

Occupy Copyright

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I support the determination of my union—the National Writers Union—and other creators and creator organizations to envision a fair world.

We can and should assume that rightsholders of some works have made good faith and reasonable decisions not to make the works available, whether by removing them from circulation or by circulating them in non-traditional ways. It is their right to do so. To insist otherwise, to countermand the rightsholders' decisions, undermines copyright law, and once the orphan works genie is out of the bottle, secure protection through copyright is in mortal danger. There will always arise a force more powerful than you, a use more fair.

But, yes, there are rightsholders who have simply walked away from their works, and there are publishers that have vanished. So, yes, it will be very difficult to get permission to use the works.

It seems to me that a plan to use works without permission has to protect the rights of the first group of works, the ones purposely undiscoverable and the ones circulating by non-traditional ways. Although to consider means such as self-publishing off the web to be non-traditional these days is hard to defend.

There's more than a little of the 1% vs. 99% in much of the pressure to make all orphan works available—the wealthiest corporations, law firms and universities vs. the rest of us. I suppose it's not a coincidence that the political dimensions of the copyright world reflect those of the world at large.

Even so, yes, there are legitimate reasons for wanting to republish works. Unquestionably. The problems that individual and SME rightsholders have with most orphan works proposals can generally be summed up like this: your proposals are likely to do serious damage to us. It is generally proposed to make our works available to the world without our permission, with only the word of a self-interested user that we couldn't be found and asked and paid, with impatience over our holding to a law that we were told would protect us.

It's not just us, the creators, who hold to that law. The copyright to a work can be shared by an infinite number of rightsholders. Each one holds a particular right to a particular use. Neither the creator, publisher nor other rightsholders can repeat that use or sell it. Only the rightsholder. No wonder finding the appropriate rightsholder of a work is so

difficult. The copyright system is many-layered, chaotic and private.

What is to be done?

Here are some brainstorming suggestions from writers I've talked to.

- Make online orphan works available only by copy-protected means. YouTube, Flash and PDF do it. Yes, hackers and pirates will be able to break it, so add encryption to the mix. Whatever. Just mandate that only uses with a substantial copy-protection scheme can be fair uses.
- Grant that only non-profit use of orphan works is fair use.
- In attributions of orphan works, require that their orphan status be noted.
- Establish a commission to set and collect royalties for orphan works instead of requiring the works' rightsholders to negotiate and collect them on the same basis as other rightsholders. Any unpermitted use violates copyright, and the rewards of such use should be limited.
- All uses of orphan works should be made public by registering them online. Users of orphan works will be specially privileged; their privileges should carry a reasonable cost, such as registration. Rightsholders should not have to search the online and analog globe every few months looking works that someone has decided are orphans.
- Adopt the Canadian system of licensing the use of orphan works. Users could purchase a license from the Copyright Office or a library of their choice. The license would allow only the specified use and would be renewable annually as long as the use persists. All license grants would be entered in a registry maintained by the Copyright Office or its licensors; failing to register or pay the license fee would invalidate the license and be prima facie evidence of infringement.
- Exclude from any unpermitted use certain types of works, such as images, which, by the nature of their digital instantiation or by trade practice, are usually unidentifiable by anyone except their creators.
- Provide a low-cost timely venue to adjudicate infringement claims by rightsholders of orphan works.

It's not rocket science.