

22 March 2005

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Jule L. Sigall
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Re: NCSU Libraries Written Comments on Notice of Inquiry for Orphan Works

I am Susan K. Nutter, Vice Provost and Director of Libraries at North Carolina State University in Raleigh, North Carolina. I am grateful for the opportunity to offer the following written comments concerning "orphan works" on behalf of our thousands of users, including students, teaching faculty, researchers, staff, and general North Carolina citizenry.

Experience

As a major academic research library, the NCSU Libraries is the owner of and repository for substantial collections of published and unpublished materials, both purchased and donated, acquired in support of the university's teaching, research, and service missions. These materials not only include books, journals, and monographs, but also extensive collections of photographs, slides, films, manuscripts, letters, notes, and other copyrighted materials. Much of this material has been created and donated over the years by NCSU faculty and/or other supporters of the library. Although in some instances, copyright has been transferred to the university, for the most part we are merely the owners of the physical copy of the work.

Access to this repository of materials, particularly the primary works residing in our Special Collections Research Center, is important for scholars, researchers, and teachers, not only at NC State, but also around the world. As we continue to move into digitization and the online world, the potential contributions to scholarship and teaching made possible by remote access to these materials becomes readily apparent. In short, large amounts of time, effort, and monetary resources are being directed towards enabling the digitization and online access to unique, often unpublished, primary materials.

However, at the NCSU Libraries, before any work is digitized, its copyright status is examined. Attempting to determine the copyright status of a work, for example, an unpublished photograph, can consume large amounts of time and resources. If there is no information with the work that identifies its creator or author, as is frequently the case, the library must decide whether to risk liability for infringement or forego making the work available to society, a decision which does not advance the interests of promoting progress of science and the useful arts. Even when there is some identifying information accompanying the work, further pursuit of the potential copyright holder frequently leads to a dead end. Either the individual has disappeared, is potentially deceased, or the identified organization has long ago ceased to exist. Once again, the choice must be made.

Does the library risk infringement and make the work visible to the world? Or do we leave it in essentially a dark archive? This process is repeated hundreds of times for all kinds of materials.

Fortunately for scholars and researchers world-wide, libraries value access to information as the gold standard. Our efforts to continue the useful life of these untraceable works are for the benefit of society, not ourselves. That we continue this intimidating task at no small risk, and without any relief from potential liability, is advantageous for all.

The NCSU Libraries, like its fellow academic research libraries, has shouldered these risks and expenses on behalf of its constituents in a number of worthwhile projects. All of the following projects have involved extensive time and effort in often fruitless searches for copyright holders. Here are some of our major and ongoing efforts:

1. The NCSU Libraries Special Collections Research Center emphasizes collections in the following areas:

- Architecture and Design
- Engineering and Technology
- History of Science
- Greenways Archive Project

These extensive collections include primary and secondary research materials such as original drawings, sketches, personal papers, correspondence, research files, department records, photographs, audio-visual materials and rare books.

2. The NCSU Libraries Special Collections Research Center has undertaken a huge digitization project whereby thousands of photographs held in the University Archives collection are being digitized.

3. The NCSU Libraries Design Library Image Collection contains over 70,000 digitized slides covering architecture, landscape architecture, industrial design, graphic design, art, and design and is used as a teaching collection for NCSU faculty.

4. The NCSU Libraries Special Collections Research Center has partnered with the Forest History Society and the UNCA Ramsey Library Special Collections and Archives in an NC ECHO (North Carolina Exploring Cultural Heritage Online) project entitled The History of Forestry, particularly at the Biltmore Estate. This project includes the digitization of hundreds of items of source materials, including photographs.

5. The NCSU Libraries has recently embarked on a \$1.044 million project with the Library of Congress and the NC Center for Geographic Information and Analysis under the National Digital Information Infrastructure and Preservation Program to collect and preserve at-risk geospatial data from state and local government agencies. This data includes digitized maps, GIS data sets, and remote-sensing data resources such as digital aerial photography from a wide range of state and local agencies.

