

20 March 2005

Via Electronic Submission & U.S. Mail

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 20024

Dear Mr. Sigall:

I appreciate the Copyright Office's consideration of the issues posed by orphan works and submit this letter in response to the Office's Notice of Inquiry. I write on behalf of the University of California, San Diego (UCSD) Libraries, for which I have been University Librarian since 1999. By way of background, I have more than twenty-five years of experience in libraries, currently serve as the Vice President/President Elect of the Association of Research Libraries (ARL), and am a founding member of ARL's Committee on Copyright and Intellectual Property Rights. When it comes to the issues that are the subject of your inquiry, however, perhaps more important than my own experience is that of my staff and patrons, which I share with you herewith.

In the Notice of Inquiry, the Copyright Office asked for the iteration of obstacles posed by orphan works and for recommendations regarding legislative solutions to those obstacles. With respect to the latter, I believe that an effective legislative solution to the challenges posed by orphan works is most likely to result from collaborative efforts amongst a variety of constituents (both public and private). It will not surprise you to learn that I consider, for example, the approach adopted by ARL, in collaboration with many in the not-for-profit community, to be a particularly laudable such effort. Thus, rather than espouse a particular legislative solution at this stage of the process, I write instead to offer examples of the hurdles that orphan works pose for UCSD's librarians and patrons by way of illustrating why a legislative solution is merited.

Definition of Orphan Works

For purposes of this letter, "orphan works" is used to encompass all works for which the copyright holder cannot be identified and located after reasonable efforts. This definition, while similar in scope to that used by the Copyright Office's Notice of Inquiry,¹ recognizes that difficulties

¹ The Notice of Inquiry defines orphan works as "works for which the copyright owner cannot be located." [*Federal Register*, January 25, 2005 Vol. 70, No. 16, p. 3740]

identifying and locating (a) copyright holder(s) are not limited to a specific category of material. Librarians and patrons find that problems of this nature apply to published and unpublished materials, modern works and those of greater age, and print and electronic media.²

Restrictions on Libraries' Ability to Make Orphan Works Accessible

Critical to the mission of UCSD, which is ranked amongst the top ten best public universities in the nation and the top 15 in the world, is the support of teaching, learning, research, and the creation and dissemination of knowledge. The UCSD Libraries play an integral role in each of these areas by providing access to information, published and archival, in a variety of media. Because many of our patrons are comfortable with (and actually prefer) digital resources, the UCSD Libraries have given high priority to the development of digital content and access thereunto.

The uncertain copyright status of orphan works imposes significant limitations on the UCSD Libraries' ability to provide access to patrons in the digital world. These limitations affect materials in most, if not all, of our collections, including our film, music, and special collections. However, for purposes of illustration, let me focus on examples derived from the Scripps Institution of Oceanography Archives ("Scripps Archives"), a significant unit within one of UCSD's eleven libraries. The Scripps Archives act as the repository for manuscripts & archival materials that document the history of Scripps Institution of Oceanography, one of the world's leading oceanographic research institutions. The Scripps Archives contain a growing collection of correspondence, photographs, logbooks, diaries, films, audio recordings, drawings, blueprints, and other materials, including nineteenth- and twentieth-century materials documenting oceanographic expeditions, ships and instrumentation, science policy, marine life and resources, and California coastal geology.

Because of the unique nature of materials held in the Scripps Archives, the UCSD Libraries are committed to making the materials as accessible on a world-wide basis as possible. Given the rarity, and in many cases fragility, of these materials, this accessibility is most efficiently accomplished via the Internet. We have made approximately 4,000 images of the more than 100,000 photographs in the Scripps Archives accessible via the Internet. Although those 4,000 images represent only a small subset of our photographic holdings, we have already seen a substantial increase in reference traffic related to the images. As a consequence, we remain steadfastly convinced that making materials from the Scripps Archives accessible via the Internet will spur research and the creation and dissemination of knowledge.

