

Digitization of Orphan Works expands access in U.S. - Is Canada far behind?

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Recent announcements from leading universities in the United States [Cornell, Duke, University of Michigan, University of Florida] as well as press reports [here and here] indicate that several large academic libraries are stepping up their efforts to utilize fair-use to make digital versions of orphan works available to their patrons. In the wake of the failed Google-Books settlement, these forward-looking libraries are taking matters into their own hands to expand digital access to their collections. At a time when major Canadian universities are considering how to move beyond their former reliance with Access Copyright, these uses of orphan works should be seriously considered as well.

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UPDATE: On September 12th, the Authors Guild, other writers groups and several individual authors filed a suit in a New York Federal District Court against the HathiTrust, the University of Michigan and other universities for copyright infringement. The Authors Guild press release is here, the complaint is here. In addition to seeking an injunction, the plaintiffs are asking the court to impound the offending digital copies in question.

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Further analysis to follow. . . Â

Orphan works is a term generally applied to works that are still under copyright, but whose owners cannot be ascertained or located. In the U.S. several Universities have been working together to identify orphan works which are in the collection of the Hathi Trust Digital Library in order to justify making these holdings more accessible. The Hathi Trust describes itself as "a partnership of major research institutions and libraries working to ensure that the cultural record is preserved and accessible long into the future."

While its list of members is almost entirely based in the U.S., they state that they are open to institutions worldwide. While the rules for getting permission to use orphan works is simpler in the U.S. than in Canada, there appears no reason why resort could not be made to fair-use (in the U.S.) and fair-dealing (in Canada) to justify the use of these works in appropriate circumstances.

In Canada, section 77 of the Copyright Act provides a mechanism for potential users to get a special license from the Copyright Board to use orphan works. But it has been criticized as unduly complex and burdensome.

As the Canadian Federation for the Humanities and Social Sciences stated in its 2009 copyright consultation submission : "Going to the Copyright Board for clearance to use materials whose author or owner cannot be contacted is a cumbersome and time-consuming process. A better system would allow free use should the user make a good-faith effort to locate the owner, and contain default prices for permission should that owner come forward in the future." (p. 3) CAUT explained the problem like this: "Determining copyright ownership of recently purchased books or music is not difficult, as the necessary information is typically displayed with prominence. However, on other material, including older publications, photographs and archival material, the author's name may not be clearly marked. Even if the name is apparent, it may be difficult to locate the owner as the copyright in the work may have been transferred several times."

Difficulty in tracing ownership can leave publishers, authors, students, teachers and researchers in the difficult situation of being unable to use needed works because the owner cannot be located and the necessary permission secured. In Canada, the Copyright Board manages a cumbersome clearance system for such "orphan works." In order to qualify for a license, one must first make a "reasonable effort" to locate the rights owner, after which one may apply to the Board for a license. In some cases, royalties may be assessed, and may be payable to a collective society with no relationship to the owner. Copyright Act and Academic Staff (pp 7-8).

Noting that the U.S. and Europe do not have such a burdensome system in place, CAUT recommended that Canada "investigate a less cumbersome process to better facilitate the use, preservation and digitization of older works which are still in copyright but where the owners are not locatable." Unfortunately, to date there has been no such efforts instituted by the government as part of the overall copyright revision process.

But regardless of the status of such permissions or licences, it is important to recognize the potential of fair-use and fair-dealing to fill in the gaps and expand access. In the wake of the failure of the Google book-settlement, several forward looking U.S. universities are doing just that and they are stepping in to fill the void.

At the University of Michigan, for example, Copyright Office of the university library has established an Orphan Works Project as part of its overall Copyright Review Management System (CRMS). The processes developed in CRMS was previously used to identify works in the public domain-- the university claims that as of August 2011 over 155,000 volumes have been reviewed for copyright status and approximately 54% have been determined to be in the public domain and are now available as full text in the Hathi Trust Digital Library. The Orphan Works Project will take the next

step and revisit the 46% of works still under copyright to determine their possible addition to the digital collection under fair-use.

There are reasons to believe that this strategy could be even more effective in Canada. For one thing, the copyright term is life plus fifty years in contrast with the longer life plus seventy term in the U.S. But copyright term calculations in the U.S. are even more complex because different rules apply depending on various factors including when the work was first published and whether copyrights were renewed in earlier years. (for a helpful roadmap to help untangle these complexities, see Lolly Gasaway's "When U.S. Works Pass into the Public Domain.")

At a baseline, the percentage of public domain works should be higher in a comparable Canadian collection because of the 20 year difference and the lack of additional complexities. And as for the further analysis of whether the utilization of orphan works still under copyright could be characterized as fair dealing, the Canadian case law on fair dealing is arguably friendlier to such a project. Even though Canadian fair dealing is still restricted to the categories of research, private study, criticism, review or news-reporting, meeting these criteria should not be too much of an issue with respect to enhancing access to the holdings of a research library. And even though the Copyright Act itself provides a mechanism for obtaining a license, the availability of a license does not preclude resort to fair dealing.

At a time when most Canadian universities have already opted out of the Access Copyright interim tariff (of the CARL affiliated universities, only Simon Fraser, Toronto, Western, Ottawa, Ryerson, McMaster and Brock have not announced they are opting out) and are grappling with new ways to make works accessible in a post-Access Copyright environment, the more proactive utilization of fair dealing rights with respect to the vast holdings of orphan works in Canadian library collections should be seriously investigated.

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