

ORPHAN WORKS

What are orphan works?

An “orphan work” is a work protected by copyright, but where the current owner of the copyright cannot be found. It can be both difficult and costly to trace the rightholders of orphan works because:

- The author may be unknown, or may be deceased leaving no locatable heirs; the date of death may be unknown.
- Where a company holds the rights or information about rightholders, it may have ceased trading with no legal successor or may have merged with another company; the old records may be lost.
- The work may include within it other works (e.g. photographs) with their own separate rights, one or more of which may be orphaned.

The main reason why a library usually needs to contact the copyright holder is in order to obtain permission to use the work in ways not covered by national copyright exceptions. A significant part of our cultural and scientific heritage is said to be orphaned. The BBC (British Broadcasting Corporation) estimates that it has one million hours of programmes in its archives presenting enormous complexities for rights clearances, and the British Library thinks that approximately 40% of its collections are orphaned. The Nordic countries, the UK government, the European Commission and the U.S. Copyright Office have all recognised that it is not in the public interest for such works to be withheld from the public due to the inability to clear the rights because the owners are unlocatable.

The problem affects libraries, archives and museums, authors and other creators of new or derivative works, publishers and the producers of sound recordings, films and broadcasts. This is especially true for preservation and digitisation projects, new publications about historical subjects and audiovisual works. Already the bane of the film and broadcasting industries, the problem of orphan works now impedes many library and archive mass digitisation projects. Meanwhile, the number of orphan works is on the increase, especially for online work, where material is posted on websites without metadata identifying the rightholder or without information on how to contact the responsible person.

Practice

Why have orphan works become a problem?

The Berne Convention (1886 amended 1971) **prohibits any formalities** for the “enjoyment and exercise” of copyright. Copyright automatically accrues from the moment the work is “fixed” in a tangible or material form and the rightholder is not required to register copyright or to formally notify any authority. The burden of finding the rightholder therefore lies entirely with the user of the material. With no systematic or centralised way of checking ownership, finding a rightholder can prove impossible, especially if they are located overseas. This is a significant deterrent to making orphan works available to the public online and to incorporating them into new works.

Each time the **term of copyright protection is extended**, the difficulties in locating rightholders and obtaining clearance for older works increase. In other words, the fewer

works there are in the public domain, the more works that may require permission. Under Berne, an author holds copyright for life plus 50 years after death. For example, the estate of an author whose memoirs on World War I were published in 1920, and who died in 1970 aged 75, would enjoy copyright in the work until 2020. If a library had wished to digitise a poem from the work in 2006 for an exhibition on the 90th anniversary of the Battle of the Somme, it would have needed permission from his estate. For European countries, which *retrospectively* extended the term of protection to life plus 70 years after death, this work remains in copyright for 120 years after the book was written, until 2040. Unless the author is very famous, the chances of locating his heirs or estate administrator for use at the centenary in 2016, are clearly diminished. The library must decide whether to take the risk or to abandon the use of the poem in the exhibition.

Extension of copyright term becomes critical in countries where exceptions for preservation copying exclude audiovisual media, hampering the preservation of fragile, older films or sound recordings. Where transfer to another medium is essential for the survival of these materials, libraries may risk infringing copyright.

The problem of orphan works does not lie solely with older works, but occurs in contemporary digital material as well. The wealth of new creative content available online can remain out of reach for re-use by others, unless care is taken to include rights information.

What level of search should be undertaken?

The level of the search undertaken to locate the rightholder is a controversial area e.g. librarians argue that “sampling” is the appropriate search level for mass digitisation projects. The only formal guidance that exists thus far are the **Europeana Diligent Search Guidelines** developed for the European Commission's *Europeana* digital library project. These voluntary guidelines can be adapted on a case-by-case basis and may be useful for ad hoc or small-scale searches, but they have been criticised as being too cumbersome for use in mass digitisation projects.

There are few comprehensive online sources of information to help find missing rightholders. A good place to start is the **WATCH** database and its sister database **FOB**. Other developing resources are the European Commission funded **ARROW project** and the **MILE Orphan Works Database**. The proposed **Google Book Search Rights Registry** (see below) may in time be another source. Useful advice on searching for rightholders can be found on the **Columbia University's Copyright Advisory Office** website.

