pglaf-orphan-response

To: The Librarian of Congress and the US Copyright Office
Date: Monday May 9 2005
Subject: Reply comments to "Orphan Works" inquiry

From: Dr. Gregory B. Newby, CEO
The Project Gutenberg Literary Archive Foundation

These reply comments are on behalf of the Project Gutenberg Literary Archive Foundation (PGLAF). PGLAF is a 501(c)(3) not-for-profit that operates Project Gutenberg (PG). PG is one of the world's oldest all-electronic information providers, started in 1971 with Michael Hart's creation of an eBook of the US Declaration of Independence. Since Michael Hart's invention of eBooks, he has worked to create a movement for the creation and distribution of free electronic literature. My own involvement, which started in 1992 and became much broader with my accepting the Chairmanship of PGLAF in 2001, has emphasized addressing the technical, social and educational opportunities for the continued growth of PG's collection. Project Gutenberg currently offers over 16,000 titles, nearly all of which are in the public domain in the United States.

We are very interested in the topic of Orphaned Works, and welcome The Library of Congress' efforts to understand and meet the special challenges they present. We are pleased to offer reply comments to several of the comments posted to http://www.copyright.gov/orphan/comments/ , and wish to augment or refute several of the claims we have found there.

At the outset, we wish to speak to comments without an adequate understanding of existing copyright protection, or who feared that attention to orphaned works would somehow endanger their own creative and artistic output. For example, Mark R. Brown [OW0005-Brown] seems to have confused copyright with contracts, in seeking to require a publisher to return copyright to the author if the publisher elects to take his books out of print. We are sympathetic to this request, but do not think a work in its first years of copyright protection with a currently active publisher is a subject for orphaned works clarification under section 108(h) of Title 17, or the other related themes raised in the Notice of Inquiry.

In the comment of Donna L. Beales [OW0009-Beales], we see fears that the law is inadequately protecting the rights of authors. While there are certainly increased opportunities for abuse, thanks in large part to recent technical advances, we strongly believe that existing copyright law is, if anything, too protective of authors. With contemporary copyright periods lasting 95 or 120 years, this is beyond the expected lifetime of contemporary authors. Moreover, our analysis shows that for those items published prior to January 1, 1923 (the current cutoff for items easily demonstrated to be in the public domain), well under 1% are still in print. In other words, there are almost no authors or works that are making any kind of money, or are otherwise benefitting authors, from that period. We believe Ms. Beales is more likely to be interested in better enforcement, and in better means to take action against known infringers. Indeed, although Project Gutenberg focuses on public domain works, we also have several hundred copyrighted works by contemporary authors. We constantly struggle to help these authors to track down and take action to stop infringers from reselling their works without permission. Surprisingly to some, the infringers are usually bona fide publishers or commercial Web sites, including large sites such as eBay

and Amazon.com. Our titles by author Sam Vaknin are one example.

We support the comments of Donna Daugherty/Christian Recording Studio [OW0013-Daugherty] in the call for better copyright education. Unfortunately, trade associations, notably the MPAA and RIAA, have sought to provide such education in an unbalanced and inaccurate manner. We hope that Ms. Daugherty encourages seeking to educate the public about the historical and legal basis of copyrights for a "limited time," as envisioned by the Founders -- rather than pandering to trade organizations who, for example, misrepresent "fair use" (under Title 17) as piracy, and seek to squash protected activities to further their own profiteering.

The comments of Joshua J. Bowman [OW0016-Bowman] support the notion of fair use, and the freeing of orphaned works, as a means to enhance artists' creativity. We concur, and believe there are great numbers of such works. Our analysis of LoC copyright renewal records indicates that from 1923-1988, only about 10% of copyrighted items were renewed (we were surprised to find that the elimination of the requirement for renewal did not lessen the renewal rate). This means that 90% of items from 1923-1964 are public domain, but it takes copyright renewal research to prove it. Such research is described in our copyright "rule 6" at http://gutenberg.org/howto/copyright-howto , and is onerous.

