ORPHAN WORKS

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Outline

What is the problem?

Possible Solutions

Future Prevention
What are Orphan Works?
FROM THE ACADEMY AWARD®-WINNING DIRECTOR OF “THE PIANIST”

A ROMAN POLANSKI FILM

OLIVER TWIST

IN THEATRES 10 NOVEMBER
Works that are protected by copyright, but the owners are unknown, and / or impossible to locate.
John Hob.
Understanding the Problem

Searching price + risk of being sued ➔ prohibitive.
Understanding the Problem

Revenue from sales

Potential Liability

Searching for the Owner

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1
Understanding the Problem

Searching price + risk of being sued $\Rightarrow$ prohibitive.

- The work is not used – even though the user either does not exist, or would not object to the use.
- "Lose-lose" situation: for the owner; the user; and society at large.
Understanding the Problem

- Not a minor problem.

- British Library – estimates 40% of all print works are orphan works.
- German Library – estimates the majority of their holdings are ‘orphans’.

- A growing problem.
Causes of the Orphan Works Problem

- Legislative causes:
  - No registration required (in accordance with the Bern Convention).
  - Lengthening of Copyright term.

- Technological Advancements.
Solutions

A Comparative Review
Diligent Search
Balancing the Interests
The depth and thoroughness of the search will define the scope of the chosen solution.
Diligent Search Definitions

- US: The 2008 bill – defined in broad terms

- EU: The i2010 recommends - common “diligent search” criteria → cross-border effect
What is considered a diligent search?

- Prior to the use of the work.
- Work by work.
- Country of the work’s origin.
- Sector specific criteria.
Where can I look?

- Digital libraries (Such as the European Digital Library).
- Information appearing on the work’s cover (including names, titles, date and place of recording, publishing).
- Collective rights management organizations.
- General databases on rightholders and/or works (such as ARROW).
- Online copyright registration lists (including those maintained by government agencies such as the U.S. Copyright Office).
- The legal deposit/national library or archive.
- Relevant personal and/or business directories and search engines.
- Legal sources such as company house records or industry specific records.
- Contact other owners of the same or similar works by same author/creator.
- Sector specific criteria.
Limitation of Liability

US
The Orphan Works Act

- If a "reasonably diligent search" was conducted prior to use ➔ liability will be limited:
  - Financial recovery would be limited to "reasonable compensation."
  - Limitation of **injunctive** relief.
  - **Noncommercial** use – eliminate monetary relief altogether.
Limited Liability

Use followed by diligent search.

If owner shows up – limited liability (monetary and injective)
How does this solve the problem?

Revenue from sales

Potential Liability

Searching for the Owner
Limited Liability – Pros & Cons

Pros

- Flexibility.
- Incentive for users.
- Incentive for owners.

Cons

- Uncertainty.
- Litigation expenses.
License

Canada
UK
Hungary
Canada
After a prospective licensor has made "reasonable efforts to locate the owner of the copyright".

The Copyright Board of Canada grants users with a license to use published works on behalf of a "unlocatable copyright owner".

### DECISIONS - UNLOCATABLE COPYRIGHT OWNERS

#### DECISIONS/LICENCES ISSUED TO THE FOLLOWING APPLICANTS (PDF)

Please note that in general licences are issued in the language in which the application was filed.

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<tr>
<th>Date Y/M/D</th>
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<td>242. 2009/10/07</td>
<td>National Film Board of Canada, Montreal, Quebec, for the reproduction of a text written by Agathe Martin-Thériault and published in the magazine &quot;Cinéma Québec&quot; in 1972 [File: 2009-UO/TI-16]</td>
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<td>Nathalie Hamel, Quebec, Quebec, for the reproduction of a photograph taken by Léon Bernard and published in the magazine &quot;Perspectives&quot; in 1968 [File: 2009-UO/TI-14]</td>
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Licensing Scheme

Use of the work – only after diligent search and license application

- Diligent Search
- Apply for license
- Pay license fee
- Use
Canada – Terms of License

- The Board determines: license fee or royalties; duration of the license; and how the orphan work can be utilized.
- The license fee goes to a designated copyright collective society.
- The copyright holder has five years after the expiration of the license to claim the royalties. If not- the collective society can keep the royalties.

Only for published works. Effective only within the reach of Canadian laws.
Canada – The CCLA

- The Board works with the **Canadian Copyright Licensing Agency** ("CCLA")-
- Operated jointly by a committee of **user groups and owner groups**.