Some possible solutions

Rights information metadata on the web

Initiatives such as **Creative Commons** (see the chapter on *Creative Commons: an “open content” licence*) whereby creators can license their online work for specified uses, include rights information metadata. Some mainstream publishers are using ACAP (Automated Content Access Protocol), a non-proprietary, global permissions tool. These initiatives may alleviate the situation, but do not address the underlying problem.

Legislative solutions

European Union

The High Level Expert Group (HLEG) of the European Commission Digital Libraries Initiative showed that there is a “black hole” of 20th century orphan or out-of-print works in the Commission's flagship *Europeana* project. The Commission is funding projects such as ARROW and MILE to provide tools to help identify or locate missing rightholders. It has brokered a model licence for out-of-print copyright works and voluntary *Diligent Search Guidelines* backed by a *Memorandum of Understanding* (MOU). However, the *Guidelines* have no force in law and cannot indemnify the user, so libraries, archives and museums remain vulnerable to prosecution even if the risk is perceived to be low. Therefore at the request of library groups, the MOU contains a commitment that the Commission will seek legislative solutions. Orphan works were included in the Commission's *Green Paper on Copyright and the Knowledge Economy (2008)*, and there is speculation that the Commission may eventually direct all Member States to legislate at national level and to require them to recognise each other's schemes.

United States

The U.S. Copyright Office report on orphan works (2006) recommended that potential publishers of orphan works should first conduct a "reasonably diligent search" to locate the owners. Should the rightholders later appear and demand payment for the use, they are entitled to "reasonable compensation", but not compensation for infringement of copyright. The U.S. approach has a major drawback however, because it does not remove liability for infringement even if the threat of damages may be removed. Instead it merely restricts the compensation that would be paid to rightholders to reasonable levels. Additionally, diligent search may not be practical for mass digitisation projects, other than on a sampling basis. None of the various congressional Bills to implement the recommendations have so far made progress. For information on American orphan works legislation, see the American Library Association's Orphan Works pages.

An eventual agreement on the terms of the **Google Book Settlement** (GBS) will likely have great significance for orphan works because of the size and comprehensiveness of the works included in the Google Books digital library. The proposed **Books Rights Registry (BRR)** would in effect become a “trustee” for the orphan works in the database, giving it a huge controlling monopoly. On the other hand, the BRR would be a significant resource for tracing rightholders and clearing rights. See American Library Association web pages on the GBS for more information.

Canada

The Copyright Board of Canada grants non-exclusive licences for the use of published works when the copyright owner is identified but cannot be located. To obtain a licence, an application form describing the efforts made to locate the rightholder must be completed. If the Board determines that “reasonable efforts” have been made, it sets terms and fees for the proposed use. If the copyright owner does not appear within five years, the fees are paid to the relevant collecting society. The Canadian system does not deal with situations where rightholders remain unidentified. Since the system was introduced in 1990, only 125 licences have been issued; anecdotal evidence suggests that applicants find the process cumbersome and slow and that it does not meet their needs.

Nordic countries

Some Nordic countries have a system of **extended collective licensing schemes mandated by law**. Extended collective licensing means that licensing schemes for orphan works are available through collecting societies that provide the licensees e.g. libraries, with indemnity from prosecution and other legal penalties, making it safe to use the works. The collecting societies are themselves indemnified by the State which allows them by law to represent their class of rightholders, whether or not the individual rightholder is an actual member of the society or has mandated the society to act on their behalf. Such schemes may also include provisions for unclaimed monies paid in licence fees to be put towards grants for the social benefit of authors and creators. For information about the concept of extended collective licensing, from the rightholder viewpoint, see the website of Kopinor, a Norwegian collecting society.

United Kingdom

The UK has a very limited statutory provision that covers only a small sub-set of orphan works i.e. works that are at least 100 years old, that might still be in copyright and have unknown or unlocatable rightowners. Like the Canadian law, it does not provide guidance as to what constitutes a “reasonable” inquiry.

