

Orphan Works and the Global Interplay of Democracy, Copyright, and Access

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Egalitarian access to information is a core ideal of a democratic society. Recognizing the fundamental right to participate in the ongoing cultural, social, and political dialogue, the framers of the U.S. Constitution ensured this access by providing that “Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Art. 1, Sec. 8, Cl. 8, hereinafter the “copyright clause”). This notion of egalitarian access to information is crucially important because access facilitates the exchange of ideas through an ongoing dialogue that enables democracy itself (Herrington, 2011).

As both users and creators of copyrighted materials, technical communicators experience this importance of access to information, copyrighted or otherwise, in their day-to-day activities. On the one hand, technical communicators in academia use this access to copyrighted works to comment on and critique various communicative structures. On the other hand, technical communicators working in industry access these materials in order to create new communication products (e.g., user manuals and online help systems) used by a range of clients or consumers. In both cases, technical communicators must obtain the appropriate permissions to use copyrighted works to create new materials should the intended uses exceed the allowable exceptions to or limitations of copyright. The rise of digital media, however, has created new contexts that can hinder these processes, and one such situation involves orphan works, or works for which the copyright holder cannot be identified and located.

The purpose of this chapter is to uncover how orphan works affect technical communicators in their daily interactions on a global stage. To satisfy this objective, the chapter first provides an overview of orphan works. Next, the author examines the harms to innovation, speech, and democratic interactions that can arise from the orphan works situation. The author then looks at the global nature of orphan works and considers the notions of control of law and “harmonization” as they relate to the orphan works problem. The chapter concludes with a discussion of potential best practices technical communicators can use to address the situation of orphan works. Such an examination of these issues can help technical communicators more effectively and proactively approach the issue of orphan works in relation to their work.

ORPHAN WORKS: A BRIEF OVERVIEW

While there is disagreement over the precise definition of an orphan work, as is apparent in the work of the U.S. Copyright Office in its foundational report on the matter, it is generally accepted that an orphan work is a copyrighted work for which the copyright holder “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” (U.S. Register of Copyrights, 2006, p. 1).¹ Such works typically arise in the “rights clearance” process through which a potential user who wishes to make use of a work’s copyright beyond an allowable exception seeks out the copyright holder for permission (typically in the form of a licensing agreement) to use the copyright. Orphan works pose particular challenges in a digital age wherein society increases its reliance on materials that would traditionally be found in physical libraries (Proskine, 2006).

¹ Following the U.S. Supreme Court decision in the case of *Eldred v. Ashcroft* (2003), the U.S. Copyright Office undertook a large effort in 2005 in order to understand the scope of the problem of copyrighted works for which identifying the copyright holder is difficult or impossible (a concern brought up in Justice Breyer’s dissent in the case). Soliciting input from libraries, archives, authors, and many others, the Copyright Office received over 850 initial and reply comments. In 2006, the Copyright Office synthesized these responses in its *Report on Orphan Works*, leading to a better understanding of the definition and scope of the orphan works problem, its legal context, and possible solutions.

Because the copyright holders of certain works contained in libraries and archives cannot be located, these libraries and archives avoid continuing with the infringing digitization of these materials for broad access. This avoidance is based on the fact that using such works without the permission of the copyright holder could result in litigation should the copyright holder appear after the infringing use has begun. A specific example of how orphan works arise in practice for libraries is illustrated by the Library of Congress' attempt to digitize letters, magazines, and other materials relating to Hannah Arendt (Hughes & Cohen Harrington, 2005). Using numerous databases such as telephone directories, websites, and various library catalogs, several Library employees spent 2 years attempting to determine copyright ownership of nearly 7,000 items (out of a total of 25,000 items, the majority for which the Library abandoned copyright holder inquiries due to the potential cost) (Hughes & Cohen Harrington, 2005, p. 6). Throughout the process, employees encountered many problems, such as for works of corporate authorship for which copyright ownership was particularly difficult to determine given mergers and name changes; even for those works for which a copyright holder was identified, it became quite difficult to actually locate the copyright holders in order to seek permission to digitize the materials. In the end, fewer than 500 copyright holders responded to a permission request (out of 1,932 inquiries sent); as described bluntly by the Library, the project was "severely hampered by 'orphan works'" and likely would not have been pursued at all if it had not been for "generous outside funding" (Hughes & Cohen Harrington, 2005, pp. 6–7).

