

Cornell University
Library

Sarah E. Thomas
Carl A. Kroch University Librarian

March 23, 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 by the **Cornell University Library** to the
Notice of Inquiry Concerning Orphan Works, 70 FR 3739 January 26, 2005

Dear Mr. Sigall:

I am writing on behalf of the Cornell University Library in response to the Federal Register notice seeking information on how the difficulty in locating the copyright owners of orphan works has affected "the progress of science and the arts."

"Orphan works" (works for which the copyright owner cannot be identified or found) have been a substantial problem for the library for a number of years. For example, we have been involved in an initiative funded by the National Endowment for the Humanities to preserve the literature of agriculture. The Core Historical Literature of Agriculture (CHLA) is a core collection of texts published between the early nineteenth century and the mid-twentieth century in the fields of agricultural economics, agricultural engineering, animal science, crops and their protection, food science, forestry, human nutrition, rural sociology, and soil science. Scholars selected the titles in this collection for their historical importance. More on the importance of the project can be found on its web site at <<http://chla.library.cornell.edu/c/chla/about.html>>.

When we began the initial project, there were no clear guidelines on when material could be reformatted for preservation purposes. One of our staff, Sam Demas, along with Jennie Brogdon from the National Agricultural Library, developed and published "best practices" for investigating the copyright status of works that had long been out of print. See Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334.

With the advent of digitization, our interest turned from merely making preservation microfilm copies of the titles to instead building a resource that could be used by students and scholars from across the country and around the world. To start, we decided to add the ability to search across the full text of all the titles. In the future, we would like to explore citation linking and other techniques that can help make the digitized collection more valuable than access to any individual title. In order to be able to disseminate the texts that were not clearly in the public domain, however, it was necessary for us to investigate the copyright status of each title again and, where possible, seek the permission of the copyright owner.

The staff of the Albert R. Mann Library at Cornell identified 343 monographs still protected by copyright and not currently in print that they wished to include in the online version of the project. For 98 of those 343, we received complete permission to republish. In almost all cases, the copyright owner was delighted that works that had long been inaccessible were going to be made available again. In 47 cases, or 14% of the total, we were denied permission to make digitized versions of the work available. In most cases, though, this was because the person we contacted was unsure if they really could authorize the reproduction or further dissemination of the work.

For well over half the works, or 198 titles, we could not locate the current copyright owner. There are several reasons for this. First, most of these works are in their copyright renewal period. As you know, for most of this century the author of the work, and not the publisher, had to renew the copyright. The renewal, therefore, would be in the name of the copyright owner or his/her heirs. In practice, in many cases the author assigned the copyright to the publisher, but there was no requirement that this transfer had to be recorded. The Copyright Office files, therefore, are of limited use as a registry of current copyright ownership.

Just to be safe, our staff attempted to contact both the presumptive copyright owner, the author (or his/her heirs if deceased), as well as the publisher (in case either copyright had been transferred to the publisher or to learn if the publisher had better information on who currently owned the copyright). Tracking the children of deceased authors was hard; so was trying to track the history of changes to publishing firms as they changed names, merged with other firms, or went out of business. Perhaps the saddest group of letters was from 38 authors who wanted their works made available as part of the project, but whose publishers (the current owners of the copyright) never responded to our inquiries.

Staff was persistent in its inquiries. Once the correct publisher was determined, contact was made first by email and then by phone or mail if there was no response to the email. The large publishing houses were particularly poor in responding in spite of indications on their websites that they had subsidiary rights departments to whom to direct inquiries. For some publishers, even after contact had been established, frequent changes in personnel handling requests resulted in the need for multiple callbacks and messages. In a number of instances, the entire request process had to be reinitiated.

The bottom line for this project is appalling. We estimate that we spent over \$50,000 in staff time working on the copyright issues. As we noted above, only 14% of our inquiries resulted in denials; for most (58%), we never could determine who currently owned the copyright. Yet without clear permission to disseminate in hand, these titles, many of which would have been in the public domain by now if not for copyright extensions and the abolition of renewal requirements and none of which are of great economic value, have been excluded from the project.

I have focused in this comment on published orphan works, but the problems of orphan works extend to unpublished works as well. For example, we have in the Martin P. Catherwood Library in the School of Industrial and Labor Relations at Cornell large number of newsletters produced by organizations for their members. We would like to digitize these in order to make them more available for scholarly use, but face the risk that the publication was limited and that these are hence still unpublished. We don't have the records to tell us if the articles and photographs in the newsletters, often done by volunteers, would qualify as work for hire, or if the copyright still exists with each of the individual authors. The Center for Labor-Management Documentation and Archives in the Catherwood Library has over 350,000 unpublished photographs that they

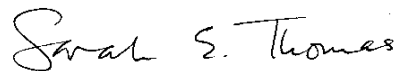
would like to make available. Yet only 1% of the photographs have any indication as to who created the photograph, let alone any information as to the current copyright owner. In our Rare and Manuscript Collections, we have some manuscript illustrations done by a Japanese-American artist in the relocation center at Poston that have been published with permission in the past. The current copyright owner has since disappeared and the paintings have become orphan – and no future scholar can publish them again until they enter the public domain, some 120 years after the date of the events they depict.

Especially problematic for us are foreign works. Identifying the copyright owners of works published abroad is difficult enough. It often requires intimate knowledge of the copyright practices of foreign countries. The blanket restoration of copyright in all works published abroad since 1923 has only exacerbated the problem, however. How is one supposed to locate and negotiate with the owner of the copyright in an obscure Russian periodical, for example, especially since each of the authors of articles in the periodical may also own the copyright in his or her work? (We are facing that problem right now with a request from a faculty member to digitize for general use a periodical published in the Soviet Union in the 1930s.)

The Cornell University Library urges the Copyright Office to support a system that would, after a reasonable investigation into the current copyright ownership of a work, allow a work to be declared an orphan. The standards for what constitutes a reasonable investigation will differ with the nature of the material, but the relevant professional organizations can establish good practice – ideally one that is less onerous than we have had to follow. Once a work is declared an orphan, all civil and criminal penalties for its use should be waived, until such time as a legitimate copyright owner steps forward. There should be on the Copyright Office's website an easy means for copyright owners to assert ownership of a presumed orphan work, but the penalties for claiming copyright that either belongs to others or where none exists should be as onerous as for the infringement of copyright.

The Cornell University Library wants to make material available for the benefit of students and scholars around the world. Without some provision for orphan works in the law, however, copyright will continue to limit and hamper the growth of new knowledge.

Sincerely,

A handwritten signature in cursive script that reads "Sarah E. Thomas".

Sarah E. Thomas
Carl A. Kroch University Librarian