



January 29, 2013

Maria Pallante
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

RE: Notice of Inquiry on “Orphan Works and Mass Digitization”

Dear Ms. Pallante:

In response to the Questions Raised in the Notice of Inquiry Concerning Orphan Works and Mass Digitization, 77 FR 64555 (22 October 2012), the Society of American Archivists (SAA) submits these comments on behalf of all archivists. SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,100 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

SAA commends the Copyright Office for again taking up the issue of “orphan works.” As professionals directly and indirectly involved in the creation of new works that incorporate information, text, and ideas from existing works, we have applauded the Copyright Office’s efforts to address the problems created by both extension of the term of copyright and the abolition of required registration. The Office’s report on orphan works in 2006 and the subsequent debate about legislative options initiated an international discussion that has refined and deepened our understanding of the issue. It is therefore an appropriate time to examine anew the issues raised in the 2006 report and to determine whether there are now more optimal solutions than those proposed in 2006 and reflected in some of the 2008 legislative proposals.

In particular, the combination of the 2006 report and developments in network technology have led to a number of important studies on the nature of the orphan works problem,

especially with regard to unpublished works and how the archival community can best address those issues. The result is a shift in SAA's position on orphan works from that which we submitted in 2005. This shift is reflected in our responses to the two questions currently posed by the Copyright Office:

1. *Orphan Works on an Occasional or Case-By-Case Basis.*

With respect to the occasional or isolated use of an orphan work, how has the legal landscape or legal thinking evolved in the past four years?

There have been two major developments since 2008 that have shaped our thinking regarding unpublished orphan works. First, it has become apparent that the costs of conducting a "good faith, reasonably diligent search" for the owner of an unpublished orphan work are disproportionately high relative to income a rights owner might realize from the publication of that work. To be clear, we are not advocating an orphan works exception for archives that imposes no burdens on repositories, but we do believe that the notion of a "diligent" search as materialized in the 2008 legislative proposals so severely undercut any value from an orphan works exception that such a bill would not address the problem. For that reason, the balance of our commentary focuses on the fact that a "diligent" search is not viable for archives not because we have no interest in being conscientious, but because the term as developed is unusable.

The difficulty of defining a cost-effective "diligent" search for the owners of unpublished orphan works became apparent in late 2009. In anticipation of the imminent passage of orphan works legislation, an SAA working group developed a statement of best practices for the investigation of orphan works. The final statement is found at <http://www.archivists.org/standards/OWBP-V4.pdf> and a copy is attached to this comment. It concluded that the level of effort in a search should vary depending on the age of the material; whether the material was created with commercial exploitation in mind; how the material was to be distributed (and whether takedown was possible); and the likelihood of success in identifying a copyright owner. The problem, of course, is that it is always possible to do more. Professional expertise might indicate that a search should be halted at a certain point, but out of fear of having that judgment challenged, the repository might engage in excessive and expensive investigations.

The assumption in our Orphan Works Best Practices statement that no single standard for a "diligent" search could apply to all orphan materials was borne out by subsequent research studies. Two in particular deserve notice. As reported in a 2007 paper published in SAA's journal, archivists at the University of North Carolina at Chapel Hill conducted intensive copyright research on the 3,304 individual letter writers in the correspondence contained in the Thomas E. Watson Papers.¹ Archivists extracted the names, dates, and geographical locations of authors of the incoming correspondence. This effort to obtain 3,304 names

¹ Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers," *American Archivist*, 73:2 (2010): 626-636. Watson was a Senator from Georgia who died in 1922.

alone required 90 hours of dedicated labor. An additional 560 hours were spent searching for death dates and the current copyright owners of those correspondents. In the end, the UNC archivists determined that 21% of the correspondence was in the public domain. Of the remaining 79%, they were able to identify only four current copyright owners; three gave permission for the letters they own to go online (at no cost); the fourth permission request went unanswered. Because this was a grant-funded special research project, UNC was able to conduct this highly time-intensive search for copyright owners. Without such extraordinary funding, however, no other archival repository could justify spending the more than \$1,000/linear foot of material that it cost UNC to investigate copyright status.

A study of copyright investigation at the Jon Cohen AIDS Research Collection at the University of Michigan found a similar pattern. As in the UNC study, archivists attempted to identify, locate, and obtain permission for web publication from every rights holder whose writings were included in a collection of correspondence. Although permissions for Cohen's outgoing correspondence were easy to obtain, the incoming correspondence posed an enormous challenge. Even though this is a relatively recent collection and hence, one would think, a relatively efficient collection on which to conduct copyright investigations, more than three times as much time was spent on copyright-related tasks than on all other tasks tracked for the project combined.²

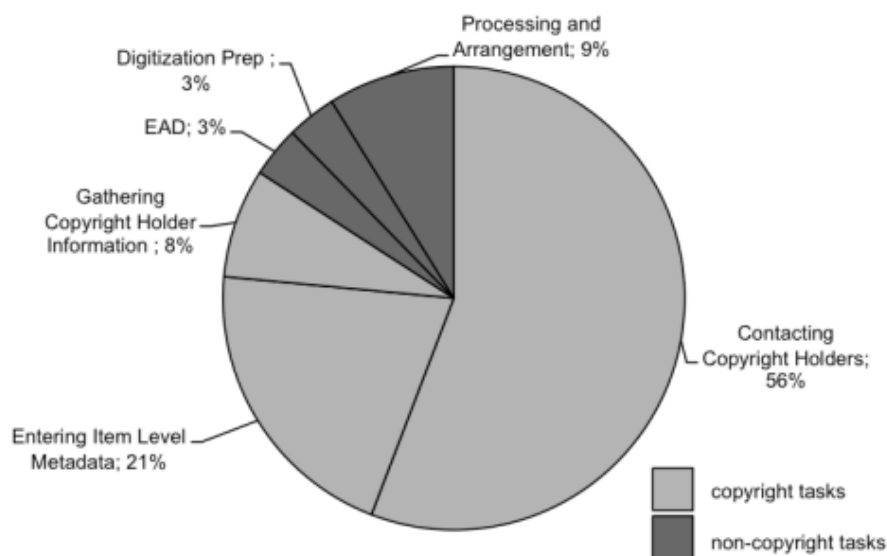


Figure 2: Relative Time Spent on Cohen Project Tasks

When rights holders were identified and responded to a rights request, 91% granted royalty-free permission, suggesting that even for recent unpublished archival material there is so little of monetary import as to undercut a cost-benefit justification for extensive

² Item-level metadata would not have been gathered had copyright not been an issue.

searching. Indeed, the study's results suggest that even recently generated archives generally contain little of monetary value to justify the cost of the kind of "diligent" search suggested by 2008 draft legislation. The study's author, noting that failure to secure permission for some of the items led to an incomplete and hence socially less-useful online collection, concluded that "a more reasonable approach to... the inability to identify and locate rights holders might be to post those items until a rights holder requests it take them down."³

Given these high costs, the imposition of the "good faith, reasonably diligent search" standard as discussed in the 2008 legislative proposals offers few benefits to archives and researchers. The unrealistic "diligent" search as proposed in the 2008 bills ran counter to the principle of balance at the heart of copyright law. It required a potential user of an item—at great expense—to search and demonstrate exhaustively that there is no potential copyright holder but required no action from copyright owners, not even to indicate their existence.

