Chapter 6: Orphan Works

In the Drake University Archives, a packet was found with interesting hand-written observations on the 1976 political caucus. Included were some sketches of candidates and a few Polaroid photographs, some of which included then-candidate Jimmy Carter. No name was found on the packet or its paper. Are these materials protected by copyright? Can a journalist use them in an online article? Can the Archive allow researchers to view them, since their ownership is unclear?

By the end of this chapter, you should be able to answer:

1) What is an “Orphan Work”?
2) Should I use an Orphan Work?
3) What are some potential solutions for problems created by Orphan Works?

An orphan work is a copyrighted work made after 1923 whose owner cannot be found after a reasonable amount of work. Orphan works can be written, music, art, photos – anything that is copyrightable. Most are from the 1923 to the 1960s. “Orphan works” is a phrase used to describe items whose owner is difficult to locate. They can be photographs, literary, musical, etc. They may be very old (1925) or very recent (last week). Orphan status may or may not last forever for a given work. It lasts until the copyright owner is found. The status of a work being “orphaned” is not official or set by law. “Orphan works” is only a phrase used to describe items whose owner is difficult to locate.

Orphan works present problems for people who would like to use them. Getting permission is impossible without the copyright owner (who might or might not be the creator), and most publishers will not re-publish a work without permission. If a person is considering self-publication of a new work that uses the orphan work in some way, then they are assuming the risk of the owner coming forward to claim ownership.

If the owner does come to claim their rights, they may file a lawsuit and claim as high a fee as the law allows (Ch. X). Or, they may want a token fee for the use of their material. They
may only want to be credited as a co-author – which they should be anyway, to avoid plagiarism. The newly publishing creator should be able to demonstrate what steps they have taken to find the original author. If these steps were thorough, the author may be satisfied that the situation is not careless infringement. Meeting the original author after publishing a work that includes an orphan work may or may not be a financial disaster.

There are millions, if not billions, of orphan works in the United States. They are in storage units, attics, basements, archives, libraries, and museums. They are not labeled as “orphan works” unless somebody has already worked with them. And they do not stay orphaned – even without publication, an author/creator may become easier to find, or may publish a document listing everything they have written or created. As awareness of this issue increases, more author/creators are making themselves more findable. In some cases, the author or creator has already died. The copyright then passes to their children or grandchildren. Sometimes descendants will publish their status as copyright holders to certain productions.

We can assume that many orphan works are not worth much, but many others could be used in many creative ways. You may find a journal written by a friend of your father’s that includes an incident that appeals to you. You re-write the incident into something modern and slightly different. Do you have to worry about getting permission? The author’s name is very common, making tracking him very difficult. But, the incident is a small portion of a much larger work; you are transforming it into a new incident; and it is not likely to affect the sales of the journal itself (which is not on the market). If the first author is credited with writing down the details of the original incident, this use seems very much like a Fair Use.

There are many artists, musicians, and other creative people who could bring these orphaned works to life again – if they could be reasonably assured that re-using them is “safe” from copyright infringement prosecution.

Some libraries, such as the Library of Congress, have decided to make their large collections of orphaned works available to the public as digital images. The Library of Congress copyright policy, briefly summarized, states that they do not own rights in their collections, that they provide the information when they have it, and any researcher that
wishes to use an item from their collection must make their own determination of the copyright status and whether to seek permission for use. Following is part of the statement:

“All About Copyright and the Collections”

Whenever possible, the Library of Congress provides factual information about copyright owners and related matters in the catalog records, finding aids and other texts that accompany collections. As a publicly supported institution, we generally do not own the rights to materials in our collections. We do not charge permission fees for using materials, and generally do not grant or deny permission to publish or otherwise distribute them.

However, permissions and fees may be required from the individual copyright holder. You should determine for yourself whether or not an item is protected by copyright or in the public domain, and then satisfy any copyright or use restrictions when publishing or distributing materials from our collections. Transmission or reproduction of protected items beyond what is allowed by fair use or other exemptions requires written permission from the copyright holder.

https://www.loc.gov/legal/

Legislation:

The U.S. Congress tried to pass bills in 2006, 2007 and 2008 to clarify the status of orphan works and what types of searches were required before publishing an orphan work without copyright clearance. The bills were not written clearly enough to satisfy all interested parties, and they did not pass. (American Library Association)

Glossary:

**Orphan Works:** Works made after 1923 for which the owner cannot be found after a reasonable amount of work. The owner may be found in the future. Using an orphan work is precarious (unless it can be claimed as Fair Use) because permission cannot be confirmed. The “Orphan Work” status can be attributed to any format – writing, painting, music, etc.
**Scenarios about Orphan Works:**

Q: I found a fantastic drawing in our collection of family records, but no one in my family knows who drew it or when. I would like to display it in an art gallery (it’s that good!) but both galleries I have talked to would not display it without knowing who the artist is and whether or not copyright clearance is required. I assumed that as a descendant of the artist, I am a current copyright owner. Is that true?

Q: In our attic, I found two journals full of notes from a college student in the 1960s. My father said they were written by a friend of his. He’s lost track of the friend and the friend had a really common name, so I doubt I’ll ever find him. I’d like to write a one-act play based on one of the events in the journals. It is different from anything else I’ve read or heard about the 1960s and I think it would be a good production. Is it OK to use this?

Q: I’ve found a photograph that looks to be from the early 1940s. There is nothing written on it, front or back. It was in a file in my school’s archives, labeled simply “Events”. I would like to use the photograph in a book I’ve got a contract to write, but the publisher says I must get copyright clearance for it! How should I proceed?

Q: Can an orphan work ever be used for any purpose? Consider what you have learned about copyright law and make an informed response.
Q: Why is it difficult to get legislation passed about "Orphan works"? (There can be several different answers to this question. One or two will be enough).

Sources:


Library of Congress. “About Copyright and the Collections” https://www.loc.gov/legal/