

HARVARD UNIVERSITY LIBRARY

Sidney Verba
Director, Harvard University Library and
Pforzheimer University Professor

Wadsworth House

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

Re: Response to Notice of Inquiry on Orphan Works

Dear Mr. Sigall:

I am writing in response to the Copyright Office's Notice of Inquiry regarding orphan works, and appreciate the opportunity to offer comments.

Copyright exists to protect the rights of authors to benefit from their work, thereby stimulating creativity and serving the public purpose of increasing knowledge. At times, however, the protection of authors' rights and this public good may clash when copyright impedes the dissemination of works, and their use in the generation of new knowledge, without providing any appreciable incentive to the creation or distribution of works of authorship. I believe that addressing the issue of "orphan works" offers an opportunity to foster openness of knowledge with little if any damage to the interests of copyright holders. A reconsideration of copyright rules in relation to orphan works would open knowledge to many without diminishing legitimate protection for those who need and deserve it.

This is especially the case in a world of increasing digitization of works of authorship. While I recognize that the orphan works problem has many aspects, I will focus my comments on the problems and opportunities presented by large-scale digitization projects. This is something I am well acquainted with in my role as Director of the Harvard University Library. I believe that a solution to the orphan works problem should

take into account the special challenges and opportunities presented by digitization projects.

Digitization, Libraries, and the Spread of Knowledge

Digitization and the Internet allow for widespread sharing of knowledge in new and beneficial ways. I will describe the work of the Harvard University Library in relation to such information sharing, but our experience parallels that of many other libraries. The Harvard collection is one of the great print collections of the world. Its more than 15 million volumes are the result of careful (and expensive) collecting over several centuries. The collection covers all subjects, across all cultures, and contains works of great general interest as well as works of interest only to the most esoteric and specialized of scholars. It is a great resource to the Harvard scholarly community. It is also a resource open to scholars from every part of America who come to Cambridge to pursue research. But Harvard's collections are, in fact, only open to those who have the time, money, and opportunity to come to Cambridge.

In recent years, the Harvard Library has invested a good deal of effort and money in digitization to make its collections available to a much wider set of users. It has been digitizing materials of all sorts – manuscripts, rare and not-so-rare books, photographs, paintings, audio materials – to disseminate them to a wide array of users. These users include advanced scholars, but also students at colleges and universities not as well endowed with library resources as is Harvard, as well as members of the general public – all of whom find important materials from Harvard on the Internet.

It may be useful to describe one major project to illustrate these activities. The Harvard University Library, with significant foundation and internal support, has instituted an Open Collections Program to develop digital collections for teaching, learning, and research. The program's goal is to increase the availability and use of some of Harvard's textual and visual historical resources by students, teachers, and researchers in broad subject areas. The Library converts these resources to digital formats, and provides free and open access to them through the web and the Harvard Library catalogs. Our first collection, chosen with the advice of a group of Harvard faculty and librarians, is Women Working. This collection explores women's roles in the U.S. economy between the Civil War and roughly the end of World War I. The collection currently contains more than 2,400 books and pamphlets and numerous manuscripts and visual materials. The collection, just being completed, is already being used in courses on women's history, economic history, and American history more generally across the country; and we anticipate much greater use. It gives students in colleges and universities everywhere the chance to do the kind of research and papers that Harvard students can. The collection can be viewed at: <http://ocp.hul.harvard.edu/ww/>.

We are beginning to plan a number of additional projects in different topical areas. These will convert resources closed to all but a few into resources freely open to anyone anywhere. And the project brings to life many books that would otherwise sit unused in our library shelves. It is a project that gives us in the Harvard Library great pride and joy – there are no other words for it.

Digitization, Knowledge, and Orphans

What has all this got to do with orphan works? A great deal. In creating our Open Collections, we are careful to stay within the confines of copyright law. The books we have digitized can mostly be determined to be in the public domain in the U.S. on the basis of their date of publication. Relying on date of publication, however, enormously limits what can be made available. Many works published in the U.S. after 1923, or never published, are of great relevance to the subjects of our Open Collections Program and are either in the public domain or, if they remain in copyright, are of no continuing commercial interest to the copyright holder, if indeed the copyright holder is even aware of the copyright. Yet there is often no feasible way for us to determine which these works are, and hence few of them are used.

There are a number of broad categories of works that are important here. One is orphan works as defined in the Copyright Office's Notice of Inquiry—namely, copyrighted works whose owners are difficult or impossible to locate. But there are also many works the copyright owner of which might be located with a diligent search but which are of no continuing commercial interest to that owner. It is hugely inefficient to make diligent efforts to find copyright owners for works that are highly likely to fall in this category. There is also a third category of problematic works: those that are no longer in copyright for failure to file a timely renewal application or failure to comply with formalities such as inclusion of a copyright notice upon publication. As you know, the renewal filing requirement affects domestic works published from 1923 through 1963. Our rough estimate is that, of the approximately 15 million volumes in our collection (excluding vast amounts of archival material), approximately 3 million were published between 1923 and 1963. And the number of affected works would be much larger if works falling into the first two categories mentioned above were included. I encourage the Copyright Office to adopt a definition of “orphan works” that is broad enough to include the second category of works, as well as the first, and to take this opportunity to solve not only the orphan works problem but also the closely related problem of identifying efficiently what works remain in copyright to begin with.