In 2009, the UK government announced plans to introduce an enabling clause for orphan works in the Digital Economy Bill (due autumn 2009). This will allow for subsequent secondary legislation which it would seem, may enable collecting societies to offer statutory extended collective licensing based on the Nordic model referred to above. Such legislation would not be in place before 2011.

Policy issues for libraries

The orphan works problem undermines the principal role of libraries in preserving cultural heritage and making it accessible through the digitisation of their collections. This is because the inclusion of orphan works often entails expensive, time-consuming enquiries to find the rightholder, that may turn out to be fruitless.

In some countries, libraries have a statutory right to copy works in their holdings for preservation purposes, including rights to digitise, but they may still need to obtain permission to provide remote access. This means that the library could spend time and effort on expensive digitisation projects in order to produce a type of “dark archive” that can only be accessed by a limited group of users.

Libraries and archives tend to be risk averse and may not have access to legal advice. Even where orphan works provide significant resources for scholarship, they may be excluded because the library cannot risk litigation. This results in gaps in digital collections.

Orphan works are an issue for publishers, broadcasters, sound recording and film producers, as well as libraries. Collecting societies are interested in encouraging extended collective licensing solutions, which brings them new business. This means that there is common ground that can bring these groups together with libraries, archives and museums to advocate for change. Libraries should consider the merits of the different approaches e.g. a copyright exception, an extended collective licensing scheme, or a dual economy approach. They need to identify which models will meet their needs in their national environments and should take steps now, together with other stakeholders and

legislators, to find workable solutions preferably backed by law.

Library position statements

Association of Research Libraries

<http://www.arl.org/pp/ppcopyright/orphan/index.shtml>

<http://www.arl.org/pp/ppcopyright/orphan/orphanresources.shtml>

American Library Association

Google Book Search Settlement <http://wo.ala.org/gbs/>

[Orphan works](#)

<http://www.ala.org/ala/aboutala/offices/wo/woissues/copyrightb/federallegislation/orphanworks/orphanworks.cfm>

IFLA/IPA joint statement on orphan works. June 2007

<http://www.ifla.org/en/statements/joint-iflaipa-statement-on-access-to-orphan-works>

IFLA/IPA joint statement on orphan works and mass digitisation (2007)

<http://archive.ifla.org/Vl/4/admin/ifla-ipaOrphanWorksJune2007.pdf>

Orphan works and mass digitisation. British Library, 2008. <http://www.bl.uk/ip/> (scroll down)

Position statement on orphan works. LACA: the Libraries and Archives Copyright Alliance, December 2007. <http://www.cilip.org.uk/policyadvocacy/copyright/statements>

References

ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana) <http://www.arrow-net.eu/>

Center for the Study of the Public Domain, Duke Law School

<http://www.law.duke.edu/cspd/orphanworks.html>

Columbia University's Copyright Advisory Office <http://copyright.columbia.edu/permissions>

Copyright Board Canada - Unlocatable Copyright Owners <http://www.cb-cda.gc.ca/unlocatable-introuvables/index-e.html>

European Commission Digital Libraries Initiative High level Expert Group

http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm (scroll down to *5th meeting - 4 June 2008*):

- Press Release
- Final report on Orphan Works and Out-of-Print Works and Annexes 1-7
- Memorandum of Understanding on Orphan Works
- Sector-specific guidelines on diligence search criteria for orphan works - Joint Report & Appendix to the Joint Report - Sector Reports

FOB (Firms Out of Business) www.fob-file.com

Google Books Settlement <http://books.google.com/googlebooks/agreement/>

Kopinor. Extended Collective License - the Nordic Solution
<http://www.kopinor.org/opphavsrett/avtalelisens>

MILE (Metadata Image Library Exploitation) Orphan Works Database
<http://orphanworks.ssl.co.uk/>

UK Intellectual Property Office
<http://www.ipo.gov.uk/c-policy-orphanworks>
http://www.ipo.gov.uk/ipo_c-orphanworks_paper0809.pdf

U.S. Copyright Office
<http://www.copyright.gov/orphan/>
<http://www.copyright.gov/orphan/orphan-report.pdf>

The WATCH File (Writers and Artists and Their Copyright Holders)
<http://tyler.hrc.utexas.edu/>

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