The high cost and relatively low success rate in conducting "diligent" searches for the copyright owners of unpublished archival materials is particularly troubling given the second development since 2008: a growing understanding that most archivists are overly cautious when it comes to copyright. A 2008 study examining the attitude of Canadian archivists toward making archival material available on the Internet found that the repositories studied preferred to select items that were perceived to incur little risk of copyright infringement (because the copyright had expired or because the repository owned the copyright) or items that required few or no resources to investigate copyright status or obtain permission. The repositories were actually more restrictive than the law required, largely due to lack of resources.⁴ A comparative study of the practices of American archivists reveals similar findings.⁵ While we might be pleased that archivists are so conscientious, the unfortunate result of their caution is that the scope of online cultural resources that could be used for new studies and innovation is much smaller than it ought to be, and would be if an orphan works exception were recognized in the statute.

Archival caution occurs in spite of the fact that the existing legal regime for unpublished works mirrors in one important manner one of the recommendations in the 2008 legislation: namely, a limitation on remedies available to a rights owner. The 2008 legislation proposed waiving any requirement for reasonable compensation from archives, libraries, and other nonprofit institutions if certain requirements were met. Under 17 USC § 412, archival repositories are already immune from statutory damages and attorney's fees for the infringement of unregistered unpublished works, and in most cases, the actual

³ Dharma Akmon, "Only with Your Permission: How Rights Holders Respond (or Don't Respond) to Requests to Display Archival Materials Online," *Archival Science* 10 (2010):45-64.

⁴ Jean Dryden, "Copyright issues in the selection of archival material for internet access," *Archival Science* 8 (2008):123-147.

⁵ Jean Dryden, "Failing Our Users: The Role of Copyright in Selection for Digitization," (submitted for publication, 2012).

damages that would accrue to a copyright owner are small. At the heart of the archival caution is professional integrity; archivists do not want to violate the law even knowing that damages would be limited. Archivists take seriously their role as honest custodians of the record of one generation for the next. Although they welcome the safety that § 412 affords, they are also reluctant to base ongoing practice on technicalities, preferring instead to operate archives as places of integrity.

Thus, in spite of these immunities, most archival repositories are reluctant to post copyright-protected material online, as the studies cited above show. While a few institutions have acted on the assumption that posting an entire archival collection online can be a transformative fair use,⁶ many more follow the model of the Library of Congress and invoke fair use only as a last resort. The Library of Congress will post archival material online under an assertion of fair use, but only after “extensive research” to locate copyright owners.⁷ Because most repositories do not have the resources to conduct extensive research, much material that may be protected by copyright remains locked in institutional vaults. Even in cases in which there are archivists and repositories that believe that they are exercising their fair use right in digitization projects, resource allocators and administrators often are not willing to support any level of risk.

Another chilling effect of the diligent search requirement is to eviscerate an institution’s ability to apply for either public or private funding to arrange and describe a collection to make it available for research. Funding agencies typically have either a requirement or an expectation that a substantial component (if not the entirety) of any collection processed with grant funding will be made available digitally. In the absence of an orphan works exception, the prospect of clearing rights is so daunting that even premier institutions must leave some large, culturally significant collections unprocessed and unavailable for research.

The research conducted since the 2008 legislation leads to some inescapable conclusions. Most unpublished material found in archival repositories is of little commercial value and the rights owners of that material have little interest in exploiting the material itself. Yet the cost of conducting a “diligent” search can be tremendously high, and there are no good guidelines for when to stop. Archival caution and uncertainty over the availability of legal protections has led too many archivists to avoid digitizing orphan works, to the detriment of researchers and the impoverishment of society.

⁶ See, for example, Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries*. (Washington, D.C: Association of Research Libraries, 2012), and Laura Clark Brown, Judy Ruttenberg, and Kevin L. Smith, “The Triangle Research Libraries Network’s Intellectual Property Rights Strategy for Digitization of Modern Manuscript Collections and Archival Records Groups,” (January, 2011): <http://www.trln.org/IPRights.pdf>.

⁷ “Copyright and Other Restrictions,” *Prosperity and Thrift: The Coolidge Era and the Consumer Economy 1922 – 1929* website, <http://memory.loc.gov/ammem/coolhtml/ccres.html>. Accessed 4 Jan. 2013.

2. *Orphan Works in the Context of Mass Digitization*

How should mass digitization be defined, what are the goals and what, therefore, is an appropriate legal framework that is fair to authors and copyright owners as well as good faith users? What other possible solutions should be considered?

It is not possible, or necessary, to define “mass digitization.” What might be mass digitization for a local historical society would be less than a day’s work for the Internet Archive. More importantly, the large-scale digitization efforts since 2008 have taught us that it is inappropriate to have two sets of rules. It is easy to imagine a scenario in which a repository would wish to digitize and make available on a website an early 20th-century diary. One could imagine, as the 2008 legislation did, that the repository should in that case conduct a “diligent search” for the current owner of the rights in the diary. But now imagine that the diary was just one of a thousand different items in a collection at the Archives of American Art. The Archives is one of the few American repositories that has been digitizing entire manuscript collections and posting them online. Since 2005, the Smithsonian’s Archives of American Art, with support of the Terra Foundation Center for Digital Collections, has scanned and posted online in their entirety more than 100 archival collections.⁸ It could not have done so if it had conducted what the 2008 legislation considered to be a “diligent search” for each item in each collection. And yet does it make sense to require a different standard for items that are posted online individually?

There should be a solution for orphan works that applies equally to mass digitization projects and to individual items. The importance of digitizing more and more material, whether 200 collections or collections of 200 boxes or even a single diary, is deeply rooted in the archival profession’s core tenets. An important archival best practice, provenance, requires keeping together materials of the same creator and origin to preserve context. This principle dictates that presenting whole collections on the web is highly preferable to presenting only those isolated documents or portions where a “diligent” search led to a clear response from rights holders. Presenting the whole collection preserves the integrity of the evidence inherent in the collection. Similarly, items within collections and across collections derive additional informational value from their context and their relationship to one another. Past practice of digitizing only “gems” or “examples” rip the items from their provenance, their order, and their connection to other collections. Moreover, only mass digitization permits students, scholars, and citizens to conduct meaningful, transformational research on archival collection material.

