
PRELINGER LIBRARY ORPHAN WORKS COMMENT TO U.S. COPYRIGHT OFFICE



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I. Introduction

The Prelinger Library is a private library in San Francisco serving the needs of researchers, writers, and scholars throughout the region. Our 40,000 volumes span the topics of western regional history and landscape; history of industry; urban and regional planning; history of media; and general American history. We have a broad collection of maps, pamphlets, textbooks, atlases, and periodicals, in addition to books. The historical reach of the materials is from 1797 to 2005, with the bulk of the holdings representing the history of American life in the 20th century. The library includes many unusual documents, and constitutes a significant historical collection.

It is a welcome opportunity to offer comment to the U.S. Copyright Office regarding the problems posed by orphan works. Our library has an access-oriented charter that includes a long-range plan to digitize and put online the large volume of public domain works that are among our holdings. The problems posed by orphan works have immediate bearing on our digitization plans, and therefore on our ability to meet a rapidly expanding public need.

Our library opened in 2004 when we, the Prelinger family, decided to make our private book collection available to the public. There were many reasons behind this decision, chief among which is that much of our collection has been built from material discarded by public and scholarly libraries.

As public libraries expand to accommodate different kinds of public needs, such as access to computer tools and video libraries, the number of books contained in them is often reduced. As scholarly libraries face pressure to keep up with contemporary research, often historical and less frequently accessed collections are narrowed. Our curatorial selection of library discards over the past several years has shaped our unique collection of works. The collection is therefore of great interest not only to us, but to the many people whose library needs are broader or deeper than those addressed by the contemporary reading collections that are the centerpieces of most public libraries. Even more so, it carries great weight as an educational collection.

II. The Expanding Public Need for Online Educational Materials

In 2004 the United States was already engaged in a rapid cultural shift toward digitized information. The development of web-based information access technologies in the previous decade meant that publicly held assumptions about access to information were already changing. When we opened a new print library in that cultural context, we created a format where many of the current cultural changes in information access patterns would play themselves out.

Most importantly, we find that our potential audience is far broader in the digital era than it would be at any other time. Our planned digitization project is expected to benefit a wide range of stakeholders, but perhaps none more important or as populous as young learners. In the everyday course of our work, we assist college students, businesspeople, artists, and researchers to find and use materials that support a broad range of projects. But it is educators whose needs are greatest, and we are not yet prepared to meet their needs. Public school instructors are increasingly turning to online cultural resources to supplement texts provided by cash-strapped school systems. And the rapid recent growth in home schooling in America coincides with an

equally rapidly expanding proportion of historical and cultural information being made available online.

In 2001, we digitized and put online for free download over 2,000 educational films from our historic film archive. So far, over 2.6 million films have been downloaded. This project was well received by the general public, but we have also received feedback from public school teachers and home schooling parents who have told us that they regularly use the films in educational situations. Some of the educators who have used materials from the film collection have contacted us requesting information about our print materials, and wanting to know when they will be available for educational use.

Our collection is rich in the history of the American West, and we have been visited by students and educators from across California, Oregon, and Washington. These patrons have asked when it will be possible to view digitized public domain materials from our library, so that they can visit us without leaving their own educational facilities. One group of home school parents in Eugene, Oregon, is planning western states history units for their class of ten children. They have used the historical film that we have put online, and they are eager to know when our digitization of historic textbooks and primary historical documents will commence. They are an indicator of the expanded public customer base of archives and libraries that has been created by the digital age.

III. An Example of An Orphan Works Problem

The central obstacle we face in meeting the needs of that expanded customer base is the work of clearly identifying which materials are public domain, and which are copyright. A cursory review of our collection tells us that about one-third of it is clearly public domain, and about one-third of it is under copyright to organizations that are reachable through contemporary channels. But the remaining third is constituted of works in the gray area where copyright status requires research on a case-by-case basis. These orphan works amount to a roadblock that inhibits our need to digitize public domain works to make them available to educational use.

For example, *Ghost Trails to California* is a beautiful book of American history by Thomas H. Hunt. This 261-page volume features large-format photo essays about emigrant trails to California, with an appendix of 28 topographical maps of emigrant routes. The accompanying text is a persuasive essay written to engender interest in pioneer trails preservation. The photo essays include hundreds of color and black-and-white images of the interior western U.S. landscape. The photos are contextualized with extracts from emigrant journals, describing emigrants' personal experiences in the landscape that has been recaptured through the photographer's eye. It is an ideal text for a wide range of educational applications, especially in our Oregon friends' American history unit.

