



The IALLT Journal

A publication of the International Association for Language Learning Technology

LEGAL ISSUES & LLT



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ORPHAN WORKS & DUE DILIGENCE

In my last column¹ I brought up the question of “orphan works,” in connection with the Google Books case. An “orphan work” is one whose copyright owner is hard to find. This may seem a distant problem, relevant only to librarians and massive digitization projects. However, it touches language teachers every day, because we are always looking for authentic linguistic and cultural materials. Let’s consider a couple of “story problems.”

Example 1: Last year you put together a terrific powerpoint an hour before class, illustrated by photos of Latin America sourced from the Web. You remember vaguely that two or three of them came from sites with the name of the photographer and contact information, but others were from blogs or other secondhand sources with no attribution. Since this was for a class, you didn’t worry about it. You are now being asked to put together an online textbook, and some of those photos are so perfect you’d like to include them. You know you

¹ http://www.iallt.org/iallt_journal/legal_issues_llt

ought to get permission from the photographers, or else not use their work. But reconstructing the searches you did to find the photos last year is not working very well.

Example 2: Professor Brown retired 10 years ago; he died last year. His widow, Mary, moved to live with her married daughter in Atlanta. This week a new faculty member, Professor Marronesquieu, discovered a trove of audiotapes that Professor Brown recorded in the field 20 years ago. Professor Marronesquieu wants to digitize them and put them online for her students, but you (since you've been running the language labs for 25 years) know that Professor Brown was really picky about who could use those tapes. You don't have an address or email for Mary Brown, his heir, to get her permission for Professor Marronesquieu's project.

If a work is likely to be under copyright, but there is no easy way to contact the copyright owner, then the would-be user has no way to get permission for the use. The U.S. Copyright office perceives this uncertainty as having a *chilling effect* on the use of orphan works. In a 2006 report, it noted that

- The orphan works problem is real.
- The orphan works problem is elusive to quantify and describe comprehensively.
- Some orphan works situations may be addressed by existing copyright law, but many are not.
- Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.²

Since then, several bills have been proposed in the House and Senate, but none have become law. The Copyright Office continues to collect opinions and hold roundtables on the subject, most recently this past March. The history of its activities can be found at <http://www.copyright.gov/orphan/>.

WHAT IS THE ORPHAN WORKS PROBLEM?

Remember that just about³ *every image of contemporary life made during the past 90 years* is legally under copyright: advertisements, family photographs, travel slides, newspaper accounts, audio or film recordings, student papers.

² <http://www.copyright.gov/docs/regstat030806.html>

³ The exceptions (in American but not international law) are works copyrighted in the US before 1963 whose copyright was never renewed.

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Registration with the U.S. Copyright office, or some other registry, is not necessary to assert copyright. Some of these works may have complex intellectual property situations, e.g. photographs or recordings of private individuals who did not sign a release, or work that belongs to a company that commissioned it. A search term on the web may turn up a miscellany of such sources. Some may be tagged with the creator's identification, or even information stipulating terms of use (a creative commons license or a request to contact the copyright holder). But many have very little information of this sort—and many seem to be ephemeral works, whose owner is unlikely to feel proprietary about them after the first publication (e.g. photographs of consumer goods in catalogues or advertisements).

If the use is clearly “fair use” according to the four factors (a *small portion* of a work with a *high factual content*, used for *non-profit educational* or critical purposes, and without *hurting the market* for the original),⁴ then it's enough just to give credit to the original owner/author without obtaining permission. If you are using the works in the classroom, you don't have to worry about the amount or type of content.

But—what if the use is not so clearly “fair”? It might be a case where you WOULD ask permission, or even negotiate payment, if you could do so easily. If the elusive copyright holder finds out about the use, though, you might be subject to a lawsuit involving court costs and even damages, as well as an outright refusal of permission (making the textbook worthless in its present condition). This very real fear would probably discourage you from using the best materials for your purpose: the “chilling effect.”

The problem of orphan works has always lurked for librarians or collectors, especially with respect to rare or fragile copies of works which ought to be preserved. For example, a film or audio recording on a deteriorating or obsolete medium needs to be copied, with or without the copyright holder's permission.⁵ The “orphan” concept is also relevant to any project of massive, indiscriminate digitization, like Google Books or HathiTrust, as I noted in my last column.

On the side of the copyright holders, artists and photographers are the group that is most upset about any attempt to legalize the use of orphan works; their

⁴ The parenthesis gives an extreme case of fair use, but it does not define fair use. The factors can be balanced so that a larger amount of the older work may be used, or profit may be made, if the other factors work in favor of fair use.

⁵ Libraries have special permissions to do this, but with strong restrictions on what they can do with the copies.

works are hardest to tag with ownership information. The situation grows worse all the time: internet publication amounts to an invitation to re-use illustrations without paying royalties and without even acknowledging the source (especially of photographs).

The best compromise seems to involve establishing a registry (or group of registries) giving extra protection to copyright holders of images. This needs to be free of charge to be effective. The law would then offer less protection to unregistered images which had come unmoored from copyright holder information. We are not there yet, though.

I will return to my two examples. The following is how I would advise handling these cases; others might have other opinions.

(1) You, the textbook author, can't use the photos without permission; this is a commercial venture and the photographer has the right to know about it. The time for "due diligence" in finding the copyright holders was during that flurried moment when you were downloading those perfect photographs last year. You can try to find them now, but if you don't, you can't use the photos.

(2) Try one more time to locate one of Professor Brown's heirs. (If only his name was Marronesquieu...!) If they can't be located, you have satisfied "due diligence," but it is still a good idea to limit the use of the audio material. Ask Professor Marronesquieu to pick out only the most important recordings to be digitized and post them in a password-protected system. The links should include attribution to Professor Brown and a note that they are only for use in this extension of the classroom provided by the system. To be more conservative, you could ensure that students can access each recording only during the time that it is assigned.

Here are some common-sense guidelines for ensuring that there are fewer orphans on the internet and in your class materials:

- Keep a log of where you found online (or hard) materials you want to use, and the copyright holders, and any other information you have about how they may be used. Open the log *before* you start searching for useful images! Note the sources on the slide or webpage—a good model for

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your students, who should be aware of the need for attribution of source material.

- If you found the item online without a useful attribution, try searching again and see if you can locate the author's original version.
- When you or your students post materials online which others might want to "borrow", include a Creative Commons license⁶ specifying how you want them used.

ABOUT THE AUTHOR

Judy Shoaf has a Ph.D. in French and Medieval Literature from Cornell. She has directed the Language Learning Center at the University of Florida since 1993. She maintains a website on copyright law & educational media that can be accessed at <http://www.clas.ufl.edu/lc/Copyright>.

ABOUT THE COLUMN

Legal Issues & LLT is a column dedicated to examination of the legal considerations of copyright, fair use and ownership within the context of language teaching and learning.

⁶ <http://creativecommons.org/> --these licenses offer legal protection and can help ensure that others do not copy the materials without crediting the source.