

**Society of American Archivists
Council Meeting
January 23 – 26, 2014
Chicago, Illinois**

**DRAFT Issue Brief: Orphan Works
(Prepared by the Committee on Advocacy and Public Policy
in consultation with the Intellectual Property Working Group)**

This issue brief addresses the following priority within SAA's Advocacy Agenda, as adopted by the Council in June 2012:

The Public's Right to Timely and Reasonable Use of Information

America's first copyright act (1790) sought to strike a balance between encouraging the creation of new works and granting monopolies over knowledge, learning, and expression. Over time, both the scope and duration of copyright monopolies have increased, to the detriment of learning and broad creative expression. A more appropriate balance must be struck between the right of authors to benefit from the fruits of their labors for a limited time and the need of the public to use freely material for the greater benefit of society.

SUMMARY

Orphan works are those whose owners cannot be identified or located. The holdings of archival repositories include many unpublished orphan works that were not created with commercial intent. Orphan works contain much valuable information but they are often not selected for online access because of uncertainty about the legal protections that apply to their use. In 2006, the U.S. Copyright Office recommended that a "reasonably diligent search" for the rights holder be required before a work can be used. Archives require a more realistic solution, given the quantity and variety of orphan works preserved in their holdings.

SAA believes that any solution to the orphan works problem must:

- Apply equally to mass digitization and individual items.
- Balance the copyright owner's interests with the diligence incumbent upon the user.
- Draw a distinction between copyrighted works that were created with material gain in mind and those works that were never intended for the commercial market. Within archives, works created for commercial gain tend to be the exception and should not be the driving consideration in any debate about copyright.

- Make it incumbent upon the rights holders of older works not currently being commercially exploited to record their ownership in a copyright registry. A “diligent search” would consist simply of an automated search of the registry.
- Waive financial liability for those who make a non-commercial use of orphan works after an unsuccessful good faith effort to obtain permission from rights holders.

THE ISSUE

Archival holdings consist almost entirely of unpublished works that were not created for commercial purposes. Among them are many orphan works of great research value. Users of archives wish to use such works in a wide variety of projects, and archival repositories wish to digitize them and make them available online to enhance their accessibility. But archivists’ fear, uncertainty, and doubt surrounding the use of orphan works can lead to the following challenges for archives and their users:

- Reduced availability of valuable historical resources,
- Prohibitive costs of largely fruitless searches for rights holders,
- Uncertainty about what constitutes a “diligent” search, and
- Little interest by rights holders in exploiting their orphan works because of limited commercial value, rendering even cursory searches a waste of time—whether or not the rights holder responds.

Each of these concerns is discussed in more detail below.

If rights holders cannot be identified or located despite the best efforts of the researcher or the archives, research and digitization projects can be stymied. In theory, the limited damages available for unauthorized use of unregistered works should not serve as an impediment to their use. In practice, however, projects often are changed or abandoned due to fears that 1) some of the material may have been published and registered and hence is subject to the draconian penalties in copyright law or 2) rights holders might surface and complain. In addition, few archival repositories are willing to ignore possibly applicable laws just because the risks involved in doing so are small. As a result, an archives might digitize only a portion of an archival collection, which compromises its integrity by presenting an incomplete picture. Consequently valuable cultural heritage remains hidden and is not available to serve the interests of society in furthering the growth of knowledge and culture.

Documented research has revealed that the cost of the investigation required to identify and locate rights holders of non-commercial unpublished orphan works is inordinately high.¹ What constitutes a “good faith, reasonably diligent”² search? The heterogeneous nature of archival holdings means that there is no single strategy to identify or locate rights holders. As the search continues beyond the most likely sources, further sources may suggest themselves but such

¹ Dharma Akmon, “Only with Your Permission: How Rights Holders Respond (or Don’t Respond) to Requests to Display Archival Materials Online,” *Archival Science* 10 (2010):45-64; Maggie Dickson, “Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers,” *American Archivist*, 73:2 (2010): 626-636.
² “Recommended Statutory Language,” United States Copyright Office. *Report on Orphan Works*. Washington, DC, January 2006, <http://www.copyright.gov/orphan/orphan-report-full.pdf>, 127.

sources are increasingly unlikely to yield results. There is no clear point at which enough research has been done; the next source might reveal the answer. No matter how diligent, the searches for rights holders have rarely borne fruit. Few rights holders have been identified as a result of time-consuming and costly research.

