

Comments to the Copyright Office on Orphan Works
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From Elizabeth Townsend, Ph.D., J.,D.

I am responding to the Notice of Inquiry Concerning Orphan Works put out by the Copyright Office. I am a scholar with a Ph.D. in Modern European History, a J.D. from the University of Arizona, and am finishing a LL.M. in International Trade, also from the University of Arizona. I am currently a non-resident fellow at Stanford Law School's Center for Internet and Society, and next year, I will be the Leverhulme Trust Visiting Fellow at the London School of Economics (in the law department, focused on copyright). I also have a blog, Academic Copyright [<http://academiccopyright.typepad.com>], which looks specifically at copyright issues affecting scholars, teachers, students, and others who both use copyrighted materials as well as create copyrighted works of their own, usually in a non-commercial setting.

My interest in copyright came while working on my doctorate in European Intellectual and Cultural history at the University of California, Los Angeles. I work in the field of biography. It was the 1990s when court cases were restricting fair use in the biography setting, which I found as a scholar quite disturbing. I began researching what materials I could and could not expect to use (with and without permission). Then, in the classroom and in conducting oral histories, more copyright questions surfaced -- who owns what, what can one use and in what context. I wanted to know the answers -- for both myself and other scholars. I decided to go to law school. I completed my J.D. at the University of Arizona James E. Rogers College of Law in 2002.

One more piece added to my copyright background. While going to school in LA, I had the fortune to work as a professional actor for a time. (I had co-starring and starring roles in about a half dozen projects, including a big-budget feature film, a series, a pilot for a different series, and two movies of the week.) It was during this time that I had a taste of right of publicity and other IP issues connected to acting. I also saw what happened to some of the unprotected and struggling artists and writers. I see myself as an advocate for scholars, students, struggling artists, and others who need a place to turn for copyright questions. I hope one day to have a Virtual Copyright Clinic, but for now, the blog will have to do.

My comments are based on my own experiences and those told to me by colleagues, students, and strangers. The issue of orphan works touches historians and other scholars, both in terms of published as well as unpublished works. In my own work as a historian, I myself have chosen only to focus on more well-known authors if their work is still under copyright because I did not want to have to deal with the problem of not being able to track down copyright holders. This has greatly shaped the nature of the work, which is a comparative biography of the Great War generation, and admittedly, made it more focused on well-known writers (Agatha Christie, for example, as opposed to Katherine Prest.) But my real concern is over the unpublished orphan works, particularly with the recent creation of the unpublished public domain. My thoughts and comments will focus on this aspect of the problem.

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

I love archival materials. It is one of the main reasons I wanted to be a historian. But, there are many legal problems associated with their use. My inquiry into copyright began because I wanted to know more about fair use and copyright, but I soon found that that was not where the problem was greatest. It is with the orphan works in the unpublished arena. Here is one example. I work with the Papers of Vera Brittain, a well-studied World War I writer. But to my knowledge no one has used her vast collection of fan mail - people who responded to her memoir with their own stories. But how is one to track down these people - from the 1930s to the 1960s? The orphan work problem inhibits one's scholarship. Let me further elaborate.

The argument in my current project, a book-length project, currently titled *The Making of the Great War Generation*, is that women, along with men, should be included as part of the primary space of war. One of the ways we can see this is that women wrote novels and memoirs, and then men wrote to these authors, corroborating that they too experienced, felt, and remembered events and moments in the war at the front in the same manner, that the women writers got it right. I have seen this in the fan mail to two authors, British author Vera Brittain (papers housed at McMaster University, Canada), and American writer Mary Lee (housed at Radcliffe College in the Schlesinger Library). I am sure that I would find it in the others I profile in my work as well, and I would have also looked to see what kind of fan mail the male authors received, particularly from women, but I stopped this portion of the project because of the orphan work problem.

To make this argument, to use these letters, I would want to quote a good deal from them, because I would not want other scholars to have to take my word for the sentiments. I would want to show that men were actually writing to these women writers in great detail the similarities they found in their experiences. But I was not going to spend my time trying (unsuccessfully) to pursue all of the copyright holders in the still-copyrighted letters (because they are unpublished, and so life + 70 applies). Some, of course, have fallen into the public domain (if the author has been dead for more than 70 years). But others have not. And moreover, under the current system, it is often impossible to figure out which ones are in the public domain and which are not, since death dates of one-time letter writers can be nearly impossible to confirm. So, this chapter has been dropped from my work, and every few days, I must say, I regret the decision, but feel I had no choice.

Letters to presidents and other correspondence carry the same problem, as do diaries and other writings when they are donated or bought by a library or archive, but somehow the copyright owner is lost or untraceable. What is a scholar to do? The materials become unusable in any significant way (because, as you know, fair use is not a reasonable alternative in the current climate.)

Scholars often just shy away from these materials, unable to figure out what to do. Archivists, who are usually not trained as lawyers, can offer only limited help. We need a system that is easy to understand and accessible to the non-legal but educated audience, that can help to broaden the materials available to scholars. In an age where expanding the canon is not only acceptable but encouraged, we need a copyright system that allows this to occur, especially in the unpublished arena.

So, as I see it the problem is two-fold. First, there are the orphaned unpublished works (diaries, letters, photographs, scrapbooks, etc.) in archives and libraries across the United States that would be so wonderful to be able to use in a meaningful way. Second, we need a system that is of benefit to the scholar and student, and not another impediment.-- something that would allow the user to figure out if the work is in copyright, who the copyright holder is, and if they can't be located, would provide a system that would be easy to understand and use. Think, for example, in the instance I gave before. If I wanted to use, say twenty or thirty of the fan mail letters, I would want a system that did not overwhelm my resources and time to make sure they were indeed orphaned.

