

March 23, 2005

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

RE: Comment on Orphan Works

Dear Mr. Sigall:

Thank you for offering the opportunity for us to submit these comments in response to the Notice of Inquiry concerning Orphan Works. This is an important issue for us, and we believe reasonable relief from the logjams created by orphan works would be in the best interests of the public, copyright owners, and those of us whose mission is to advance education. We have organized our comments below according to the outline of your Notice of Inquiry.

*1. Nature of the Problems Faced by Subsequent Creators and Users*

MIT OpenCourseWare (OCW) is a free, publicly accessible, and openly licensed (under a "Creative Commons" license) digital resource that offers high quality, substantially complete learning materials from the courses taught at MIT. At this writing there are over 1,000 MIT courses published on OCW.

OCW is a *publication* of course materials created by MIT faculty to support teaching and learning. It is not a distance education program or an online learning system. Our target audiences are a) educators, who may adopt or adapt the materials for their own teaching purposes; b) students enrolled in educational programs, who may use the materials for reference, practice exercises, or mapping out a program of study; and c) self-learners, who may find the materials helpful for enhancing their personal knowledge either from the materials themselves or from the many references to readings and other resources.

A key feature of OCW is that the materials are IP-cleared, meaning that the MIT OCW has the rights, either through ownership or by license (permission), to make the materials available to others under the open terms of the Creative Commons license that we offer to users, and that nothing in the materials infringes the copyrights of others. Importantly, subsequent users may copy or create derivative works (subject only to the attribution, non-commercial use, and "share alike" provisions of our license) without worry about infringement on their parts.

As is commonly the case in academe, our faculty often use materials in their classroom teaching under the Fair Use doctrine. Accordingly, many of the course materials we publish contain charts, graphs, photos, quotes, drawings, video clips, and other small works that belong to third parties. (Collectively, we call these "embedded IP objects," or simply "objects"; note that we do not normally republish free-standing full-text works such as journal articles or books, but only bibliographic references to them.) While Fair Use may cover third-party objects in the classroom, we believe that publication in OCW goes beyond the limits of Fair Use, and therefore, we require permission from third-party copyright owners before we can include these objects in OCW course materials.

In our two most recent publication cycles, we added 375 courses to OCW. Among these courses, there were 2,932 third-party objects requiring permissions. Typically, the copyright owners are faculty or colleagues at MIT and other institutions, current or former students (whose works include class projects and papers), and some commercial book or journal publishers. Of the 2,932 objects, we received permission on 1,720 (59%), we were denied permission—or permission was restricted—on 468 (16%, mostly commercial publishers), 471 (16%) were not contactable, and the remaining 273 (9%) are still pending. We define *not contactable* as unknown owner, unlocatable owner, or no response after three attempts. We should mention that we cannot accept permissions that impose restrictions that are more limiting than the license under which we offer the materials to end-users.



For example, we do not accept limited-duration permissions or permissions that prohibit derivative works. We also cannot accept permissions that require a royalty. We classify all such restricted permissions as *denied*.

*2 - 4. Nature of "Orphan works": Identification and Designation; Age; Publication Status*

As mentioned, we consider copyright owners to be *not contactable* if they are unknown, unlocatable, or do not respond after three attempts, and it would seem reasonable for our purposes to designate the works of such non-contactable owners as orphan works.

We do not keep statistics on whether objects are published or unpublished. Many are unpublished student works, one-off drawings, amateur photos, and the like—perhaps half or more of the objects we deal with are unpublished. In our experience, works of non-contactable owners are much more likely to be unpublished rather than published works. As to age of works belonging to non-contactable owners, we often have no way to tell. In any event, neither age nor publication status seem relevant (for our purposes) to what might be designated as orphan works.

*5. Effect of a Work Being Designated "Orphaned"*

Because of the nature of OCW, anything we publish is tantamount to "letting the genie out of the bottle." While short of granting a work to the Public Domain, our Creative Commons license gives end-users enormous latitude to reproduce materials, derive new works from them, and redistribute them, subject only to our attribution, non-commercial use, and share-alike requirements. Moreover, OCW users are anonymous to us—in the spirit of open sharing, we have no user registration, logon process, or other means of identifying users. Therefore, were an orphan work to be published on OCW, its subsequent use would be impossible to control.

*Additional dimension to the discussion and idea for consideration*

We would like to propose an idea for consideration. The foregoing discussion centers mostly around what should characterize an orphan work, but not what uses may be made of them or what rights might devolve to the public.

Our experience has been that nearly all individuals and non-commercial entities who are copyright owners from whom we seek permissions believe in the mission of OCW, have no commercial aspirations for their work, and therefore are happy to grant permission for us to include their work in OCW. And, in the vast majority of cases, non-contactable owners as described in section 2 – 4 above are individuals and non-commercial entities; it is relatively rare that we have difficulty contacting commercial publishers.

Therefore, we would favor an outcome in which:

- a. The definition of *orphan work* were liberally construed along the lines in section 2 – 4 above, without onerous and costly requirements for protracted research of ownership or owner's location, and with no more than a reasonable requirement as to procedure and number of attempts to contact (our policy is three attempts).
- b. In exchange for this liberal construction, right to use might be limited to those with non-commercial educational, charitable, or personal purposes.

It might also be worth considering a two-tier system that would impose a more restrictive definition of orphan works or required a greater investment of resources or time to locate owners for those works sought out by commercial entities, which, presumably, would recognize a greater economic value in the works and would stand to reap economic benefits from them.

Again, we appreciate the opportunity to comment on this issue, and we wish you the best of luck in working this through to a reasonable conclusion.

Very truly yours,



Anne H. Margulies  
Executive Director  
MIT OpenCourseWare