

Statement of Gary E. Strong
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University Library
University of California, Los Angeles
Concerning
Orphan Works

Notice of Inquiry, Copyright Office, Library of Congress
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By Electronic Submission and U.S. Mail

Jule L. Sigall
Associate Register for Policy and International Affairs
U.S. Copyright Office
Copyright GC/I & R
P.O. Box 70400, Southwest Station
Washington, DC 20540

Dear Mr. Sigall:

I, Gary E. Strong, am University Librarian and Director of the University Library at the University of California, Los Angeles. I am also on the Advisory Board of Public Knowledge, a Washington-based advocacy group dedicated to the building and strengthening of a vibrant information commons. I have more than thirty years of experience directing large libraries of all types and have participated in a variety of activities related to copyright and other legal matters. Prior to coming to UCLA,

I was the Director of the Queens Borough Public Library and prior to that I was State Librarian of California, the top administrator of the California State Library system.

This topic is of critical importance to libraries and archives, which play a unique and vital role in providing long-term access to and use of library and archival collections. College and research libraries in particular are integral to the mission of higher education by supporting teaching, learning, research, and the creation and dissemination of knowledge. New technologies provide opportunities for libraries to more broadly and effectively fulfill their primary role of providing access to collections over time. Libraries and users take advantage of limited exemptions to the exclusive rights of copyright owners afforded by Section 107 and 108 of the Copyright Act. However, neither exception provides for libraries to engage in digitizing and digital delivery of copyrighted orphan work. Libraries and their users have embraced new digital technologies that provide the potential for 24/7 desktop delivery of information. College and university libraries are utilizing digital technologies in support of teaching and research needs of their users to provide digital access to material that previously was only

accessible by traveling to the particular library that owned the item. Yet, as applied to these new uses of digital technologies, current copyright law impedes or prevents libraries from providing services such as digital delivery and digital access to and use of recorded knowledge, including millions of items of orphan work¹ .

This statement will address six key points:

- Significance of the problem
- Scope of the problem
- The problem of identification of copyright owners
- The problem of locating copyright owners
- Implications of the problem
- Recommendations

Ranked among the top ten research libraries in the U.S., the UCLA Library system is a campus-wide network of libraries serving programs of study and research in many fields. The UCLA Library has one of the country's premier collections of manuscripts, rare books, and special materials and is one of the most heavily used. The Library's special collections contain extensive collections of primary and rare resources in the arts, music,

¹ The definition used throughout this statement is that used by the Copyright Office Notice of Inquiry, i.e., "copyrighted works whose owners are difficult or even impossible to locate." Federal Register: January 26, 2005 (Volume 70, Number 16) Notices, P. 3739-3743.

humanities, life and physical sciences, and social sciences. Its rare book holdings consist more than 350,000 volumes, while its non-book holdings comprise more than thirty thousand manuscripts, five million photographs and over 630,000 maps, music, sheet music, sound recordings, art, architectural drawings, graphic arts, and ephemera. The UCLA Library's collections as a whole are open to the general public for reference and research, and the Library places a priority on providing the highest quality collections and services to the UCLA community and to present and future generations of users.

Significance of the Problem

Since their inception, a fundamental purpose of college and research libraries has been to provide access to library and archival materials, which are essential for instruction and research. Historical and archival materials present particular problems related to identification of copyright ownership. In order to determine copyright ownership, the creator, author, or publisher must be identifiable, but for many historical and archival collections such as manuscripts, personal papers, architectural drawings photographs, and non-book material, that is often impossible to determine. For example, most historic

photographs are undated and unsigned, and unattributed in any manner. Ephemera and materials such as notes, while often of unique research and teaching value, are also typically unsigned and therefore in most cases untraceable. As noted above, the situation is further complicated because most historical items do not contain adequate information to identify copyright ownership. In addition, prior to 1978 an unpublished work was entitled to perpetual copyright; the absence of registration records for any unpublished work prior to 1978 makes the identification and location of owners and heirs more difficult.

There is no single registry or list of registries that can be used to locate owners of typically non-commercial works that are covered under copyright. The Copyright Office Information Circular 22 states that "searches are not always conclusive" and continues that particular categories of work present additional challenges of identifying ownership. Among the categories listed are archival materials and collections including "before 1978, unpublished works were entitled to protection under copyright law without registration" and "the work may have been registered under a different title or part of a larger

work".² This lack of certainty regarding the basic question of determining copyright ownership for much historical and archival material presents a significant problem for libraries who want to take advantage of new technologies to digitize for access and dissemination. Unfortunately, this often results in growing segments of library and archival collections and material becoming "hidden knowledge," thus denying full educational access and use of the rich library and archival collections.

