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It has come to my attention that the copyright office is soliciting input on the issue of "orphan works," i.e., copyrighted works whose owners are difficult or even impossible to locate. I am a medical illustrator and a university professor. As such, I am both a creator of intellectual property and one who uses others' intellectual property in my teaching and research. I would like to comment on the issue of orphan works from both perspectives. My comments will focus on artistic works and illustrations since this is my area of expertise, but I believe they apply to all copyrighted materials.

We live in a time when there is little respect for the concept of intellectual property. Modern technology has made it easier for individuals to steal copyrighted works with no compensation to their rightful owners. Software piracy, cable TV theft, and Internet downloads (e.g., Napster) are but a few examples. Our society seems to feel that if something is "out there" on the Internet, it is free for the taking. Even my own students are reluctant to accept the idea that sharing software and music is wrong - not until I explain to them that their future survival as freelance illustrators depends upon strong copyright protection of creative works.

Meanwhile, the "Free Culture" and "Alternative Copyright" movements suggest that open access to information is more important than protecting the rights of creators. This notion is further advanced by BioMed Central and other so-called "Open Access" publishers who insist that all scholarship be available free of charge. While the notion of free access to information is very romantic, it denies the reality that many creators make their living by controlling the distribution of their intellectual property. Researchers who publish in open access journals earn their income from academic appointments and research grants. Freelance illustrators and writers do not.

Defining certain works as "orphaned" will further undermine the value of intellectual property, particularly in the eyes of the general public. Since many people already fail to grasp the concept of intellectual property, they will view this law as condoning the theft of copyrighted material. If it's not immediately apparent that someone owns the copyright (e.g., by affixing a copyright notice), the average person will feel little obligation to track down the rightful owner before using the work.

Permitting the use of orphan works would have a particularly devastating effect on individual creators such as writers and artists. Big publishing companies can ensure that their works are never orphaned. Through unique identifiers such as ISBN and ISSN numbers, it will always be possible to trace a published work back to its owner. The Copyright Clearance Center, established by the publishing industry, helps ensure that their member companies are compensated for every use or reproduction. However, it is often difficult to identify the contributors to a collective work, even though the individual contributors may retain the rights to their work. Publishers rarely allow an author or artist to post a copyright notice and they remove signatures from artwork as a matter of policy. Furthermore, copyrighted works are often posted on the Internet without permission and with no attribution to the creator. Illustrations, in particular, are often scanned and separated from

the context in which they were originally published. Thus, through no fault of his own, an artist's work may be published with no way of tracing it back to its rightful owner.

Even the Copyright Clearance Center insists that it is not possible to track the use of illustrations which appear in published work. Thus, they refuse to pay compensation to artists, even though those artists often retain all rights - including reprographic rights - to their work. If the CCC is correct that it's impossible to track ownership of illustrations, then virtually all published artwork may be designated as orphaned.

I happen to disagree with the CCC on this point. I believe it is possible to track usage of illustrations and other artistic work, as has been done by several European licensing societies for many years. In fact, this suggests a much more equitable solution to the problem of orphan works. Rather than designating works as orphaned and putting them "up for grabs," we should strive to create a better system for tracing copyrighted works to their rightful owners. For example, we should support the efforts of the Illustrators Partnership of America (IPA) which seeks to establish a clearinghouse for published artwork, similar to the CCC. They have already proposed a model of unique identifiers which would make published artwork traceable to its source.

(Incidentally, this would have a dual benefit. The IPA could also collect reprographic royalties on illustrations and return them to their rightful owners. As I mentioned above, many illustrators retain all rights - including reprographic rights - to their artwork. Currently, these royalties are collected by the CCC and returned to publishers, rather than to the artists to whom they belong.)

This brings me to my second point. As an educator and researcher, I often use the work of others in my teaching and writing. If I wish to reproduce another person's work, I must first obtain their permission and sometimes pay a re-use fee. I have rarely had trouble locating the rightful owner of a work to obtain this permission. However, I recently had an experience that I believe bears on this issue. Specifically, this addresses one of the issues raised on your website regarding the Identification and Designation of orphan works.

I recently wrote an article on the history of molecular illustration. Among other things, the article discusses the work of Roger Hayward, who illustrated several books by famed chemist Linus Pauling. I wished to reproduce some of Hayward's artwork in my article. I contacted the publisher of Pauling's books, W. H. Freeman, and discovered that Hayward had wisely retained the rights to all of his artwork. However, the publisher had no information on his whereabouts. By searching the Internet, I discovered that he had died in 1979. I also discovered that several other individuals were trying to locate the Hayward estate in order to obtain permission to reprint some of his artwork. For example, the Rights and Permissions Editor at *Sky and Telescope* magazine wanted to reprint some of his illustrations from *Scientific American*. The Oregon State University Library posted many of Hayward's drawings on the Internet as part of an online exhibit about Linus Pauling. Neither organization had been able to track down Hayward's heirs to obtain permission.

At this point I had a choice. I could accept that these other institutions had made a reasonable attempt to locate the Hayward estate and I could declare the works as orphaned. I could choose to reprint the work and take my chances that I wouldn't be sued for infringement. If an orphan works law was in place, I could probably do so legally. However, as an artist myself, I strongly value the principles of copyright protection and I felt an obligation to pursue a different course. I chose to continue my search.

A quick Internet search indicated that Mr. Hayward died in Merced County, California. I visited the website of the Merced County Recorder's Office and quickly located documents showing that Hayward left his entire estate to his wife, Elizabeth. Further searching revealed that she died in 1983 and I found other documents in which she bequeathed her estate to the couple's nieces and nephews. After a few more hours of searching the Internet, I located two of these relatives and even had an email address. I emailed Hayward's niece and within a few days had received written permission to use his work. I passed this information along to the magazine editor and the OSU librarian, so now everyone can obtain the proper permissions. Hopefully OSU will make this information available to anyone who inquires about Hayward's work in the future. What was once an orphan work is now re-united with its rightful owners.

This story reveals an important fact. We all have different ideas about what constitutes a "reasonable" effort when it comes to locating the rightful owners of intellectual property. Even a Rights and Permissions editor at a national magazine and a librarian at an academic institution had failed to locate the Hayward estate. Yet I was able to do so in a matter of hours. This is not a reflection of my searching skill - the tools I used are available to anyone with an Internet connection. It is more indicative of the value I place on intellectual property and how much effort I was willing to invest to uphold the principles of copyright law. Unfortunately, as I stated above, the average person cares little about protecting intellectual property rights. Therefore, they will be quick to declare works as orphaned. It will be extremely difficult - if not impossible - to define what constitutes a reasonable effort in locating the rightful owners of intellectual property.

I should also point out that the Hayward family was well aware that they owned the rights to their uncle's work. They had no intention of abandoning his work or letting it slip into the public domain. Yet they were victims of a system that made it very difficult for potential users to locate them. This further underscores the need for a system to match a published work with its rightful owner.

It is critical that we retain strong copyright laws in this country. Copyright protection ensures that creators control the distribution of their work and, therefore, have an incentive to create. This is far more important than any inconvenience that may result because it is difficult to track down copyright owners. Rather than letting orphan works lapse into the public domain, we should instead focus our efforts on assuring that no work ever becomes an orphan. Developing a system of numerical identifiers for all written and visual works, similar to the ISBN or ISSN number, as well as licensing societies such as the IPA, to complement the existing CCC, will guarantee that potential users will always be able to track down the rightful owners of a creative work.

Respectfully submitted,

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