

March 24, 2010

Victoria A. Espinel, Esq.
United States Intellectual Property Enforcement Coordinator
Executive Office of the President
Office of Management and Budget

VIA EMAIL: intellectualproperty@omb.eop.gov

Dear Ms. Espinel:

The Society of American Archivists appreciates the opportunity to respond to the Notice issued by the Office of Management and Budget, Executive Office of the President entitled "Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan." The Society of American Archivists (SAA) is the oldest and largest association of professional archivists in North America. Representing more than 5,000 individual and institutional members, the SAA is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

Archivists are familiar with both the benefits and strictures of copyright law, especially with regard to one-of-a-kind, unpublished resources. Archivists endeavor to make the collections that they protect available to the widest possible audience for the purposes of education and study.

Archivists do not exploit copyright for personal or institutional financial gain but rather strive to make their holdings freely available to all researchers.

Being able to access archival materials on the Internet allows many more people to enjoy them – suddenly the cost of research need not include the cost of a plane ticket, hotel, restaurant meals, babysitters, or vacation time. Both patrons and donors pressure archivists to digitize collections and make them available on the web. This is difficult because nearly every collection includes content from multiple creators. For example, an important physicist might donate his professional correspondence to an archives, together with his copyright interest. The archives thereby could digitize all of his outgoing correspondence and make it available on the web, but his *incoming* correspondence must remain consigned to paper, unless the archives obtains permission from all of the correspondents (or their descendants), or elects to risk violating copyright provisions and digitize the correspondence anyway. This situation distorts access and potentially the public's understanding of the full documentary record.

Costs for obtaining copyright permission are prohibitively high for archival collections. For example, the University of North Carolina conducted a case study for the Thomas E. Watson Papers Digitization project.¹ Watson was a Senator from Georgia who died in 1922. His collection

¹ Maggie Dickson, "'Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers'" forthcoming *American Archivist*, 73(2) (2010).

comprised 7.5 bankers boxes of materials or 8,434 items. Archivists extracted the names, dates and geographical locations of authors of the incoming correspondence. This effort to obtain 3,304 names required ninety hours of dedicated labor. This was only the first step in obtaining copyright clearance before digitizing the incoming correspondence. Using the genealogical database Ancestry.com, and other online resources, archivists then found that 608 of the correspondents had died more than seventy years ago, thus putting their work in the public domain. Through additional investigation, archivists determined death dates for only 1,101 of the remaining correspondents. This work required the full-time labor of an archivist for an additional 560 hours (or *fourteen weeks!*) After all of this effort, only a handful of the representatives of correspondents were successfully contacted – and each freely gave his/her consent to publish the old letters.

Yet even with this handful of permissions, a repository cannot be assured that the people who provided the permission actually have the right to do so. One of the major copyright crimes in the U.S. today is the assertion of ownership of rights in copyrighted works when no such rights exist. A descendant may not be aware of how copyrights were handled in an individual's estate, nor realize that in the past copyright could be transferred or even lost through a variety of different mechanisms. In the absence of decades-old contracts, rights owners might assume they have more rights than they do. There are no effective mechanisms to prevent individuals and corporations from claiming rights where none exist, and the cautious repository or researcher will spend time and possibly pay licensing fees to inappropriate rights owners. Any effort you make to calculate the "costs of infringement" should also calculate the costs associated with unclear or fraudulent copyright ownership.

The letters in the Thomas Watson collection, like the overwhelming bulk of materials in American archival collections, have little commercial value. Consider how much more efficient—and cost effective – it would have been to have digitized and posted the letters together with a notice offering to take down an image if a copyright owner objected. Truly, the societal cost of this type of infringement is nearly non-existent, while the societal value of making these materials freely available is high. Holdings in archival collections should be used, not left inaccessible because of obscure ownership status. In fact, un- or under-used primary source materials represent their own societal cost: most repositories are taxpayer-supported, the price of storage and preservation of millions of cubic feet of papers and hundreds of thousands of terabytes of born-digital records—though yet to be calculated—is staggering when considered across the thousands of archives in the US. As a result, many individuals who need access to records must take time off work and incur significant travel costs to view the original documents at a distant repository. These individuals include genealogists, historians, students, and other researchers who may be pursuing personal interests, commercial projects, or academic scholarship. If the records were available electronically, access would be increased and the records would be available to all researchers rather than just those who could afford the time and expenses associated with traveling to a distant research collection.

Archivists maintain a strong professional code of ethics. Archivists have substantial expertise in understanding which archival records are likely to have licensing value, and which will not, and we are professionally committed to the ethical and principled use of others' copyrighted works. For

example, we understand that professional or prominent authors are more likely to seek continued income from their creative work. (See, for example, our Orphan Works: Statement of Best Practices, <http://www.archivists.org/standards/OWBP-V4.pdf>.) But where creators are anonymous, obscure, or not professional artists and the work was created many years ago, we know that there is usually trifling harm that could possibly come from providing digital access to the works. Nevertheless, the long term of copyright and the heavy potential penalties associated with suspected copyright violations often prevent archives from making these works more available.

As the Intellectual Property Enforcement Coordinator, we hope that you will remember that not all copyright infringement imposes societal costs, while the threat of penalty for effectively non-existent harm in providing digital access imposes its own substantial societal costs. America's archives are filled with materials that could be digitized and made freely available to researchers' delight and the education of millions of our citizens, were it not for the sometimes perverse incentives imposed by our current copyright regime. We hope that any new legislation, enforcement techniques or tools, will be narrowly tailored to redress those areas where the holders of intellectual property are actively exploiting the value of their work.