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Principal Librarian for Special Projects

March 22, 2005

Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington DC 20024

Re: Response to Notice of Inquiry about Orphan Works, *Federal Register* (January 26, 2005), Vol. 70, No. 16: 3739-3743.

Dear Mr. Sigall,

I am writing on behalf of Carnegie Mellon University Libraries to address the issues in the U.S. Copyright Office Notice of Inquiry. The universe of copyrighted works is huge and diverse and issues related to defining what constitutes abandonment by copyright holders of different categories of work are complex. This response to the Notice of Inquiry focuses on published written material, such as books, journals, anthologies, dissertations, conference proceedings, technical reports, etc. I address your questions and propose a solution related specifically to scholarly and educational uses of orphaned publications.

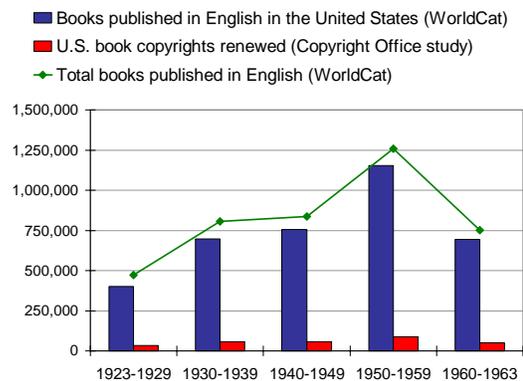
Nature of the problems faced by subsequent creators and users

Potential creators or other users of copyrighted works face the following problems in obtaining rights or clearances in pre-existing works:

- 1) ***Determining the copyright status of a work*** – It is common knowledge that works published in the United States prior to 1923 are in the public domain. It is likewise common knowledge that—unless the copyright owner placed the work in the public domain—works published 1923-1963 are copyright protected only if the copyright owner renewed the copyright, and works published after 1963 are copyright protected. The ideal method for determining the copyright status of works published 1923-1963 is to have the Copyright Office conduct a title search. In 2004, the Copyright Office charged Carnegie Mellon

University Libraries \$150 to conduct title searches of seven books. Many potential creators or other users might not be able to afford this. Alternatives, such as hiring a copyright attorney, could likewise be unaffordable. The result is that potential users either (a) do their best to determine copyright status and take a risk that their determination is accurate, (b) play it safe when in doubt and pursue copyright permission—which leads to additional problems described below, or (c) simply abandon the prospect of using the work, having been discouraged or disenfranchised by the current copyright system.

The figure illustrates the scope of the problem with books. The number of books published in English in the United States and the total number of books published in English were derived from the WorldCat database.¹ The number of U.S. copyrights renewed is based on a study conducted by the U.S. Copyright Office in 1960.² Granted the numbers are estimates, but the disparity between the number of books published in the United States during this period and the number of books that had their copyright renewed is striking. According to the study conducted by the Copyright Office, only seven percent of book copyrights were renewed. Potential users do not know which books published 1923-1963 are still copyright protected and therefore must bear the burden of determining copyright status.



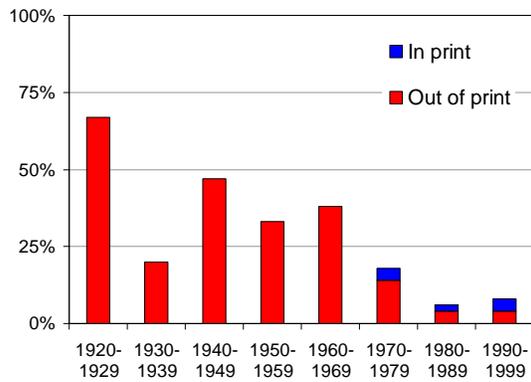
- 2) **Identifying and locating copyright owners** – This task almost requires a detective. The publisher name that appears on the title page or front matter of a book is often only the starting point for a long and tedious journey that frequently dead ends. Publishers merge, go out of business, or sell their rights. Often copyright reverts to the author or the author’s estate when a book goes out of print. According to people we spoke with at the Copyright Office, the *claimant* on a copyright renewal record is the copyright owner at the time of renewal, but not necessarily the copyright owner today. In our experience, often the initial publisher or claimant cannot be found, so there is no starting point for finding the current copyright owner.

