8 million maps, and 57 million manuscripts. The Library’s mission is to make its resources available and useful to Congress and the American people and to sustain and preserve a universal collection of knowledge and creativity for future generations. In fulfilling this important mission, the Library routinely encounters problems with “orphan works.” These problems are especially notable in the Library’s efforts to digitize the items in its

¹ Such reasons include term extension (both directly and through the elimination of renewal requirements), the elimination of notice and registration requirements, and the creation of termination rights.

collections and post those materials on the Library's website.² The Internet offers the opportunity for those who are unable to travel to Washington, D.C. to more fully appreciate and learn from the Library's collections.

The Library began digitizing its collections around 1990, and in 1994 inaugurated its National Digital Library Program. The flagship of that program, American Memory, is a pioneering systematic effort to digitize some of the foremost historical treasures in the Library and other major research archives and make them readily available on the Internet. The Library has also begun digitizing and posting some of its international collections through its Global Gateway project. In another major digital project, the National Digital Information Infrastructure and Preservation Program (NDIIPP), the Library is studying how to better collect and preserve significant information that was created in digital form and is at risk of loss.

II. Impact on the Library

Compared to many users, the Library is better situated to resolve "orphan works" issues that it encounters. Copyright law grants some exceptions for libraries.³ In addition, the Library has on staff a large and varied number of experts, fluent in many languages, who can perform curatorial assessments for ascertaining authorship. The Library has staff researchers experienced with searching for copyright owners, and has in-house legal counsel. The Copyright Office's card catalog and other records are housed in the Library, enabling easy access.

Nonetheless, the Library – and thus its patrons – has suffered significant adverse impacts from "orphan works" issues. These include:

A. Substantial Expenditures of Staff Time and Other Resources

Many of the 7,000 items processed by the Library each day do not come from the copyright deposit program and frequently lack copyright-relevant information, let alone permissions. Even the materials received via the copyright registration process are not immune from "orphan works" problems (see Section III.A., below). As a result, the Library expends substantial amounts of time researching copyright ownership. Efforts to locate copyright owners include careful evaluation of the materials and the collection of which they are a part, searches of Copyright Office records, searches using online resources (including Internet search engines,

² The Library also encounters "orphan works" issues in other contexts, including preservation, presentations by Library staff, use in publications, and the reformatting of works for persons with disabilities (beyond the limited scope of 17 U.S.C. § 121).

³ See, e.g., 17 U.S.C. § 108 (allowing limited uses of some classes of works for preservation or replacement purposes, or during the last 20 years of the copyright term, if certain conditions are met). See also 17 U.S.C. § 121 (allowing authorized entities, such as the Library, to reproduce or distribute copies or phonorecords of previously published, nondramatic literary works in specialized formats exclusively for use by persons with disabilities, if certain conditions are met).

online telephone directories, and electronic reference sources), searches on estates, and inquiries to historical societies, museums, archives, libraries, and groups that represent artists. Despite these efforts, Library staff are often unable to locate copyright owners, and are frequently unable even to determine the copyright status of the works at issue.

B. Diminished Service to Digital Library Patrons

Patrons of the Library's online digital library do enjoy the fullest possible benefit from the richness of the Library's collections as most of the Library's Internet-accessible digital collections focus on material published before the 1920s. Many materials are not included in the Library's online digital collections, because extensive copyright research often fails to clarify ownership, and many other materials are not considered for posting because of anticipated problems with copyright research. This chilling effect is especially unfortunate because many of these materials – including many of those published after 1922 – are in the public domain,⁴ but are rendered unusable because their public domain status cannot be confirmed. This goes to the question of whether “orphan works” should include works whose copyright status is indeterminate.

The materials that are posted on the Library's website are of a very limited range. The Library's re-use activities have concentrated on materials that are demonstrably in the public domain, as the efforts to determine copyright status and research, identify, and locate any copyright holders would divert staff resources from other activities. This approach severely restricts the date-range and publishing history for materials that can be re-used by the Library, as well as by researchers and other patrons.

C. Reduced Preservation Efforts

Preservation efforts may be curtailed because costs are more difficult to justify when there is an inability to derive multiple benefits, such as the creation of digital copies for users, from the preservation activities. This is a critical issue for motion pictures, broadcasts, and recorded sound, where preservation can be especially costly – and, given the rapid deterioration of many of those materials – especially necessary. The law regarding preservation of these materials, moreover, is more restrictive than for nondramatic literary works.

D. Unreasonable Constraints on the Advancement of our Cultural Heritage

Researchers and scholars are hampered in their efforts to build on or cultural heritage due to unanswerable copyright questions about copyright ownership and denials of reproduction requests when copyright status cannot be determined. This often results in the omission of central materials in publications and other information products, even though many of these omitted materials are probably free of copyright restrictions.

⁴ For example, works published in the United States under older copyright laws sometimes became public domain if they were published without copyright notice or if the copyright registration for those works was not renewed.

