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By Electronic Submission & U.S. Mail

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

Comment Re: Orphan Works and Research Libraries and Archives

Dear Mr. Sigall:

We represent the Howard W. Hunter Law Library and the J. Reuben Clark Law School at Brigham Young University. We are responding to the Copyright Office request for comments in the Notice of Inquiry dated January 26, 2005.

At the J. Reuben Clark Law School, we have a number of faculty who teach courses in Philosophy of Laws, Perspectives on Law, Readings in Biblical Law, etc. The course readings selected by these faculty often include materials first published in the 1920s and 1930s. It is impossible for us to determine whether or not copyright even continues for many of these materials. While we are aware that 90% of copyrights were never renewed, the litigious nature of our society has created an aversion to risk on the part of the library and law school administration.

Preferring to err on the side of caution, it is our practice to contact the publisher for any item first published after 1922. However, even this practice is difficult to complete: many of the publishers no longer exist, and more than once their assigns have disclaimed any knowledge whatsoever of the publication in question. While, for the most part, we have found the publishers to be very understanding and accommodating of our circumstances, there have been some who requested that we pay royalties even though they would have been unable to prove ownership of the materials. In fact, a couple of years ago, a major US publisher suggested we pay substantial royalties to use two paragraphs from a public domain work: Alexis de Toqueville's Democracy in America, originally published in 1835, and republished

by them in the mid-1970s. A similar situation occurred with one of Cato's letters, first published in 1721. (In both cases, we found another source for the material.)

The biggest concern we have, however, is not the payment of royalties where they are not due (although that is a serious issue). The real problem is the amount of time that it takes to manage permissions requests for materials printed in the first half of the 20th Century. Publishers have merged or gone out of business and sold their inventories to others. Records are missing. And some publishers ask us to obtain parallel permission from authors or heirs who cannot be located. We must often send four or five letters to different organizations and individuals, trying to track down the correct information about who controls the rights to these materials, only to be told by the ostensible owners that even they don't know if the rights are still protected.

This is a very frustrating and time-consuming process. It is not uncommon for the semester to end before our efforts are completed, by which time it is impossible for us to collect any royalties from students who already have their grades or even their diplomas. In such cases, we have to spend time with the professors trying to determine what the risks are in using the materials (often for the third or even tenth time, which argues against fair use) without permission. Some professors have elected to find other sources rather than spend the time searching for rightsholders, which of course means that we must process those new materials as well.

To provide specifics, in the last six years our copyright office has processed 1558 copyright requests. In 121 cases, an identified rights owner failed to respond to the permission request (7.75%). In another 94 cases, we were unable to identify the correct rightsholder (6%).

Two specific examples:

- In November 2000, a professor notified us that he wanted to distribute an article on a particular political-economic Constitutional theory to his Winter Semester class. The article was originally published as part of a compilation volume in 1958, then reprinted by Oxford University Press in 1969. We sent a request letter to Oxford, and were notified in December by their London office that the request had been forwarded to the New York office for research. We sent a follow-up letter in January 2001, and then again in May and August of 2001, reiterating the request for permission, but never received a final answer. We spent over a dozen hours working on this request before just giving up.
- In January 2001, one of our professors wanted to use some pages from Judge Medina, a biography by Hawthorne Daniel. Although the author passed away in 1945, the book was not published until 1952, a not-uncommon situation immediately after World War II. The original copyright in the work was held by the publisher. But the publisher has gone out of business and we were unable to determine whether its

intellectual property assets had been acquired by anyone else. Nevertheless, we spent upwards of twenty hours trying to find out.

The Copyright Clearance Center is of little assistance in these situations, because the materials are obscure and out of print. The 'time tax' that obtaining copyright permission imposes on those of us who are trying to comply with the law is prohibitive. The question as to how much effort is required in order for a school or library to show due diligence and sincere good faith in its attempts to comply with the copyright law has never been answered. So in situations like those described above, the school is ultimately faced with the choice between using the materials in the hope that either they have entered the public domain or the rightsholder will not mind, or seeking out some other alternative resource. Either of these options can be very time consuming.

We believe that the most beneficial action the Copyright Office could take in the area of orphan works would be to establish a system whereby the owners of copyrights in older out-of-print materials could voluntarily register their property interests. Such a system would give permission-seekers the necessary information to request permissions appropriately. In cases where the original copyright term has expired and no ownership interest has been registered, it should be presumptively reasonable for permission-seekers to assume that the material in question has entered the public domain. (The Stanford Libraries ALOW proposal to amend 17 USC §108(h) would create one such system, and we would support its implementation.) In the interests of copyright owners, we do not believe the failure to register for such a system should be deemed to forfeit any legitimate copyright claim. In cases where a permission-seeker has violated a non-registered copyright, Congress and the Copyright Office could establish a modest statutory royalty rate (perhaps \$.02 per page), payment of which would be considered due compensation for unintentional infringement. We believe the proposed system would provide an appropriate balance between the interests of copyright owners and those of educators and other users of published works.

We appreciate the consideration the Copyright Office is giving to the important matter of "orphan works." Thank-you for allowing us the opportunity to comment on this issue.

Cordially,



Constance K. Lundberg
Associate Dean, J. Reuben Clark Law School



Laureen C. Urquiaga
Law School Copyright Coordinator