To locate publishers, we search the Web, the publisher search feature of the Global Books in Print database (BooksInPrint.com), the yellow pages, and relevant reference works. Many publishers have reported that copyright reverted to the author, but seldom do they have contact information for the author. For older works, often copyright has passed from the

¹ The number of books published in English in the United States was estimated by subtracting the number of books published in English in the United Kingdom, India, Canada, and Australia from the total number of books published in English.

² Ringer, Barbara. A. June 1960. Study No. 31: Renewal of Copyright. In 1 *Studies on Copyright*, Arthur Fisher Memorial Ed.: 513-514. Reprinted in Library of Congress Copyright Office. *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. Washington: U.S. Government Printing Office, 1961.

author to the author's estate. Authors and estates are very difficult to locate. We consult the Authors Registry,³ the Writers, Artists, and Their Copyright Holders (WATCH) File,⁴ and the Authors Licensing and Collecting Society. Often these resources cannot help us.

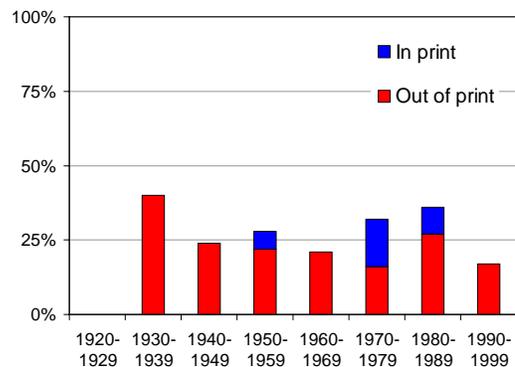


Carnegie Mellon University Libraries conducted a study in 1999-2001 to determine the feasibility of acquiring copyright permission to digitize and provide Web access to books in our collection. The study was based on a statistically valid random sample of our books and a search of the copyright renewal records to determine their copyright status. The figure shows the distribution of copyrighted books in the sample by publication date and print status for which *we could not find the copyright owner*. Overall,

publishers of almost a fourth (22%) of the books could not be found. In general, the older the book, the more difficult it was to find the publisher. In addition, the older the book, the more likely it was that the book was out of print—neither generating revenue for the copyright owner nor easily accessible to potential readers.⁵

Sometimes copyright to a book is owned by many people, for example, the introduction, translation, photographs and figures could each be owned by a different person. If a potential creator or user wants to use the entire book, copyright ownership of each part or item must be traced through time. In our feasibility study, 11 percent of the books in the initial sample were eliminated from the study as too complicated to pursue because of third-party copyright ownership.

- 3) **Copyright owners often do not respond** – In the feasibility study referenced above, over a third (36%) of the publishers we successfully located did not respond to multiple letters of inquiry. Most (79%) of the books about which they did not respond were out of print. The figure shows the distribution of books for which we got *no response from the copyright holder* based on the total number of books in the final sample (same scale as the figure above). The percentages would be higher if the figure was based instead on the number of books for which we successfully located the publisher.



³ The Authors Registry is a New York City-based service that provides contact information for authors. They will try to locate ten authors per week (two per day) at no charge. See <http://www.authorsregistry.org/welcome.html>.

⁴ WATCH File is an online database maintained by the Harry Ransom Humanities Research Center at the University of Texas at Austin. Available from <http://tyler.hrc.utexas.edu/>.

⁵ Print status was determined by searching Global Books in Print (BooksInPrint.com).

- 4) ***Problems if the copyright owner responds*** – Even if the copyright holder is located and responds, potential users can still encounter problems. In our experience, some publishers have no record of having published older works. We have had to photocopy and send them the title page. Nevertheless, when they have no records, the search for copyright permission dead ends. Furthermore, publishers are not always certain what rights they have. Some appear to operate under the assumption that if a right is *not explicitly granted* to them in their contract with the author(s), then they do *not* have that right, for example, the right to make a digital version of the work. Other publishers operate under the opposite assumption that if a right is *not explicitly denied*, then they *do* have that right.
- 5) ***Transaction costs*** – The cost of labor, postage, and long distance telephone calls entailed in determining copyright status and identifying, locating, and negotiating with copyright owners is not trivial. In a subsequent study seeking permission to digitize and provide Web access to 278 fine and rare books, conducted by Carnegie Mellon University Libraries in 2003, the transaction cost was \$78 per title for which permission was granted. This is a very conservative estimate. It does not include the cost of consultations with university legal counsel, creating the database to track the work, managing the project, or intermittent labor costs in 2004 invested in locating and finalizing negotiations with some authors and estates.

