

MIT Libraries
Cambridge, MA 02139
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Jule L. Sigall, Associate Register for Policy & International Affairs
U.S. Copyright Office
Library of Congress
Washington, D.C.

Dear Mr. Sigall,

I am writing on behalf of the MIT Libraries in response to the Notice of Inquiry on Orphan Works. First, we are very happy that the Copyright Office is seeking to examine issues related to “orphan works” as these issues are among many related to the copyright law that are important to libraries, the users of libraries, and all citizens of this country. We would encourage you, however, to seek different nomenclature, as “orphan” carries a very negative connotation for works that may be significant and even critical to recording the nation’s culture. That said, we will comment on the specific topics outlined in the Federal Register.

1. Nature of Problems Faced

Many libraries are currently engaged in significant projects to digitize materials in their print collections to create digital library collections. The impact of copyright extension acts, coupled with the difficulty of achieving permission to copy materials still in copyright, have virtually stymied the creation of digital library collections of 20th century materials. This relegates a tremendous body of literature to the limited availability of the print environment, just at the time when digital technologies offer the capacity to “liberate” the world’s collective scholarly record. It is reasonable to assume that many of the creators of that record would like to see their contributions given broad accessibility, and that we need a mechanism to separate those copyright owners from copyright owners who wish to restrict access for commercial or other purposes. For libraries interested in creating digital collections, in the process of trying to find the copyright owners, there will be a great many they will never find. Therefore, libraries usually simply cannot justify the costly effort because the outcome is certain to be too inconclusive. The comments below are based on the presumed benefits of these digitization activities on the part of libraries.

2. Nature of “Orphan Works”: Identification and Designation

If we are to move beyond the “brick wall” defined above, “orphan works” need to be defined in some way whereby it is not labor intensive to discover them, and whereby the

process results in a definitive answer. In addition, the requirement of a fee (or reasonable royalty) for use (as in the Canadian example) would probably also significantly hinder the goal of libraries creating digital collections.

A filing system for continuing claims to copyright would satisfy these conditions if the absence from the file meant that use of the content was legally unrestricted. (However, this seems not much different from registering copyright and probably doesn't satisfy the "no formalities" requirement of the Berne Convention.)

The alternative of a filing system for "intent to use" would not require "formalities" on the part of the copyright holder, but if it must be preceded by a search for the copyright holder it will not satisfy the condition of "no costly effort" defined above, unless that search process is greatly simplified and narrowly defined.

Perhaps a combined system of a voluntary registry of copyright holders and a filing system for "intent to use" would provide sufficient protection for copyright owners and sufficient ease for those who choose to use the materials. It could work something like this:

- *person or body wishing to use ("user")the content checks registry
- *if copyright holder is in registry, user contacts copyright holder and requests permission to use
- *if there is no response to the request in a defined time period, or if the copyright holder is not in the registry, user files "intent to use" in filing system
- *if copyright holder does not challenge use after defined time period, use is allowed

3. Nature of "Orphan Works": Age

If it would help make the processes for determining "orphan status" extremely simple and therefore affordable, age could be one determining factor. For instance, one could define a system where there would be no "orphans" for the first 28 years (harking back to the 1909 Act), but thereafter any work not included in a registry (as above) could be used without further checking.

4. Nature of "Orphan Works": Publication Status

The Archives of most institutions hold many unpublished works on deposit, for which the authors or their heirs can no longer be located. The Archives are contributing storage space and organizational efforts to manage these collections, but their use must be greatly restricted. Resolving issues related to "orphan works" would make it possible for Archives to make these works accessible to scholars both within their reading rooms and through web-based delivery if they were digitized.

5. Effect of a Work Being Designated "Orphaned"

For the purpose of building digital library collections, the designation of “orphan” would have to mean that the work could be copied and distributed without further ado. Perhaps a distinction could be made between commercial and non-commercial use, however, i.e. an “orphaned work” could be used only for non-commercial purposes until it was clear that copyright would have expired.

5. International Implications

We agree that international consistency is a worthy goal. However, if existing conventions and agreements do not reasonably serve the end of ease of information transfer in balance with reward to authors, then they have become an end in themselves. Giving authors a reasonable means of protecting their copyright (whether registering as a copyrights holder or checking an “intent to use” file) seems sufficient when weighed against relegating the entire scholarly output of the twentieth century to the inflexibility of print distribution.

We appreciate the opportunity to comment on these issues, and trust that reasonable solutions will emerge from your processes.

Sincerely,

Carol Fleishauer
Associate Director for Collection Services