

What Can Fair Use Do?

Libraries and the Mass Digitization of Orphan Works

Orphan Works and Mass Digitization:
Obstacles and Opportunities

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Fair use and orphan works

- The fair use doctrine in U.S. copyright law is a straightforward, if partial, potential solution to fears of using orphan works
- Some uses of orphan works would be fair, regardless of whether the work is an orphan or not
 - Purpose of the use is transformative, etc.
 - Analysis would proceed similarly whether or not an owner of the work is locatable
- U.S. legislative efforts regarding orphans focused on infringing uses--those that extend beyond fair use
- Not a great deal of attention to the parameters so far
 - ARL's resource packet, whitepaper

Fair use and orphan works

Two questions:

1. Is fair use a viable basis for libraries to digitize orphans and make them available to patrons?
1. More generally, can or should fair use do any additional work where the copyrighted work in question is an orphan, specifically?

Fair Use

- 17 U.S.C. 107

[F]air use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. ...the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

- Fair use operates as an “equitable rule of reason”
- Factors are interrelated, and must be read as such. *Campbell*

The “nature” of an orphan work

- Why begin here?
- The second fair use factor is historically underused and tends not to drive fair use decisions
- But: the second factor should play an important role in orphan works cases
- Two aspects of a work’s nature are traditionally considered (Beebe):
 - Is more factual, or more creative?
 - Is it published, or unpublished?
- Courts also, however, periodically consider the *availability* of the work under this factor

The “nature” of an orphan work

- S. Rep. No 93-983, 117-118:

“If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case...”

- This idea is also reflected in a handful of cases: *Williams & Wilkins*, *Hofheinz*, *Maxtone-Graham*
 - All involved works once on the market, but no longer available
 - Different result when the owner withheld the work purposely: *Letterese v. Church of Scientology*
- Orphans are unavailable, not because an owner has withdrawn them, but because no owner is exploiting them

The “nature” of an orphan work

- Beyond the important issue of availability, a range of aspects of an orphan work’s nature are important to the analysis
- Guidance from Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor* (2008)
 - The nature of the work is linked to both the first factor (purpose of the use*) and the fourth factor (the market for the work):
 - Some features of a work’s “nature” can illuminate the incentive to create the work in the first place
 - Gives guidance regarding whether allowing a use would damage incentives
 - Example: Model Dairy Company example from Crews, grocery lists or academic journal articles (non-monetary incentives to create) vs. a Hollywood film
 - Inquiring into a work’s “nature” also (and relatedly) illuminates the question of whether a follow-on use will invade appropriately identified markets under the fourth factor
- E.g.: works in research libraries were often created for scholarly purposes, to advance and share knowledge, build reputation, and advance in academic careers. Often not for money.
- E.g.: works in special collections may have been created for a variety of reasons

*Here, as compared to the creator’s purpose in creating the work

The effect on the “market” for an orphan

- The most obvious place to begin, if not with the first factor...
- A true orphan represents a complete market failure
 - Wendy Gordon: test for fair use as market failure
 - Orphans meet even the original version of this test
- For orphans, where no locatable owner exists to collect them, the costs of a licensing system would essentially be misallocated to highly inefficient ends
 - No amount of transaction costs will bring the putative licensee and the missing owner together
 - The licensing system would create additional administrative costs
 - The licensing fee, itself, would be likely misallocated into service of the other costs, as owners are very unlikely to ever collect it
- This does mean that identifying orphans is important: where a reasonable search for the owner turns up no one, a lack of viable market can be expected to exist

The effect on the “market” for an orphan

- It is particularly important to avoid building licensing systems where they are both inefficient and could contribute to the perception of an existing market—which would only be a “ghost market”—undermining fair use
- Justice Stevens said it best in *Sony v. Universal*:

“...a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create. [This] would merely inhibit access to ideas without any countervailing benefit...*some* meaningful likelihood of harm [must] exist.” (emphasis in original)

The purpose of the use

- This factor will vary by the user
- Library digitization projects are likely to fulfill a wide variety of socially beneficial purposes, many already recognized in 107 and caselaw. For example:
 - Teaching, scholarship, research, criticism, comment
 - Supported in the preamble
 - Most well-supported in caselaw
 - Some divergence around education and research
 - “Non-consumptive” tools for research
 - “Search” or “Index” uses (*Kelly, Perfect 10*)
 - Preservation of historical, scholarly, cultural works
 - Access to historical, scholarly, cultural works
- Libraries and other nonprofits support a variety of learning and access goals, for a wide variety of patrons

The amount and substantiality of the use

- Shorthand version often heard is that using the entire work weighs against fair use
- The modern trend in the caselaw is clear, however, that the amount of use must actually be considered in light of the purpose
 - The modern trend is to ask whether the taking is reasonable in light of the use
 - Use of whole works are justified in a variety of situations *Sony*, *Kelly*, *Perfect 10*
- Given libraries' likely purposes in digitizing orphan works, this factor should often be considered neutral
 - To meet educational, research, and scholarly purposes, entire works will often be necessary
 - Quality and accuracy
 - Preservation and access

Other considerations

A variety of additional practices might be considered:

- Demonstrating good faith through record-keeping of reasonable searches for owners
- Offering only works the library holds in its collection
- Offering works only within the library's patron community, or within a broader research community, but not to the public
- Offering an “opt out” for a period of time, as the UMich/HathiTrust program does
- “Taking down” or licensing a work if an owner appears and a licensing market develops

Limitation to all of this: U.S.-centric

Thank you

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