Our experience with unpublished orphan works since 2008 has established the following:

- Most unpublished material found in archival repositories lacks the sufficient commercial value to justify costly “diligence” in largely fruitless searches.

⁸ <http://www.aaa.si.edu/collections/online>

- It is not possible to establish meaningful and uniform diligent search standards for all unpublished works.
- The cost of searching for the rights owners of non-commercial unpublished orphan works is prohibitive.
- When they can be located, the rights owners in what are presumed to be unpublished orphan works that were not created for commercial purposes rarely have any interest in exploiting those works.

In light of these findings, SAA suggests that any new orphan works solution be more nuanced than the solution initially proposed in 2008. S. 2913 from the 110th Congress should not be used as a starting point for any future solution. In particular, we urge that a distinction be drawn between copyrighted works that were created with material gain in mind, and hence in part dependent on the incentive structure of copyright law, and those works that were never intended for the commercial market. Within archives, works created with the hope of material gain tend to be the exception rather than the rule and hence should not be the driving consideration in any debate about copyright.

For works created with commercial intent, if rights owners wish to prevent their exploitation under an orphan works exception, it should be incumbent upon them to record their ownership with a copyright registry. This would serve as a means of balancing the copyright owner's responsibilities with the diligence incumbent upon the user. A "diligent search" would then consist simply of an automated search of the registry. If no registration is found, then the recourse open to rights holders would be to request the takedown of infringing material. A similar limitation could be applied according to chronological criteria—possibly requiring no more than the automated searching of registered rights holders for material older than, for example, 50 years. We note the impact of age here because as is shown in the UNC and UM examples, as the time from creation increases, so too does the chance that the copyright holder cannot be identified, thus increasing the number of orphans.

Placing part of the burden of preventing works from becoming orphans on rights holders by requiring them to make their intentions known in a registry (and then making a search of that registry the standard for a diligent search) is much more reasonable and balanced than a different solution that has emerged since the 2008 proposed legislation: namely, the introduction of an extended collective licensing scheme. It only makes sense to provide payment to rights holders if and when they appear and demand compensation for future (though not past) use of a now-formerly orphan work. But repositories that are seeking to increase access to our cultural heritage generally have no surplus funds (and are frequently fighting cuts in those funds). Allocating those funds in advance to a licensing agency that will only rarely disperse them would be wasteful, and requiring such would be irresponsible from a policy standpoint. Extended collective licensing will only further impede noncommercial access to orphan works.

Requiring repositories to conduct an automated search of a registry of rights owners would still impose costs on an archives for cases of materials created with commercial intent. We are cautiously optimistic, however, that they would be low enough that repositories would be more willing to make our unpublished heritage available online. In consequence, copyright law would no longer impede but instead foster historical research.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Dooley', with a long horizontal flourish extending to the right.

Jackie M. Dooley
SAA President, 2012 – 2013

Attachment: Orphan Works: Statement of Best Practices (SAA, 2009)



Orphan Works: Statement of Best Practices

January 12, 2009
Rev. June 17, 2009

1. INTRODUCTION

Purpose of the Report

“Orphan works” is a term used to describe the situation in which the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Proposed orphan works legislation, such as the Orphan Works Act of 2008 (H.R. 5889) and the Shawn Bentley Orphan Works Act of 2008 (S.2913), would reduce penalties for infringement if an infringer “undertakes a diligent effort to locate the owner of the infringed copyright.” This statement describes what professional archivists consider to be best practices regarding reasonable efforts to identify and locate rights holders. It is based on the authors’ knowledge of the kinds of materials that are likely to qualify as orphan works and on their professional experience in trying to obtain rights information for such works in the past.

Although the statement focuses on unpublished materials because these are the types of materials that are usually found in archives, the authors recognize that many of the techniques that are useful in identifying rights holders for unpublished materials may also be useful in identifying and locating rights holders of published materials.

Acknowledgments

Heather Briston, Mark Allen Greene, Cathy Henderson, Peter Hirtle, Peter Jaszi, William Maher, Aprille Cooke McKay, Richard Pearce-Moses, and Merrilee Proffitt are the primary authors of this statement, which was approved by the Society of American Archivists Council on June 1, 2009.

SAA gratefully acknowledges the financial and administrative support of RLG Programs, OCLC Research and the RLG Partnership, which made the preparation of this document possible.

2. PRINCIPLES

A set of principles underlies the decision to use materials that may be covered by copyright. They include:

- Multiple legal rationales may apply to a specific project or use;
- Holdings in archival collections should be used, not left unused because of obscure ownership status;
- Common sense should apply.

An orphan works analysis should be conducted in those cases in which it is recognized that the materials are or may be under copyright, permission for the use must be obtained, the author cannot be located, other exemptions are not available, the use benefits society, and common sense guides the decision-making process.

Legal Rationales

The central premise of an orphan work analysis is that the item is copyrightable, is currently within copyright, and the use would be in violation of copyright without permission granted by the author, or his or her heirs or assigns. Prior to beginning an orphan works analysis, one must first determine whether the orphan works process is an appropriate legal rationale for the proposed use of the selected materials.

Public Domain

One legal rationale to consider when deciding whether an orphan work analysis is necessary is to identify whether the work is within copyright. The largest body of works in this case is the public domain. (See http://www.copyright.cornell.edu/public_domain/) If the work is in the public domain, then it is not necessary to determine the author or current rights holder because the item is available for everyone to use without permission. In addition, for those items that are facts, works of the federal government, or other material outside of copyright, it is not necessary to make an orphan works analysis.

Fair Use

Fair use may be a better rationale for creating a copy or publishing a copy of a document. If a use can be supported by a balance of the four factors considered for determining fair use—the purpose, nature, amount, and effect of the use—the use does not infringe upon an author’s copyright and permission of the holder is not necessary. Whether or not the copyright holder is known is immaterial.

Because courts evaluate fair use on a case-by-case basis, one cannot predict with absolute certainty how a court will rule on a particular set of facts. This should not, however, deter archivists from relying on fair use. In the Copyright Act, Title 17, Section 504(c)(2) specifically provides that a court “shall remit statutory damages in any case where an infringer believed and had a reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107,” if the infringer was a nonprofit educational institution, library, or archives, or an employee thereof acting within the scope of his or her employment, and the infringement involved a reproduction in copies or phonorecords. Thus, an archivist’s reasonable belief that the reproduction was a fair use is sufficient to protect the archivist from statutory damages.

