

Abandoned But Not Forgotten: A Proposal for Orphan Works Use in Archives

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Abstract

Under Canadian copyright law, archives and other cultural heritage institutions (CHIs) cannot legally share and distribute any orphan works in their collections. Orphan works are copyrighted materials whose copyright holders cannot be located or identified. To prove that a work is truly orphaned, the proposed user must demonstrate that the copyright holders could not be located after a diligent search. The burden of this rights clearance increases for CHIs that have large collections of orphan works. This paper reviews the current legal context for using orphan works in Canada, and the shortcomings. I propose a new system for orphan works rights clearance based on two parts. Firstly, formalizing the requirements for a diligent search to make them clear and objective. Secondly, creating a less stringent set of requirements specifically for use by CHIs, so that it is feasible for them to do diligent searches for large collections of materials. This paper also discusses and refutes multiple arguments against the proposed system.

Keywords: orphan works, copyright, archives, unlocatable works, Canada, cultural heritage institutions

Archives are a valuable cultural institution that preserve records as a form of cultural heritage. They collect records and artifacts for education, research, curiosity, and exploration. Society benefits the most from archives when they are able to share their materials as widely as possible, so that they may be used and enjoyed by members of the public. However, they do not always have copyright permissions to share these works freely. This is specifically an issue for materials whose copyrights are held by an unknown holder, known as orphan works. In this paper, I will discuss the current deficiencies in the Canadian Copyright Act with regards

to orphan works, and propose a solution to help archivists take full advantage of their materials without sacrificing extraordinary amounts of effort and resources.

Archives & Archivists

Since many of their holdings are still under copyright, archivists should be considered as users of copyright materials. During the acquisition process, donation agreements can be used to transfer the copyright of the donated records from the donor to the archive, but this is not universal. The donor may not be the original rightsholder, or may not have the authority to transfer the copyright. For example, consider someone who donates their collection of concert posters, or their correspondence with a dear friend who is now a famous politician; in both instances, the donor does not own the copyright, even if they own the physical records.

Copyrighted archival materials are becoming more common with time. The recent extension of Canada's copyright term to life plus 70 years means that nothing will be eligible to enter the public domain until 2043 (Pugh, 2023). With the changing nature of copyright laws, as well as the political and lobbying landscape, archivists should not be relying on their existing copyrighted materials to enter the public domain in a timely manner.

Digitizing records to create online collections are becoming increasingly popular in archives (Ahmed & Al-Salihi, 2019, p. 426). Digital collections democratize the archives by supporting patrons who would otherwise not be able to access them. Researchers do not always have the funds to travel to archives in different countries, or even different provinces, to view records that may be critical for their research. Digitization also allows records to become more accessible to those with disabilities. For example, it becomes easier to enlarge the text size, increase the contrast, or incorporate a screen reader into a digital collection without fundamentally damaging or altering any physical records. However, digitization also has its drawbacks. In order to create an online collection of paper records, the archives must make a digital copy, and then publish that copy online, where it can be freely accessed by the public. This requires the archive to have copyright permissions, which is not an easy task.

Orphan Works

Orphan works have many definitions globally. In general, they are copyrighted works that a person or group wants to reproduce, but that person or group cannot get permission because they are unable to locate the copyright owner after performing a diligent search (Ahmed & Al-Salihi, 2019, p. 420). The process of conducting a diligent search is also referred to as rights clearance (Ahmed & Al-Salihi, 2019, p. 425). In Canadian law, orphan works are commonly known as works whose owners cannot be located, or works with unlocatable owners (Copyright Board of Canada, n.d.).

Orphan works make up a non-insignificant portion of library and archival holdings. In 2009, the British Library estimated that up to 40% of the works in its collection were orphan works (Lu, 2012, p. 256). Also in 2009, a Google Senior Vice President estimated that up to 20% of all books published in Canada, the UK, the US, and Australia were or would become orphan works (Lu, 2012, p. 257).

In Canada, there are few ways to use an orphan works legally. The Copyright Board of Canada can grant users a license to use a published orphan work, but the user must prove they have done their utmost to locate the current rightsholder and have still been unsuccessful (Copyright Board of Canada, n.d.). Although Canada does not specifically define what constitutes a diligent search, the rights clearance process is extensive, and may involve consulting genealogical databases, social media sites, collective societies, other archives or libraries, existing orphan works databases, and open web searching, among other sources (Shaw, 2018, p. 55). Unfortunately, the Copyright Board will not grant licenses for any unpublished orphan works, or whose owners are known but cannot be contacted (Copyright Board of Canada, n.d.). While the advent of the internet has made it easier to identify and locate rightsholders, many are still unable to be contacted (Ahmed & Al-Salihi, 2019, p. 422).

