

Michael A. Keller

*Ida M. Green University Librarian
and Director of Academic
Information Resources*

*Cecil H. Green Library
Stanford, California
94305-6004*

The Stanford University Libraries

18 March 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 20540

Re: [Orphan Works and Research Libraries and Archives](#)

Dear Mr. Sigall:

In response to the Copyright Office's request for comments on Orphan Works, Stanford University submits this proposal to amend section 108(h). Stanford's comments and proposal are focused on addressing the limits the existence of Orphan Works places on access to information for purposes of research, teaching, and learning. Others in the Stanford community, such as the Center for Internet & Society at Stanford Law School, may choose to address broader aspects of the Orphan Works questions. Our comments reflect the interests of the Stanford community at large.

Stanford's Interests

Our country's founders recognized that the grant of a copyright represented a balancing of interests, with its fundamental purpose being "To promote the Progress of Science and useful Arts." U.S. Const., Art. I, Sec. 8, Cl. 8. As an academic research institution, Stanford recognizes the importance of copyright protection. Stanford also believes that the progress of science and useful arts is well served by providing researchers with deep and precise access to the ideas and knowledge of others.

To that end, the Stanford University Libraries have amassed a collection of well over 8 million volumes and copyrighted works in article and other genres too numerous to count. Most of these works are books, periodicals, and other publications, substantial numbers of which were created in the 20th century and are no longer in print. The collection was amassed generally through direct purchases or through gifts. Many works in the collection are available today only through libraries or archives like those at Stanford. The ability of researchers to learn about and make use of the ideas and knowledge within individual volumes is limited by the very physicality of these publications.

Modern technology provides libraries and archives with ever-improving tools for expanding researchers' access to the information within their collections. Stanford invests substantial resources in exploring these tools, and has played a lead role in developing new ways to access and preserve individual publications as well as collections of them.

The existence of Orphan Works, though, can significantly hinder the ability of research libraries and archives to use these advances to "promote the Progress of Science and useful Arts" to their fullest extent. Without more clarity regarding, among other things, how and when these institutions can use technological advances that provide deeper and more precise access to the ideas and expressions in Orphan Works, important parts of the collections at Stanford, as well as the collections at other libraries and archives may simply remain on the shelf, with the works and the knowledge within them not fully exploitable as ideas and expressions that could be used for the non-profit and socially useful purposes of teaching, learning, and research. Too many Orphan Works now collect dust rather than promoting "progress in science and the useful arts."

Changes in the Copyright Act over the last few decades have had a generally laudatory effect in eliminating traps for the unwary that led to the loss of copyright protection. However, these changes also have created potential traps for both the unwary and diligent users of Orphan Works. In Stanford's view, a balance must be explicitly struck so that researchers and educators may make appropriate use of Orphan Works, and technological advances, while avoiding possible copyright missteps. Stanford believes that this can be done in a way that is fair to owners of copyrights and more generous to researchers and educators.

Proposal for New Legislation

Under an amendment to section 108(h) envisioned by Stanford, libraries and archives, including non-profit educational institutions, would be expressly permitted to make certain uses of presumptively orphaned works, or Archive and Library Orphan Works (ALOW). An ALOW would be any work included under section 108(i) where:¹

- 1) the work was first published 28 or more years ago;
- 2) the work is no longer in-print, as demonstrated by reference to recognized industry publications; and
- 3) the rights-holder has not excluded the work from the ALOW program through a designation filed with the Copyright Office.

The uses that a library or archive could make of an ALOW would include those uses identified in the current Section 108(h) of the Copyright Act. That is, such an institution could reproduce, distribute, display, or perform in facsimile or digital form an ALOW for purposes of preservation, scholarship or research. A primary difference between the existing regime set forth in section 108(h) and this ALOW proposal is the class of works to which each applies.

As it stands now, section 108(h) applies only to certain published works during the last 20 years of their copyright term. Having it apply to this class of works does not solve a fundamental

¹ Stanford notes that Congress is currently addressing whether to expand 108 to include works beyond written works and phonorecords, such as to music, movies and other audiovisual works. While the vast majority of works in Stanford's collections are written works, Stanford has a large collection of music and audiovisual works that have been orphaned by being both out of print and no longer subject to exploitation. In Stanford's view, because it is so easy to opt out of ALOW and so important for society to use Orphan Works to the extent possible, Congress should pass the legislation expanding the types of works covered by 108.