Searching Out the Orphans

One way to bring these orphans into our projects would be to do a thorough search to find orphans that can in fact be made accessible. However, especially where a significant number of older works is involved, it is often not feasible to devote the time and resources required, on a work-by-work basis, to try to determine if the book remains in copyright and to locate and contact the holder of the relevant copyright. We have engaged in such attempts to locate copyright holders for “elderly” works not clearly in the public domain in connection with various projects, and it is remarkably cost-ineffective. In a large number of cases, we can find no information – which leaves a debilitating uncertainty about the item. In others, where we can locate and successfully contact the rights holder, we frequently get permission. In many cases, however, no response is received to the queries we send. The number of refusals tends to be quite

small. The expense of this sort of searching, with the tools now available, is an expense that in most cases simply cannot be borne on any significant scale. The result is that many books, whose free access through digitization projects would greatly promote the dissemination and creation of knowledge, while not damaging the interests of any copyright owner, are kept out of digital collections serving the public good. A truly lose-lose situation. Finding a solution to this problem would unlock a public benefit consistent with the goal of protecting the rights of content creators while serving the dissemination of knowledge widely.

Towards a Solution

The problems and opportunities presented by digitization projects such as those of the Harvard Library suggest some features that could helpfully be incorporated into a solution of the orphan works problem. Without trying to offer a comprehensive solution – I know that many others are speaking to other aspects of the problem – I would like to propose six elements of a sound solution.

First, the definition of orphan works should not be limited to copyrighted works whose copyright owners have *proven* difficult or impossible to locate after diligent efforts. If the definition were limited in this way, the solution would be of little value in larger-scale projects that cannot support the substantial expense required to undertake those efforts for each of many works. Rather, a work should qualify as an orphan work if it meets objective criteria aimed at capturing those works whose copyright owners are likely to be difficult or impossible to locate or are unlikely to have a continuing commercial interest in the copyright.¹ There are various criteria along these lines that could be employed, such as, for example, (i) creation or publication more than a specified number of years ago, (ii) continuing commercial exploitation as determined by reference to one or more on-line databases, such as BooksInPrint.com, and/or (iii) inclusion in on-line listings created for this purpose to provide notice of works that the copyright owner does not want included in the orphan category or that a user intends to treat as an orphan work in the absence of objection by the copyright owner. I recognize that a balance must be struck here, so that obstacles preventing beneficial use of works are removed without harming the legitimate interests of copyright owners. A registry system, through which copyright owners can easily eliminate their works from the orphan category, would seem a useful means of helping to strike that balance.

Second, the solution should scale – that is, one should be able to apply it cost-effectively to large numbers of works. To this end, the objective criteria by which a work qualifies as an orphan should be determinable, to the greatest extent possible, by checking computerized records by automated means. One of the major obstacles in the current situation is the need to conduct labor-intensive manual searches for each work. It should be possible to craft a solution that relies on publicly available computerized records, either currently existing or newly created.

¹ There may be a benefit in defining orphan works as *also* including works whose copyright owners prove difficult or impossible to identify or locate after diligent efforts. However, I would urge that this not be the only way a work can qualify as an orphan, since that would leave in place a substantial barrier to beneficial use of many works of no remaining value to their copyright owners.

Third, the solution should protect users of orphan works against significant monetary liability. Potential exposure to monetary liability is typically the biggest impediment to inclusion of orphan works in valuable digitization projects. For many of these projects, preserving copyright owners' rights to prevent use—i.e., injunctive relief—is not a problem, though I note that such a right can be a real impediment in the case of some newly created derivative works. If a compulsory license fee or other payment were to form part of the solution, the amount should be set with an eye not only to small projects but also to large ones, where the total costs could swiftly mount.

Fourth, the solution should allow orphan works to be used, at a minimum, for research and educational purposes. Given that the generation and dissemination of knowledge is not limited to projects that meet this criterion, however, I would advocate that the kinds of uses permitted be broader and include, for example, other non-profit undertakings and potentially for-profit commercial uses as well. Recognizing the need to protect the interests of copyright owners, one might determine the scope of use based in part on how orphan works are defined and what terms, if any, are imposed on the use. One could even imagine potential solutions involving different categories of orphan works with different corresponding rights of use, though this would lack the virtue of simplicity.

Fifth, the solution should not limit fair use. It would be counterproductive if one effect of a legislative solution to the orphan works problem were to constrain fair use.

Sixth, as suggested above, I would urge that, as part of this endeavor, the traditional copyright registration records maintained by the Copyright Office be made available in their entirety in a readily searchable on-line database. This would enable users to determine much more efficiently than they can today whether older works, particularly those published in the U.S. between 1923 and 1963, remain in copyright as a threshold matter.

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I applaud the Copyright Office for undertaking this inquiry and hope that the process will result in a solution to the orphan works problem. I believe that a well-designed solution will yield a substantial public benefit consistent with the purpose of the copyright law.

Very truly yours,

Sidney Verba,
Carl H. Pforzheimer University Professor &
Director of the Harvard University Library