How Orphan Works Impact Archives

Despite their critical role within society, many archives suffer from a lack of resources. This may manifest as inadequate staffing, minimal equipment, or low budgets. Some archives may be fortunate enough to have donors and other benefactors, but donated funds often have stipulations for how they may be spent. Donors may insist that their money be used to acquire new materials, which is more

exciting and less glamorous than supporting more staff or administrative projects. It suffices to say that archives, along with many cultural heritage institutions (CHIs) generally do not have excessive funds and manpower to spare. This poses a problem, because the process for getting copyright permissions for orphan works in Canada requires both.

In her 2010 report, Anna Vuopala discusses how the effort required of CHIs for the rights clearance process is complex and expensive (Vuopala, 2010, p. 5). It costed the British National Archive 2 years and £35 000 to perform rights clearances on 1100 old wills, but they were only able to locate less than half of the rightsholders (Vuopala, 2010, p. 5). An Austrian university library digitized 200 000 dissertations, but the high cost of rights clearance meant they were unable to post any of them online (Vuopala, 2010, p. 5). In that case, the cost for rights clearance would have been at least 20 times greater than the cost of digitization (Vuopala, 2010, p. 5). Rights clearance is also a slow process. In the Netherlands, a project to digitize 1000 handbooks was only able to clear the rights for 50 within five months (Vuopala, 2010, p. 5). Based on this pace, it would have taken 8 years to clear the entire collection, which was only for a single project (Vuopala, 2010, p. 5).

Orphan works can be risky for archives. Even if they are unable to locate the rightsholder, it is still possible for the rightsholder to find out about their unauthorized usage, and accuse the archive for copyright infringement. This often discourages archivists from publishing, disseminating, or digitizing orphan works (Brito & Dooling, 2005, p. 76). However, if archivists are reluctant to use orphan works, they may view the acquisition of those works as risky. Every acquisition requires time, money, and resources to appraise, arrange, and store. If archivists are unwilling to use orphan works due to the risk of lawsuit, they may also be unwilling to invest in the orphan works in the first place. If they are willing to take the risk, it may only be for collections they consider to be the most important. Collections that are considered to be less popular or less valuable may be rejected, which can prevent archives from having diverse holdings.

The Solution

In order to address the problems stated above, I propose a solution in two parts. Firstly, Canada must adopt clear guidelines on what constitutes a diligent search. This process should not be done in isolation; I suggest that Canada look to existing laws from the European Union as exemplars. Directive 2012/28/EU from the European Union outlines the basics of diligent searches, and many member states have adopted their own specific search guidelines. (Directive 2012/28/Eu of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012), (Information on Diligent Searches for Orphan Works in EU Member States and EEA Countries, 2018). For example, the UK has extremely detailed guidance for diligent searches, including an extensive open-ended list of sources that should be checked (Schroff et al., 2017, p. 290). Some consider them excessively prescriptive, because the list includes hundreds of sources to check, making it too rigorous for many CHIs to complete in full (Schroff et al., 2017, p. 290). Not every country is that specific. For example, Italy's guidelines are much looser, and although the list of suggested resources to consult is much smaller, it is slow to update and not considered to be comprehensive (Schroff et al., 2017, p. 290). It would be best to strike a balance between these two extremes. Canada should also consider prioritizing sources that are freely accessible online, as those are the easiest for CHIs to access and comprehensively search (Schroff et al., 2017, p. 290).

Once the guidance for diligent searches has been created, Canada should develop a two-tiered structure for requirements. Individuals and commercial organizations will be required to perform diligent searches that are analogous to the existing standards. There will be no substantial changes for them. For CHIs, the standard for a "diligent" search would be substantially reduced in order to make the process easier and quicker. If the rightsholders cannot be identified during this reduced search, then the Copyright Board would grant CHIs permission to use those works for the purposes of education, research, preservation of cultural works, or similar. This would apply to both published and unpublished works.

The new diligent search requirements would drastically reduce the cost of rights clearance for archives, allowing them to maximize their few resources. Rights clearance

of orphan works would no longer be as significant of a barrier to digitization and other dissemination projects. The extended permissions granted by the Copyright Board would reduce the risk of copyright infringement for archives and CHIs.

The new protocols would have a cascading effect. Projects that were previously considered too costly and onerous would become more viable. This is especially important for small community archives, which are more likely to be underfunded and understaffed (Froese-Stoddard, 2014, p. 54). The new guidance and requirements would simplify and clarify the search process, making it easier for volunteers, community members, or anyone with minimal experience with research and copyright to participate in archival work. Community archives often serve underrepresented groups, so simplifying and democratizing the process of digitizing collections would allow more community groups to share their voices, stories, and histories online.

While this paper primarily focuses on archives, similar benefits would be achieved by other cultural heritage institutions, including libraries and museums. In general, this new proposal would help CHIs to better carry out their mission of preserving and sharing cultural records for the good of society.