Orphan Work

A first step is to determine whether the work is actually orphan. There are two ways an item can be orphaned:

- The identity of the rights owner cannot be determined;
- The identity of the likely rights owner is known, but he or she cannot be located.

Some have proposed that the failure of a rights owner to respond to a request to use a work also makes that work an orphan, but this definition has not been adopted in the proposed legislation.

Other Legal Impediments

Some works are governed by other laws, such as trademark, privacy, and publicity, which could potentially make an orphan works analysis irrelevant. If the proposed use violated one of these laws, there would be little point in conducting an orphan work analysis.

Putting Assets to Work

A second principle that we believe underlies the decision to pursue an orphan works analysis is whether the assets should be put to work in order to benefit society and the economy as a whole. In those situations, it is more likely that the use of orphan works is defensible.

Moreover, in the digital environment, it is relatively easy for a copyright owner to alert archives to infringements and for those archives either to obtain permission from the copyright owner or to take down the infringing work.

Common Sense

The third principle that should guide individuals in making “diligent searches” under the orphan works rubric is common sense. Effort should be expended in contexts and situations in which it is more likely to bear fruit. As the United States Register of Copyrights, Marybeth Peters, has observed:

If one step in a user’s search leads him to another step, he must follow the trail and explore the facts that present themselves. On the other hand, a user ought not to be required to explore meaningless steps if he has good reason to believe they will be fruitless. For example, it makes no sense to require a user to check an electronic database specializing in contemporary images of American photographers if what he is looking for is the owner of a 1930’s photograph of German origin.¹

As professionals governed by common sense, archivists understand that more effort should be expended to locate the copyright holder of a more recent work because the search has a higher likelihood of success. Similarly, because individuals who have earned their livelihoods through their creative works presumably want to be found, a higher standard should apply to searches for professional authors and artists than for amateurs. Professional creators often do a much better job of making themselves findable through copyright office records, authors and photographers associations, and similar tools and databases, and orphan works searchers should expend greater effort to pick up the trail that they may have left behind.

¹ Marybeth Peters, “Statement of Marybeth Peters The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary,” U.S. House of Reps., 110th Congress, 2nd Session, March 13, 2008. Retrieved May 13, 2008, from <http://www.copyright.gov/docs/regstat031308.html> (checked November 1, 2008).

Finally, archivists understand that more effort should be expended if the work is difficult to rescind or take down, or if the use is prominent, than if a use involves a limited audience or is easy to take down. Figure 1, below, illustrates the exercise of reasoned decision-making about how much effort to expend in an orphan works search.

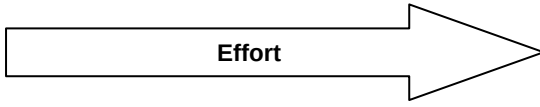
Cost / Effort of Search	
	
Unlikely to be able to locate information leading to rights holder	Likely to be able to locate information leading to rights holder
Older work	Recent work
Anonymous, obscure, non-professional creator	Prominent or professional creator or prominent rights holder
Narrow distribution, easy takedown, non-prominent use	Wide distribution, rescinding use difficult, prominent use, promotional use

Figure 1

In practice, it may be helpful for archivists to think in terms of doing a “minimal,” “extended,” or “extraordinary” search, depending on the amount of information initially available about the work, the uniqueness of the name of the creator, its age, and other important factors.

3. SEARCH STRATEGIES

A search involves answering three questions: Who created the work? Who owns the work now? And where is that owner located now? Sometimes the answer to the first question is readily apparent and the archivist can move on to the second question. As discussed in Section B below, the creator of the work may not have been the owner of the work at the time of creation. Moreover, the owner at creation may no longer be the owner.

A. Identifying the Creator of the Work

Because the lack of identifying information on a work pertaining to its author is not by itself sufficient to render the work an orphan, the first inquiry is to identify the author. The items below represent related, and sometimes overlapping, steps more than a linear sequence or branching flow chart.

1. Even if the document itself is not “signed” (marked with either a name that is handwritten or printed by mechanical means, typed, or otherwise indicative of the author’s identity), at a minimum other internal clues should be examined, including any initials, logos, addresses, or the like. For a work of potentially broad artistic significance, consider whether there are highly idiosyncratic and distinctive stylistic elements to suggest an author.

2. If the document itself is not marked, then the next step is to examine adjacent materials for contextual clues. At a minimum, for example, examine all other documents in the same file folder in which the potential orphan work is located to see if the content of other documents contains clues. This might apply, for example, in a case in which there is an unsigned photograph in a file of correspondence with a particular person and the photograph was originally an enclosure in one of the letters. It might also apply where a single sheet of an unsigned letter is related to other letters to or from a person with the same handwriting or stationery. Note: In most instances, this examination for contextual clues may be limited to the folder in which the work was found.
3. Although it would not be reasonable to have to examine all of the other documents in the collection in which the work is located, reasonable further contextual steps might include, at a minimum, a thorough examination of the finding aid for the collection to determine if similar works have been filed elsewhere in the collection, and then examination of any folders that appear appropriate. A related reasonable minimal step would be to examine the donor or accession files for evidence of names of correspondents of the collection creator.
4. If the previous three steps do not allow identification of any name for the author of the work, then it may be considered an anonymous work for which neither authorship nor rights holder can be established, and thus reasonably treated as an orphan work unless other conditions apply, such as internal evidence that it was a work of employment.
5. Another minimum reasonable step in determining the identity of the author of a prospective orphan work should be to confer, if possible, with the archivist or manuscript curator responsible for the collection and to inquire about the existence of any relevant donor/acquisition documentation.
6. When a name can be located, an expanded search would include conferring with a reference librarian or genealogist to establish the author's specific identity.
7. If the previous six steps provide a reasonable indication of the author's name, the next reasonable step is to determine if the name is distinctive enough to establish identity. For example, a letter signed "Jane Smith" with no other contextual clues, such as place of residence, will present greater difficulties than one signed "Helga Winterbottom" on a letter posted from Helena, Montana, in 1962. If the name on the document is not sufficiently clear by itself, then the contextual investigations in steps 2 through 4 would be reasonable. In all cases, a carefully done search in Google or another robust search engine should be regarded as only a minimum step in determining actual identity of individuals with common names.

B. Identifying the Rights Holder

The default starting position for any orphan works investigation must be the creator of the work because the working assumption is that the creator is the copyright owner. There are, however, at least three situations, in which the initial author may not be the copyright owner:

1. Is the creator still alive?

Copyrights do not end with death; for most unpublished items, they extend for another 70 years after death. If the copyrights had not previously been transferred to a third party (see the next section), then they would pass to heirs under the terms of the will or, in the absence of a will, according to the intestate laws of the state in which the creator died.