In a study conducted by Wayne State University in 2000, the transaction cost of seeking permission to digitize 1000 articles for electronic reserves was \$24,500.⁶

- 6) ***Permission fees and restrictions*** – In addition to the transaction cost of seeking copyright permission, there could be permission fees levied by the copyright holder. The potential user has no way of knowing if a fee will be levied or, if so, what that fee might be. In our experience seeking permission to digitize and provide Web access to books, many publishers who granted permission charged no fee, but some did. The fees ranged from \$50 to \$300 per book and were often accompanied by a limited license, meaning that we can provide access to the digitized book for a limited length of time (from two to seven years), after which it must be removed from the Web. Furthermore, over half of the publishers that granted permission in the two studies we conducted restricted access to their digitized books to members of the Carnegie Mellon community. Given that almost all of these books were out of print, this restriction seems in most cases to be a senseless hurdle to access to information.

A project conducted by Carnegie Mellon's Center for the Advancement of Applied Ethics in 1987-1989 sought permission to incorporate images of art works into educational software they were developing on art forgery. The project manager encountered great disparity in permission fees for use of the images, from no charge to \$150 per image. Overall, the permission fees to use thirty images totaled \$2,142 (converted to currency rates of 2002).

The permission fees, as compared with the transaction costs, for the 1000 articles in the Wayne State University electronic reserves work referenced above was \$26,000. The total

⁶ Bradd Burningham, "Copyright Permissions: A Pilot Project to Determine Costs, Procedures, & Staffing Requirements," *Journal of Interlibrary Loan, Document Delivery & Information Supply*, 11 (2), 2000: 95-111.

cost of acquiring copyright permission for the thousand articles was \$50,500 or \$505 per article.

Along these same lines, academic departments pay royalty fees to include copyrighted work in student course packs. In fiscal year 2000-2001, departments at Carnegie Mellon paid over \$81,000 in royalties and roughly \$2,800 in Copyright Clearance Center fees to use 1,400 book chapters, newspaper and journal articles. The royalty fees ranged from less than \$10 to more than \$1000 per item, with no apparent correlation between the fee and the number of pages or date of publication of the work. In addition, Carnegie Mellon faculty sometimes pay permission fees to use their own published work in the courses they teach because traditionally they transfer their copyright to the publisher as a condition of publication.

Even if potential users absorb the transaction cost and the copyright holder grants permission, potential users might not be able to afford the permission fee, which means the effort they expended was fruitless and their valuable time wasted. Having some expectation of what the permission fee might be for different types of requests and types of material would help potential users budget their finances and their time. The apparently whimsical setting of permission fees is problematic and only adds to the possibility that some users will be disenfranchised by the current copyright system.⁷

- 7) ***Time and outcomes***— The time it takes to identify, locate, and receive a response from copyright holders can be substantial. In the feasibility study we conducted, more than 60 percent of the publishers we located did not respond to our first letter of inquiry, so we sent a second or sometimes a third letter. The average length of time to receive a response from a publisher was 101 days from the date of the initial letter for a response of “permission granted,” and 124 days for a response of “permission denied.” Three to four months is often too long for scholarly or educational purposes. Teachers, students, researchers, and scholars have deadlines set by publishers, conference organizers, or the academic calendar. Furthermore, research is a competitive enterprise. Delays are serious and can be detrimental.

The possibility of not acquiring permission despite the effort invested in identifying and locating copyright holders is real. Obviously the nature of the request influences the copyright holder’s response. In the study we conducted to determine the feasibility of acquiring permission to digitize and provide Web access to books, almost a third (30%) of the publishers we contacted denied permission.