- The CCLA **reviews the search**, and recommends.

- Advantage - potentially provides **greater certainty**, by fostering the development of more specific guidelines.
Licensing – Advantages & Shortcomings

Advantage
No risk of being sued for infringement by the owner later.

Disadvantage
The application may be costly, involving a certain amount of delay.
UK – Digital Economy Bill

- The Digital Economy Bill included a clause on orphan works licensing.

- Reaction to the bill – support / criticism.
From The Times
February 3, 2010

Unlock collections for digital access to all

Sir, Proposed amendments to the Orphan Works Clause 42 (works with no known copyright owner) of the Digital Economy Bill will pose one of the greatest barriers to mass digitisation of content by the UK's leading national institutions. We must seek to retain the Government's draft clause to provide the UK with the world's best solution to unlocking vast amounts of our collections for the nation.

One example of orphan works are the thousands of photographs of British servicemen during the First and Second World Wars held by the British Library. These photographs have enormous value to researchers but there is no way of tracing the rights owner — which in turn means the photographs cannot be digitised and made accessible. Other examples of orphan works held by libraries, archives, museums and galleries in this country include oral histories, personal letters, films and drawings.

The Digital Economy Bill proposes a system that allows a cultural or educational organisation to apply for a licence for the use of these works. We believe that such a flexible system is the right one given the types of works that fall into the category of orphan works.

Perhaps 40 per cent of some of our national institutions' collections are orphan works. A significant proportion of these...
Currently

- The relevant clause was dropped during the committee stage debate.
Hungary
Hungary

- Similar mechanism: **Diligent search, followed by a licensing request.**
- **Registry** – only for works which the HPO has granted licenses.
Hungary – Non profit use

- Preferential treatment for not-for-profit uses: No deposit required; preferential rate of the administrative fees.

- Note - preferences are not linked to the type of the institution, only depend on whether or not the intended use is for-profit.
Other solutions considered
Other Solutions Considered

- Copyright exemptions
- Copyright levy
- Abandoned/ ownerless property regime
Abandoned / Ownerless property regime.

- If the owner of the property is unknown or cannot be located – the court could transfer the management rights in the work to the appointed “government guardian”, who could (inter alia) permit the use of the work.
Other Solutions Considered

- Enhancing the public domain (e.g. – Public Domain Enhancement Act)
- Renewable Copyright
Preventing Future Orphans
How to prevent future orphans?

Reduce search cost ( = increase information available):

- Technological Solutions
- Collective Licensing
- Registries
Electronic Solutions

- Increasing available information
- Owners: make themselves known
  - Online databases.
- Users: search tools.
  - Open source, wiki, and social networking technologies.
Open Access Licensing

- The owner allows certain uses of the work.
Collective Licensing

- Licensing agency collectively represents a large number of copyright owners.
- ‘Blanket license’.

- Advantage ➔ reduced search cost and transaction cost.
- Disadvantage ➔ sector specific.
Collective Licensing - Examples

- Denmark
- Netherlands
Registries - EU

- i2010 European Digital Libraries initiative
ARROW

Accessible Registries of Rights information and Orphan Works ("ARROW").

- Gathers national libraries, collective management organizations and publishers and is co-funded by the European Commission.

- Aimed at identifying right-holders and clarifying the rights status of a work, including whether it is out of print or orphan.

- Risk – de facto formal registry.
About Arrow

ARROW, Accessible Registries of Rights Information and Orphan Works towards Europeana, is a project of a consortium of European national libraries, publishers and collective management organisations, also representing writers through their main European associations and national organisations.

ARROW aims in particular to support the EC’s i2010 Digital Library Project by finding ways to identify rightholders, rights and clarify the rights status of a work including whether it is orphan or out of print. This will enable libraries as well as other users to obtain information on who are the pertinent rightholders, which are the relevant rights concerned, who owns and administers them and how and where they can seek permission to digitise and/or make available the work to user groups. The project also seeks to enhance the interoperability between sources of rights information (i.e. exchange of information) held by rightholders, RRROs and other collective management organisations, agents, libraries and users. Solutions envisaged by the venture include the establishment of systems for the exchange of rights data, the creation of registries of orphan works, information on or registries of works out of print, supporting the creation of a network of rights clearance mechanisms. Key to achieving this objective is interoperability, standards deployment and stakeholder involvement.

