Orphan Works at Home and Abroad: International Solutions to a Global Problem

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Six Categories of Alternatives to the Status Quo Worldwide

As proposed by Van Gompel and Hagenhoff in their 2010 article, “The orphan works problem: The copyright conundrum of digitising large-scale audiovisual archives, and how to solve it.”

Rights Management Information System (aka Rights Registration) (2010, pp. 64-65)
- Limited to current and future works with living rights holders to provide current information
- Governments adhering to the Berne Convention (an international copyright agreement to which the U.S. adheres) aren’t allowed to mandate registration, but a voluntary system is acceptable.
- Possibly the easiest voluntary solution to implement for current and future works.

Extended Collective Licensing (aka Collecting Societies) (2010, p. 66).
- The voluntary transfer of legal rights to an organization known as a “collecting society” as well as the extension of those same rights to cover the works of rights holders unaffiliated with the society if a “substantial number of rights holders in a given category are represented by the collecting organization.”
- Music industry example: ASCAP
- Creators do not always choose to be represented by a collecting society.
- Limits the control that creators who do join have over their work and its licensing.
- (The society makes decisions regarding licensing and use and then distributes royalties to rights holders.)

Indemnity or “Security” (2010, p. 67)
- Would allow private organizations representing rights holders to grant permission in exchange for “fair compensation,” which is held in escrow in case the rights holder ever comes forward.
- Allows for commercial use that rights holders may not approve of when/if located.

- Limits the damages that can be sought from an end-user who has undertaken an “unsuccessful but reasonable search” for copyright holders.
- Prevents copyright holders from requesting an injunction on derivative works if they do not undertake an action within a reasonable time frame.
- Allows for commercial use that rights holders may not approve of when/if located.

- Limits the use of orphan works to certain strict conditions.
- Limits the compensation a rights holder can claim to “reasonable royalties.”
- Prevents a rights holder from suing for infringement or stopping dissemination of a derivative work.

The U.S. Quagmire

2008 Efforts and Google

While efforts are still underway, the most recent American attempt to address the situation took place before the 110th United States Congress. The legislation that was introduced was supported by Google, Inc., Public Knowledge, the Electronic Frontier Foundation, and the Recording Industry Association of America (Castle & Mitchell, 2009). Castle and Mitchell go on to summarize the approach that was taken with the following:

- Any person can use any work (foreign or domestic) of any kind for any purpose (commercial or noncommercial, 1:1 reproduction or derivative work) if they are unable to find the copyright owner following a “reasonable diligent search” in accordance with “best practices” in “good faith.”
- If the copyright owner later comes forward, the user (called an “infringer” in the legislation) must demonstrate to a court that he or she conducted the requisite search if the copyright owner brings a lawsuit, but the copyright owner may not obtain statutory damages or an injunction and shall only be entitled to recover a “reasonable fee.” There is no notice or registration requirement for the user of the orphan work. There is no database of orphan works.

As part of a settlement, Google has offered to fund a rights collecting society which would collect revenue earned by the materials and disseminate it to authors and publishers who choose to register with the society whether or not they hold any copyright on the materials included (Semakow, 2009, pp. 28-29). Additionally, the arrangements settling with Google are highly commercial organisations that are hardly representing scholarly work or interested in the plight of libraries. There will likely prove a tight, “copyright maximalist” structure that will force a fee-based system on all uses of published works not unlike that currently seen in the recording industry (Semakow, 2009, pp. 28-30).

In a 2009 study funded by the Canadian Copyright Board and the Department of Canadian Heritage, Jeremy de Beer and Mario Bouchar presented the following findings about Canada’s nascent orphan works solution.

Section 77 of Canada’s Copyright Act allows the Copyright Board of Canada to grant applicants a non-exclusive license to use orphan works if applicants can prove they have failed to find copyright holders after making extensive and reasonable efforts.

The Board bases its decision on:
- The nature of the applicant.
- The nature of the work.
- The nature of the proposed use.

The Board’s jurisdiction covers published or fixed:
- Works.
- Performances.
- Sound recordings.
- Communication signals.