Scope of Problem

The magnitude of the problem is large and growing daily. Two types of material contribute to the size and scope of the problem. First, as noted earlier, historical archival and library material such as photographs, diaries, recordings, personal papers, and architectural drawings are often unsigned and unattributed, making it impossible to identify the copyright owner. Second, newly created, born-digital material is often drawn from a variety of existing and new sources put together by multiple people over a period of time, making the task of identification of the copyright owner equally, if not more, difficult.

² U.S. Copyright Office. Information Circular No. 22

Further complicating this situation, works created after 1978 do not require registration with the Copyright Office, so the task of identifying and locating the copyright owner is even more difficult. In addition to the problems of uncertainty and increasing complexity is the fact that libraries are not in the business of copyright clearance but rather in the service of facilitating access to and use of their collections and services. Most libraries do not have staff trained to do complex copyright clearance, and the sheer volume of materials, including the large number of orphan works, makes detailed copyright clearance a very expensive, time-consuming and potentially irresolvable task.

University and college libraries, and libraries in general, acquire materials such as manuscripts, photographs, etc., and license electronic resources, but they do not receive the copyright of the material. For the vast majority of library material and collections, the library is not the copyright holder. To further illustrate the scale and scope of the problem, in the case of the UCLA Library alone, literally millions of individual and in most cases unique items would be in this category of orphan works. On a positive note, this inquiry by the Copyright Office

provides an opportunity to demonstrate the rich contribution to knowledge that would result from a less restrictive approach. In light of the above, the scope of the existing problem is quite extensive and, if left unabated, will continue to increase exponentially.

Problem of Identification of Copyright Owners

It is well established that historical and archival material present particular challenges with identification of copyright ownership. The Society for American Archivists cites three reasons for the difficulty. First, archival materials such as letters sent and received by an individual, third party, or government or private sector agency may have hundreds if not thousands of potential sources and thus copyright owners that must be contacted. This means that the library, in order to digitize and make the material available broadly over a digital network, must make a determination of copyright ownership on an item-by-item basis and that any one item may require multiple permissions from a variety of sources. An example of the historical materials category is any of the thousands of historical photographs in the UCLA Library collections where the photographer, the subjects, or studio are not identified or identifiable. While these materials are of

considerable historical and research value, they contain insufficient information to identify the copyright owners. Does that mean that they should be locked away for the duration of their copyright term available only to those who can personally visit the UCLA library in order to access and use the materials on site?

In addition, certain types of work such as music or film have multiple layers of copyright owners such as director, cinematographer, actors, etc., making any copyright clearance highly complex and time-consuming. Second, many documents found in archive and manuscript collections were created anonymously. Even if authorship is identifiable, it may be difficult if not impossible to either locate or determine when the creators or their heirs died, which is necessary for determining copyright ownership. Third, even when an heir can be located, they may not know the copyright status or whether the work was a work for hire and therefore subject to ownership by someone else.

In addition, as mentioned above, newly created born-digital educational and instructional materials utilize new methods, models, and conceptions of authorship. An example of the newer materials category is any modern-day

collaboratively created digital classroom project that involves multiple people such as faculty, students, and staff, who create the work for a learning and educational purpose and do not include information necessary to later request permission to use the work. How is the library or an archive to determine ownership of a work without any obvious or identifiable authors, creators or publishers?

Problem of Location of Copyright Owners

If it is possible to identify a copyright owner, there is the additional problem of locating and contacting the copyright owner. The Frontera Collection at UCLA, which consists of more than one hundred thousand recordings and thirty thousand performances is a good example of this problem. The Frontera Collection is the largest repository of Mexican and Mexican-American vernacular recordings in existence.³ The value of the collection to students, scholars, and the community is invaluable, and yet copyright law prevents the Library from making this work fully available because most of it is covered under copyright and we are unable to locate the copyright owners.

³ The Frontera Collection is a collaborative project of the UCLA Library, Los Tigres del Norte Fund at UCLA, and the UCLA Chicano Studies Research Center, in collaboration with the Fund for Folk Culture and Arhoolie Records. For more information, see the Frontera Web site:
<http://digital.library.ucla.edu/frontera/project.jsp>

Among the reasons that locating the copyright owners is difficult if not impossible for the vast majority of Frontera materials are the following:

- Many of the artists are not well known; therefore, their names do not appear in standard reference works or rights databases such as ASCAP and BMI.