Our ambition of providing world-wide digital access to these materials for educational and research purposes is limited by the problems posed by orphan works. Many of the images in the Scripps Archives are photographs taken by unidentified participants on oceanographic voyages, given to the Scripps Archives by the participants without formal documentation of copyright licenses. Although fair use principles allow us some latitude with respect to images in which we do not hold copyright, the uncertainties associated with fair use principles in the context of Internet access and the high

² For example, when an unidentified person posts on a Web site chat room or blog, making a determination as to whether the posting is published or unpublished or determining the date of creation has little meaning. Irrespective of the answers, identifying and locating the copyright holder in order to request permission to use the posting will pose unusual and potentially insurmountable problems for the would-be user.

costs of litigation serve to mitigate against our posting digital copies of orphan works on our Web site. We actively pursue permission from copyright holders; yet, with respect to orphan works, are unable to do so. It is often difficult and sometimes impossible to *identify*, let alone *locate*, the creator, author, or publisher of a work or the date of its creation, authorship, or publication. In addition to undated and/or unsigned photographs, we have extensive collections of letters, manuscripts, and other correspondence—again often donated without clear guidance as to copyright ownership.

Moreover, even when a work is signed or the creator is otherwise identifiable, a search by the Copyright Office may not settle the work's copyright status given that copyright protections are not, per se, predicated on registration with the Copyright Office. In our experience, when a search by the Copyright Office results in a registered copyright holder, the registry may no longer be accurate, which necessitates additional research of death certificates and wills, histories of corporate mergers and dispositions, correspondence with tangential family members, and so on. These efforts consume valuable staff and financial resources, and often still lead to inconclusive results and a lack of certainty as to copyright status. In practice, this means that the orphaned works are not digitized and made available on the Scripps Archives Web site; instead, they remain accessible only to patrons able to physically visit the Archives.

In sum, the challenges posed by orphan works restrict the UCSD Libraries' ability to provide our patrons with online access to orphan works. Absent such access, there is little hope that dissemination and creation of new works will occur.

Restrictions on Patrons' Ability to Use Orphan Works

Patrons' use of the Scripps Archives' collection of more than 100,000 photographic images and 6,000 cubic feet of manuscripts is substantially limited because of the problems associated with orphan works. As an initial matter, many patrons are not sufficiently familiar with copyright processes nor in a position to expend resources tracking complicated and sometimes unidentifiable copyright status. Our Scripps Archivist reports that scholars and publishers have abandoned efforts to publish previously unpublished photographs of world-renowned scientists because of the uncertainties surrounding the copyright status of a particular photograph, resorting instead to the republication of a photograph published hundreds of times before. This occurs because of the difficulties scholars have, even with the assistance of our archivists, in identifying and locating the copyright holders of the Archives' "fresher" photographs. Our archivist also reports that scholars and publishers have paraphrased scientifically important correspondence because they are unable, again even with archivist assistance, to identify who holds copyright in the letters. As a result, scholars and publishers are deprived of the opportunity to enrich the informational content of their publications and scholarship is concomitantly impoverished—all to the detriment of our patrons.

The limitations on dissemination posed by orphan works extend beyond publishers, directly affecting patrons in unusual ways. Again, using the Scripps Archives as an example: the Archives hold the memoirs of an oceanographer who served in the Spanish American War, which memoirs were donated to Scripps without formal documentation of the copyrights. The granddaughter of the oceanographer requested permission to digitize her grandfather's memoirs and post them on her Web site so that her geographically dispersed family could access them. However, the Scripps Archivist was unable to identify the copyright holder except to determine that the University of California is not the holder, and thus was forced to deny the granddaughter permission for fear that

the fair use exemptions of copyright law would not comfortably cover the proposed reproduction and distribution.

Repository

I have focused my comments on examples of the issues posed by orphan works on access to and use of copyrighted materials, and have refrained from commenting on potential solutions. I would be remiss, however, were I not to recommend the creation of a resource through which orphaned works could be registered and through which the copyright status of such works could be tracked. Given the significant staff and financial resources involved in researching copyright status, far better that the results of our research be shared with others, and theirs with us.

In closing, I hope that this letter will have served to illuminate the challenges posed by the copyright situation that currently attends upon orphan works to our providing access to, and our patrons making use of, those works. These challenges impact a wide swath, both public and private, not-for-profit and commercial: in all cases, fruitless and economically unjustifiable copyright searches lead to frustrated service providers and users. That said, the Copyright Office's desire to understand the challenges is commendable. If desired, the UCSD Libraries are happy to participate in additional discussion of these complex issues. In the meantime, best of luck in your investigations.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Schottlaender", with a long horizontal flourish extending to the right.

Brian E. C. Schottlaender
University Librarian