Because most libraries and archives avoid assuming the risk of infringement, access to these more "traditional" forms of orphan works is, at best, limited or, at worst, nonexistent. Researchers who have focused on this situation (e.g., Huang, 2006; Proskine, 2006) consider this approach paradoxical and suggest it is fundamentally at odds with the promise of novel technologies to allow for broader, possibly global access to copyrighted works. In fact, this situation ultimately threatens the very underpinnings of the U.S. copyright clause, for copyright subsists in works merely as a means of achieving the more important ends of learning through regulated knowledge distribution (Patterson, 1987). Consequentially, when society cannot access copyrighted works, the regulatory structure of statutory copyright fails to achieve its constitutionally assured purpose.

Yet orphan works are not limited to the works contained in the depths of libraries and archives. Another type of orphan work includes the various ephemera on the Internet, and such works include weblogs, numerous websites, and other communicative structures. These ephemeral forms of copyrighted works have an increased likelihood of being “orphaned,” particularly because of the mere quantity of works online and the potential difficulty of identifying and locating their respective copyright holders in an environment in which identity can be very difficult to discern (Huang, 2006; Hughes & Cohen Harrington, 2005). Furthermore, it is important to note that these ephemera expose a different problem than orphan works contained in libraries and archives, which threaten the ability of society at-large to access information. Instead, as Huang (2006) suggests, orphaned ephemeral works make innovation and creativity much more difficult, particularly for those whose work builds upon existing copyrighted expressions.

This situation is particularly true for technical communicators who rely on these ephemeral documents in their work—academicians in assessing and critiquing these various forms of communication and practitioners in developing more effective and innovative forms, models, or structures. While technical communicators might still be able to access these potentially orphaned works for their ideas, any intended use of the copyrights associated with these works (beyond an allowable exception to or limitation of copyright) would entail a search that researchers suggest is likely to fail (Huang, 2006). Thus, technical communicators should have an interest not only in the effects of the more traditional orphan works on the broader notion of access, but also the effects of orphan works, particularly ephemera, on the ability of technical communicators to critique, analyze, and develop effective, novel communicative forms.²

For example, an American technical communicator may be interested in adapting an existing copyrighted communicative structure she has found

² A troubling point that is beyond the scope of this chapter regards these ephemeral documents once they are removed from the Internet. For all intents and purposes, they are inaccessible, yet they still have an associated copyright. This in itself warrants a thoughtful analysis, particularly in light of the purpose of the copyright in the United States. Technical communicators would benefit greatly from access to the ephemeral documents that were once on the Internet and have subsequently been removed; further research should suggest ways of addressing this problem.

on the Internet in order to create a boilerplate for a client. If her desired use of the structure goes beyond the allowable exceptions to or limitations of copyright, she would need to seek out the copyright holder for permission; however, the copyright holder could potentially be difficult to identify and locate, particularly given the global, ephemeral nature of the Internet. Should a diligent search for the copyright holder fail, in which case the work could be considered orphaned, she would either be unable to use the structure or risk infringement if she proceeds with her intended use. As this example demonstrates, orphan works diminish the ability of technical communicators to innovate effectively and efficiently.

This issue of orphan works becomes even more important for technical communicators when it is placed within a global context. To understand the orphan works situation from this perspective, it is necessary to examine the relevant treaties and multilateral trade agreements that currently control the international intellectual property (IP) “market” for copyrighted works. Through this international IP structure, the importance of questions regarding the harmonization of solutions and control of law becomes apparent. Particularly important is the global nature of the Internet. Within a global setting, very little is agreed upon in the international legal community about which laws are relevant in cases of infringement when the infringing works were disseminated across the Internet and thus potentially into hundreds of different nation-states with differing treatments of intellectual property (Wilson, 2009).