E. Legal Risks

Despite its cautious approach, the Library, like other similarly situated institutions, risks being sued where it has reached the wrong conclusion as to copyright status or ownership.

III. Recurring Problems with Locating Copyright Owners

A. Incomplete Records

There are instances in which Copyright Office records are unable to yield conclusive information about copyright owners for a number of reasons, including the following:

- Not all protected works are registered.
- There are often multiple works registered with the same title, none of which may correspond to the work being researched. This problem is particularly acute for visual works, which often contain no identifying information and which are virtually unsearchable based on visual image alone.
- Individual works registered as part of a periodical or collection are seldom listed separately by title in Copyright Office records.
- Deposits of published materials are often unavailable for comparison with researched materials, as the Copyright Office generally keeps copies of such deposits for only a short portion of the copyright term.
- Publication status, addresses, and owners change. Therefore, Copyright Office records may not be current. Copyright owners are not obligated to inform the Copyright Office of any changes to the information provided on registration forms, and rarely do.

B. Uncertain Publication Status

Difficulties determining publication status are particularly vexing because the term of protection for published and unpublished works can vary considerably. This, too, goes to the question of whether “orphan works” should include works whose copyright status is indeterminate. While works published in the United States before 1923 are in the public domain, more recently published works may have lost copyright protection due to failure to comply with no-longer required formalities. Term computations for unpublished works are complicated. For example, the copyright in some unpublished works created before 1978 and published before January 1, 2003 will not expire before December 31, 2047.⁵

⁵ 17 U.S.C. § 303(a).

Even when facts are known, the law is not always clear. Concepts of limited publication under the 1909 statute and a broad definition of publication under the current statute create uncertainty. Internet and computer law are rapidly evolving, and federal judicial circuits can be inconsistent in their conclusions as to what actions may constitute publication.

C. Uncertain Authorship

Authorship, and thus initial ownership, is often unclear. Records that would affect whether a work is a work made for hire are often not available. Joint authorship can be difficult to determine. Pre-existing protected materials may have been used – with or without permission – in the creation of a work.

Folk materials are especially challenging for permissions researchers. Although much of the underlying material may be public domain, the works evolve over time through numerous anonymous contributions. Identifying such contributors, or even when specific contributions may have been made, can be impossible.

D. Out-of-Date Information

Original information about copyright owners may be out-of-date. Rights may have been transferred,⁶ individual owners may have died, and corporate owners may have gone out of business, changed their names, or been acquired by or merged with another business. In addition to being factually complex, these changes of ownership are often legally complex, entailing research into such disparate areas of state law as corporations, wills and estates, contracts, community property, and common law copyright.

Commercial audiovisual works and sound recordings have been especially susceptible to complicated changes in ownership. These industries have undergone repeated consolidation and rapid change. Companies are not always aware of materials in their inventories, or of the copyright histories of those materials. These companies may, as a result, be unresponsive to copyright inquiries or unwilling to grant permissions for materials in which they have uncertain rights. The Copyright Office's Notice of Inquiry recognized this problem, citing the concerns of film preservationists that the lack of clear ownership for many older motion pictures interferes with film preservation efforts, as needed permissions cannot be obtained.⁷

⁶ Transfers of copyright ownership may be recorded with the Copyright Office, but often are not. *See, e.g.*, Copyright Office Circular 12, Recordation of Transfers and Other Documents.

⁷ Notice of Inquiry, 70 Fed. Reg. 3739, 3741 (Jan. 21, 2005) (citing letter from Larry Urbanski, Chairman, American Film Heritage Association, to Senator Strom Thurmond Opposing S. 505 (Mar. 31, 1997)).

IV. Illustration – The Hannah Arendt Project

One Library project that was severely hampered by “orphan works” issues was the digitization and posting of the papers of Hannah Arendt, a noted political philosopher, author, and educator.⁸ Because of questions of copyright ownership, the Library decided not to post hundreds of items from the collection on its public website. The collection, spanning the years 1898 to 1977, features Arendt’s correspondence with many individuals (both prominent and obscure), and with corporate, nonprofit, and educational entities. Additional materials include clippings and reviews from newspapers, magazines, and newsletters, trial transcripts, and a notebook kept by Arendt’s mother. The quantity and complexity of the materials presented formidable copyright challenges. Accordingly, the Library decided to concentrate on sections of the papers most useful for researchers on Arendt and her work. Of the approximately 25,000 items in the collection, only about 7,000 were selected for permissions research. The Library ultimately posted on its public website approximately 5,000 items.⁹

Library employees¹⁰ worked on this project for two years, conducting extensive research as to ownership of materials. They created a copyright database and recorded into it any relevant information they could obtain about authors, recipients, publishers or other corporations, addresses, and dates. Research sources included the Library’s catalog, Gale Research’s *Contemporary Authors* database, several online telephone directories, business websites and public affairs offices, university websites, alumni associations, the *National Union Catalog of Manuscript Collections*, curators and reference staff of repositories, and executors of authors’ estates. Business name changes and mergers had taken place over time, necessitating additional layers of research.

