SENT TO: orphanworks@loc.gov

To: Jule L. Sigall, Associate Register for Policy & International Affairs.

From: Mary Minow, Policy Analyst, California Association of Library Trustees and Commissioners c/o LibraryLaw.com

Subject: Comment solicited by Notice of Inquiry, Orphan Works, Federal Register: January 26, 2005 (Volume 70, Number 16)][Notices][Page 3739-3743]

I am the policy analyst for the California Association of Library Trustees and Commissioners (www.caltac.org). I am also a library law consultant. I have given workshops to librarians, archivists and museum personnel in California and other states on how to evaluate the copyright status for works chosen for digitization projects. I summarize this process in the article, "Library Digitization Projects and Copyright," *llrx.com* (June 28, 2002) at http://www.llrx.com/features/digitization.htm.

1. Nature of the Problems Faced by Subsequent Creators and Users

In my experience, many libraries, museums and archives (herein stated simply as "libraries") that undertake digitization projects restrict themselves to works published pre-1923. In many cases, the expertise, time and money is simply not available to even determine whether or not a work is still in copyright (i.e. determining whether each work satisfies the legal definition of "published," and if so whether it complied sufficiently with the formalities required at the time of publication), let alone track down unknown copyright owners via probate records and bankruptcy proceedings.

Although I generally point out to libraries that 17 U.S.C. § 108 (b) and (c) allow them to make digital copies for preservation (unpublished) and replacement (published), subject to certain conditions, the interest evaporates when they learn that digital files may not be made available outside the library premises. Funding sources are generally not available for such limited projects.

Further, although § 108 (h) partially returns the twenty years added by the Copyright Term Extension Act, at least for published works, perhaps mitigating the orphan works project at least for that timeframe, (see Minow, **Library Digitization Projects: U.S. Copyrighted Works that have Expired into the Public Domain** at http://www.librarylaw.com/DigitizationTable.htm), I am not aware of any libraries that make use of this exemption. I believe this is because the exemption is so uncertain. The exemption applies only where the copy is made for special listed purposes by the library (not subsequent users), it covers only "published" works not "subject to normal commercial exploitation" and not obtainable, apparently not even as a used copy, at a "reasonable price"; and it insists that the library assure itself through "reasonable investigation" that these conditions have been met. 17 U.S.C. § 108(h). See *Eldred v. Ashcroft,* 537 U.S. 186, 252 (Breyer, J. dissenting).

Most importantly, the terms "reasonable investigation" and "subject to normal commercial exploitation" are so open-ended that the risk-averse library does not use the twenty year exemption. Many of these older works fall into orphan status.

Rather than take steps to locate copyright owners, libraries simply do not digitize the items.

Examples of collections I am commonly asked about: old posters, photographs in defunct local newspaper files, defunct local newsletters

2. Nature of "Orphan works": Identification and Designation

Works with unclear status tend to remain in dusty filing cabinets in all but the least risk-averse institutions that are simultaneously the best informed on the contours of fair use and the remittance of penalties under 17 U.S.C. § 504(c)(2)(i) for nonprofit educational institutions, libraries and archives that believe and have reasonable grounds for believing that their use is a fair use.

This notice of inquiry asking for definitions and suggestions to identify "orphan works" could open a window to great contributions by libraries in disseminating works in their collections that are valuable to scholars yet not commercially viable.

The criteria set forth to define an "orphan work" in the notice of inquiry are excellent, at least with regard to *published* works:

1-No indication of copyright owner (no author/publisher listed)

2-Copyright owner possibly listed (i.e. author or publisher or other likely party listed), but standard locating sources have failed to find owner. Standard sources can not be specifically defined, but the Copyright Office could give examples such as those in this notice of inquiry: Copyright Office records, Internet search via standard search engines such as google, reference source searches such as Books in Print and publishers' directories.

3-Original copyright holder deceased, heirs and assigns unknown.

Rebuttable presumption: If a user can demonstrate satisfactorily that these criteria are met, the burden then shifts to a claimant owner to show that either the she has filed a notice of the work with the Copyright Office (see below), or alternatively, that the criteria above have not, in fact, been met.