As of the printing of this report:
- 413 total files covering 12,640 orphan works.
- About half the received applications have resulted in a license.
- Few applications are rejected. Located copyright holders account for many of those not awarded licenses.
- The Board usually takes between two and 16 weeks to grant a license depending on speed of applicant efforts to locate copyright holders.
- Non-commercial applications are often processed faster than commercial applications.
- 55% of applications are for commercial purposes.
- Application origin breaks down as follows:
  - 37% – Businesses or commercial organizations.
  - 11% – Individual.
  - 13% – Educators or educational institutions.
  - 13% – Government agencies.
  - 3% – Galleries and museums.
  - Community and charitable groups made up the remainder.

Materials requested break down as follows:
- 59% literary works.
- 22% – Artistic works.
- 18% – Musical works, performances, and sound recordings.
- 19% – Architectural plans (but these requests ceased after 2007 when policy toward them changed)

Total royalties paid or payable: under $70,000.
- 30% payable on location of copyright holder.
- 70% payable immediately to a collective society.
- 30% payable to the society collecting the funds held for five years. Because of the demands put on the societies to manage small sums of money, the societies may now use the money as they see fit but are still responsible for paying copyright holders if they turn up within the allotted five years.

Nothing in the law prevents copyright holders from stopping infringing use of their works should they come forward after a license has been granted, but users who have received a license are not technically committing infringement. De Beer and Boucharnd note that the Canadian law’s application in such a situation is unclear.

In the Meantime: Innovative Work-Arounds

Orphan Works Database on the MILE (Metadata Image Library Exploitation) website (images only)
http://orphanworks.ssl.co.uk/
Centrals European search efforts and discussion regarding orphan visual works.

The WATCH File
http://tyler.hrc.utexas.edu/
A combined effort of the Harry Ransom Center at the University of Texas at Austin and the University of Reading, the “Writers, Artists, and Their Copyright Holders” database contains copyright contacts for creators in several fields.

FOB (Firms Out of Business)
http://tyler.hrc.utexas.edu/fofb.cfm
Another combined database effort between the Universities of Texas and Reading that compiles information on publishing, literary, and other potentially copyright-holding firms gone out of business.

International Solutions to a Global Problem

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Orphan Works at Home and Abroad

2009 study by the Canadian Copyright Board and the Department of Canadian Heritage, Jeremy de Beer and Mario Bouchar presented the following findings about Canada’s nascent orphan works solution.

The orphan works situation across the European Union is still in flux. Some member nations are progressing towards an agreed-upon solution faster than others. EU efforts have progressed farther than they have in the United States, however, and tend to focus on state-regulated rather than private sector solutions. Existing regulations between Member States have complicated matters somewhat.

In a January 2011 document prepared by the “Comité des Sages” for the European Commission, Niggemann, De Decker, and Lévy call orphan works the “black hole of the 20th century.” They report that:
- “21% of films held in audiovisual archives are orphaned (and 60% of these are over 60 years old).”
- “40% of the British Library’s in-copyright collection is estimated to be orphaned.”
- “90% of photographs in U.K. cultural institutions is estimated to be orphaned.”

The Comité offers an “8-step-test” for an effective legal solution:
1. It must be in place in all Member States of the E.U.
2. It must cover all information formats.
3. Orphan works designations must be recognized across borders of all E.U. Member States.
4. orphan works made accessible digitally in one Member State should be accessible in all Member States and, ideally, worldwide.
5. It must comply with public-private digitization partnerships.
6. It must include copyright holder remuneration for commercial use or the payment of a one-time fee for non-commercial use by cultural institutions. These could be placed in an escrow account or handled by a collecting society.
7. It must ensure reasonable costs for the process that correspond with the commercial value of the work.
8. It must be supported by rights information databases and lists of eligible orphan works, even though this may conflict with the Berne Convention. These databases should be linked to Europeana and serve as a central reference.

The report was generally favorable toward the idea of public-private sector digitization partnerships, but it pointed out the need for competitors to Google. It also suggested reducing the duration of Google’s exclusivity agreements to seven years and recommending making free access of digitized material through Europeana a condition to using public funding in digitization projects.