

How Fair Use Can Help Solve the Orphan Works Problem

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Many works that libraries, archives, and historical societies, among others, would like to digitize and make available online are "orphan works," that is, works for which the copyright holder either is unknown or cannot be located after a diligent search. Encountering orphan works can be stymieing because the lack of an owner means that there is no way to obtain permission to use them. While Congress nearly passed legislation to deal with the orphan works problem in 2008, its ultimate failure to enact this bill has left those who possess orphan works in limbo. Because of the risk of high statutory damages if an owner later shows up, nonprofit libraries and similar institutions have been reluctant to digitize these works and offer them to the public. The orphan status of these works thus creates a barrier to access to important cultural and historical information despite recent improvements in digitization technologies that could bring these works out of obscurity and make them much more widely useful. As such, there is international consensus that the "orphan works problem" must be addressed.

This Article argues that legislation is not necessary to enable some uses of orphan works by nonprofit libraries and archives. Instead, the fair use doctrine in United States copyright law provides a partial solution. The Article addresses three basic questions: first, does fair use provide a viable basis on which libraries might digitize orphans? Second, does fair use provide a viable basis on which to make these orphans available to patrons or the public? Third, more generally, can or should fair use do any additional work in infringement analysis where the copyrighted work in question is an orphan?

The answer to each of these questions is yes. Nonprofit libraries and archives should be able to rely on fair use in order to digitize orphan works in their collections and to make those works available. In addition, the orphan status of works has special relevance to the fair use analysis. First, the oft-ignored second factor that courts consider in fair use cases (the "nature" of the work) should be given much greater weight in orphan works cases than it is traditionally given. Inquiring into a work's "orphan" nature, and into other specific attributes of the work, gives useful guidance as to whether incentives to create would be harmed by digitizing the work and making it accessible. Second, the fourth fair use factor (harm to the copyright holder's market) clearly favors the use of orphan works, as there is no market exploitation of the work, and as one party to the putative transaction is simply missing, representing a complete market failure. Finally, regardless of a work's orphan status, many uses by libraries and archives will fit squarely under the umbrella of uses favored by the first fair use factor (the "purpose of the use"), and their digitization of entire works for preservation and access should often be justified under the third fair use factor. As such, fair use represents an important, and for too long unsung, part of the solution to the orphan works problem.