

Orphan Works — Bringing the Past Into the Present?

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It's probably easier to adopt a human orphan than it is to determine whether or not you can find one — an orphan work, that is. At least the adoption process, although fraught with its own uncertainties, attorneys, filings, and lengthy processes, has a proscribed workflow and the expectation of a predictable result. But if you are an archivist trying to find the original photographer from a 1940s image, or an author trying to locate an architect from a now-defunct firm so you can use a measured drawing, or an author trying to locate another author without benefit of any publisher's trail, you may never reach your desired result. More than likely, driven by fear of a later infringement claim, or the daunting task of detective work and high research fees, you'll give up entirely on your quest. If you do pursue it, you're likely to find more questions than answers. Welcome to copyright reform efforts.

A recent review of 2006 legislative efforts and responses may lead you to a surprising position on the topic of reform, and of orphan works. With the **Library of Congress Copyright Office's Strategic Plan**¹ to address issues of technology, practice, and legislation for access and preservation of materials, the **Section 108 Study Group**, plus 2005 legislation for orphan works, you'll find many comments, controversies, and opinions.

The term "orphan works" is often unclear, even to information professionals. We know copyrights are protected for defined terms of time, that inclusion of a copyright notice (©) has not been required since 1989, and that earlier in the last century, copyrights had to be renewed — but often, we don't know how to go about finding older copyright holders. Determining copyright is not the entire issue — in the case of "orphan works" the issue is that the copyright holder is difficult or even impossible to find, even after reasonable, diligent, willing searches. Orphan works don't have metadata to help us identify and locate authors and copyright holders. Faced with uncertainty about ownership, many creators who are willing to pay for permission to use an older work often abandon their efforts. Whether the result of futile search efforts or a fear of using an older work without permission, the abandonment of a new work directly affects the public's wealth of new works, and thus, one of the main tenets of copyright law, which is to "promote the progress of science and the useful arts."² According to the **Center for the Study of the Public Domain at Duke University's School of Law**, the "default response of archivists, libraries, film restorers, artists, scholars, educators, publishers, and others is to drop copyrighted work unless it is clearly in the public domain."³ The **Center** estimates that orphan works comprise the majority of the record of 20th century culture."⁴

Orphan works awareness has reached new heights, partly due to users needing help in locating copyright holders and increased terms of copyright protections. The **1998 Sonny Bono Copyright Extension Term Act (CETA)** added 20 years to the term of copyright for both new and existing works, whether published or unpublished. For U.S. books (only) published 1923-1963 (an era of renewals and lapsed renewals) help arrived in April 2007 when **Stanford University** released an online searchable database initially dubbed "**The Determinator**."⁵ But in an increasingly litigious society, fear of using a work without proper identification and permission is a driving force. This, coupled with the lack of the pre-1989 registration requirement that had practical information to help both copyright holder and user, and today's rapidly increasing proliferation of new works and new digital projects, the orphan works issue has become a serious problem.

Call for a Solution

On January 26, 2005, in response to growing sentiment about orphan works problems, the **Library of Congress Copyright Office** issued a **Notice of Inquiry (NOI)** soliciting advice and comments on the problem of orphan works [increasingly] ambiguous statuses.⁶ Comments were gathered over several months, and roundtable discussions were held on the East and West coasts. The resulting 207-page report asks for new Section 514 limitations for orphan works, among other things, eliminating monetary damages if creators conducted diligent and good faith searches for owners and the owners later filed for infringements. In May, **H.R. 5439 Orphan Works Act of 2006**⁷ was introduced, affirming the **Copyright Office's** recommendations and limited infringement damages.

