

Orphan Works Comments
Fall 2012

SUBMITTED AT <http://www.copyright.gov/orphan/comment-submission>

TO: Maria A. Pallante, Register of Copyrights.

FROM: Jill Zimmerman, Librarian

SUBJECT: Comment solicited by Notice of Inquiry, Orphan Works, Federal Register: October 22, 2012 (Volume 77, Number 204), Notices, Page 64555-64561.

I am a librarian at a community college and a graduate student. I teach community college students how to use information sources ethically. I believe in the benefit to society for Congress "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;..." (U.S. Constitution). I am not an expert on copyright, but I try to be a law abiding user of copyrighted works and teach others to use information ethically as well. My comments will be limited to orphan works, defined as "an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law." (Orphan Works and Mass Digitization, background)

I am taking advantage of this notice of inquiry to implore Congress to take action on orphan works. There is a cost to all of us for the United States Congress not taking action to solve the orphan works problem.

- There is a cost to not developing commercial exploitation of works whose owners are not known or are unlocatable;
- There is a cost to our cultural heritage when scholars, documentary filmmakers, curators, archivists, artists, educators, librarians and other individuals abandon projects because they cannot locate a copyright holder to ask permission for the use;
- There is a cost if orphan works that are born digital never make it to the public domain. Although it is not known with certainty how long digital media lasts, it is known that steps must be taken to preserve it. The extension of copyright for these media might well last longer than the works, if steps are not made to preserve them. (Digital Preservation, Library of Congress).
- There is a cost that fear of being found guilty of copyright infringement causes projects of value to not be undertaken or not begun because an injunction may halt the project at any time;
- There is the cost of litigation in federal courts when copyright owners do make their presence known even after a potential user has done a diligent search for the copyright owner;
- There is the cost of the diligent search;

As brought out in the Notice of Inquiry, there are potential solutions to these problems that other countries are already implementing. What is needed is:

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- Fewer works whose owners cannot or will not be identified or located;
- Easier connections between rights holders and potential users to negotiate licenses for uses;
- Services available to assume some risks and minimize some of the costs of using the orphan works

Identifying Copyright Owners

The Role of Best Practices is important in clarifying what the courts would accept as a “diligent search”. This was left vague in the law because what constitutes a “good faith search” depends on the material format and the intended use. However, there are several online databases available that can help streamline the search process. The WATCH file, a database jointly maintained by the Harry Ransom Center of the University of Texas and the University of Reading Library, tracks information about the copyright owner of works. If the writer or artist is listed, one can find the contact information for either the current holder or the authorized representative. (Hirtle, 160). There are several other databases such as the Copyright Clearance Center (CCC), the Artists Rights Society (ARS), Visual Artists and Galleries Association (VACA), ASCA, BMI, and SESAC, as well as other Reproduction Rights Associations. Essentially the orphan works problem is a disconnect between the potential user and the rights holder. If they could meet to negotiate, the transaction is taken out of the realm of orphan works. A universal system such as defined by the Copyright Hub envisioned by the UK Intellectual Property Office would be a huge first step in resolving issues around orphan works. Orphan works enter the system because who owns the copyright is not connected to the work. If potential users registered what they know about the works into a database and if the copyright owners searched the database the two could be connected. The *Orphan Works: Statement of the Society of American Archivists* offers a very reasonable assessment of how to proceed to document a diligent search for legal purposes, while also documenting steps not taken for reasons such as likelihood of usefulness and for other defensible reasons. For example, the age of the work might be important in determining not to look at a database that is known not to cover the years needed. The Cost/Effort of Search diagram is applicable to other organizations as well. (Society, 3)

Again, technology is part of the solution. Google Images, GettyImages, and others can successfully allow one to search by image. One concern during the 2008 bills discussion was the lack of “two separate and independent searchable, comprehensive electronic databases that allow for searches of copyrighted works that are pictorial, graphic, and sculptural work.” (Orphan Works and Mass Digitization, 64556). The search technology is only as good as the content, though. The other part of the solution lays with the rights holders. Orphan works legislation will make it advantageous to copyright holders to voluntarily submit information on their works and the rights holders contact information to prevent their works labeled orphan works.