These factors become even more problematic in the context of orphan works, because the existing nation-specific solution structures are unique and address the issues of search requirements and infringements differently, if at all. While there are no answers to the control-of-law quandary, it provides motivation for technical communicators, whose work environments are becoming increasingly global, to understand harmonization, control of law, and how they play a role in the orphan works situation. Moreover, the global nature of the interactions between technical communicators and their colleagues as well as their audience presents the possibility for technical communicators to shape the direction of the dialogue surrounding orphan works. Therefore, it is important for technical communicators, even those working exclusively within domestic environments, to understand the potential effects of their interactions with orphan works on both a local and a

global stage. In the following sections of this chapter, I explore in depth these notions that arise in the global context. First, though, it is important to consider how orphan works affect broader notions of access, challenging the constitutional foundations of copyright; this ultimately affects the ability of technical communicators to participate in democratic interactions.

WHY ORPHAN WORKS MATTER

Speech and Innovation

Speech and innovation are central to the work of technical communicators. Academic technical communicators have speech interests in being able to analyze, critique, and comment on the possible impact of varying forms of (copyrighted) communication. At the same time, practitioners employ existing structures and work to develop innovative, potentially more effective products, structures, and documents. Yet speech is not an interest unique to academics, and likewise, innovation is not solely of interest to practitioners. For many practitioners working within a work-for-hire environment, their ability to “speak” is correlated with their ability to create products that “have a broad effect on the general public’s access to shared communication over a broad range of topics” (Herrington, 2011, p. 67). Likewise, academics who analyze various structures have an interest in developing more effective forms of communication by understanding the problems with existing forms. It follows that technical communicators should have an interest in how orphan works damage their abilities to work effectively in environments structured around interests in innovation and speech.

To begin, the effects of orphan works on innovation are particularly concerning. Consider a technical communicator in industry designing an online user interface for a client company. Suppose that while developing the user interface, he or she comes across an existing copyrighted interface that he or she would like to build upon to make a more effective structure for her own client. In the process of acquiring the appropriate permission from the copyright holder in order to make a derivative work, that technical communicator would need to locate and identify the copyright holder. If the copyright holder cannot be located (which is a possibility, given the quantity of creative works online), the technical communicator would be unable to continue with his or her intended use or fear infringement should the

copyright holder reappear after the use has begun (Huang, 2006). This situation ultimately stifles the technical communicator's ability to innovate, for innovation requires access to copyrighted materials as well as the appropriate permissions. Even though this technical communicator could consider alternative structures for possible innovation, the situation is often one wherein alternative sources from which creative, innovative expressions can be developed will not suffice (Van Houweling, 2005).

Innovation for technical communicators thus becomes much more difficult in light of orphan works. The increased likelihood of searches for copyright holders of ephemeral works to fail can discourage potential innovators from pursuing permission for use of any works, much like the many libraries and archives that abandon all searches before beginning due to the potential pitfalls ahead (Hughes & Cohen Harrington, 2005; Nisbet, 2005). This potential stifling of creative efforts should be considered particularly disconcerting, especially for technical communicators whose work requires an interaction with ephemeral documents for which orphaning is a valid concern.

However, as the work of academic technical communicators throughout the past two decades has demonstrated, exceptions to or limitations of copyright (such as fair use in the United States) are viable avenues of pursuit for technical communicators, particularly for those whose work merits speech (Herrington, 2011). Even for technical communicators working under these exceptions and limitations (for which permission of the copyright holder is unnecessary, in certain circumstances), orphan works are still relevant.

Support for this position is found in the global nature of the work of technical communicators. Oftentimes technical communicators, particularly those developing products, structures, or documents for online consumption, work for clients throughout the world. In their daily work, these technical communicators strive to effectively convey information to their target audience—a situation that inherently relies on understanding that audience. For an American technical communicator producing user help manuals for a client in France, it would be important to learn more about the French audience. To do so, it would be imperative to have access to existing French communicative structures, not only those found on the Internet. However, the ability to access copyrighted materials is the crux of the orphan works

problem, particularly when it comes to those works located in the depths of libraries and archives. When many of these orphan works are unavailable for technical communicators to use to develop effective materials, technical communicators are hampered in their daily interactions. It follows that orphan works affect all technical communicators, even those who rely on the exceptions to or limitations of copyright in carrying out their work.

