

# **Copyright Concerns of Archivists and Special Collections Librarians:**

## **The Problem of “Orphan Works”**

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University of Illinois at Urbana-Champaign

Over the past few years, one can hardly pick up a newspaper or one of the weekly newsmagazines without finding one or more of the following:

- a story of a copyright law suit;
- news of a pending change in the copyright law (complete with dire predictions about what will happen if it is or is not passed); or
- pious pronouncements by those who advocate either for more freedom from copyright controls or who indignantly proclaim that the economic sky is falling because of file-sharing, wholesale “piracy,” or even simple private copying.

Indeed, American University’s Peter Jaszi has noted that since the last major revision of the copyright law in 1976 the consensus that existed between the community of publishers and producers and the community of users, librarians, and consumers has given way to a sharply divided environment. He notes that on the one side we see copyright protectionists or absolutists, who have sought legislative and court action to apply the copyright monopoly to ever more information formats, for ever lengthening terms, and with expanded legal protections for technological controls on copying and access. On the other side, there are what he calls copyright “secessionists,” who argue that copyright regimes are retrograde and oppressive controls that not only limit freedom of expression, but also stifle technological advancement and public learning. In this highly polarized environment, it is rare not to find citizens, information

professionals, and institutional administrators lacking strong views, as well as divergent opinions on copyright issues. All of us seem to have suddenly become aware of how much copyright both enables and limits our use of information and information technology. What was historically a rather esoteric and rarefied intellectual aspect of legal studies has now become a hotly-contested field where the old priesthood and theologians are locked in a battle with technologists and younger legal scholars who are copyright revisionists, agnostics, or even atheists, as one scholar has characterized them. Both sides see themselves as being either soldiers or missionaries in a sacred crusade.<sup>1</sup>

In this context, it is little wonder that those stereotypically quiet and reclusive folks in archives and libraries have found that they have a significant stake in the copyright battles. Certainly, trouble in the copyright relations between librarians and publishers dates back at least to the *Williams & Wilkins* case of the early 1970s about library photocopying, even though a working compromise on the driving issue of that case was worked into the 1976 law. Indeed, a quite viable system has emerged for such conventional published materials by applying the Section 107 and 108 Fair Use and Library/Archives provisions, and this system has been further aided by the market management structure of the Copyright Clearance Center.

There is, however, a significant and very large realm of creative works covered by the 1976 copyright law that falls outside the framework of manageable procedures and mechanisms. This is the entire area of works found in archives, research libraries, and special collections libraries. Remember that in the United States, until the 1976 law took effect in 1978, copyright

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<sup>1</sup>Hugh C. Hansen, "International Copyright: An Unorthodox Analysis," 29 *Vanderbilt Journal of Transnational Law* (1996): 579-93.

essentially only covered works that went through a formal publication process. The far larger quantity of unpublished works, whether a manuscript letter, typescript technical report, a diary, or family snapshots and home movies, were outside the rules of copyright. It is exactly these kinds of works that make up the raw materials for all kinds of historical studies, such as scholarly monographs, a Ken Burns documentary, legal brief, fund-raising brochures, family genealogies, or a historic site nomination.

At the same time, with the mass emergence of the internet and associated computer technology in the 1990s, we have seen the advent of two trends that are rattling the borders of the lands of intellectual property. On the one hand, technology has fueled an expansion in the public appetite for multiple media, delivered immediately to them, and there is a near universal desire by the public, scholars, students, and journalists to be able to move seamlessly from printed books, journals, and recorded music and movies to correspondence, manuscripts, and original photographs and sound recordings. On the other hand, the technology has presented those of us who manage the cultural resources found in libraries with an unprecedented tool set to bring our collections directly to the users and the public at large. It is unfortunate that copyright stands directly in the way of both of these movements.