ARROW is one of the projects selected among 102 ones proposed in 2007 under the European Commissions eContentplus Programme which seeks to help make digital content in Europe more accessible, usable and exploitable.

Read More

News

The Committee on Culture and Education of the European Parliament urges EU States to enlarge Europeana while respecting copyright

A report approved unanimously by the Culture Committee of the European Parliament on Europeana includes references to ARROW project.

Final report of the EC i2010 Digital Libraries Expert Group

The final report of the EC i2010 Digital Libraries High Expert Group has been published recently on the EC Information Society’s Thematic Portal.

ARROW System development. German pilot on its way

During the first semester of 2010, the ARROW consortium will deliver the first phase of the project pilot.

France and Germany announced digitisation projects

Both initiatives would presumably feed into Europeana.

The Deutsche Nationalbibliothek and its dissemination activities on ARROW

The ARROW project presented at important librarians events in Latin America.

Read More
The Committee on Culture and Education of the European Parliament urges EU States to enlarge Europeana while respecting copyright

A report drafted by MEP Helga Trüpel and approved by the Culture Committee on 22 February 2010 urges the EU Member States to provide more and better content to Europeana while copyright needs to be observed.

The draft report "Europeana, the next steps" highlights the need of the EU governments and cultural institutions to co-operate closely in speeding up digitisation, and "not to restrict availability to the territory of their country".
MILE

Metadata Image Library Exploitation ("MILE")

- MILE has set up an 'Orphan Works Database' - acts as a repository for all Orphan Works, and invites visitors to offer information about those works.

⇒ Note: Sector specific.
Advanced search of Orphan Works

You can search here for Orphan Works from many of the major collections of the world.

Quick Search

Enter your choice of keywords and click on Search at the top of the page. These may include image ID, artist, title, location, subject or content. Use spaces or commas to separate each keyword.

Advanced Search

Here advanced search allows you to refine your search within specific categories. Enter any combination of criteria listed left, including free text search in the keywords' box.

Title

Creator of original work

Date of creator of original work

Location of original work

Photographer

Date of photograph

Keywords

Image ID
e.g. BAL_34531

Clear

Search
Welcome to Orphan Works

What is an Orphan Work?

Orphan Works are works of art (and other copyrighted material) that are believed or known to be in copyright but whose copyright owner is unknown or untraceable. Orphan Works can be original works of art, or an original image (e.g., a photograph) of a work of art. When an original work of art is out of copyright, images of that work of art may continue to be in copyright.

What are the problems?

The uncertainty around the copyright holder of an orphan work often prevents it from being used creatively or commercially. This inhibits access to, exploitation of, and promotion of Europe’s cultural heritage and results in a loss of potential income.

Copyright can be bought, leased, sold or mortgaged. Very often, the owner of a work of art, or image of a work of art, is not the copyright holder. The duration of copyright in the UK extends to 70 years after the death of the creator of the original work of art or image of a work of art. However, copyright law differs by country.

What is MILE doing to help?

MILE has set up an Orphan Database which acts as a repository for all Orphan Works and invites you to offer information about these works. This database also serves to collate all search efforts for associated works of art so that Europe is provided with a centralised source for Orphan Works discussions, search history and potential repatriation.

How can you help?

- Look at MILE’s collection of Orphan Works to see if you can provide any information about any of the works we hold.
- Submit any Orphan Works you have in the database.
- Contribute to ongoing discussion on possible Orphan Works legislation at the MILE forum.
- Contact us as soon as possible if you are or know the copyright holder of any of the images displayed here.
Google Book Rights Registry

Part of the Google settlement, the Book Rights Registry’s goal is to mediate between Google and copyright owners

- Could potentially assist preventing orphanhood.
- Risk: monopoly, antitrust.
Summary - Solutions

- Limited Liability
- License
- Abandoned Property
- Prevention

Diligent Search
Summary - Solutions

- **Legislative Solutions**
  - Limitations on liability (e.g. US)
  - License for use (e.g. Canada, Hungary).
  - Ownerless/Abandoned property (e.g. Israel).
  - Renewable Copyright, Public Domain Enhancement

- **Non-legislative Solutions:**
  - Collective Licensing
  - Registry (ARROW, Google Book Search)
THANK YOU FOR LISTENING

Questions? Contact: lif.yael@gmail.com