Orphan Works problem -- determining whether there is an extant copyright term in the first place. As Copyright Office Circular 22 aptly points out, the electronic records of the Copyright Office are limited to entries created beginning in 1978, and, even if one were to go through the cost and time to have manual searches performed, one cannot necessarily rely on the results. Resources outside the Copyright Office, if even locatable, are similarly sketchy. Thus the current section 108(h) effectively requires an assumption of the longest copyright term possible, with the benefit of the statute providing relief for only the last 20 years of that term.

Under Stanford's proposal, using the former renewal period as a guideline would greatly expand the class of works that would be presumptively available for use by libraries and archives. Instead of collecting dust due to uncertainty, previously orphaned works would become more generally available to researchers.

Another difficulty with the current section 108(h) is that subsection (h)(2)(B) adds the uncertainty of forcing a library or archive to determine if a copy of a work can be obtained at a "reasonable price." This subsection opens up the possibility of a copyright misstep through the subjective determination of whether a copy is priced "reasonably" or not. Any uncertainty within the copyright scheme results in libraries and archives acting cautiously thereby diminishing appropriate use of Orphan Works.

By definition, though, the proposed ALOW class would not be without limit. First, works that are still being commercially exploited would not be considered ALOW, and therefore could not be put to any permitted use. Which works are being commercially exploited at any given time would be defined by reference to generally recognized lists and catalogues of current works, such as RR Bowker, LLC, BooksInPrint.com. The burden would be on the library or archive to reference those materials.

Second, a rights-holder would have the ability to remove a work that is no longer being commercially exploited from the class of works considered ALOW. The rights-holder could do this at any time from the twenty-eighth anniversary of the publication of a work through the end of the work's copyright term. It would not matter whether the work was being commercially exploited or not. Uses before the work was no longer considered ALOW would receive the benefit of the proposal's protections. Those following it would not. A process for filing such notices already exists under section 108(h)(2)(C) and would need only slight modifications from the Register of Copyrights under the amended ALOW legislation. Consideration should be given to maintaining filings received in a separate database and for allowing for automated delivery of notices to libraries and archives. The opportunity to opt out of the ALOW definition would ensure that rights-holders could not be exploited by this legislation.²

In addition, a rights-holder should also be given the ability to file a "take-down" or similar request directly with a library or archive using a work to cut off the protections otherwise provided by the proposal.

² In Stanford's view this proposal does not conflict with the Berne Convention's prohibition against formalities as it simply relies on the scheme already provided under 108(h)(2)(C). Stanford also comments that the greater good of accessing Orphan Works – both domestic and international – compels an international discussion about how to ensure that these works are not lost to the world. Does the "no formalities" restriction ultimately have the unintended consequence of making older copyrighted works completely inaccessible for appropriate uses because of the fear that an unidentified copyright owner will be the rare exception to object to further use of the work?

Conclusion

It is Stanford's experience that rights-holders for works published long ago are very difficult to identify, or if identified, to find. Once found, the overwhelming reaction by rights-holders is to grant permission for use of their works to further academic purposes. Indeed, most rights-holders are thrilled with the prospect of greater accessibility to their works and many consider digital distribution as breathing new life into forgotten works. But, given the uncertainties in the current state of Copyright law, Stanford might not make the full use of older copyrighted works for the advancement of science and the arts that it otherwise could. This result is wrong. Congress needs to take appropriate steps – even if different from those outlined here – to restore balance and certainty so that teachers and researchers are able to make full use of ALOW knowledge by permitting deeper and more precise access so we are better able to advance ourselves as a nation.

Yours truly,



Michael A. Keller
University Librarian
Director of Academic Information Resources
Publisher, HighWire Press
Publisher, Stanford University Press
Stanford University

C: Senators Barbara Boxer and Diane Feinstein
Representatives Anna Eshoo and Zoe Loftgren
Larry Horton
Debra Zumwalt
Lauren Schoenthaler
James DeGraw (Ropes & Grey)