

THE ORPHAN WORKS PROBLEM

FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY
INSTITUTIONS

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<https://www.law.berkeley.edu/orphanworks.htm>

<http://www.law.berkeley.edu/librarycopyright.htm>

Report on Orphan Works

A Report of the Register of Copyrights · January 2006

Copyright

United States Copyright Office

Library of Congress
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20540-4000

<http://www.copyright.gov/orphan/>

I. Executive Summary

A. Introduction and Background

This Report addresses the issue of “orphan works,” a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.

Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner. Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

Thomas E. Watson Papers

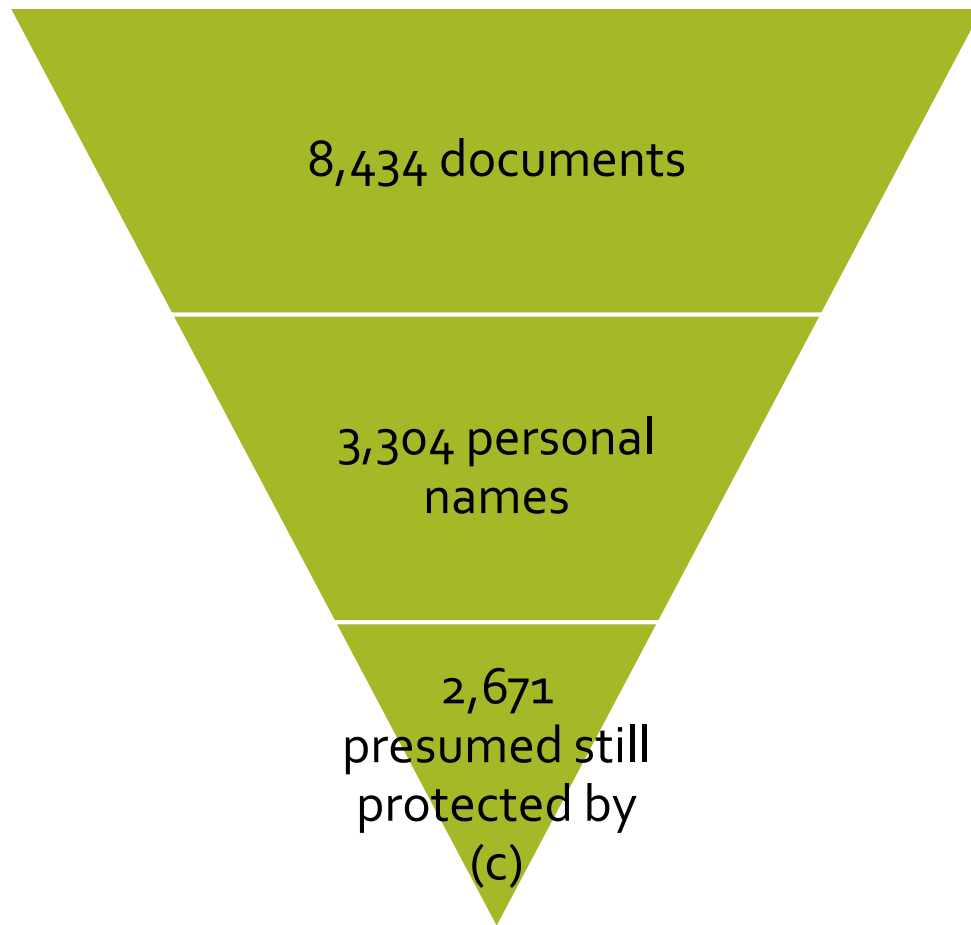
- drafts of books;
- articles;
- speeches, and other writings by himself and others;
- periodicals and pamphlets he edited and published;
- political materials;
- legal and financial papers;
- biographical information;
- diaries and scrapbooks;
- family pictures; and other materials



Maggie Dickson, *Due Diligence, Futile Effort: Copyright and Digitization of the Thomas E. Watson Papers*, 73 *American Archivist* 626 (2010),
<http://archivists.metapress.com/content/16rh811120280434/>

<http://www2.lib.unc.edu/dc/watson/>

Watson Correspondence Series (subset of the whole collection)



- 91 hours; **\$1,960**

- 20 hours per week for 4.5 months; nearly **\$6,000**

Effort to locate owners

- 450 hours total, over 9 months
- Investigations yielded current, dependable contact information for 4 authors
 - William Randolph Hearst, a prominent newspaper publisher
 - Miles Poindexter, a United States representative and senator from Washington state
 - Upton Sinclair
 - Hamlin Garland
- All but Hearst estate (which did not respond) granted permission

Non-Copyright Challenges: Thomas E. Watson Collection

- The Story of France
- Thomas Jefferson
- Napoleon: A Sketch of His Life, Character, Struggles, and Achievements
- The Life and Times of Thomas Jefferson
- Bethany: A Story of the Old South
- The 4th Degree oath of the Knights of Columbus : an un-American secret society bound to the Italian Pope by pledges of treason and murder
- Roman Catholics in America falsifying history and poisoning the minds of Protestant school children
- The Italian Pope's campaign against the constitutional rights of American citizens

Orphan Works Best Practices

- Concerns about liability limit library goals for digitizing and providing access
- concerns about orphan works may obscure uses that libraries could make under fair use or under other copyright limitations without reference to the orphan status of a work
- General uncertainty among librarians, archivists, and other collectors about how to engage in a diligent search for rightsholders, and when such a search is necessary
- Uncertainty among the community about the true risks of using potentially orphaned works.
- Concerns within the community about non-copyright related issues, such as respecting privacy, ethics of access

Report on Orphan Works Challenges for libraries, archives, and other memory institutions (January 2013),

http://www.cmsimpact.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf

Best Practices in Fair Use of Orphan Works for Libraries, Archives, and other Memory Institutions

- 10 half-day discussion groups, in nine U.S. cities
- More than 150 librarians, archivists, curators, and other custodians
- Documenting best practices that help guide and empower digitizing organizations that seek to make good faith efforts using orphan works
 - Identify when a search is desirable
 - For search should take
 - Role of ancillary considerations
 - Approaches for permission

Best Practices in Fair Use of Orphan Works for Libraries, Archives, and other Memory Institutions

- Fair use rationale:
 - Generally favored purpose and character of use
 - Nature of works
 - Limiting potential for market harm
- In practice
 - Memory institutions digitize collections
 - Whole process is important (acquisition, cataloging, specific rights clearance, additional curation, dialogue with public, etc.)

Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 Berkeley Tech. L.J. 1379 (2012), <http://ssrn.com/abstract=2089526>.

Addressing orphan works

- #1 Recognize importance of fair use as an orphan works solution

Continue development of community best practices for use of orphan works

“Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work.” (2006 Copyright Office Report on Orphan Works, p.1)

- Not all users are comfortable with fair use alone (e.g., commercial users, creators of derivative works). For those users, a limitation-on-remedy legislation might make sense*
- Address some of the root causes: formalities, lack of useful registry information

David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson, and Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 Columbia J. L & Arts 1 (2013), <http://ssrn.com/abstract=2323945>.