A total of 1,932 inquiries to seek permission or find out information about copyright holders were sent out to authors, heirs, and businesses in the United States and numerous other countries. Where no responses were received, or where replies indicated that inquiries had been sent to the wrong person (e.g., someone with the same name as a potential rights holder), additional attempts were made. Eventually, 422 copyright holders granted permission. Only 14 denied permission.

The value of this project is enormous. Many papers were disintegrating due to constant use. Historians applaud the preservation efforts. Researchers appreciate the improved ability to study these materials, both as individual items (e.g., the ability to zoom in on handwritten materials

⁸ See <http://memory.loc.gov/ammem/arendhtml/arendthome.html>.

⁹ The entire collection was digitized and is available, with some restrictions, to onsite researchers at the Manuscript Division at the Library and at the Hannah Arendt Centers at the New School University and the University of Oldenburg, Germany.

¹⁰ These employees worked in cooperation with the National Digital Library Program and with assistance from the New State University in New York City.

that in their original state were barely readable) and as a collection (e.g., the ability to study the development of Arendt's thought over the years).

The project was supported by a grant from the Andrew W. Mellon Foundation. Most projects do not enjoy this generous outside funding and cannot go forward because of the magnitude of permissions research requirements.

V. Definition of "Orphan Works"

The definition of "orphan works" should focus on the core issue – the sometimes extreme difficulty or impossibility of locating copyright owners. Any definition should consider including unpublished works and works of any age. Below are issues that the Library believes need to be addressed in this effort.

A. *Age*

The age of many works cannot be determined, and "orphan works" problems are not limited to older works. More recent materials also present challenges. For example, owners of materials posted on websites can be quite difficult to locate. Some websites are anonymous by design. Some posters to websites are anonymous. Moreover, time is of the essence for some web archiving projects. The Internet is a fluid medium. Materials can quickly be altered or even lost.

Newer works are also a problem because the elimination of notice and registration requirements has resulted in exponentially more works being protected by copyright, while decreasing incentives for owners to consistently provide identifying information along with copies of their works.

B. *Publication Status*

Many of the same problems arise for unpublished works as for published works. In fact, the majority of materials in the Arendt collection were unpublished.

As discussed above, in section III.B., publication status is often factually and legally difficult to determine. Works lacking identifying information as to ownership tend also to lack information as to publication status. Any protections offered for users of "orphan works" should minimize, not heighten, the need for users – especially of older works – to research obscure facts, calculate complicated terms, and evaluate legal nuances.

VI. Effect of Works Being Designated as "Orphaned"

The Library makes the following observations as to any solutions that are developed.

A. *Good Faith Efforts to Locate Owners*

Good faith efforts to locate owners should be recognized. Currently, many individual and institutional users operate under the assumption or just the hope that they may be able to address any infringement claims by establishing good faith efforts. This is a reasonable but mistaken assumption. The law’s reward of such efforts is slim.¹¹ Good faith efforts to locate owners are not overtly or regularly recognized in determinations of fair use, infringement, or damages.

B. *Practicality of Solutions – Safe Harbors*

The Copyright Office should consider the practicality of a safe harbor rule that would insulate users from liability upon their demonstrating good faith efforts to locate and obtain permission from copyright owners. Lists of factors and vague standards will have little real world impact, and may do little more than reassert the fair use doctrine.

For all of its merit, fair use often does not reassure users or create legal certainty regarding uses of a work. Fair use is a fact-specific affirmative defense. Answers are provided, if ever, after litigation has run its course.

Similar problems attend the application of 17 U.S.C. § 108. For example, the terms “reasonable investigation” and “normal commercial exploitation” are not defined and are subject to varying interpretations.

A solution regarding “orphan works” should provide a reasonable level of certainty in dealing with these extremely complicated issues.

VII. Conclusion

The Library recognizes that the proposals offered by commentators are likely to require complicated determinations and compromises. Copyright law is replete with such situations, as are other areas of the law.

¹¹ Statutory damages may be increased for willful infringement and decreased for innocent infringement (narrowly defined), and in very limited circumstances such damages may be remitted if the court determines that an infringing nonprofit educational institution, library, or archives reasonably believed that the infringing use was fair use. No such distinctions are drawn where the owner elects to instead recover actual damages or profits. 17 U.S.C. § 504. Fair use does not expressly reward good faith efforts to locate owners, though it does not penalize users whose permission requests were denied. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994). Finally, a user relying in good faith on a Copyright Office certified report is entitled to the presumption that an author has been dead for at least 70 years. 17 U.S.C. § 302(e).

The Copyright Office's colleagues in the Library are eager to assist the Office and Congress in developing and implementing a balanced solution to the various issues associated with the use of "orphan works."

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