

Established 1884 Incorporated by Congress 1889



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March 25, 2005

Mr. Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building, Room-401
101 Independence Ave., SE
Washington, DC 20540

Orphan Works Notice of Inquiry – 70 Federal Register 3739 (Jan. 26, 2005)

Dear Mr. Sigall:

On behalf of the American Historical Association (AHA), I thank the Copyright Office for inviting comments on the orphan works issue, which is a matter of deep and abiding concern to us. The AHA was incorporated by Congress in 1889 for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research. It is in those capacities, and on behalf of the 14,000 members and 3,000 institutions we represent, that we urge you to address this issue.

In our roles as an organization working on behalf historians as authors, and as a corporate entity that has authored works in the past, we have found that ambiguities in fair use and recent expansions in copyright law have created a severe impediment to the development and exchange of scholarship about the twentieth century.

As a corporate entity, the AHA has encountered difficulties in these areas, as the copyright for reports written by our committees in the middle part of the century were ceded to publishing companies that have since gone out of business or disappeared into larger corporate conglomerations. This makes securing the rights to digitize and post such reports on the AHA web site difficult, if not impossible.

In 2002, the AHA sought to digitize and post online (without charge) a report it had authored in 1962, entitled *The Education of Historians in the United States*. The AHA was then preparing an updated version of the report, and thought the original would provide a useful point of comparison. Unfortunately, copyright had been ceded to the publisher, the McGraw-Hill book company. Due to sales of subsidiary elements of McGraw-Hill, securing copyright proved more difficult than anticipated. It took us more than a year to untangle the various corporate entities that might have held copyright since that time, and to discover that none of them could find a record that they actually held copyright to our book. In the end, we were only able to convince the corporate entity called McGraw-Hill to cede copyright back to us assuming they did hold the copyright, but without indemnifying us if someone else should appear to assert copyright.

We encountered a similar experience in 2001, when the AHA decided to create a freely available online collection of Civil War newspaper editorials, utilizing two volumes originally published by the AHA in 1931 and 1942. AHA staff quickly discovered that no copyright renewal was ever filed for the second volume, edited by Harold C. Perkins, and it subsequently had entered the public domain. However, the editor of the first volume, Dwight L. Dumond, had renewed the copyright in his own name in 1959.

The staff's good-faith effort to track down the current copyright holder of Dumond's work showcases how difficult, and sometimes futile, such a search can be. Obituaries confirmed that Dr. Dumond passed away in 1976 and that a wife and two children survived him. We then consulted with Dumond's former colleagues to help locate his relatives and their possible whereabouts (we knew his son was living in Guam in 1976 and his daughter in California, due to searches of older city/state directories—no newer information, however could be found). Contact was made with university libraries, Masonic lodges (to which Dumond belonged), and even veterans' associations (since Dumond fought in World War I). The AHA staff even contacted the Washtenaw County Probate Office to request a copy of Dumond's will, in which we discovered that his financial effects had been ceded to a trust company (who would presumably control any royalties generated by the book) that no longer exists. These numerous problems forced us to abandon our project since we could not protect ourselves from infringing upon the possible copyholder's rights. Despite considerable expense and effort, we were unable to make available work that is only of historical and scholarly, rather than commercial, interest.

Beyond our corporate interests, however, we have also been contacted by a number of historians who have reported that their ability to use images in works—even as a subject of analysis—has been impeded because publishers will not allow them to use images without securing copyright. As with our experience on the Civil War books, these authors report extended and unsuccessful efforts to find copyright holders. In the end, the historians who contacted us had to leave out a portion of their book, because their analysis was not possible without the image.

Beyond the issue of publishers, images, and printed scholarship this issue of securing copyright also extends into the archives, hampering the historian's ability to work with the raw materials of history. Ron Grele, former head of the Oral History Office at Columbia University, reported to us that

Among oral historians it is generally agreed that until the interviewee signs over all rights to the interview in some formal manner (usually a deed of gift) all rights to the testimony are held by the interviewee. In general it is the practice of formal projects to transcribe the interview and return the transcript to the interviewee for editing and correction (review), and at the same time send a copy of a release stating where the copyright is to rest and what restrictions on use are to apply.

The problems arise when interviewees die somewhere along the process either before they receive a transcript, or most often when they die before correcting the transcript, or returning the corrected version, or before they sign a release. Sometimes years may intervene before a transcript is returned. In most cases it is possible to trace a surviving family member or an executor of the estate but not in every case, and the problem compounds over time. In other cases, copyright is held by institutions or corporations or law firms that go out of business (at Columbia: Continental Can and the Lazarus Department Stores for example).

All of this means that many interviews cannot be made available to researchers, although we found over the years that such researchers were valuable in locating the possible sources of copyright (distant family members, etc.).

When I was director of the Oral History Research Office we developed an argument for “a good faith effort.” It was our contention that if through the record we could show a good faith effort to contact possible heirs or executors. No exact quantitative measure was developed or defined procedure but twenty years ago this passed muster with the general counsel’s office. I doubt that it would today.

Given these concerns, we believe it is vitally important that the Copyright Office address the issue of orphan works. Recognizing the importance of the “orphan works” problem, and the need for a balanced solution to it, the American Historical Association endorses the proposal filed in the comments by the Glushko-Samuels Intellectual Property Law Clinic in response to this Notice of Inquiry. We believe that approach would help to clarify the definition of an “orphan work” in a way that scholars and organizations like ours can understand and use as a basis for working through these issues. We also endorse the statutory procedure proposed, which would serve to delineate “reasonable efforts” to identify the copyright owner and provide needed assurance to scholars and their publishers that the potential damages would be limited. At the same time, as a corporate entity with copyrights extending back to 1923, we appreciate the balanced approach that would allow copyright holders such as ourselves to retain the authority to license future uses of our work. We believe this approach will support further progress in our understanding, preservation, and dissemination of history—progress that now seems jeopardized by the recent broad extensions of copyright without adequate protection for public good.

We thank you for inviting comments on these issues, and look forward to participating further as this inquiry proceeds.

Sincerely,

A handwritten signature in cursive script that reads "Arnita A. Jones". The signature is written in black ink and is positioned above the printed name and title.

Arnita A. Jones,
Executive Director