

Michigan State University Statement on Orphan Copyrights

Michigan State University wishes to submit the following comments in response to the Copyright Office query about orphaned copyrights.

Summary

We recommend: 1) that a standard fee be charged for the use of works determined to be orphaned, and 2) that a mechanism be established that can determine orphaned status quickly and efficiently. For educational use, both a timely determination and predictable costs are important.

1. Nature of the Problems Faced by Subsequent Creators and Users

The Michigan State University Libraries provide a service for faculty and graduate students who need to get permission to use copyright-protected works in online teaching or other university-sponsored projects. Over the past six years, orphaned copyrights have consumed staff time and resources out of all proportion to their numbers, and often there is no good substitute for the work. After extensive research into publishing mergers and takeovers, staff have sometimes tracked down the probable owner, only to have them deny any knowledge of the work.



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One example of this is the *Journal of Children's Mathematical Behavior*. The copyright information on the *Journal* states that it was published by the Curriculum Laboratory, University of Illinois. The copyright date was 1973. The *Journal* was short-lived and apparently depended on National Science Foundation funding. Since the University of Illinois clearly still exists, a response to a permissions request ought to have been possible, but most universities have no formal permissions office except for publications from their presses. After a lapse of thirty years, records can be hard to find, and it may be impossible for anyone to tell whether, for example, the authors transferred copyright to the *Journal*, or still hold it. And after thirty years, authors may have moved or died, and they or their heirs may have no clear records about ownership. Our permissions staff eventually abandoned this attempt because no one felt able to give a clear "yes" or "no" answer to the permissions request.

The result was that the faculty member had to choose less well suited alternative readings for his class, and had to do it at the last minute because of the time it took to make the permissions attempt. In the end, the students were the real losers by not having access to a work originally intended for scholarly dissemination, not commercial gain.

2. Nature of "Orphan works": Identification and Designation

Any work can be orphaned, regardless of age, type, or even publisher. MSU staff mark many requests as "request abandoned," after weeks or months of attempting

to get an answer to a permissions request. Often, the problem is not merely the inability to find a probable rights holder, but the inability to get a timely response when such a probable rights holder has been contacted (see the example discussed in item 1 above).

Timeliness is particularly important for educational uses. Identifying orphan works on a case-by-case basis could be extremely slow and labor intensive, even with clear guidelines. A system that allows potential users to register their interest in using works for non-profit purposes would be preferable.

The ability to predict royalty costs is also important for educational uses. An ideal system would allow educational institutions to pay an automatic license fee for any protected work whose owner had not specifically registered to request a different fee.

3. Nature of “Orphan Works”: Age

Age helps to predict whether a work may be orphaned. With the exception of web pages, MSU staff encounter relatively few situations where we cannot get a response from the rights owner if a work is less than five or ten years old. The likelihood of problems increases substantially after 20 years, and dramatically after 40 or 50, especially for purely academic works. Films, music, and commercially successful works rarely have ambiguous or unreachable rights owners.

4. Nature of “Orphan Works”: Publication Status

Both published and unpublished works can be a problem. With unpublished works, there is less potential ambiguity about who owns the copyrights, but far more trouble in contacting the rights owner. MSU staff encountered many unpublished photographs in small libraries during the Institute of Museum and Libraries Services-funded “Making of Modern Michigan” project. Donor information helped to contact the rights holders in many cases, but for many other photographs without such records, their provenance and their rights owners became impossible to trace.

With works that fit the legal definition of published, but that did not have a traditional publisher such as a commercial or university press, finding and identifying the rights holders is a major problem. Web pages represent one modern example. An older example might be a mimeographed work handed out in the street. These works often have little or no information to identify the rights holders. Frequently, it is unclear whether or not they are works-for-hire. The number of works in this category have grown enormously because of web publication.

Works published via a standard commercial or university press rarely represent a problem in reaching the rights holder, unless they are over 20 years old. Commercially successful works essentially never become orphaned.

5. Effect of a Work Being Designated “Orphaned”

For a rights holder, having a work declared as “orphaned” and available for non-profit educational use could be a benefit. The orphaned status would indicate some

demand for the work, which the rights owner could later exploit (assuming the orphaned status were reversible).

In cases where a rights owner had continued to want to exercise copyrights, and for some reason other than negligence the potential user could not make contact, it is possible that the rights holder lose financially. [Comment: A loss will be suffered by a rights holder if they aren't compensated for any "licensable use", regardless of the cause. Since that outcome isn't tied to having a work declared as orphaned, we might want to consider whether to retain the first sentence or revise it accordingly. The next sentence seems to really get to the heart of our comments as a user.] Some standard fee paid to a collecting organization such as is done for music would provide a reasonable pool to offset legitimate claims, and would allow non-profit educational users to predict costs.

6. International Implications

While the Berne Convention does not allow members to require registration, it does not forbid a system where people register their desire to use particular works. Automatic licensing systems are also widely used internationally and in the US.

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