In the call for comments, some expected and unexpected threads emerged. Not surprisingly, the introduction of the report stated that 40% of the comments simply did not identify an instance where the copyright holder could not be found, and others identified situations that did not pertain to orphan works.⁸ The East and West coast roundtable discussions and comments from various organizations, however, illustrated the problems of identifying copyright holders and the situations those problems created. Research libraries claim the amount of problem orphan works is substantial: "five years ago **Carnegie Mellon University's** library studied a sample of about 270 items from its holdings; librarians could not find the owners of 22% of the works." Similarly, **Cornell University** librarians attempted to clear copyright on 343 monographs for a digital archive project on agriculture. They spent \$50,000 and many hours of time investigating,

and were unable to identify 58% of the owners."⁹

The **Copyright Office-Report on Orphan Works**¹⁰ recognizes the severity of the problem of orphan works, but the solutions proposed create new controversies. Initially, one might assume that lower financial penalties and immediate take-down actions if copyright owners file claims after the fact are reasonable, allowing at least initial use even after diligent searches fail to reveal copyright holders. If a copyright holder appears with an infringement claim, limitations on damages (statutory and attorney fees, for instance) can still provide encouragement for the creation of new works and/or access. The report clearly recognized the problems of defining 'reasonable, diligent' searches, or reasonable fees after the fact, noting that nothing in a new provision should adversely affect other copyright protections of the **Copyright Act**, and offered that a new provision should sunset after ten years to allow for **Congress** to examine changes and new issues. The report considered and rejected the suggestion that users pay into escrow accounts in the likelihood of a copyright holder surfacing later and demanding payment, and also rejected the argument that a 'chilling effect' would result (situation where speech or actions are suppressed by fear of penalties), saying that most diligent searches for copyright holders correctly result in null searches. Limits on financial remedies, especially when a new transformative work is created, especially in a non-commercial situation, were deemed reasonable.

Artists, illustrators, photographers, designers, and others disagreed. Many of the objections related to the definition and proof of reasonable or good faith efforts to locate them, and the multiple and exponential uses that technologies provide. Organizations such as the **National Press Photographers Association, Graphic Artists Guild, Stock Artists Alliance, Picture Archive Council of America, Illustrators Partnership of America, the American Society of Media Photographers**, and more, posit that revisions to relax copyright terms would be detrimental to them, and that copyright terms are still in effect and should not be ignored due to difficulties of another user trying (or not trying) to locate them. Considering that their works might be different and require different approaches is a new way to look at the landscape, when others are attempting to redefine the issues with broad coverage.

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Where Are We/They Now?

H.R. 5439 died in the 109th Congress, although it was folded into H.R.6052, the Copyright Modernization Act of 2006¹¹ incorporating music licensing and other issues. With political issues looming for Americans, it remains to be seen whether or not the orphan works legislation will resurface or change.

Global concerns, however, continue — Canada has announced the development of a public domain registry, a result of Access Copyright, The Canadian Copyright Licensing Agency, and Creative Commons Canada (in partnership with Creative Commons Corporation in the U.S.) And a recent British report on intellectual property recommended another look at orphan works for the European Union.¹² Since the U.S. dropped the copyright registration requirements in 1989 to comply with the Berne Convention, it's unlikely that in the U.S. there will be any return to requirements that could be construed as inconsistent with international agreements like Berne and WIPO.

Change, Here and Now

The consensus seems to be that we need practical change concerning orphan works that matches our practical actions in today's digital age, yet continues our principles of copyright balance of protection and encouragement. In arguing that since information plays a crucial role in today's economy, and that an easy-to-use, efficient and competitive marketplace tends to push prices down and reduce transaction costs, Hal Varian, professor of business, economics and information management at UC Berkeley wants us to apply some business models to the dilemma.¹³ Urging the return of orphan works legislation with clear practical terms should be a 'high priority,' he says. Business models prevail for academe, as well. Tim Robson, Deputy Director, Kelvin Smith Library at Case Western Reserve University, indicates when discussing future copyright searches for collaborative works archived in the institutional repository, Digital Case:¹⁴ "People are so frightened now that the concept of fair use is eroding. We have to have reasonable compromises for this, especially since we know that we are often dealing with multiple authors in the research environment. Right now, we abide by 1923 [copyright terms] but for instances in Digital Case, we are requiring the PI on a work to take principal responsibility to ensure that all participants are listed and credited in metadata."¹⁵ Thus, in theory and in practicality, one hopes that future scholars will not encounter orphan work problems as often as scholars do today with print works.

against the grain people profile

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FAMILY: Married, with a daughter who is an accomplished artist & metalsmith in San Francisco.