The Arguments Against

At first glance, this solution may appear controversial to some. Below, I have presented major arguments against this solution, and my counterarguments:

Exploiting the System

What prevents anyone from exploiting the new system to use any orphan work without restriction? It is important to remember that the proposed solution only applies to CHIs that want to use a work for the purposes of education, research, preservation of cultural works, or similar. It would not allow CHIs to use orphan works for commercial purposes (for example, using an orphan work for promotional use in an advertising campaign). CHIs will not be able to make money from orphan works, minimizing the incentive to exploit the new system. Similarly, the new protocols do not apply to individuals and corporations at all; they will still have to use the old rules.

Additionally, CHIs will still be required to document their search process, and provide evidence to the Copyright Board proving that a work is truly an orphan work.

Clarifying and detailing the requirements for diligent searches will make it easier to prove if applicants' searches are substandard. Penalties and fines would also be applied to applicants that were caught abusing the system, to discourage copycats.

Lost Income for Rightsholders

Won't the true rightsholders be losing out on income because they aren't being found through new search requirements? As mentioned previously, the existing diligent searches do not always find the rightsholders. This can happen when an author was never attributed to a work, or when it is not known who the author transferred their rights to, for example (Ahmed & Al-Salihi, 2019, p. 422). Even if the rightsholder has been identified, they may not always be contactable. This can happen if the rightsholder lives in a different country, or if their contact information that can be found for them is inaccurate or out of date (Ahmed & Al-Salihi, 2019, p. 422). In both cases, the rightsholder would not be getting any income anyway.

Currently, there is no way to reproduce an unpublished orphan work risk of penalty. The only solution is to not use the work until it enters the public domain. However, it is difficult to calculate the term of copyright without knowing who the author is and when they died. Additionally, no new works will be able to enter the public domain until at least 2043. The proposed solution would allow CHIs to reproduce unpublished works 20 years sooner than they otherwise could.

There will always be works with unlocatable owners. Archives should not have to spend prohibitive amounts of time, money, and resources trying to identify rightsholders that cannot reasonably be found. Additionally, it benefits the public interest to make works freely available to the public as soon as possible, so that they don't continue to depreciate and lose relevance (Patry, 2011, p. 133). Does it really benefit anyone to restrict access to a work with an unknown or unlocatable author, who therefore could not receive any compensation? In the new system, diligent searches will still be required. The proposed solution aims to reduce the amount of work needed for rights clearance while still balancing the rights of the copyright holders.

Formalizing the Process

Won't formalizing the diligent search process cause problems? People should be able to decide for themselves what resources they want to search through.

Formalizing the search process will be necessary for a two-tiered system, so that CHIs and others can easily tell if they are fulfilling the requirements of their tier. However, the new diligent search guidance will take into account some of the issues that other countries with formalized guidelines face. Specifically, it will prioritize resources and search methods in a way that minimizes costs and efforts, so that it meets the needs of the CHIs, while still being realistically achievable. It will prioritize sources that are freely accessible online: these are the easiest to search and access for all CHIs, regardless of their location (Schroff et al., 2017, p. 295). Prioritizing resources that are entirely digital will allow CHIs to do more comprehensive searches; they can be more confident that a work is truly orphaned if they know that they've searched through an entire resource, not just the parts of the resource that are available online (Schroff et al., 2017, p. 298). There will still be recommended resources that aren't free or digital, but there will be fewer of them, and they won't be emphasized as much. Even if the diligent search process isn't free, the costs will be dramatically reduced.

Despite the presented rebuttals to the above arguments, the presented solution is idealistic, and unlikely to become a reality in Canada. It is doubtful that the Federal Government would be able or willing to legislate such a reform, because it runs contrary to the recent change to Canadian copyright law of December 2022. That change extended the length of copyright terms by 20 years, to life plus 70 (Pugh, 2023). Longer copyright terms directly benefit the interests of large media conglomerates by further protecting the works they have so heavily invested in, so there would likely be major pushback against any attempt to relax copyright restrictions, even if only for select special cases of CHIs.

Conclusion

To conclude, this paper has proposed changes to Canadian copyright laws about works with unlocatable owners. The new system formalizing the procedures for conducting diligent searches, and creates a two-tiered system that reduces the barriers for CHIs that wish to use a work for educational, research, cultural preservation, or similar reasons. It will be easier for archives and other cultural heritage institutions to determine if a work is truly orphaned, and makes it possible for them to use published

and unpublished orphan works. Even though the proposed solution is unrealistic for the current times, it represents a possible goal for the future. Archivists must join forces and advocate for themselves on a wide variety of issues, including copyright and orphan works. When presented with the opportunity to create real change in the laws, it's critical for archivists to have a vision for what those new laws will be, and this system is one possible vision. Overall, I believe that this system will empower more archives, so that they have more choice over how to spend their few resources, and allow them to complete new projects that previously would have been out of reach.

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