Note: It is heartening to note the absence of a phrase such as "not subject to normal commercial exploitation." This phrase has created much uncertainty in the library world with regards to § 108(h). That section, originally part of the Copyright Term Extension Act, allows libraries and archives (and nonprofit educational institutions that function as such) to copy some works in their last twenty years of copyright, as long as the works are not subject to normal commercial exploitation. Although this provision has been expanded in 37 CFR §201.39, libraries do not know what "normal commercial exploitation" really means, especially in this era of print-on-demand. To most of the libraries I talk with, the exemption granted is thus effectively negated.

3. Users' Registry

The establishment of a filing system for users to file an intent to use a work by an unknown or unlocatable author is an excellent idea, and perhaps experience by users of these provisions can be brought to bear:

> USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE
>
> 37 CFR 260.7 Unknown copyright owners.
>
> If the designated collecting agent is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the collecting agent shall retain the required payment in a segregated trust account for a period of three years from the date of payment. No claim to such payment shall be valid after the expiration of the three-year period. After the expiration of this period, the collecting agent may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty fees.
>
> [63 FR 25413, May 8, 1998, as amended at 64 FR 36576, July 7, 1999]
>
> … and
>
> Use of Certain Copyrighted Works in Connection with Noncommercial Educational Broadcasting.
>
> 37 C.F.R. § 253.9 Unknown copyright owners.
>
> If PBS and its stations, NPR and its stations, or other public broadcasting entity is not aware of the identity of, or unable to locate, a copyright owner who is entitled to receive a royalty payment under this part, they shall retain the required fee in a segregated trust account for a period of three years from the date of the required payment. No claim to such royalty fees shall be valid after the expiration of the three year period. Public broadcasting entities may establish a joint trust fund for the purposes of this section. Public broadcasting entities shall make available to the Copyright Office, upon request, information concerning fees deposited in trust funds.
>
> [57 FR 60954, Dec. 22, 1992; redesignated at 59 FR 23993, May 9, 1994]

In the case of orphan works that do not fit into the above categories, a segregated trust account could be set up by the Copyright Office, with filings by users and potential users.

Nonprofit users, including most libraries, would only need to file their intent or use, at no cost. Commercial users would follow the same procedure but would additionally need to pay a set fee in a segregated trust account, to be held for a period of three years. If the fee is unclaimed during that time, it will go to the Registrar of Copyrights to maintain the system. If an owner checks the registry within the specified three year timeframe and does not approve a use (either by a nonprofit or a commercial enterprise), she may require the user to cease its use or negotiate for permission with her, unless the use is already exempted by copyright law, such as the exemptions set forth in § 108. If the user refuses, the owner would have full remedies as set forth by current law.

This does not put an untenable burden on users – if they wish to rely on a particularly broad use of a work, such as distribution over the Internet, they need to wait for the three years to pass after filing their intent to use the work with the Copyright Office.

Case-by-Case Approach

The “case-by-case” approach, like that adopted in Canada, is not likely to give enough certainty to libraries to make it truly useful. Further, although a requirement to search inheritance records may be useful to an author who wishes to pursue a few particular works, it is far too onerous for a library that is digitizing a collection of any significant size.

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Appendix showing suggested format of notice for registry

Appendix A to Sec. 201.39--Required format of Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price

NLA
Check box if continuation sheets for additional works are attached.

Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price

1. Title of the work (or, if untitled, a brief description of the work): _____.
2. Author(s) of the work: _____.
3. Type of work (e.g. music, motion picture, book, photograph, illustration, map, article in a periodical, painting, sculpture, sound recording, etc.): _____.
4. Edition, if any (e.g., first edition, second edition, teacher's edition) or version, if any (e.g., orchestral arrangement, English translation of French text). If there is no information available relating to the edition or version of the work, the Notice should state, ``No information available'': _____.
5. Year of first publication: _____.
6. Year the work first secured federal copyright through publication with notice or registration as an unpublished work: _____.
7. Copyright renewal registration number (not required for

foreign works restored under 17 U.S.C. 104A): _____.

8. Full legal name of the copyright owner (or the owner of exclusive rights): _____.

9. The person or entity identified in space #8 owns:

all rights.

the following rights (e.g., the right to reproduce/distribute/publicly display/publicly perform the work or to prepare a derivative work): _____.