If there is more than one heir, it is likely that they will jointly own the copyright in the creator's work. For example, if an author has four children and the remainder of her estate (including her copyrights) is left equally for them to share, then each child owns a one-fourth interest in the copyright. If they should pass away, then their estates would divide each quarter share among the surviving heirs. By the time 70 years have passed and the copyright enters the public domain, there could be literally dozens of copyright owners.

Fortunately in an orphan works investigation, the search must identify and locate only one of the joint owners of an inherited copyright. That joint owner can authorize any use of the copyrighted material, although that individual is obligated to account to the other joint owners for any profits they may receive from the use.

In the case of deceased creators, therefore, the search must attempt to identify and locate copyright heirs rather than copyright creators. Tools to consult in this case include standard genealogical reference tools, such as obituaries and such online reference tools as Family Search (<http://www.familysearch.com/>), Ancestry.com (<http://www.ancestry.com/>), and Google (<http://www.google.com/>) for information on the death of the author and possible heirs.

2. Did the creator transfer copyright?

Any rights owner (both creators and copyright heirs) can transfer their copyrights to a third party. For example, academic authors frequently assign copyright in their articles, and sometimes in their books, to publishers. Literary figures sometimes transfer their copyrights to executors or to institutions that they wish to support. Mark Twain's copyrights are owned by the Mark Twain Foundation, for example, and Marjorie Rawlings, author of *The Yearling*, gave her copyrights to the University of Florida. Photographers may assign the copyright in their photographs to a publication in which it appears or they may retain copyright and merely license limited use of the photographs.

Unfortunately there is no requirement that copyright transfers be registered with the Copyright Office (although they can be). The only requirement is that such copyright transfers must be in writing. Thus it is very difficult to know with certainty whether the copyrights in any particular document have been transferred.

Best practice would dictate that potential users of copyrighted works follow the contextual clues described in the preceding section. In the absence of any readily accessible evidence that copyright may have been transferred to a third party, assume that the copyright still belongs to the creator and search for that creator (or heirs). If there is evidence that the item may have been published or copyright otherwise transferred to a third party (for example, editorial and/or layout marks on a document or photograph), search for the publisher as well, for it may have acquired the copyright.

3. Was the work produced as “work made for hire”?

“Work made for hire” is the major exception to the generic rule that the creator is the initial owner of the copyright. In a work made for hire situation, the employer of the creator—not the creator himself or herself—is considered to be the “author” for copyright purposes and the employer is therefore the copyright owner. Copyright in a business letter composed by an employee of a firm does not reside with that employee, but rather with the firm. Any time spent in an orphan works search in trying to locate that employee or, if deceased, his or her heirs would be wasted because he/she or they would not own the copyright.

Unfortunately it is often very difficult to determine whether any individual document or photograph was prepared as work made for hire. A letter written on corporate letterhead is often work made for hire, but many employers allow their employees to use corporate stationery for non-official business. Academics in particular often sign contracts with their employing institutions that specify that the academic, and not the institution, owns copyright in non-administrative writings. To determine with certainty whether an individual document was a work made for hire, it would be necessary to have access to the employment contracts under which the work was created.

What does this mean for best practice for orphan works investigations? Again, context matters. If a work appears to have been composed as part of an employment contract, attempting to locate the employer first would seem to be the most efficient use of one’s time. Similarly if an employment contract in the personal archives of a photographer indicated that some of the photographs in the collection were taken as an employee, then one can assume that copies in the archives were for personal use only; the copyright belongs to the employer. In some cases, however, it may be necessary to consult both creator and employer.

C. Locating Copyright Holders

Once you have established the identity of the creator or rights holder, a variety of approaches can be followed for locating that person or his/her copyright heirs and executors. What constitutes a reasonable effort in locating contact information for a rights holder (hereafter author or artist) depends on a number of factors:

- If the author is a professional rather than an amateur, the likelihood that a professional author can be located is greater, and hence a greater amount of effort may be warranted.
- If the work enjoys wide distribution (i.e., it is published), a greater amount of effort may be merited than if the work has a limited distribution (unpublished).
- The interplay of the above two factors against the expense of tracking down contact information for a rights holder may be an important consideration in determining what constitutes a reasonable effort.

The following suggestions are listed in descending order of ease of effort weighed against likelihood of success.

1. For professional authors and artists, an excellent starting point is the WATCH File. WATCH, for “Writers, Artists, and Their Copyright Holders,” is a database maintained jointly by the Harry Ransom Center of The University of Texas at Austin and the University of Reading

Library. The database tracks information about the copyright owners of works by usually prominent individuals, with an emphasis on American, British, French, and other European authors and artists. One can find in the database the contact information for either the current holder of the copyright or the authorized representative charged with administering the copyright. Although developed primarily to track copyright in unpublished works, it can also be used to identify a copyright contact for those instances in which the author has retained copyright in a published work. The WATCH file is found at <http://www.watch-file.com> or <http://tyler.hrc.utexas.edu/index.cfm>.

What if the author or artist you are searching for is not listed in the WATCH file? Suggestions for how to proceed have been modified from some of those given on the WATCH site and are presented below.

2. Try to determine if there is an archival collection of the creator's papers by, for example, conducting an Internet search using the following search terms: "[Name of Creator] Papers" or "[Name of Creator] Collection" or "[Name of Creator] Archive." (Note: Several archives can hold papers by the same individual.) If the work is in an archival collection, the archives staff may know the identity and contact information for the copyright holder. Archives staff may be able to locate such information in accession records or donor or purchase files. Similarly, if the material is family-owned, the family members may know the identity and contact information for the copyright holder.
3. If the archives staff do not know the identity and contact information for the copyright holder or if the work is not in an archives, then the most efficient and cost-effective step is to conduct an Internet search with the goal of locating heirs or a literary executor. In conducting the search, use as much precise information about the creator as possible. Search for all possible variant forms of the name, and qualify the search with specific facts about the individual in order to narrow the search. Use such search strings as "[Name of Creator] Obituary" because U.S. obituaries often list the names and places of residence of surviving family members. You may then use phone books, city directories, or other address sources to try to make contact. If you can identify when and where a person died, check the probate records for the author (although this may involve some expense). These records may indicate who inherited copyrights.
4. Look at works about the author. The notes may contain acknowledgements or other information about copyright ownership. Check with societies devoted to the author's work. The International James Joyce Foundation, for example, maintains an FAQ devoted to copyright issues surrounding James Joyce's work. Similarly the Ernest Hemingway Society publishes permission information for works by Hemingway. See <http://www.hemingwaysociety.org/#permissions.asp>. Check online for copies of works by the author to see if any carry a credit line indicating copyright status. Be careful, however, for even the most reputable institutions can make mistakes when it comes to assessing copyright.
5. Use reference sources to locate information about where an author or her family (who may have information on her copyrights) lived. Literary tools such as author directories and *Contemporary Authors* are especially valuable for writers. Other general biographical tools, such as *Marquis Who's Who* and the *Biography and Genealogy Master Index*, are good sources of general information.