Furthermore, there are also concerns about the effects of orphan works on speech. For all technical communicators, there are interests in critiquing and commenting on various existing structures, documents, and forms in order to participate in a constructive dialogue and to guide progress and developments in the field. Much as orphan works damage innovative efforts and creative work practices, orphan works, particularly those for which access is limited, diminish the ability of technical communicators to make commentary. For those in industry, this commentary is primarily in the form of innovation and novel, creative developments, so the findings above regarding innovation apply. For technical communicators in academia, speech depends upon access to copy- righted works. While there may be access to many ephemeral works online, research suggests that access to orphan works contained in archives and libraries can be incredibly limited, greatly diminishing the ability of technical communicators to make effective critical commentary (Huang, 2006).

Though beyond the scope of this chapter, it is important to note a particularly disconcerting aspect of potentially orphaned ephemeral works: the fluid alteration of content facilitated by the Internet can allow copyrighted works to be “lost” from the Internet, after which all access is impossible. However, being able to analyze why certain content or structural changes were made would necessarily be a point of consideration for academicians who assess how dynamic choices affect efficacy and for practitioners who want to better understand why certain choices in content development and management are more effective than others. Even though the potential loss of these ephemeral works is not explicitly connected to orphan works, it raises similar concerns about the ability of technical communicators to work effectively and efficiently in global, Internet-driven environments.

Admittedly, many technical communicators work in environments in which practices such as single sourcing and the use of boilerplates are common and in which innovation and speech interests are, out of necessity,

not the focus of their work. Yet even those working in such environments are not immune to the notions of speech and innovation, and are thus affected by orphan works. This is for several reasons. First, the employers who create settings that encourage consistent document production nevertheless are interested in the efficacy of the documents being created; the technical communicators producing these materials, then, have interests in more effective and innovative techniques being developed by other technical communicators.

Furthermore, and perhaps more importantly, the work of technical communicators is unique in that it has a broad effect on society, so even those working in limiting environments have the potential to have an impact on society through their work (Herrington, 2011). Their ability to shape the perception of information suggests that technical communicators, regardless of the limitations of their environments, would have an interest in their speech and innovative powers implicated in their works (Herrington, 2011, p. 67). Finally, for those who work solely in environments wherein the impact of their work on society is not directly implicated, such as those who construct technical reports for internal corporate consumption, there are broader implications in democratic interaction that are important to consider. This situation serves as the focus of the following section, wherein I primarily consider the orphan works that fill libraries and archives, for which public access is limited at best.

Democratic Interactions

At the end of the day, technical communicators are participants in a democratic dialogue. As such, they are affected by the broader interests satisfied by access to knowledge, such as democracy and free speech. These interests are present throughout the U.S. Constitution, particularly in the copyright clause. Because the goal of copyright is to promote the dissemination of knowledge for the purpose of learning and the general advancement of society, it becomes clear why access to knowledge in copyrighted materials is inherently connected to the broader ideals of a democracy (see e.g., Herrington, 2001; Patterson, 1987).

Herrington (2011), for example, interprets this connection by considering the intent of the framers. She suggests, and I strongly agree, that “democracy, free speech, self-actualization, and humanistic endeavors stem

from this core [inherent in the copyright clause] in a mutually dependent interplay of support for the [United States'] principles" (p. 49). This interpretation that "progress" means the advancement of knowledge and learning and thus supports broader, democratic notions is supported through careful consideration of the historical developments in copyright in the United States throughout the past three centuries, as the influential work of copyright scholar L. Ray Patterson (1987) makes clear.

Consequently, when the public cannot access the ideas (which are not copyrighted) or the expressions (which are copyrighted) within copyrighted works, society cannot "progress." This does not affect only our ability to learn, it affects our ability to participate in a dialogue. As a dialogue necessarily entails mutual criticism and commentary, it cannot go on if there is nothing upon which to comment. These theoretical positions may seem overstated; yet consider an orphan work "buried" in the depths of a library. Statistics produced by the Library Copyright Alliance (Nisbet, 2005) would suggest that, if the work were older or of a nontextual form, or worse, unpublished, a search for the copyright holder would likely prove unsuccessful, in which case the library would likely not be willing to provide online access to it, even for a select group of researchers. In this sense, the ideas contained within the work, despite being theoretically, in some sense, a part of the "public domain," are confined to the physical library, where only those with physical access are able to benefit from the work's contents (Patterson, 1987, p. 7).

