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Harvard Report: One Step Closer to Low-Risk OA Orphan Works?

Jennifer Dixon
Fordham University School of Law, jdixon22@law.fordham.edu

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by [Jennifer A. DixonJennifer A. Dixon](#)
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On August 12, the Harvard Library Office for Scholarly Communication published a comprehensive literature review detailing strategies for digitizing copyright-protected works for which rights holders cannot be found or contacted—colloquially called "orphan works." This 112-page peer-reviewed report, "[Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works](#)," is the culmination of the 2015–16 Orphan-Works Project at Harvard. "The orphan works problem that we have in this country is profound," explained Kyle Courtney, copyright advisor for Harvard Library's Office for Scholarly Communication. Designating material as orphan works is a form of "locking up culture," he explained. "It's not by license, it's not by contract. It's by the fact that our copyright laws have changed so much in a 100-year span that we don't know what to do about it." The need to provide exposure to what Courtney called a "virtual treasure trove" of materials led to the development of the Harvard Orphan Works Project. David Hansen, clinical assistant professor and faculty research librarian at University of North Carolina School of Law, Chapel Hill, compiled and wrote the report, with input from a panel of experts who reviewed drafts and provided feedback on its strengths and weaknesses. According to Hansen, the goal of this paper is to review options for making either low-risk or no-risk use of orphan works, particularly through digitization for open access. He compiled the report based not only on a substantial literature review, but also on conversations with librarians and archivists around the country. "Sometimes there are legal strategies that are being employed that just aren't being written about in the formal literature," said Hansen. His work seeks to identify the types of strategies libraries and archives have used to reduce the risk of making orphan works available.

FOLLOWING THE LEADERS

According to Nancy Sims, copyright program librarian at the University of Minnesota Libraries, there are two common avenues that information professionals take in handling potential orphan work issues: "Either 'let's not do anything because we don't want to experiment with what we don't know' or 'let's dive in and go for it even though we don't understand it.'" This report, she explained, can serve both types. A section of the report that describes "current practices" in libraries and archives can be particularly useful, she said, so that overwhelmed professionals can follow the lead of others who are testing out good strategies for orphan works. While fair use is

the best-established defense to copyright claims, the Harvard report highlights lesser-known approaches to either avoiding suits in the first place or minimizing negative outcomes in the event of litigation. There are "tools that are both baked in to the copyright statute and that judges have access to as principles of equity that allow for a reasonable determination of what is allowed," said Hansen. In addition, Courtney noted that "perhaps copyright law isn't always the answer"—there are other laws and legal strategies that can help information professionals navigate the world of orphan works. The report takes an expansive view of the legal landscape applicable to orphan works. Sims noted that some of the report's strategies are more "theoretically interesting from a legal scholar perspective," but many are "common sense things that are within reach for any institution." For example, Hansen emphasized the value of libraries conducting a minimal but good faith search for rights holders before digitizing what appears to be an orphan work. This extends to other media as well; several media librarians across the country have joined forces to build an online database of due diligence searches for orphan VHS titles to help other libraries doing digitization work avoid duplicating each other's efforts. Libraries should also have a thoughtful takedown process for situations where a rights holder comes forward and requests that the institution take a document offline. This research is not just aimed at librarians and archivists–it can also prove valuable for university general counsels, who frequently lack experience and expertise in copyright. Their approach to copyright law is "let's just not get sued," said Hansen. "They haven't had someone explain to them the very low level of risk that is involved here." Indeed, in a search of all U.S. federal trial court and state court cases filed in the last five years, Hansen found only 13 copyright infringement lawsuits involving a defendant with a variation of "library" or "archives" in its name.

MINIMIZING MISCONCEPTIONS

The report "tries to minimize misperceptions about risk levels" of working with orphan works, according to Hansen, which may have historically caused libraries to forgo the productive use of such materials. In the course of his conversations with librarians, he found very few that reported negative experiences after digitizing orphan works. Some rights holders even come out of the woodwork and thank libraries for finding and digitizing what they thought were "lost" works. Where there has commonly been negative feedback it has been based on privacy issues, not copyright. Another common misconception about orphan works, according to Sims, is that "many folks in the library community think that there is legislation about orphan works." To the contrary, there are no set rules about orphan works, no official legal definition of an orphan work, and no special protection for orphan works. In this uncertain environment, she explains, well-meaning librarians may "move ahead with just enough knowledge to trip themselves up in the future."

NO MAGIC BULLET

As Peter Hirtle, Research Fellow at the Berkman Center for Internet and Society at Harvard University, described it, "there is no magic bullet" and no way to declare with complete certainty that an orphan work can be put online risk-free. Because of this, Hirtle praised the Harvard report's emphasis on "risk management." The "possible defenses combined with approaches to risk management might be enough to convince some hesitant general counsels and libraries around the country" to make more orphan works digitally accessible, he said. As information professionals, librarians are in the best position to deal with the orphan works issue, explained Courtney. "If there is anyone who is going to be able to find documentation about rights holders, it would be us," he said. In addition, copyright and other laws have a great deal of protections built in to protect libraries, including limits on statutory damages where a library makes use of a work that they believe in "good faith" is an orphan. Courtney described these as "library superpowers" for opening up access. "I think ownership of copyright issues should reside in libraries," he said. Since its August publication date through early October 2016, users downloaded the report 1,738 times. The Harvard project anticipates that librarians, archivists, and the attorneys who work alongside them will continue to discuss the use of orphan works and educate themselves about their options for digitization. The Harvard orphan works report should lead to "experimentation" as organizations test out what strategies work best for their needs, Hansen said. In addition, Courtney noted that an increased amount of digitization and experimentation could spark new areas of scholarship and new legal protections for the use of orphan works.

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