- Even where the artists' names are included in a reference work, this does not provide enough information. If a musical work is not registered with a rights organization, it is impossible to determine if the work or performance is a work for hire.

- Many of the labels included in the Frontera Collection were very small and did not produce many recordings. Often the recordings were made in small communities and had limited distribution. These companies may have gone out of business or been acquired by another company, but because the recordings were not registered

with any rights organization, that is impossible to determine.

- The rights to the underlying musical publication may also be difficult if not impossible to establish. Most of the titles in the Frontera Collection are not represented in the ASCAP databases.

Implications of the Problem

The implications of this problem are serious and far-reaching. There are four specific areas I would like to highlight. First, what are the effects on library users and use of library materials? There is no doubt that the current status of copyright law prevents a library or archive from facilitating full use of orphan work. In the digital environment, in order to facilitate access and use of library materials, libraries must provide information related to the types of uses that users may appropriately make. If libraries are unable to determine copyright ownership then they are unable to provide this information and users are left not knowing what, if any, uses can be made of the item or material. For example, with the Frontera Collection, under current copyright law the

Library is unable to offer complete songs to listeners outside the UCLA community, thereby preventing other educational uses simply on the basis of our inability to identify or locate the copyright owners. Given the vast number of library and archival materials that fall in this category, the implications for present and future generations of students and scholars are serious.

Second, what is the effect on higher education and creation and dissemination of knowledge? College, university, and research libraries contribute to the mission of higher education by providing long-term access to library materials. As mentioned above, if libraries are unable to determine the underlying copyright status and ownership for any item or material in the collection then the item cannot be digitally copied or digitally delivered and instead, access is limited to on-site access and use of the original. Copyright law currently prevents libraries from fully making available the richness of their collections and thereby denies users access to knowledge that is essentially locked away.

Third, how do copyright restrictions on orphan work influence what constitutes the permanent record of recorded

knowledge? If libraries and archives are unable to make large amounts of their historical and archival material available, they may not continue to accept that type of material, and if they don't, this material, consistently a unique record of human knowledge and endeavor, will not be preserved.

Fourth, what is the effect of current copyright law on orphan work on restricting or limiting access to our cultural heritage? As mentioned above, there is a category of orphan works that are unique, rare and therefore invaluable for teaching and research and for contributing to the richness, wealth and diversity of our cultural heritage. Using current technologies these works can have an unprecedented contribution to research and learning. That potential, however, is not being reached because creators and users of all types, including libraries, are currently restricting uses of orphan work because of the fear of violating or not understanding current copyright law. If libraries and creators were able to use the rich and unique materials that comprise orphan work without fear of violating the law then new and improved access to cultural heritage would be possible.

Recommendations

College and research libraries and archives play a unique role in the process of the creation, dissemination, preservation, and defense of the record and recorded knowledge. As the director of a major U.S. research library facing the implications of this problem on a daily basis, I have four recommendations related to the focus of this inquiry. First, I recommend that the Copyright Office report on the findings of this inquiry and advise Congress as to the serious nature and growing magnitude of this problem. Second, I propose an exemption for educational and research use that would allow libraries and archives to fulfill our fundamental mission of preserving and providing access and use of library collections and services. Third, I would propose that a registration system be reinstated that would require any copyright owner interested in commercial remuneration to register. This would enable libraries and archives to check a single source and proceed to either contact the registered owner and request permission or, if not listed, use the item for educational and research purposes without fear of suit for copyright infringement. Fourth, I recommend a due-diligence clearinghouse be established. The clearinghouse would

provide libraries or individual users the opportunity to establish due diligence by registering items covered by copyright where the owners cannot be identified or located. The clearinghouse would provide an opportunity for rights owners to be located by interested creators as well as for creators to use copyrighted material and to comply with copyright if owners do not respond within a reasonable (for example, sixty days) time.

Thank you for the opportunity to comment. I commend the Copyright Office for investigating this problem and hope the findings reflect the serious ramifications of the existing barriers and present opportunities to address orphan works. For libraries and archives, the use of orphan work will make available hidden knowledge for present and future generations and further the purpose of Copyright law to promote science and the useful arts.

Sincerely,

Gary E. Strong

University Librarian
UCLA Library

