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Ms. Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
PO Box 70400, Southwest Station
Washington, DC 20024

Dear Ms. Sigall:

In response to a Notice of Inquiry by the Copyright Office of 26 January 2005, I write to comment on the impact of the “orphan works” problem on scholarship, libraries, and the diminishment of the public domain.

Until Congress passed the Copyright Act of 1976, the owner of a copyrighted work was required to renew the copyright after a specified period of time; failure to do so placed the work in the public domain, where it could be used freely in scholarly inquiry and the production of new creative works. Libraries recognized that the 1976 legislation reduced the burden on copyright owners, but accepted the apparent reduction in the number of works entering the public domain because Congress retained somewhat reasonable limits on the duration of copyright. With the passage of the Sonny Bono Copyright Term Extension Act of 1998, however, Congress extended copyright terms by twenty years, effectively creating a cumbersome and expensive review process for all creative works produced since the early 1920s. The result for scholars and libraries is the proliferation of published and unpublished resources for which the copyright owner cannot be located. This “orphan works” problem has dramatically increased the risks to scholarship and the cost that university libraries must bear to support teaching and learning.

At Duke University, the “orphan works” problem contributes subtly to an environment of tension and stress that scholars overcome either by ignoring copyright laws altogether, or by avoiding the overt use of copyrighted works, materially dampening the creative process itself. If no one claims the copyright for a work, the argument goes, it stands to reason that the public benefit of having access to the work would outweigh whatever copyright interest there might be. The “fair use” defense is often too unpredictable as a general matter to remove the uncertainty in the scholar’s mind. In the present environment of virtually “unlimited copyright,” the only way to be sure that an item is available for creative use is to obtain permission. The complexities of copyright clearance are extraordinary for works produced by anyone other than a major publisher. Obtaining certain permission to use

“orphaned” manuscripts and archives – the primary sources of humanities scholarship – has become nearly impossible.

Duke’s Center for Instructional Technology, which supports the creative use of technology by faculty in teaching and learning, receives frequent appeals to provide copyright clearance services. We know from studies at Cornell University and elsewhere, however, that clearance services can cost up to \$5.00 per item and result in a failure rate of greater than fifty percent. Since failure to locate a copyright owner does not necessarily free a copyrighted work for creative use, Duke scholars are left frustrated or confused. If the copyright clearance burden for “orphan works” could be eased or managed more effectively by the Library of Congress or through other agents, scholars at Duke and across the country would find an immediate benefit.

For the Duke University Libraries, the “orphan works” issue plays out in very specific ways that add operational costs and reduce services to users. To provide digital access to “orphan works” through electronic reserve systems, the library is forced to administer complex and expensive technologies that limit access to students enrolled in specific classes and produce redundant and duplicate digitization processes across campus. To create digital collections that include “orphan works,” the library must go to extraordinary and expensive lengths to establish confidence that it is not violating copyright laws. The typical result is to avoid digitizing significant resources for scholarship if clearance cannot be obtained conclusively. When “orphan works” on deteriorating film or magnetic tape are preserved using digital techniques, the complexities of the clearance process virtually prohibit us from making such preserved resources available for scholarship.

In the short run, the legislative environment in the United States works against the interests of student and faculty scholarship and complicates the work of the librarians who support their work. We wish only to make new and creative use of published and unpublished works that retain little or no economic value yet are vital to creative scholarship. We support any effort by the Library of Congress to reduce the risk to scholars who need to use “orphan works” for scholarship and limit the cost to libraries and universities that manage the existing copyright clearance processes. The U.S. Copyright Office would do well to explore streamlined and cost-effective copyright clearance mechanisms, such as those implemented in Canada and the United Kingdom.

Thank you for the opportunity to comment on the “Orphan Works” issue. I applaud the efforts that the U.S. Copyright Office is making to explore solutions.

Sincerely,

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