This concept that ideas are limited to the physical domains of a library presents a paradox of sorts, for the author who incorporated public domain ideas into her work is "withholding," not through an assertion of her own exclusive (copy)rights in the work, but merely because she cannot be identified and located, the ideas as well as her original expressions in the work from being redistributed back to the public for consumption. Yet "the public can be compensated most effectively" for an author's "encroachment on the public domain . . . by making the author's efforts accessible" (Patterson, 1987, p. 7). With orphan works, though, such redistribution is impossible unless the entity wishing to provide broad access is willing to risk a claim of infringement should the copyright holder reappear after the infringing use of the copyright has begun.

This example, which anecdotal evidence suggests is relatively commonplace, supports the conclusion that orphan works, particularly those

in libraries and archives, portend an ideological conflict in copyright. When access to copyrighted works is not sustained, knowledge is not disseminated; when knowledge is not disseminated, a dialogue cannot take place; when a dialogue cannot take place, the more fundamental notions of self-actualization and free speech are threatened (Herrington, 2001). These concerns suggest that orphan works impact the ability of technical communicators, as members of society, to participate in a democratic system. Thus, technical communicators should care because orphan works hamper democratic dialogue and the dissemination of knowledge for the mutual benefit of society, even if technical communicators can access certain potentially orphaned ephemeral documents. In this sense, though, everyone should care about orphan works because of their potential limitations on the ability of society to shape the development of culture.

Technical communicators work in many different environments throughout many different cultures; moreover, they complete an incredibly varied body of work, from technical reports to creative communicative products. All technical communicators, then, have varied interests that are a result of their cultural and environmental influences, among others. Yet at the core of the work of all technical communicators are interests in speech and innovation. These interests enable technical communicators to maintain an active role as participants in a democratic dialogue through the creation of many different products, structures, and critiques that ultimately serve to affect the way society perceives content. As a result, when orphan works threaten the fundamental notion of access to copyrighted works, technical communicators should care. Not only do orphan works have very practical effects on the ability of technical communicators to work effectively, they also threaten broader humanistic interests, such as the notion of egalitarian access to information. And when society does not have access to copyrighted information, the democratic ideals of free speech and self-actualization break down.

Therefore, the consideration of the orphan works situation within the limitations of the U.S. intellectual property foundations is important for understanding the detriments to the constitutionally assured notion of access to copyrighted information that allows for the purpose of copyright to be fulfilled: the promotion of learning through the dissemination of knowledge. Understanding the orphan works problem from this perspective is important

for technical communicators, who have significant interests in innovation and speech that are supported by the U.S. Constitution.

The interactions of technical communicators, however, take place on an increasingly global stage. As such, technical communicators should have an interest in orphan works within a global context wherein various ideological conflicts arise and affect how orphan works are treated transnationally. The developments in this global context will motivate several suggestions for how technical communicators can effectively and proactively participate in the ongoing orphan works dialogue through practices for both academics and practitioners. First, though, the global context is explored, particularly how ideological conflicts arise and how the elements of the international intellectual property framework affect future developments in orphan works. Then, consideration of control of law and the notion of harmonization of solutions will shed light on the best practices for technical communicators to carry out in their ongoing work.

THE GLOBAL NATURE OF ORPHAN WORKS: SOLVING THE PROBLEM

Ideological Conflicts

The work of technical communicators as content managers, product developers, commentators, and innovators is becoming global in nature. Many practitioners, for example, complete work for clients across the globe or work in environments such as globally distributed virtual teams. Likewise, many academicians access, critique, and comment on structures on the Internet. In fact, the very nature of the Internet diminishes the traditional notion of borders and creates an environment in which people on opposite sides of the globe can communicate quickly and easily.

At the same time, orphan works are not unique to the United States. Several nations, including Canada, Japan, and the United Kingdom, already have orphan works solutions implemented in the form of national legislation that aims to alleviate the orphan works problem. Yet all existing national solutions are unique, and there does not exist a global solution to the orphan works problem (Wilson, 2009). As a result, technical communicators who access potentially orphaned, online ephemera should have an interest in how inconsistent solutions would affect their ability to effectively address the

problem in their own work. At the same time, it is important to understand how the structure of the current international intellectual property framework could potentially affect developments in orphan works solutions, both locally (at the national level) and globally.