10. Person or entity that the Copyright Office should contact concerning the Notice:

Name:----------

Address:----------

Telephone:----------

Fax number (if any):----------

E-mail address (if any):----------

11. Person or entity that libraries and archives may contact concerning the work's normal commercial exploitation or availability at a reasonable price:

Name:----------

Address:----------

Telephone:----------

Fax number (if any):----------

E-mail address (if any):----------

Additional Content (OPTIONAL):

12. Original copyright registration number: _____

13. Additional information concerning the work's normal commercial exploitation or availability at a reasonable price: _____

Declaration:

I declare under penalty of perjury under the laws of the United States:

that each work identified in this notice is subject to normal commercial exploitation.

that a copy or phonorecord of each work identified in this notice is available at a reasonable price.

Signature:----------

Date:----------

Typed or printed name:----------

Title:----------

Appendix B to Sec. 201.39--Required format for Continuation Sheet

NLA CON

Page ____of ____Pages.

Continuation Sheet for NLA Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price

1. Title of the work (or, if untitled, a brief description of

the work): _____.

2. Type of work (e.g. music, motion picture, book, photograph, illustration, map, article in a periodical, painting, sculpture, sound recording, etc.): _____.

3. Edition, if any (e.g., first edition, second edition, teacher's edition) or version, if any (e.g., orchestral arrangement, English translation of French text). If there is no information available relating to the edition or version of the work, the Notice should state, ``No information available'': _____.

4. Copyright renewal registration number (not required for foreign works restored under 17 U.S.C. 104A): _____.

Additional Content (OPTIONAL):

5. Original copyright registration number: _____.

6. Additional information concerning the work's normal commercial exploitation or availability at a reasonable price: _____.

Dated: December 21, 1998.
Marybeth Peters,
Register of Copyrights.

Approved:
James H. Billington,
The Librarian of Congress.
[FR Doc. 98-34430 Filed 12-29-98; 8:45 am]
BILLING CODE 1410-30-P

4. Owners' Registry

Published works. A good approach would be to add a requirement for copyright owners who wish to exploit their works to either satisfy the requirements necessary to keep the work from orphan status (see above). Alternatively, if it is too late for that, owners may complete a simple, no-cost filing with the Copyright Office. Although filing is not required to assert copyright, it would be required to maintain a range of remedies. Owners would file, at no cost, notice of any works that a potential user could reasonably demonstrate as satisfying the orphan criteria. To make the system viable, the owner would need to designate an agent and keep that contact information on file with the Copyright Office, such as under § 512. The Copyright Office would then keep that file online and easily accessible to anyone.

Unpublished works. Authors of unpublished works would not need to file. Libraries possess a great number of unpublished orphan works that could be digitized and disseminated without harming a living author – diaries from the last century etc. Yet since copyright lasts for the life of the author plus 70 years, digitizing these works quickly runs into copyright problems. Heirs are unknown and scattered. For those works, an additional criterion should be added to attain orphan status: death of the personal author (last surviving author in the case of joint works) plus ten years. For unknown authors and corporate works, perhaps a term of years less than the 120 years from date of creation could be set, such as 75 years from the date of creation.

Again, owners may avoid orphan status of the works by a simple, no-cost filing procedure similar to the one for published works. Registration by the heirs/assigns would be available for up to ten years after the death of the author. After the ten years have passed, users may safely make use of a work, simply by checking to make sure the work is not listed in the registry.

Mandatory requirement. The owners' registry must be mandatory, or it is not meaningful. Today, libraries may check to see if owners have filed with the *optional* registry provided for under §108 (h)(2)(C)

> **"**the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies."

Yet since the notice is optional, it is not widely used (if at all), and serves no real function or use for libraries.

Information required: Name of author(s), name of assign(s), contact information, title of work and date of creation and/or publication. If the work is registered with copies deposited at the Copyright Office, the owner is entitled to full remedies, including statutory damages and attorney fees. The fraudulent claimant would not be able to sustain his claim when the rightful owner shows his copyright certificate from the Copyright Office any better than he can under the current system. A model for the information required could be found in 37 CFR §201.39.