At the same time, changes in copyright law have also been driven by a succession of international treaties and trade agreements, such as the Uruguay Round Agreements Act of 1994 and later the Digital Millennium Copyright Act (DMCA) and Copyright Term Extension Act, both of 1998. All have tried to address the enormous challenges and opportunities that new copying and communication technologies have posed to the owners of commercial content. In simple terms, for every new opportunity that technology has provided for archivists and

librarians to reach their publics and turn their vast warehouses of books and manuscripts into cultural resources for the use of society at large, we have seen new legal barriers being erected that militate against our fundamental professional mission.

As a community, archivists and librarians, while clearly interested in doing all we can to disseminate information, are also very committed to being good citizens and to not tread on authors' or publishers' rights. However, the technological and legal environment has created some rather significant frustrations. Perhaps the single biggest area, and the one most amenable to a solution, is that of what we can call "orphan works," which are defined as:

works for which the copyright holders cannot reasonably be located. Creators and scholars cannot get permission to use these materials. As a result, public access to information is restricted. "Sample Talking Points" for 11 April 2003 *Copyright Clearance Initiative Clinic*, Washington College of Law, American University, c.f., [www.wcl.american.edu/ipclinic/cci.cfm](http://www.wcl.american.edu/ipclinic/cci.cfm)

These will be the focus of my remarks today, but first we should step back just a bit to talk a bit about what it is that archivists do, *[SLIDE: HFL.HTM]* what kinds of works we hold, and what kinds of uses people want to make of these works. The core archival mission and purpose is to be purveyors of recorded knowledge and thereby to ensure that the knowledge created and accumulated by past generations is joined with that of the present to form a body of knowledge available for all of society to build a better future for the world at large. *[SLIDE: ARCHIVES.HTM]* The archivist's role is to appraise, secure, arrange, describe, preserve, and make accessible an authentic record of the government, institutions, organizations, and peoples of our world. *[SLIDE: POSTERS.HTM]* We do so to provide the basis for the accountability of institutions and to educate society. The presumption is that archivists preside over the past so that others may examine it, and we see our mission as the management of the documentary

record for use by others, who will form their own opinion and picture of the past. **[SLIDE:**

***PROGRAM1.HTM]***

As a profession, we are interested in supporting accountability and preservation of heritage by facilitating citizen and scholarly access to governmental and institutional records. Because we understand that knowledge is cumulative, and because we believe that our work must result in an ultimate utility, we know that the content of our archives and manuscript repositories must be copied, quoted, published, performed, broadcast, and otherwise disseminated, such as via the Internet. We need to be able to support research work that disseminates historical information using the latest information technology, and in fact we engage in such dissemination ourselves whenever possible. In this mission we inevitably encounter copyright issues.

In broad terms, an archives is any cultural repository of documentary material regardless of physical format, including manuscripts, typescripts, printed and published works, photographs (whether negative, print, JPEGs, or TIFFs), sound recordings (on disks, wire, acetate, polyester tapes, cassettes, CDs, etc.), motion pictures (on silent and sound film, videotapes and DVDs), and electronic records in any computer-readable format. **[SLIDE: *STARSSTRIPES.HTM]*** As you can imagine, the sheer number and divergence of physical formats presents serious challenges for anyone wanting to acquire, arrange, describe, and make accessible such material over time. Nevertheless, nothing should be selected or cared for in an archives unless it is intended to be used. **[SLIDE: *REINES (YANKEEDOODLE.HTM]*** At the first level, the use consists of a one-on-one examination by the researcher of the documents, but more important is the “indirect use” made of the material as these researchers cite, quote from, or

reproduce the archival works in a new production designed to advance society's knowledge in some ways. *[SLIDES: AMYJAY.HTM then HALLBED.HTM, then MONTEZUMA.HTM, then SUN.HTM, then TAFT.HTM]* For this to happen, the copyright holder's exclusive rights (i.e., § 106) must be abridged. *[SLIDES: ADCOUNCIL.HTM, then CORNMAID.HTM then ENCYUNIVER.HTM, then WARPROTEST.HTM]*

As with the use of any other copyrighted work, there are only a limited number of options to the secondary user:

1. He/she may ignore copyright, infringe the work, and risk a suit. While not every such flagrant abuse will lead to legal action, the system for publishing and broadcast will generally screen out such uses. Thus, for both pragmatic and legal reasons, such a course is not recommended.
2. He/she may seek and obtain permission from the copyright holder. This is a viable option for works still subject to commercial exploitation or when the copyright owner has been a responsible citizen and registered with some service to manage their rights. Regrettably, the permissions route can require quite costly searches before finding someone to accept your payment of a permission fee, and the costs and time needed for that search can easily outstrip those of the original research. Even worse, it can result in destructive dead ends if rightsholders decided to use copyright to censor what the researcher says or if a publisher bars use of a work for which no rightsholders can be found.
3. In many instances, the researcher may be justified in going ahead and reproducing the material in reliance on "fair use" as a defense should an infringement claim ever be brought. As we remember Section 107 of the copyright law is one of the few short and readable, but far from unambiguous parts of the law. In its entirety it reads:

*§ 107 Limitations on exclusive rights: Fair use*

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-*

*(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

*(2) the nature of the copyrighted work;*

*(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

*(4) the effect of the use upon the potential market for or value of the copyrighted work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.*

The codification of fair use into the 1976 law has been a significant advance for research. Furthermore, several court cases have reinforced the scholar-friendly spirit of the fair use doctrine. Especially notable in this regard are: *Wright v. Warner Books, Inc* (1991), *Campbell v. Acuff-Rose* (1994), *Sundeman v. Seajay* (Appeals 4th Circuit, 1998), *Suntrust Bank v. Houghton Mifflin* (11th Cir., 2001), and *Chicago Board of Education v. Substance, Inc. And George N. Schmidt* No. 03-1479 (USCA 7<sup>th</sup> Cir 2003).

Nevertheless, the fair use exemption represents a weak, inadequate, confusing, and costly device for the support of scholarship, learning, and public education. First, fair use is a judicial finding made on a case-by-case basis only after the case has gone to trial, and perhaps appeal. Fair use rules are not clear, but overlapping and highly circumstantial. Certain kinds of transformative uses have received little support in fair use decisions, and there have also been some judicial distortions of the factors often at odds with the fundamental purposes of copyright. [For example, in 1989 the Second Court of Appeals, in *New Era Publications v. Henry Holt* (commonly know as *Hubbard*) prevented a biographer from making fair use quotations of unpublished writings of his subject—quotations necessary to establish basic characterizations of the subject.] In sum, while a fascinating and well-meaning provision, fair use is not much more

than what copyright guru Lawrence Lessig characterizes as “a licence to hire a lawyer.”

***[SLIDE: CAROTHERS.HTM, then THORPE.HTM, then SATYR.HTM]***

There is a further, a particularly troubling development since 1976 that renders “fair use” much less viable as a way to bring balance to the copyright nexus. The possibility of litigation and the unavoidable uncertainty of what a court will rule has led the legal departments of many publishers to set aside the doctrine entirely. That is, as risk-averse agents of their corporations or institutions, they back away from utilization of “fair use” when reviewing manuscripts prior to publication and instead require that the author bear the responsibility for obtaining formal written permission from all persons quoted in the course of their work. In fact, I have had instances of researchers needing to use material from unknown and unknowable copyright holders tell me that their publisher will not let them use the item in question unless they can somehow get written permission, even though such circumstances should support a fair use justification.