6. Check with professional membership associations. The Author's Registry will search its author records for one or two names for free. Even if an author is not found in the Author's Registry, it may still be helpful to check with some of the organizations it represents, such as:
 - The Author's Guild, primarily a writer's advocacy group that includes literary agents and estates among its members;
 - The American Society of Journalists and Authors, which represents professional freelance writers; and
 - The Dramatists Guild, which represents more than 6,000 playwrights, composers, and lyricists.
7. If these steps do not yield any information or further clues, write to the known or presumed copyright holder's last known address. The post office or current resident may know a forwarding address. Requesting delivery confirmation or return receipt will be useful in documenting your search efforts. Other potential sources of contact information for a copyright holder are the accounting or permissions office of the author's most recent publisher or the copyright holder's last-known employer. If the identity of the author's literary agent can be determined (from an Internet search or acknowledgements in published works), ask the literary agent for information about the copyright holder. Some publications, such as the *New York Review of Books*, the *New York Times Book Review*, and the *Times Literary Supplement*, will publish your query about the identity and contact information for a copyright holder.
8. For less prominent authors or artists, genealogical resources (including local obituaries) may prove helpful in tracking partners or heirs. Because genealogical resources are so varied and numerous, you may wish to begin by consulting a reference archivist or librarian for assistance in devising a reasonable research strategy.
9. The decision to search fee-based databases or, at an extreme, hire a private investigator in an effort to locate a copyright holder is largely a risk management issue that will be influenced by such factors as the age and nature of the work itself; the nature of the use you wish to make of a work (wide distribution for profit or limited distribution on a not-for-profit basis); and the likelihood of success relative to the expense.

Locating Publishers

Publishers are an important resource for securing permission—even for unpublished works—if the author has published something in the past. Publishers may be able to provide current contact information for a copyright owner, especially if the publisher has to send royalty checks to that individual.

There are two major advantages to starting a search for copyright owners with the publisher. First, it may be easier to find an old publishing house or its successors than it is to find an individual author or her heirs. The directories of publishers are extensive, and the publishing literature often records what happens to major publishers. Publishers may also have a greater willingness than authors to be found—publishers, after all, are interested in marketing their products. Second, publishers know about copyrights. Many of them have departments that specialize in permissions; you can usually find the address for that department on the publisher's website.

Although the task of locating a publisher may be slightly less daunting than finding an author, it is not always easy because ownership of firms can change so frequently. Even if the publisher can be located,

the publisher's knowledge about the copyright status of the works they owned varies widely. In some cases this might be because the titles were acquired when another publisher was absorbed into the current firm. In other cases, it may have been due to poor record keeping.

In 2007, the University of Reading and the Harry Ransom Center at The University of Texas, the groups that created the WATCH file, unveiled the FOB (Firms Out of Business) file. FOB records information about printing and publishing firms, magazines, literary agencies, and similar organizations that have gone out of existence. Whenever possible, it identifies the successor organizations that might own any surviving rights. Newer and less complete than WATCH, with community input and support it has the potential to grow into just as important a resource. FOB is found at <http://www.fob-file.com/> or <http://tyler.hrc.utexas.edu/fob.cfm>.

Reproduction Rights Organizations

A reproduction rights organization (RRO) is a society that acts as an agent for a large number of copyright owners. Collecting societies administer copyright, and collect and distribute income, in relation to copyright owned by their members. This commonly includes administering copyright under statutory licensing schemes.

It is possible, and sometimes mandatory, to negotiate permissions and licenses with collecting societies rather than with the individual owners of copyright. (Some copyright owners do not wish to be bothered with permission requests and choose instead to authorize a collecting society to manage the entire business.) For cultural institutions, one of the key benefits of collecting societies is that they offer a streamlined procedure for rights administration, thus reducing the administrative difficulties in locating and contacting individual owners.

Although copyright collectives can simplify the permissions process, they are not a panacea. Not all organizations are authorized to license all possible uses. Rights to license electronic and Internet distribution in particular often remain with the publisher or author. The transaction costs associated with securing permission can often be high, and the organization will usually charge even if the use is educational or non-commercial. In some cases the copyright owner may permit non-commercial, educational uses at a cost lower than would be charged by the reproduction rights organization. It is important to remember, therefore, that just because a copyright owner has licensed a reproduction rights organization to manage its copyrights does not mean that the cultural institution cannot also ask the copyright owner directly for permission.

There are many reproduction rights organizations in the U.S. and abroad. Several websites, including that of the Copyright Advisory Office at Columbia, provide information about and links to many of them. A brief list follows:

- For published textual works, the most prominent rights collective is the Copyright Clearance Center (CCC): <http://www.copyright.com>
- Two primary organizations serve as the rights agents for artists. They are the Artists Rights Society (ARS): <http://www.arsny.com/> and Visual Artists and Galleries Association (VAGA): <http://vaga.org>
- For the online reproduction and distribution of musical works, one of three collective rights organizations license the performance right in the musical composition—ASCAP (<http://www.ascap.com>), BMI (<http://www.bmi.com>), and SESAC (<http://www.sesac.com>). The reproduction, distribution, and performance right in the sound recording is often managed by the Recording Industry Association of America:

<http://www.soundexchange.com/>. The reproduction and distribution right in the composition is often licensed by the Harry Fox Agency (<http://www.harryfox.com/>).

International Reproduction Rights Organizations

The equivalent of many of these U.S.-based collective rights societies can be found in other countries. They can be an important resource in locating copyright owners for foreign works. Many of them are members of the International Federation of Reproduction Rights Organizations (IFRRO), found at <http://www.ifrro.org/>. Others belong to CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs), the Paris-based umbrella organization that oversees the activities of more than 200 international author copyright collecting societies. Directories of members of both organizations are available on their websites.

Among the most important international text licensing agencies are Access Copyright, the Canadian Copyright Licensing Agency (<http://www.accesscopyright.ca/>); CLA, the Copyright Licensing Agency Ltd., representing publishers in the United Kingdom (<http://www.cla.co.uk/>); and ALCS, Authors' Licensing & Collecting Society, UK, created to provide collective administration for writers (<http://www.alcs.co.uk>).