Though the data provided above reflect efforts by a university library to acquire copyright permission to digitize and provide Web access to books, the problems are inherent in the U.S. copyright system. Scholars wanting permission to reproduce a copyrighted poem, photograph, or figure in a book they are writing could easily encounter significant difficulties determining the copyright status of the item, identifying or locating the copyright owner, or getting a response from the copyright owner in time to meet their deadlines. Furthermore they would have no idea whether a permission fee would be levied or what that fee might be. The same is true of teachers

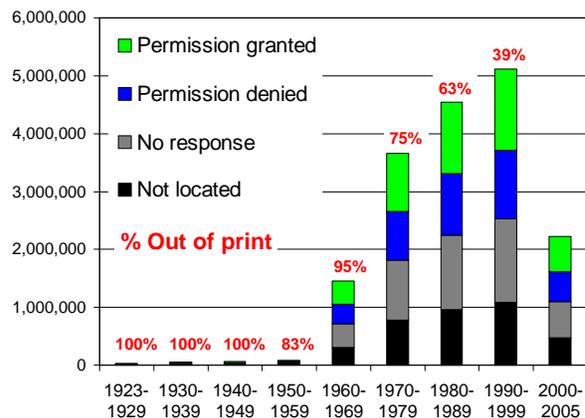
⁷ Guidelines for different types and duration of use and different types of published material could help solve these problems. Perhaps such guidelines could be developed through the collaboration of the stakeholders—researchers, educators, publishers, authors, and their estates.

who want to incorporate copyrighted works into courseware they are developing or anyone who wants to include a copyrighted work in a conference presentation that will be made available on the conference Web site.

A final problem related to acquiring copyright permission merits mention. Many books are brittle and slowly turning to dust on library shelves because they were printed on non-acid-free paper. Most if not all of these books are out of print. Though preservation-quality digitization standards have been established and current copyright law allows digitization for preservation purposes, the digital copy can not be used unless or until the physical copy is so deteriorated that its use would threaten destruction of the artifact. Even then, the digital copy can only be used within the physical library facility that owns the item. As older books are weeded from library collections, fewer copies remain. And as these copies become more and more brittle, they cease to circulate on interlibrary loan, which means that users have to bear the cost and inconvenience of traveling to a library that has the book. With no way to browse the material ahead of time to confirm its relevance, how many potential users are likely to invest the time and money—or to have the time and money to invest—in traveling to the library to examine the book? Given these circumstances, chances are that many potential users will not use the book. Again the copyright system appears to disenfranchise potential users and uses of published material.

Under the current copyright system, the only way to provide users with timely, equitable access to these older books is to determine their copyright status and acquire copyright permission to digitize and provide open access to them. And the longer we delay, the more brittle the books will become and the more the work will cost because more expensive scanners are required to digitize fragile materials.

Even if the cost of determining copyright status and attempting to acquire permission were not prohibitive, the number of books for which the copyright owner could not be located, did not respond, or denied permission would likely be huge. The figure shows a rough estimate of copyright protected books to illustrate the scope of the problem. The data are based on the number of books published in English in the United States (according to the WorldCat database), the seven percent of these books published 1923-1963 that had their copyrights renewed (according to the study conducted by the U.S. Copyright Office), and the pattern of interactions with copyright holders of books encountered in Carnegie Mellon’s random sample feasibility study. The percentage of books estimated to be out of print is also based on the analysis done in the feasibility study. The bottom line is that there are millions of brittle, copyrighted books and other published written works for which attempts to acquire permission to digitize, preserve, and provide open access would be unsuccessful.



Nature of “orphan works”

Carnegie Mellon University Libraries share the perspective of Stanford University Librarian Michael Keller, but with some modifications. We propose the following criteria for identifying orphaned works:

- The work is out of print as determined by RR Bowker, LLC, BooksInPrint.com.
- The work was first published at least 25 years ago.⁸
- The work has not been identified by the copyright holder as a work to be excluded from the designation of orphan status. A list of excluded works should be created, maintained, and made freely and publicly accessible on the Web by the Copyright Office or its designee. In addition, the list should include contact information so that potential users can locate the copyright holder or his or her designee to request permission.