Connecting the Owners and the Potential Users

The report “Rights and Wrongs, the first report of the Digital Copyright Exchange Feasibility Study”, succinctly states the fact that making copyright licensing easier to use, less expensive,

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more accessible for licensees both large and small, for companies and individuals, will encourage new digital services...reforming the IP system to stimulate technology and content creation.” (Intellectual Property Office, 5-6) There is consensus that the problem of orphan works was exacerbated by copyright legislation within the last thirty years. (Orphan Works and Mass Digitization, 64555). Various solutions have been proposed through legislation to protect copyright owners. As noted, other countries have been making advancements in making orphan works available for use while reducing the risks to the user. It is time for the United States to stop discussing the matter and make our orphan works open to the digital marketplace. Cultural institutions are averse to risk and any possibility of accumulating unexpected costs may prevent the use of orphan works.

The orphan works solution should cover all uses, commercial and non-commercial, and all types of materials, published and unpublished, foreign and domestic, print, sound, graphical representation, and audiovisual. The best way to do this is to set up the proposed compulsory license system. The model of the UK Copyright Hub satisfies the requirements needed to meet the concerns of the shareholders in dealing with the problem of orphan works. The UK solution proposes a compulsory license. A non-compulsory license but legislative encouragement to participate in the registry may be more palatable to US legislators and their constituents.

The Copyright Hub (Copyright Works, p.55) or similar public-private supported organization would support digital copyright licensing of orphan works. The solution would provide practical information/guidance for:

- Licensees (users) on the importance of licensing content, how to identify content owners and navigate the copyright process;
- Licensors (copyright holders) on the value of the copyright licensing and how to register their rights and monetize their content through selling rights.
- Provide signposting and navigation to key sites that support the management of digital rights such as private databases, websites, publisher sites, collecting societies, professional organizations, trade organizations, and other useful sites.

Users of orphan works want to locate the copyright holders and use the work without legal complications. A compulsory licensing

- Diligent search capability for rights owners / holders associated with an Orphan Work;
- Formal email confirmation that a diligent search has been performed;
- Orphan work registry to enable consumers to register their use of an orphan work;

Digital Rights Market Services

Projects involving the use of orphan works entail substantial transaction costs. Labor, postage, and long distance telephone calls to determine the copyright status and identifying, locating and negotiating for digitization and web access of 278 fine and rare books at Carnegie Mellon University Library in 2003 was \$78.00 per title. (Covey, 4) An opportunity exists for services to assume some of the tasks and risks associated with these projects. Services to do searches for

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authors, create technology that provides some of the tasks of documentation, provide bonds or insurance coverage on “unchangeable” uses, services to determine if a work is in the public domain, if a use is a fair use, or negotiate the licensing of uses could create jobs in new industries.

Registering of potential uses could require a small fee in order to support the streamlining of the licensing system and some of the licensing fees would be set aside to pay for copyright holders for orphan works that are truly orphans. If the copyright holder does not claim ownership within a set number of years, that fee would go back into maintaining the system. The registration fee would be based on the use, such as for-profit or commercial. The Copyright Office would create and maintain an archive to retain the Notice of Use filings as stated in the “Orphan Works Act of 2008”. This would be useful as a starting place for items that have been determined previously to be orphan works. Public-private support would maintain the Copyright Hub that acts as a clearinghouse for licensing uses of the Orphan Works. The imbalance in copyright law has created many of the orphan works. In order to comply with formalities that interfere with copyright protection, requiring registration of copyrighted works was loosened (1989), published works no longer needed a proper copyright notice making it more difficult to verify the year of publication as well as the copyright owner (1989), and then in 1996 under the Uruguay Round Agreement Act, copyright was reinstated for millions of foreign works that had previously been in the public domain in the US. (Promoting the Use of Orphan Works, 18) These changes, as well as the extension of copyright duration, have impacted the creation of knowledge.

“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, “[t]o promote the Progress of Science and useful Arts. . . .” U. S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” (Cornell University Law School, Campbell, para 6).

The United States Congress must provide leadership in bringing creators, rights owners, rights users, rights managers, and consumers together to solve the orphan works problem domestically, as well as being an involved partner in the international solutions being implemented. The cost of non-action can no longer be carried by the shareholders.

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