This international intellectual property framework is composed primarily of treaties and trade agreements. These include the Berne Convention for the Protection of Literary and Artistic Works (1971) (Berne Convention or Berne) administered by the World Intellectual Property Organization (WIPO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (1996) (TRIPS Agreement or TRIPS) administered by the World Trade Organization (WTO), among others.³ The Berne Convention sets certain statutory minima regarding the protection of intellectual property rights necessary for all nations that are members to the Convention. The TRIPS Agreement incorporates and expands on the rights established in Berne (except for certain *droit moral*, or moral rights), and its inclusion as an agreement administered by the WTO requires all WTO members to comply or face possible trade sanctions. Many nations are parties to both Berne and TRIPS, and so they serve as the defining framework for all developments in intellectual property across the globe.

However, this international IP structure has foundations that are very different than those of the United States. Whereas U.S. intellectual property law is derived from the constitutional policy of ensuring the promotion of learning, TRIPS and Berne are founded on the principles of ensuring “maximum [economic] value for intellectual property products in the global market” (Okediji, 2000, p. 81). These governing documents, particularly TRIPS, focus on the “markets” for intellectual products and are mostly built on the principles of free trade (Birnhack, 2006). These ideological differences between trade and access are very relevant for many aspects of copyright, but particularly for orphan works. As the instructive example of the U.S. orphan works situation demonstrates, orphan works pose very real threats to

³ Other such documents that comprise the international intellectual property framework are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These texts build upon the Berne Convention and TRIPS to address technological issues, and so solely considering Berne and TRIPS shall suffice for the present purposes. For a broader view of the international intellectual property structure, see Birnhack (2006).

knowledge and democracy itself. Placing the orphan works problem in a trade context reduces it to purely economic terms in which the economic inefficiencies of the permissions clearance process likely serve as the main motivation for resolving the orphan works problem.

Example Situation: The Case of Fair Use

In order to understand the ideological difficulties of extrapolating from the access-driven basis of U.S. intellectual property law to the trade-driven basis of international IP law, it is important to consider the ongoing dialogue about the creation of an international fair use doctrine. The fair use doctrine, as statutorily codified in the United States with the 1976 Copyright Act (specifically, 17 U.S.C. Sec. 107), allows for some of the policy goals of the U.S. Constitution, such as access to copyrighted material for learning and dialogue, to be effectuated (Patterson, 1987).

The core of the fair use doctrine rests on allowing for exceptions to copyright in certain instances of speech and innovation. This approach is consistent with the intentions of the framers of the Constitution in supporting egalitarian access to knowledge for a thoughtful, critical dialogue that results in the development of knowledge for the benefit of society. While not explicitly obvious, the ideals of fair use are consistent with the notions hindered by orphan works: speech, innovation, and democratic interactions. It follows that fair use is incredibly relevant to the orphan works problem, not because it applies directly but because thinking about orphan works in terms of speech and innovation suggests a fair use structure through which innovation and speech are supported.

And so, when problems arise with creating an international structure for fair use within the trade-driven IP framework, ideological problems arise in considering orphan works. Particularly difficult in the case of creating an international fair use structure, which still does not exist, is the connection between the fair use doctrine and the goals of the U.S. Constitution, particularly the copyright clause and the First Amendment (Herrington, 2010; Okediji, 2000). To effectively construct an international fair use framework, it is necessary to rely on advocating for a structure that supports the deeper concepts inherent in fair use. This kind of egalitarian access to information helps support goals of self-actualization and democratic interaction, for it is impossible for the U.S. foundations to placate other intellectual property

structures by being incorporated into TRIPS or Berne (Herrington, 2010). However, as Herrington (2010) aptly recognizes, there still arise problems in simply advocating for a conceptual structure. This is because its creation necessarily relies on ensuring that less powerful nations who are affected by the international IP framework are not marginalized in ongoing discussions. At the same time, a fair use structure, as it is tied to the U.S. Constitution, supports broader notions of human rights, and the lack of global consensus on human rights alone makes developing a global structure difficult (pp. 324–327).