4. DOCUMENTING THE SEARCH

If you are unable to locate the author of a work or the author's heir or estate representative, it will be important to have on file evidence that a reasonable effort was made to locate the copyright holder should a claimant to the copyright come forward post-publication. List each step taken and source consulted. Date and record the results for each. If a search step involves correspondence, keep copies of all letters written and replies received. It may be useful to request return receipts in the event that a letter of inquiry is undeliverable. A documented history of the search for a copyright holder should help establish that a good-faith effort was made.

5. BIBLIOGRAPHY AND RESOURCES

Note: All links to online resources in this list and throughout the document were checked on November 1, 2008. Circa dates are based on the initial harvest of the URL by the Internet Archive's Wayback Machine, although the content of the page may have changed significantly since then.

Investigating and Locating Copyright Owners and Permissions

Crews, Kenneth D. "Permissions," 2008. <http://www.copyright.columbia.edu/permissions>.

General information on identifying and locating copyright owners. Includes model permission letters and discussion of some problematic formats (including unpublished correspondence and home movies).

Dunning, Alastair. "Tracing Copyright Holders. How Two Digitisation Projects Coped with Copyright for Historical Material," Arts and Humanities Data Service, August 2004. <http://ahds.ac.uk/creating/case-studies/tracing-copyright/index.htm>.

Case study of two U.K.-based digitization projects at two different archives and the approaches they took to locate copyright owners. Although the legal context is different, the sensibility is similar.

Included in the links at the bottom is a link to a document containing “Details of the fields used in the Swansea copyright database, plus brief details of procedures for tracing copyright holders.”

Firms Out of Business (FOB), The University of Texas Austin and the University of Reading, ca. 2007–present. <http://www.fob-file.com/> or <http://tyler.hrc.utexas.edu/fob.cfm>.

Hirtle, Peter B. “Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use,” *Journal of the Copyright Society of the USA*, 49:1 (Fall, 2001). <http://hdl.handle.net/1813/58>.

“The last part of the paper considers what might constitute reasonable investigation of the copyright ownership of unpublished works. It may be that the standard for reasonable investigation would be enough to establish a fair use defense of the material, obviating the need for compulsory payments.”

U.S. Copyright Office, “Copyright Internet Resources,” ca. June 2008. <http://www.copyright.gov/resces.html>.

A partial list of resources that may be useful in pursuing licensing or permissions.

Writers And Their Copyright Holders (WATCH), The University of Texas Austin and the University of Reading, ca. 2002–present. <http://www.watch-file.com> or <http://tyler.hrc.utexas.edu/index.cfm>.

Orphan Works

Association of Research Libraries. “Public Policies: Copyright and Intellectual Property Policies: Orphan Works,” ca. January 2008. <http://www.arl.org/pp/ppcopyright/orphan/index.shtml>.

Includes links to ARL statements on orphan works legislation.

Association of Research Libraries. “Public Policies: Copyright and Intellectual Property Policies: Orphan Works: Orphan Works Resources,” ca. August 2007. <http://www.arl.org/pp/ppcopyright/orphan/orphanresources.shtml>.

Jimerson, Rand, President of the Society of American Archivists. “Response by the Society of American Archivists to the Notice of Inquiry Concerning Orphan Works, 70 FR 3739 January 26, 2005.” <http://www.copyright.gov/orphan/comments/OW0620-SAA.pdf>.

Jimerson, Rand, President of the Society of American Archivists. “Reply comments by the Society of American Archivists to the comments on Inquiry Concerning Orphan Works, 70 FR 3739 January 26, 2005. <http://www.copyright.gov/orphan/comments/reply/OWR0088-SAA.pdf>.

U.S. Copyright Office, Orphan Works, ca. 2005. <http://www.copyright.gov/orphan/>.

General Resources

American Library Association, Office for Information Technology Policy. “Copyright Advisory Network,” ca. 2004. <http://www.librarycopyright.net/>.

“This website is a way for librarians to learn about copyright and seek feedback and advice from fellow librarians and copyright specialists. We’d like to encourage communication and discussion—with copyright, there are no definitive answers. We also hope to provide useful resources for librarians and others seeking to learn about copyright.”

Carson, Bryan M. *The Law of Libraries and Archives* (Lanham, Md: Scarecrow Press, 2007).

Hirtle, Peter B. "Copyright Term and the Public Domain" [The Hirtle Chart], 2004–present.
http://www.copyright.cornell.edu/public_domain/.

Hirtle, Peter B., Emily Hudson, and Andrew T. Kenyon, "Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums." Ithaca, NY: Cornell University Library Press, *forthcoming*.

Hodgins, David. "Copyright resources on the Web: Sites to keep you current," *C&RL News* 68:3 (March 2007). <http://www.ala.org/ala/mgrps/divs/acrl/publications/crlnews/2007/mar/copyrightresources.cfm>.

"The resources presented here offer librarians, educators, and other information professionals a wide range of information on copyright from the introductory, to the practical, to the philosophical. . . . The following Web sites are just a slice of some of the better resources one will find when researching the topic." Sections include: Accessing and interpreting guidelines and law; Academics; Resources and policies of professional organizations; Permissions and licensing; Advocacy; Discussion lists and bulletin boards.

Society of American Archivists, Intellectual Property Working Group. "IP Update for Archivists," 2007–present. <http://www.archivists.org/saagroups/ipwg/index.asp>.

Stanford Center for Internet and Society. "Fair Use Project," ca. 2006–present.
<http://cyberlaw.stanford.edu/taxonomy/term/374>.

"The Stanford Center for Internet and Society's "Fair Use Project" ("the FUP") was founded in 2006 to provide legal support to a range of projects designed to clarify, and extend, the boundaries of "fair use" in order to enhance creative freedom."

U.S. Copyright Office, [Website], ca. 2001–present. <http://www.copyright.gov/>.

Blogs

American Library Association, Office for Information Technology Policy. "Copyright Advisory Network [web page]," 2005–present. <http://librarycopyright.net/wordpress/>.

Contributing authors: Julia Binnie, Janet Brennan Croft, Ruth Dukelow, Claudia Holguin, Molly Kleinman, Cindy Kristof, Raizel Liebler.