Another 90% of items since 1964 were similarly not renewed. How many of these items are still in print, and how many might quality as orphaned works under section 108(h)? We speculate there are at least one million items (primarily books) published since 1964 that would qualify, and another one million from 1923 to 1964 that are in the public domain, but demonstrating their copyright status is difficult. In his comments, David Creighton Samuels [OW0017-Samuels] sees the gold mine for creative work in these millions of items, but fears the mine field of trying to identify which works are truly either public domain (through copyright expiry or non-registration) or orphaned.

Based on the high proportion of public domain works and orphaned works, compared to the vanishingly small proportion of works still in print and/or still generating proceeds for their copyright holders, we agree with the many comments that suggested some form of registration for continued copyright protection. Although Congress removed the requirement for renewal in the 1976 copyright act, we do not believe this prevents a requirement for registration against being declared an orphan. Many comments offered suggestions to make this more appealing to copyright holders, such as Garry Jaffe [OW0020-Jaffe] and Steve Rhode [OW0022-Rhode]. We believe that a process that protects both parties against unintentional infringement, such as that suggested by John Michael Williams [OW0010-Williams], can co-exist with copyright protection.

Comments by Thomas A. Beckett/Law Offices of Thomas A. Beckett, PLLC [OW0024-Beckett] makes a similar suggestion, but also suggests a shortening of copyright terms. We support such shortening wholeheartedly: at the time of the US's creation, copyright protection lasted for 14 years with one extension. This grew, especially during the 20th century with, amazingly, fourteen separate extensions of copyright terms. The net is that the balance has shifted, so that the proportion of currently sold or widely available items under copyright protection is vastly greater than the proportion of items that are in the public domain, or otherwise available for creative and artistic use.

The notion of an "active" rights-holder is very much consistent with our understanding of the Founders' intent. The Founders did not seek to have unlimited copyright terms, or unlimited expansion of copyright

terms. Rather, they considered copyright to be an active granting of rights to a copyright holder, which would be balanced by active benefits to the public. The comments of Lawrence Lessig et al./Save The Music and Creative Commons [OW0643-STM-CreativeCommons] speaks to this theme quite well, and we concur with their notion. We suggest that their intentions are particularly appropriate for future shaping of copyright laws, and for the conceptual basis of the LoC's decisions concerning orphaned works. By their nature, most creators of orphaned works are difficult to find (and may be deceased or otherwise unavailable). Thus, we might not be able to expect such an active role for rights-holders from, say, 1964 or prior.

Although we have managed to determine non-renewal, and therefore public domain status, for many hundreds of books through our copyright clearance procedures described at http://gutenberg.org/howto/copyright-howto , we have long recognized the difficulty in doing so. Until late 2004, when our eBook #11800, "U.S. Copyright Renewals, 1950 - 1977," became available, there was no free electronic source we know of to look for copyright renewal records. Even with this valuable resource, there are opportunities for error, due to the details and vaguaries of the copyright renewal process. In addition, eBook #11800 only covers books.

Because we know how difficult non-renewal research is for books, we are particularly sympathetic to the several comments made about films and radio dramas. Such comments identify that multiple copyright holders (for performance, scores and scripts), along with vast numbers of studios that went out of business or were bought during the golden ages of radio and film, make tracking copyright holders or renewal records nearly impossible. Such comments were offered by John Lovering/WSCA-FM [OW0032-WSCA-FM] Kenn Rabin/Fulcrum Media Services [OW0030-FMS] and Jon Miller [OW0001-Miller], among others.

In closing, we would like to echo the calls of comments such as those of Maureen LaWent [OW0033-LaWent], David H. Bailey [OW0026-Bailey] and Alex Krupp [OW0025-Krupp], that support the moral right of the US to foster a vibrant and growing public domain. All persons in the creative arts rely on access to the works of their predecessors to advance. A healthy, accessible and non-threatened public domain is the best possible gift a society can make to itself.

Respectfully submitted,

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