Ghost Trails to California was published and copyrighted in 1974 by American West Publishing Company, a small independent press in California. American West published a series of books, of which *Ghost Trails* is a part, titled *Images of America*. By researching the corporate history of American West at the public library, we learned that in 1975 they were sold to Crown Publishing. Then, from an article published in 2000 in an online magazine called Imaginarypress.com about the history of American West Publishing, we learned that following

its acquisition of American West, Crown subsequently dropped the imprint, and retained “only one or two” titles from the American West catalog. The article does not specify which one or two titles were kept, and Crown Publishing is now an imprint of Random House.

From speaking with the Rights and Permissions office at Random House, we learned that their office is equipped to process standard permission requests to reprint excerpted materials from known works, in the contexts of excerpts being reprinted in other works. This is the standard range of responsibility for such offices. It means that they have no routine provision for processing requests to research orphan works, nor do they have a frame of reference for processing requests relating to the digitization of whole works.

Ghost Trails to California was copyrighted in 1974, so it falls within the window of works copyrighted between 1964 and 1988, which under current law are copyright for 95 years. But the book is out of print, and it is quite possible that a rights holder’s interests would be served by their book being made available online. It is also possible that no rights holder currently exists if *Ghost Trails to California* were among the majority of American West titles abandoned by Crown. It is also possible that the negotiation between Crown and American West, on point of purchase in 1975, specified to whom the rights would be transferred in the case of works not retained by Crown. Details of such possible contractual arrangement are not knowable. At this point speculation becomes limitless: *Ghost Trails of California* is an orphan work with an unknowable, or perhaps no longer extant, rights holder.

IV. The Problem of Orphan Works, Now and the Future

The above example illustrates several core points that must be remembered as the problems posed by orphan works move toward resolution:

1. Public need for access to online cultural materials is expanding, and is urgent. The changing face of libraries in the U.S. means that online cultural resources are quickly coming to play a central role in arts and research of all kinds. Putting works online requires subjecting them to a transformative process that may be restricted by copyright law. Cultural resource providers are therefore under compelling pressure to resolve questions around orphan works to enable digitization projects to move forward.
2. Educational use is a core component of this expanding need. The range of stakeholders in the world of online cultural resources is very broad, and educational use is the fastest-growing segment of that audience. The digital world, combined with the presence of computers in most classrooms, has opened up a tremendous new world of teaching tools for educators, and resource providers have a public duty to make public domain materials available to those classrooms.
3. Current available channels of locating rights holders are inadequate in several ways. Of primary concern to us is that those available channels are so inefficient as to be unusable with regard to projects having a large number of items. With regards to *Ghost Trails of California*, the information we gathered about the work’s orphaned status took several hours of work, over several days, to accumulate. In that respect, the outcome of the research is beside the point. Even had we been fruitful we could not afford the time to

perform parallel research on five hundred orphan works, much less the five to ten thousand that actually exist in our collection.

History is at stake. The retroactive extension of copyright term on works copyrighted since 1963, and the loss of renewal requirement, means that American history since 1963 is under a lock and key that will impact young people hardest. When this author was in public school in the 1970s, teachers brought to class their magazine clippings and souvenirs from the World War II and Korean War eras, and the class was encouraged to copy, interpret, and re-enact the stories told in those souvenirs as a way of learning history. The climate of cloudiness and fear that currently surrounds copyrighted works has a prohibitive effect on that kind of learning. Repairing the regulation of orphan works would make a great impact on the availability of historical teaching materials.

V. Conclusion

It is crucially important for the U. S. Copyright Office to move toward development of a system where rights information can be quickly and surely obtained. Ideally, a system would be put in place that could accommodate a large number of requests simultaneously or in short order. The model at work in Canada is one strong possible direction that would protect rights holders while enabling authors and publishers of orphan works to have their works rediscovered and used.

Most importantly, a system should be instituted that would clarify the steps required for locating rights holders or determining whether rights holders even exist. The needs of rights holders would be protected if they could know exactly what steps cultural resource providers were required to fulfill before proceeding with any transformative projects. With a clear site for communication between rights holders and potential users, both groups would benefit tremendously in saved labor and concern. These respective benefits would generate a generous dividend for the public.

Most works are abandoned by their rights holders after their copyrights expire. Before copyright renewal was made automatic, up to ninety percent of copyrighted works entered the public domain when they were not renewed. Resolving the problems posed by orphan works would re-open the public domain in a way that fully respects rights holders, yet enables the rediscovery and educational re-use of important historical materials and ensures that recent history is not lost.