Finally, when they *have* been located, the owners of copyright in unpublished non-commercial orphan works rarely have any interest in exploiting their works and often grant royalty-free permission to use them. Most unpublished material found in archival repositories lacks sufficient commercial value to justify costly, but largely fruitless, searches.

THE SOLUTION

In January 2013, SAA responded to the Copyright Office's Notice of Inquiry Concerning Orphan Works and Mass Digitization.³ SAA noted that any solution to the orphan works problem must:

- Apply equally to mass digitization and individual items.
- Balance the copyright owner's interests with the diligence incumbent upon the user.
- Draw a distinction between copyrighted works that were created with material gain in mind and those works that were never intended for the commercial market. Within archives, works created for commercial gain tend to be the exception and should not be the driving consideration in any debate about copyright.
- Make it incumbent upon the rights holders of older works not currently being commercially exploited to record their ownership in a copyright registry. A "diligent search" would consist simply of an automated search of the registry.
- Waive financial liability for those who make a non-commercial use of orphan works after an unsuccessful good faith effort to obtain permission from rights holders.

BACKGROUND

There have always been works whose copyright owners cannot be identified or located. The problem for published works has been exacerbated by amendments to the Copyright Act that 1) eliminated the requirement for registration and a copyright notice and 2) changed the term of copyright from a fixed term based on the date of publication to one based on the life of the author plus 50 years (lengthened by a further 20 years by the 1998 Copyright Term Extension Act).

The orphan works problem was considered by the Copyright Office in 2006. After consultations with stakeholders, the Office issued a report recommending that users could exploit orphan works only after a "reasonably diligent [unsuccessful] search," and should a rights holder later emerge, the amount of any penalty would be limited.⁴ Legislation to implement these recommendations subsequently was introduced in Congress. Vigorous opposition from those

³ Dooley, Jackie, SAA President, Response by the Society of American Archivists to the Notice of Inquiry Concerning Orphan Works and Mass Digitization, 29 January 2013, online at http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf.

⁴ United States Copyright Office. *Report on Orphan Works*. Washington, DC, January 2006 <http://www.copyright.gov/orphan/orphan-report-full.pdf>, 8, 93-122.

whose works do not typically include rights information (particularly photographers) kept the legislation from passing.

The Copyright Office again considered the issue in 2012 when it issued a discussion document⁵ and sought input “regarding the current state of play for orphan works, including ... what additional legislative, regulatory, or voluntary solutions deserve deliberation at this time from stakeholders.”⁶ SAA’s submission is summarized in this issue brief. The Copyright Office has not yet issued a report on the consultation.

ADDITIONAL REFERENCE SOURCES

- Akmon, Dharma, “Only with Your Permission: How Rights Holders Respond (or Don’t Respond) to Requests to Display Archival Materials Online,” *Archival Science* 10 (2010):45-64.
- Dickson, Maggie, “Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers,” *The American Archivist*, 73:2 (2010): 626-636.
- Dooley, Jackie, SAA President, Response by the Society of American Archivists to the Notice of Inquiry Concerning Orphan Works and Mass Digitization, 29 January 2013. http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf.
- Society of American Archivists (SAA) Intellectual Property Working Group, *Orphan Works: Statement of Best Practices* (Chicago, 2009), <http://www.archivists.org/standards/OWBP-V4.pdf>.
- United States Copyright Office. *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (Washington, DC, 2011), <http://www.copyright.gov/docs/massdigitization/>.
- United States Copyright Office. *Report on Orphan Works* (Washington, DC, January 2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁵ United States Copyright Office. *Legal Issues in Mass Digitization : A Preliminary Analysis and Discussion Document* (Washington, DC., 2011), <http://www.copyright.gov/docs/massdigitization/>

⁶ [Notice of inquiry], 77 FR 64560 October 22, 2012, <http://www.copyright.gov/fedreg/2012/77fr64555.pdf>.