We agree with Stanford University that legislation should be passed that would allow orphaned works to be used for legitimate educational or research purposes. The criteria that constitute legitimate educational or research purposes should be provided by the Copyright Office or enacted into law in consultation with scholars, researchers, and educators.

In comparison with Stanford University, however, we recommend shortening the time frame and expanding the scope of potential users who can take advantage of orphaned works. We see no reason why scholars, teachers, and students should be denied the right to use orphaned works for educational or research purposes without a library or archive serving as intermediary, or why libraries or archives alone should bear the burden of providing digital copies at the request of patrons. Libraries and archives should certainly have the right to provide digital copies at the request of patrons, but many might not have the facilities or labor force to do this in the time frame available to the patron. Free enterprise should allow other organizations and businesses to respond to this demand. Alleged infringements of the right to use orphaned works for educational and research purposes should be addressed using existing mechanisms.

Like Stanford, Carnegie Mellon University Libraries does not believe that requiring copyright holders to file a notice with the Copyright Office to exclude a work from the designation of orphan status conflicts with the Berne Convention’s prohibition against formalities. Copyright law has granted safe harbors for libraries and archives and in practice has allowed fair use exemptions for educational and research purposes. Even if copyright holders do *not* file for exclusion of their work from orphan status, they continue to own and maintain the right to exercise their copyrights.

If, after a determination of orphan status has been made and users have made legitimate uses of an orphaned work, the copyright holder later files for exclusion, those users who legitimately used or facilitated use of the work while it was considered to be orphaned (e.g., a library or archive that distributed an electronic copy) should not be subject to charges of copyright

⁸ Research conducted by the Copyright Office indicates that 93 percent of book copyrights were abandoned (not renewed) within 28 years of publication. Scholarly and educational resources frequently go out of print within a few years of publication. Designating works as orphaned only in the last twenty years of their 95-year copyright term would likely limit legitimate scholarly and educational uses unnecessarily for 50 years.

infringement. However, they and other potential users should make no further uses or distributions of the work without the permission of the copyright owner. Copyright infringement should apply only when the use was not for a legitimate educational or research purpose or when the work was used or distributed after the copyright holder filed notice for exclusion.

Identifying orphaned works on a case-by-case basis would be prohibitively expensive and significantly delay educational and scholarly work. Requiring potential educational and scholarly users to (a) determine that a copyright holder is “unlocatable” and (b) bear the financial cost and further delays associated with adjudicating the case, whether through filing an intent to use the work and waiting some to-be-designated length of time for the copyright holder to surface or by taking the case before a tribunal charged with deciding such matters, unduly burdens the user. If potential users have to pay to file a notice of intent or to have their request heard by a tribunal, this would limit use of orphaned works to only those who can afford to pay. And how long would the process for a given case take? Meanwhile, the potential user is denied use. What creative or scholarly work would be postponed indefinitely, what windows of opportunity would be lost, while the tribunal assigned to identify orphaned works deals with a lengthy queue of requests? What if multiple users want to use the same work? Would they each have to determine that the work is “unlocatable” and file an intent to use or bring it to the tribunal for adjudication? Or would the initial determination regarding a work be made publicly available? On the one hand it would be ridiculous to have subsequent users repeat the process. On the other hand, is it fair and equitable to have the initial user bear the cost and the delays inherent in the system?

Furthermore, hinging the designation of orphaned works on their being “unlocatable” ignores the serious problems that are frequently encountered even when the copyright holder is located, i.e., many publishers do not respond or respond in a timely way, and some do not know what they published or what their rights are. Basing designation and legislation of orphaned works on whether the copyright holder can be located skews and only partly addresses the problems in the current system and would potentially leave millions of published works in limbo. (The figure on page 6 gives some idea of the number of books.)

Carnegie Mellon University Libraries applauds the Copyright Office for undertaking the task of designating and developing a system to manage orphaned works. We hope that this effort will begin to restore the balance between private interest and public good. This is a significant first step in resuscitating the social bargain that our founding fathers intended copyright to be.

Sincerely,

Denise Troll Covey
Principal Librarian for Special Projects
Carnegie Mellon University Libraries