2. Nature of "Orphan Works": Identification and Designation

I know that many people and organizations are proposing various systems dealing with orphan works. I think the problem is bigger. There needs to be a system to be able to identify *when* a work is orphaned. That is, as users we need in the age of the Internet, to be able to access contact information for a copyright holder in order to gain permission, and if current copyright information is not available, to have some way to get a declaration *from the Copyright Office* (or an officially recognized legal source) that the work is orphaned.

I think the most radical proposal I have - as a user - is to require as part of copyright registration that a copyright holder keep updated contact information in order to keep the privileges attached to registering (statutory damages, attorney's fees, etc.) The heirs should also be required within a period of time, to report the death of the copyright holder, and who now is the literary executor to whom interested users should contact. This information should be made public in an easy and accessible way, and if not managed by the Copyright Office itself, there should be a link on the Copyright Office site. UT Austin's WATCH is a good model, but it does not cover a good deal of the copyrighted and unpublished materials. We need an expanded system.

Under an ideal system, scholars and others using copyright materials would be able to look up on a website information on the copyright holder of published as well as unpublished works (that is collections held in an archive or other public space). The website would identify when the copyright work would go into the public domain, if the death date was known, and if not, would lead a scholar/user to a site where they could contact the copyright holder, and if the copyright holder was not known, then it would connect them to a site that would allow them to file an intent to use an orphaned work.

3. Nature of "Orphan Works": Age

I do not have a strong opinion on this - any shorter time than the system currently is great. Take again, the problem of letters from World War I. An orphan letter could have been written by a soldier that died during the war (1914-1918), but under the current system, the letter could not be used until 120 after creation (because it was not published). This is crazy and not good for scholarship. These letters, under this scheme, would not be available until between 2034 and 2038 (120 years after the creation). That's a long time.

I'm not sure how long is reasonable, but something shorter would be nice -- 50 years, perhaps, as the question indicates? (I hope this would be from publication OR creation, which ever was longer, instead of adding years if there is no publication.)

And yes, it would be nice if scholars and others could use the work in that 20 year window, now afforded libraries and archives, if the work is not subject to commercial exploitation or available at a reasonable price. If a scholar could also use the materials (publish quotes, use in a reader, put on a website) during the last 20 years of the term, that would be great (life of the author + 70, and then during the last 20 years, one could use it for scholarly purposes like it was in the public domain). But we must have a working definition of "not subject to commercial exploitation" so that publishers of academic work would be willing to allow the use of such works without permission from the copyright holder.

Finally, the question about what to do when an author's death date is not known. I don't know, but again, the uncertainty is maddening. I have tried to search on different obituary websites, but I have never had much luck. I think there would have to be specific sites one would be required to view rather than a general requirement, or at least suggestions on what websites to use.

4. Nature of "Orphan Works": Publication Status

The status of "orphan works" should apply NOT ONLY to published works, but also unpublished works. There are too many orphan unpublished works -- fan mail, one-time letter writers to Presidents, photographs, archival materials that just suddenly appear at libraries, old photographs where the photographer is unknown, to name a few. We need to be able to use these materials. We want to be able to use these materials.

As to the issues of right of first publication, I think the difference with the Harper and Row case was that, like the case of competing newspapers, the question was about a competitor trying to first publish excerpts from a memoir about to be published. This is market-driven. The works that I am concerned about have little market value -- they are not in the market because their owners cannot be found. They have been abandoned. Like other kinds of orphans, they are still amazing creations, but there is no one to nurture and foster their care and growth. I think that is different from the President Ford situation. I think if an owner cannot be found, there should be a presumption favoring a user over the right of first publication. (*For those less familiar with the Harper case, 471 U.S. 539, the publisher contracted with Time to include excerpts regarding Nixon's pardon in the magazine before publication. An unauthorized person gave The Nation the excerpts, and they published first. The Supreme Court did not find this a fair use, and instead based their decision on right of first publication, emphasizing the differences between published and unpublished. HOWEVER, after this case, the fair use provision was revised TO INCLUDE unpublished materials.)

As to the negative implications of applying an orphan work system to unpublished works, I cannot see any. For those who do not want their unpublished works out in the world, they would still hold copyright, because presumably they would tend to their works and they would

not become orphans. Alternatively, access controls (keeping them in one's possession, not allowing access to the works for a specified time when donated to an archive) would also eliminate privacy and other concerns. Again, we are talking about abandoned works.

5. Effect of a Work Being Designated an "Orphan Work"

There are lots of people working on ideas for a system. I think in terms of my comments, I would say that I hope any system would USER FRIENDLY in a couple of aspects. First, I hope that a user would not need a legal background to figure it out, that somehow it would be set up so that you could put in the information you had, and you would get an answer or an "Intent to Use" application, or a formal certificate that you could give to a publisher that the work is useable, even though you have not tracked down a copyright holder.

Second, I hope that whatever system is adopted, it would keep in mind users who do not have great funds - scholars, graduate students, struggling artists, and others. Any kind of fee to a fund should keep these users in mind, otherwise the fee-system would just be another barrier for using materials.

Finally, I would hope a system would automatic, and not require a hearing or anything else that would take legal counsel or considerable time. It should be accessible to all users in an easy and convenient manner, like a website.

6. International Implications

I think this is an important part of the questions to consider, as both someone who works materials from European authors (housed in Canada, the U.S., U.K., and German libraries), and also as someone concerned with International Trade issues.

It would also be greatly appreciated if a system address foreign works housed in U.S. archives that are orphaned, as well as U.S. works housed in foreign archives. What law applies, and what does a scholar need to do in that situation? Would the system set up by the Copyright Office apply in these situations? I have had a number of requests through my blog from people using foreign works that have been orphaned and they have no idea what they need to do to be able to post the materials online legally.

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