

Orphan Works

Some thoughts about orphans and their foster parents

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I. Public archives and orphan works

I will start with a confession: We are guilty! It is the fault of archives that we have to deal with the problem of orphan works today. We wouldn't have this problem without archives -- or it would be irrelevant.

Why?

Without public archives, the creations that we call orphan works would no longer exist. Take the example of films. Archives are the only reason we still have films that lack the potential for commercial exploitation. Orphan works are yet more evidence of why we need public archives.

Without archives, we would not have orphan works, only **lost films**. Films that have decayed are a substantial cultural loss, but not a legal problem.

The intellectual parents and copyright owners of these films did not take care of them, and their identities are no longer known. Public archives are the **foster parents** of orphan films. They have cared for them with **expert knowledge, reliability and dedication**.

Because their publicly funded preservation efforts have created the legal problem of orphan works, the archives' position, status, and interests must be considered in any solution to the problem.

II. New opportunities for archival material

The legal problem of orphan works is not new, but it has become more urgent.

“New technologies breathe new value into old content.”¹

¹ E. Atwood Gailey
, in Hugenholtz, Bernt et al.: The Recasting of Copyright & Related Rights for the Knowledge Economy,
European Commission DG Internal Market Study, Institute for Information Law, Amsterdam 2006

Digitisation creates new opportunities for the use of archival materials.

The low production and distribution costs of digitised material make possible new forms of exploitation and new business models.

Archives are expected to provide public access, and within the EU this expectation has been strengthened because of programmes and projects like i2010 and the European Digital Library.²

III. Legal status of orphan works

Orphan works – like all works – cannot be used without permission; because permission can't be given, all use is forbidden – that's it in a nutshell! (As a footnote, I should mention that orphan works can be used legally if covered by an exception to copyright law such as quotation or – in most countries – copying for the purpose of preservation.)

IV. Actual handling of orphan works

How do archives deal with orphan works?

First, no one really discusses the problem of orphan works openly. Confessing that you've used an orphan work is confessing that you've ignored the copyright laws. No matter what film you declare to be an orphan, there will always be someone who claims to own its copyright -- not necessarily because he actually is the copyright owner, but because for some companies falsely claiming the right to collect licensing fees is their business model! If just one person out of 100 pays a fee in response to a false claim, the business model works.

Sometimes risk management replaces licensing.

² www.europeana.eu

Book publishers generally use orphan works, but include a notice at the back of a book explaining that a diligent search has been made to find the copyright owner and that the rights holder should contact the publisher to make a claim. These notices have no legal effect whatsoever.

Sometimes orphan works are **hidden in the archives** and never used. And there are some **good reasons** for this, two of which I want to mention:

First, many archives are **publicly funded** and are not permitted to take the legal and financial risk of using orphan works.

Secondly, archives depend on **mutual trust** with copyright owners. Any use without permission endangers these relationships.

To use or not to use? That is the question! Both choices are wrong. You must choose between two evils.

V. International solutions

Some countries already have laws that stipulate the conditions for using orphan works. In others, the legislative process has begun.

1. Canada

Canada has the oldest regulation on orphan works:

“Where the copyright owner of a published work cannot be located, section 77 of the Copyright Act in Canada permits a person who wishes to use that work to apply to the Copyright Board for a licence. The Board must be satisfied that the person has made reasonable efforts to locate the copyright owner [even if they have been unsuccessful]. If the Board is satisfied with [the effort made], it can issue a non-exclusive licence authorising the person to do what they wish. Such a licence will [include] what use is permitted, when [it] will expire and will include a licence fee and any other terms and conditions that the Board considers appropriate. The licence fee is usually required to be paid to a copyright collective society which would normally represent the unlocatable copyright owner. That society is then liable to reimburse

with the licence fee anyone who establishes ownership of copyright within five years of the expiry of the licence, but the collecting society is permitted to dispose of the royalties it receives under this procedure in the meantime as it sees fit for the benefit of its members.”³

2. The Scandinavian solution: extended collective licences

Scandinavian countries use extended collective licences, which solves the problem of orphan works. Collecting societies grant the licences needed to use copyright-protected material; rights holders may opt out of this system and negotiate individually with users.