On a daily, or at least weekly basis, archivists and manuscript curators receive requests from authors to satisfy their publisher’s clearance department’s interest in a written sign-off for use of a quote or photograph. Sometime it is for permission to use an entire work, such as a photograph or a single letter. Other times, it is for clearance on a quotation or of as little as five words [*They were: “Thou shalt not contemplate paradox.”* from the Heinz von Foerster Papers.] If the ultimate use is clearly commercial and non-transformative, this request process is justified, but in the vast majority of use it is not. Indeed, I have a file of dozens of such unnecessary requests for just the last five years alone. The absurdity of the process is even greater when our typical response must be that we do not own the copyright since we, the University, were not the



authors, or the author is unknown or unknowable, or the author has entered the black hole of anonymity because of the lack of a current address or even an indication that they are still alive. How for example, could one find the rightful *per stirpes* descendant copyright holders for Dr. M. W. Brubaker who wrote in 1884 [\[SLIDE: 1884Ja7.HTM\]](#) on behalf of the Charleston Institute of Medical Electricity or worse yet, the 1877 photographer [\[SLIDE: 1877PHOTO.HTM\]](#) of J. Edwards Smith of Ashtabula, Ohio. [\[SLIDE: 1885ANON.HTM\]](#) While assigning an actual dollar value to the harm to learning and scholarly careers is difficult, and while the circumstances of each case might include mitigating factors, the stakes can be quite high. This is illustrated by the example of the Indiana University Press's recent withdrawal from distribution of Liane Curtis' *Rebecca Clarke Reader* as it appeared unwilling to mount a fair use defense against an infringement claim from a rival scholar. Since the book has been withdrawn, we can never really know the merits of the case, but clearly the cost to the publisher was great since the book had already been printed.<sup>2</sup> There is the further phenomenon that because of the publisher demands for signed permissions instead of reasonable fair use, we regularly see researchers skip over better quality photographs and instead focus on those for which rights clearance will be easier, resulting in a sanitized historical record.

Where the market structure provides a system for registration and tracking of ownership and can facilitate permissions either for free or for a reasonable fee, the publishers' attorneys are on a reasonable and productive ground. However, for a vast quantity of copyrighted works of public and scholarly interest, this is not the case, and such risk-averse counsel is corroding the

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<sup>2</sup>Richard Byrne, "Silent Treatment: A Copyright battle kills an anthology of essays about the composer Rebecca Clarke," *Chronicle of Higher Education* 16 July 2004, A14-16.

infrastructure of a learned, educated, and culturally rich public. Let's look at some archival examples of orphan works that would frustrate any writer, publisher, or publisher's counsel looking for the certainty of a written waiver of copyright claims. **[SLIDES:**

***RACEIMAGE.HTM, then PARADE.HTM, then DRAG.HTM]***

So what can be done about the problem of the difficulty of making use of orphan works?

A range of options exist; however, all but one or two require legislative action:

Non-legislative solutions:

1. The publishers could individually or jointly come to an agreement to respect the fair use rights of today's authors and artists. Utilizing such excellent fair use guidelines as those provided by Kenneth Crews of Indiana University-Purdue University, Indianapolis or Georgia Harper of the University of Texas, they could be more strategic and less categorical in their requests for authors to obtain written permissions when the works in question are obviously orphaned. Of course, their legal departments would have to be willing to take on the rare infringement suit and vigorously defend fair use—after all, with fair use, it is either use it or lose it.
2. Although it might not be possible without a formal mandate and funding from Congress, the Copyright Office should place all of its copyright registration and renewal records on-line in a user-friendly web database. Thus, the 41 million cards covering 1870-1977 that the Copyright Office has available for only in-person access should be just as available as those records for 1978 to the present.<sup>3</sup> They should develop a model as efficient and effective as *WATCH, Writers,*

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<sup>3</sup>Numbers are taken from Library of Congress, Copyright Office, *Circular 23*, <http://www.copyright.gov/circs/circ22.html> <http://www.copyright.gov/circs/circ23.html>

*Artists, and Their Copyright Holders* which is maintained by the University of Texas and the University of Reading (England). Admittedly, this only solves part of the problem but it would clarify a bit of the foundation, i.e., it would make it easier for today's author to demonstrate that the market for the work they want to quote is indeed non-existent or defective, thus supporting their ability to rely on the fourth factor in a Fair Use argument. Furthermore, since we know that only seven percent of all the published textual works registered for copyright under the 1909 copyright law were ever renewed, efficient and effective access to the Copyright Office's registration records would open up a large quantity of works for much clearer administration.