Each of these projects routinely and consistently faces the challenges of attempting to determine the copyright status for significant numbers of works. The lack of guidelines concerning what constitutes a sufficient copyright holder search combined with unlimited liability for infringement affects each and every project undertaken at the NCSU Libraries.

Recommendations

In our experience, a comprehensive definition of “orphan works” must necessarily include both published and unpublished materials, in all media. Although examination of each work on a case-by-case basis is a time-consuming and often unproductive effort, it is, for the present, the most viable solution for both copyright holders and users. If, after a reasonable investigation, no copyright holder can be either ascertained and/or located, a work should be fairly deemed an “orphan work”.

More formal systems of designating works as “orphan works” have been suggested, such as requiring potential users to file an intent to use or mandating that copyright holders register continuing claims of ownership to copyrights in their works. At first blush, the notion of being able to consult a list for the “answer” to a search for a copyright holder is beguiling. However, further contemplation of how such a system might actually function quickly leads to unworkable scenarios. For example, how do we, as a library, begin to describe with sufficient particularity, an unpublished photograph that we wish to digitize? “Picture of barn with old truck, circa 1930s?” “Farmer with three horses, mountains in background?” A copyright holder would have the same problem in reverse should there be a requirement to register a continuing claim. Even published photographs or images would present significant identification problems. How often would such a list need to be checked? Who would maintain the list? Even if the list contained thumbnails of the works, searches might still be substantially burdensome and unsuccessful.

Conscientious users of copyrighted materials, such as the NCSU Libraries, are already scrutinizing each work on a case-by-case basis and making good faith, reasonable determinations about the availability or unavailability of the copyright holder. What is needed is legislative sanction of such efforts, assurance that a reasonable investigation is all that is required, and relief from liability should a copyright holder unexpectedly surface.

For the NCSU Libraries, a reasonable investigation always includes consulting and following up on any information attached to the work in question as well as any information obtained when the material was accessioned. Any available names are searched via local records and the Internet. We do not, however, place ads in newspapers as the cost/benefit ratio would be untenable. Similarly, tracing inheritance records is beyond the expertise and scope of both our staff and our projects. For unpublished works with no identifying information, the search is virtually impossible and should be recognized as such. For published works, attempts are made to reach the last known copyright holder. If no response is received after several documented attempts, a decision is made concerning fair use status, the risk of using the work and/or the likelihood of litigation. Establishment of guidelines or best practices for reasonable investigations concerning various categories of works would be of great benefit to potential users of copyrighted materials like the NCSU Libraries.

Finally, and very importantly, in addition to sanctioning reasonable investigations, there must be a safe harbor from unlimited infringement liability for those who have conducted such good-faith, reasonable investigations. Institutions and individuals who have made reasonable attempts to determine and locate copyright holders of “orphan works” should not be thrown into the same liability category as other potential copyright infringers. In particular, if the objectionable use is a nonprofit, educational use, the previously undiscoverable copyright holder should be limited to enjoining further use of the work in question, with statutory monetary damages unavailable. This would track well and be entirely consistent with the current section 504(c)(2) which states that a court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the

infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment, or such institution, library or archives itself, which infringed by reproducing the work in copies or phonorecords.

Summary of Recommendations

The NCSU Libraries wholeheartedly supports the Copyright Office's interest in the significant problem of orphan works and welcomes the opportunity to provide insight, evidence, and a suggested solution. As described above, the issue of the use of works, both published and unpublished, for which no copyright holder can be reasonably located, "orphan works", is encountered frequently as we move toward making more of our collections available online to scholars, researchers, and the public.

We recommend legislative sanction of the practice of reasonably investigating the copyright status of works on a case-by-case basis according to a set of guidelines or best practices. Furthermore, potential users who, in good faith, conduct such a "reasonable investigation" should be shielded from liability for statutory damages should a copyright holder appear and complain subsequent to a documented reasonable investigation.

Sincerely,

A handwritten signature in blue ink that reads "Susan K. Nutter". The signature is written in a cursive, flowing style.

Susan K. Nutter
Vice Provost and Director of Libraries