3. Switzerland

Article 22b of the Swiss copyright law regulates the use of some orphan audio-visual material in public archives and in the archives of broadcasting companies if the material was produced in Switzerland. Use of these works is permitted only when balanced by informing collecting societies.⁴

4. European Commission

The European Commission recommends “having a mechanism to facilitate digitisation and online access of orphan works [...] while fully respecting content owners’ interests and rights”.⁵

It is a shame that, in referring to the rights and interests of these works’ intellectual parents, the commission did not mention the interests of the orphan works’ foster parents.

5. U.S. Congress: Limitation of remedies

The U.S. Congress has proposed legislation that would limit the remedies available if an orphan work is used after a reasonably diligent but unsuccessful search for the copyright owner.

³ <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>

⁴ http://www.parlament.ch/ab/frameset/d/s/4715/236180/d_s_4715_236180_236262.htm

⁵ EU Concil: Council conclusions on the digitisation and online accessibility of cultural material, and digital preservation, 2006

VI. Principles for a legal solution

From the archives' perspective there are important principles that must be part of any legal solution.⁶

1. Clear definition of orphan works

First, legal systems must accept the existence of orphan works. In most countries the problem is simply ignored. Orphan works must be clearly defined.

2. Clear criteria for diligent search

Secondly, there must be clear criteria for what constitutes a "reasonably diligent search".

You can **never** be absolutely certain that no copyright holder exists or cannot be located!

What kind of effort must be made?

Funds spent on researching copyright ownership lower your budget for paying royalties to known rights holders. **Both copyright owners and users are interested in low transaction costs!**

The requirements for a diligent search **should not be too high**, or they will be **prohibitive**. Users should not be the only ones responsible for clearing rights. This leads me to my next point.

3. Databases and procedures for clearing rights

We need databases of works that have been identified as orphans to avoid forcing each prospective user to repeat research that has already been done. We also need a procedure for clearing rights that includes all stakeholders.

⁶ These principles comply with recommendations on dealing with orphan works of the Network of Multimedia Resource Centres in Germany, <http://www.netzwerk-mediatheken.de>

4. Copyright owners and collecting societies must be involved

Collecting societies and copyright owner organisations must play a role in clearing rights.

5. Archives should not be responsible for clearing rights

Archives should, of course, support the procedure for clearing rights, but they should not bear responsibility for its result. Clearing rights can be highly controversial.

Archives and copyright owners depend on mutual trust. They should avoid conflicts whenever possible.

6. Licensing or copyright exception

There are basically two ways to permit the use of orphan works: licensing or creating an exception to the copyright laws for their use. These concepts differ in theory, but in practice the difference is not as great as one might imagine.

7. Payment for use

It goes without saying that there should be payment for use of an orphan work. A reasonable fee should be paid into a fund. With a licensing model, that would be a licence fee; with a copyright exception it would be a type of insurance fee. This fee should be paid at the time of use rather than when the copyright owner reappears.

This has advantages for both copyright owner and user. The rights holder is guaranteed payment and does not have to negotiate the fee. The user knows at the time of use how much the royalty fee will be and can decide not to use the work if it is too high.

8. Copyright owners reappear

If copyright owners reappear, their proven claims should be satisfied. Their claims should be limited to the fees that have already been paid; no further remedy should be available.

9. Refund for archives

The money that foster parents pay into a fund will be used to compensate any copyright owner who reappear. If no copyright owner reappears after five years, the money should be refunded into the archive.

10. Fees not used to settle claims of identified copyright owners should be used for film preservation

If the entire fee paid into the fund is not needed to settle the claims of copyright owners who have reappeared, any remaining money should be used for film preservation.

VII. Possible objections

The most serious objection to any legal approach to allowing the use of orphan works is that copyright owners will be ignored. Some authors, creators and rights holders are averse to any approach that makes it easier to use (and reuse) an orphan work. Mark Simon, an American artist, recently called orphan works legislation "legalized theft".⁷

This is why all stakeholders must be involved.

This is why collecting societies and right owners should play a crucial role in clearing rights.

We do not want to expropriate the work of copyright owners!

It took hundreds of years to develop rules of correlation/rules for in rem rights such as acquisition in good faith, acquisitive prescription and the abandonment of ownership. Intellectual property also needs more rules of correlation.

⁷ http://mag.awn.com/?article_no=3605

VIII. Conclusion

Don't plan orphan works' future
without asking their foster parents.