**Copyright Office Study of Renewals under 1909 Law<sup>4</sup>**

Class of work	Original registrations 1927	Renewals 1954	Percent of renewals to registrations
Books, pamphlets, etc.	75,780	3,126	4.1%
Periodicals	41,475	2,219	5.4%
Lectures, etc.	302	4	1.3%
Drama	4,475	690	15.4%
Published music	17,251	7,761	45.0%
Unpublished music	8,031	1,685	21.0%
Maps	2,677	910	34.0%
Works of art	2,575	27	1.0%
Technical drawings, etc.	1,229	2	0.2%
Photographs	7,415	20	0.3%
Prints, etc.	14,883	227	1.5%
Commercial Prints	2,856	76	2.7%
Motion picture photoplays	1,271	556	43.7%
Motion pictures, not photoplays	644	1	0.2%
TOTALS:	180,864	17,304	9.6%

Solutions requiring Congressional Action, perhaps with prior actions in WIPO:

1. Expand the § 108 (h) provisions to include unpublished works as well as published works in the exemption which allows libraries and archives to make preservation and access copies of

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<sup>4</sup>James J. Guinan, "Study No. 30, Duration of Copyright," 1957 in *Studies on Copyright*, Volume I, (South Hackensack, New Jersey: Fred B. Rothman & Co., 1963), Appendix B, p. 82-83.

works in the last 20 years of their term. Of course, this would not address the needs of individual researchers nor would it deal with orphan published and unpublished works still within a life plus 50 window. Still it would help rationalize this rather strange concession, made in the rush to write and pass the Sonny Bono Copyright Term Extension Act of 1998.

2. Reduce the liability penalties stated in the law when a person or publisher, after a good faith effort, has been unable to locate a copyright holder. This solution would build on the notion in § 504 (c) 3 according to which statutory damages and fees are disallowed for libraries, archives, nonprofit educational institution, or a public broadcasting that had a good faith reason to believe that the copying was fair use.

3) Adopt the Canadian model of a licencing structure for “unlocatable copyright owners,” whereby the user pays a fee to a central fund that becomes available if any claimants ever appear and that the user’s liability does not extend beyond this fee.

4) Create a registration requirement whereby those wishing to continue to assert their copyright claims after a very generous automatic term (e.g., publication plus 50 or 75 years) be required to pay a nominal \$1.00 per decade maintenance fee along with providing current contact information so future users could readily obtain rights. This is the notion behind the Public Domain Enhancement Act (H.R. 2601) which was introduced, but not acted on, in the current legislative session. *[SLIDE: END.HTM]*

No doubt there are other approaches that could render the copyright barriers more manageable for older works with little or no enduring commercial value, but finding a workable solution will require refocusing society’s attention away from the myopic notion of copyright as a system for total control of information products based solely on the premise of exclusive and

virtually perpetual monopolies. Instead, we need to return to the ideals of Jefferson and Madison whereby the government grant of exclusive rights was a privilege solely for the purpose of supporting the expansion of learning.

### **Some Useful Internet References**

Presenter's e-mail: [w-maher@uiuc.edu](mailto:w-maher@uiuc.edu)

#### **ALA Washington Office, issue briefs:**

[http://www.ala.org/Content/NavigationMenu/Our\\_Association/Offices/ALA\\_Washington/Issues2/Copyright1/Copyright.htm](http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Copyright1/Copyright.htm)

Kenneth D. Crews. *Fair Use Checklist*, (Indianapolis: Indiana University Copyright Management Center, 1999, 2001):<http://www.copyright.iupui.edu/checklist.htm>

Peter Hirtle. *When Works Pass Into the Public Domain in the United States: Copyright Term for Archivists and Librarians*

<http://cidc.library.cornell.edu/copyright/>

Intellectual Property Clinic, Glushko-Samuels Center, of the Washington College of Law at American University

[www.wcl.american.edu/ipclinic/index.cfm](http://www.wcl.american.edu/ipclinic/index.cfm)