PROFESSIONAL CAREER AND ACTIVITIES: NASA Research Center (Cleveland) Technical Library — Librarian, early days of Web design; Case Western Reserve University — Librarian; Copyright, Public Services, Marketing & PR; Chair of InterCampus Services Committee, OhioLINK; President, SLA Cleveland Chapter; First Chair of ILLiad Users Group; Committee Chair, ALA/RUSA Virginia Boucher OCLC Distinguished ILL; Librarian Award; Invited presenter to ALA, SLA, OCLC, various state library user days.

IN MY SPARE TIME I LIKE TO: Finding spare time, then reading, photography, travel.

FAVORITE BOOKS: Historical biography that leads me somewhere new; mysteries for pleasure and the puzzle solution.

PHILOSOPHY: Engage in the love of learning, embrace change, and let it show! It energizes you and others, and the momentum is exciting.

MOST MEANINGFUL CAREER ACHIEVEMENT: Campus copyright policy and getting others to understand what copyright does for them; also guiding support staff to new ways of understanding and living customer service.

GOAL I HOPE TO ACHIEVE FIVE YEARS FROM NOW: It's my hope that continuous advancement with technologies should just become normal to all of us. It's already a natural part of our lives. We use what tools we have, from printed tomes, to fiche, to digital, to wikis, blogs, and other new things that help us teach others. In an environment where change is normal we'd be more agile, faster to change, and in so doing, more truly speak the same language as our customers, who are less concerned than we are about new things. If we could get to that point, we'd be more effective teachers, and would hopefully contribute to the changing landscape, helping to drive it. 🌱



Whether it is the creation of business models to support discovery of copyright holders, much like The Harry Fox Agency¹⁶ for music, The Copyright Clearance Center¹⁷ and publishers for print publications, Websites for image sharing, or the Creative Commons¹⁸ licenses for digital works, we clearly need to find reasonable solutions to discovery of copyright holders. A new orphan works section also could benefit from a look-back provision, much like the three-year cycle in reviewing the Digital Millennium Copyright Act (DMCA).

The Executive Summary Conclusions (Report on Orphan Works) should remain front and center, for the enrichment of the public interest and access to works: the problem is real, elusive to quantify and describe, and we need a meaningful solution to the problem as we know it today. For all the disintegrating films, the music that might not be played, the research that won't occur, let the rest of us "opt-in" on orphan works...read some more and become conversant, and comment when we have the next opportunity. 🌱

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Endnotes

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6. <http://www.copyright.gov/fedreg/2005/70fr3739.html>
7. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.05439>:
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9. **Carslon, Scott**, “Whose Work Is It, Anyway?” *Chronicle of Higher Education*, 7/29/2005, Vol. 51, Issue 47
10. <http://www.copyright.gov/orphan>
11. <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.6052>:
12. **Pike, George H.**, “An Update on Orphan Works,” *Information Today*, Jul/Aug 2007, Vol. 24, Issue 7.
13. **Varian, Hal R.**, “Copyrights That No One Knows About Don’t Help Anyone,” *New York Times*, 5/31/2007, Late Edition, Business Day Section, *Economic Scene*; pg. 3
14. Digital Case, university institutional repository and archive <http://library.case.edu/digitalcase>
15. Conversation with **Tim Robson, Kelvin Smith Library, Case Western Reserve University**, October 31, 2007.
16. <http://www.harryfox.com>
17. <http://www.copyright.com>
18. <http://creativecommons.org>