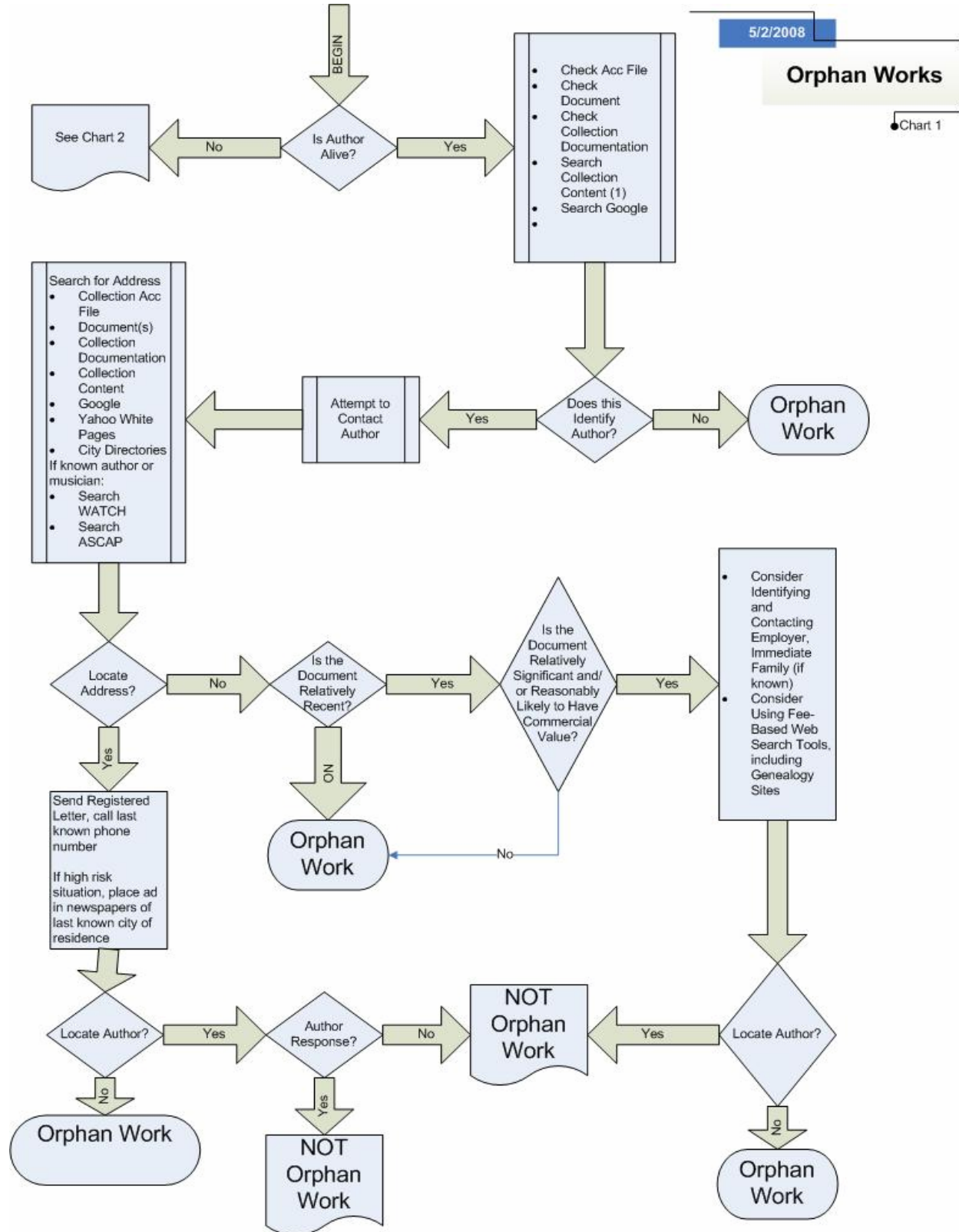
LibraryLaw Blog, ca. 2004–present. <http://blog.librarylaw.com/librarylaw/>.

"Issues concerning libraries and the law—with latitude to discuss any other interesting issues. Note: Not legal advice—just a dangerous mix of thoughts and information." Contributing authors: Peter Hirtle, Raizel Liebler, Mary Minow, Susan Nevelow Mart.

"Scholarly Communications @ Duke," Duke University Libraries, ca. 2007–present.
<http://library.duke.edu/blogs/scholcomm/>.

"This web site is intended to help keep the Duke [University] community informed about developments in scholarly communications, including the application of copyright law and its exceptions to teaching and research."

APPENDIX A: CHART 1 (for a living author)



5/2/2008

Orphan Works

Chart 2

Search for Descendents

- Check Acc File
- Check Document
- Check Collection Documentation
- Search Collection Content (1)
- Search Google
- Search on-line obituaries
- Contact Genealogical Society of Author's last known address
- Search SS Death Index to last known address

Is Author Alive?

Yes → See Chart 1

No → Search for Descendents

Descendent Identified?

No → Is the Document Relatively Significant and/or Reasonably Likely to Have Commercial Value?

Yes → Search for Address

Search for Address

- Collection Acc File
- Document(s)
- Collection Documentation
- Collection Content
- Google
- Yahoo White Pages
- City Directories

If known author or musician:

- Search WATCH
- Search ASCAP

Locate Address?

Yes → Send Registered Letter, call last known phone number

If high risk situation, place ad in newspapers of last known city of residence

Locate Descendent?

Yes → Descendent Response?

No → Orphan Work

Descendent Response?

Yes → NOT Orphan Work

No → Orphan Work

Is the Document Relatively Recent?

Yes → Consider Searching Probate Records

No → Orphan Work

Consider Searching Probate Records

Locate Address?

Yes → Send Registered Letter, call last known phone number

No → Orphan Work

Identify Descendent?

Yes → Search for Address

No → Orphan Work

Consider Using Fee-Based Web Search Tools, including Genealogy Sites

No → Orphan Work

Orphan Work

NOT Orphan Work

APPENDIX B: Summary Table

Task	Questions	Minimum Search	Expanded Search	Extraordinary Search
Identify the creator	<i>Who made it?</i>	Search the document itself, the collection documentation and provenance information, and likely other parts of the collection as identified by the inventory or access aid. Google Follow up on leads	Free resources outside collection Ask a reference librarian/archivist/genealogy librarian Use resources, such as genealogical databases to which the searcher has free access institutionally or at a public library Consider search recommendations from creators' professional organizations and advocacy groups.	Fee-based resources Search recommendations from creators' professional organizations and advocacy groups which are fee-based or are less likely to result in usable information.
Identify the rights holder	<i>Creator dead? Who inherited? Work for hire? Assigned to someone else?</i>	All of above plus Social Security Death index	Same as above plus obituaries available locally, free Copyright Office resources (printed, Stanford, online at Copyright Office)	Check past employers Public records: probate, divorce, deeds. Pay-to-play databases
Locate the rights holder	<i>Current contact information?</i>	All of above, plus attempt contact using relatively current, available option of telephone call, street address, email. Phone books, city directories.	Certified letter to last known address if less than current. Check relevant rights databases (e.g. WATCH)	Same as above, plus site visit. Private investigator.