Therefore, taking the orphan works situation and placing it in the global orphan works context implicates many ideological conflicts that could arise. An international fair use structure would be crucially important for technical communicators to function effectively in the global workplace (Herrington, 2010). At the same time, the ideological connections between orphan works and fair use suggest ways in which technical communicators could take place in ongoing dialogues about orphan works solutions. More importantly, though, as the international fair use developments make clear, there arise important humanistic considerations that affect technical communicators. These humanistic considerations are further explored later in this chapter.

First, though, it is necessary to consider how some of the transnational, ideological conflicts manifest themselves as actual problems in working toward a global solution. To understand these differing approaches to solutions, I briefly consider the two main approaches to solving the orphan works problem locally (at the nation level). I then use the global level to discuss how these solutions fit into the international IP framework and how the IP framework affects the development of solutions. The notion of control of law is further considered, as well as how developments in this area could affect technical communicators. This leads to a consideration of the broader impact of motivations toward harmonization on technical communicators.

Conflicts in Solutions: When Ideological Turns to Actual

There are two primary approaches to solving the orphan works problem locally: a limitation on remedies approach and a compulsory license

approach.⁴ The limitation on the remedies approach has been the primary consideration in potential U.S. legislation. It focuses on reducing the liability for infringers of orphan works by limiting the monetary and injunctive relief available to reappearing copyright holders of (once-)orphan works. Additionally, this approach applies primarily to users who have made use of the copyright associated with an orphan work after having conducted a diligent search for the copyright holder and failed to successfully locate and identify him or her (U.S. Register of Copyrights, 2006). This approach also allows for users to make use of the copyright without verification that a search was “diligent,” and so should a copyright holder reappear after the infringing use has begun, the diligence of the search would need to be addressed on an *ad hoc*, case-by-case basis (Thompson, 2006).

In contrast to this approach is the compulsory license approach generally adopted in various forms in Japan, Canada, and South Korea, among others. In these compulsory licensing systems, a public body typically assesses the diligence of a failed search for the copyright holder conducted by a potential user of the orphan work’s copyright (Wilson, 2009). Based on varying search standards, these public bodies might issue a compulsory license for certain uses of the copyright if the search meets certain minima. This solution is drastically different from the limitation of remedies solution, which takes an *ad hoc* approach to determining the validity of a diligent search. Moreover, the differences between the two unique structures raise very different legal issues, which, despite being beyond the scope of this chapter, would be necessary to consider fully if movements toward harmonization gain force.

While these solutions are local, the global nature of the international IP framework directly affects their development. Berne and TRIPS do not contain standards for local orphan works legislation. They do, however, limit exceptions and limitations to the exclusive rights of the copyright holder (Ginsburg, 2008). For example, the Berne Convention (1971) requires that exceptions to the exclusive right of reproduction be limited to “[a] certain special cases, provided that such reproduction [b] does not conflict with a

⁴ There is another approach, extended collective licenses, which is employed by some Nordic countries (Wilson, 2009). However, for the present purposes, the two primary solutions that have been considered will suffice since these simply serve to show the conflicts between local (national) solutions.

normal exploitation of the work and [c] does not unreasonably prejudice the legitimate interests of the author” (Art. 9[2]). This test, generally known as the “three-step test,” was expanded to all exclusive rights of the copyright holders by the TRIPS Agreement (Art. 13). The relationship between Berne and TRIPS is still debated among scholars of copyright, especially given a WTO Dispute Settlement Panel’s (2000) interpretation of the three-step test in proceedings regarding 17 U.S.C. Sec. 110(5) governing exceptions to copyright for a subset of public performances.⁵ Regardless of the interpretation of this relationship, though, it is important to recognize that national laws are limited in their abilities to provide exceptions to the exclusive rights of creators of intellectual products. Huang (2006) suggests that these limitations ultimately make the construction of feasible legislation that would pass international muster difficult. As Ginsburg (2008) and Thompson (2006) demonstrate, making any orphan works legislation fit within the narrow confines of the international IP framework requires very thoughtful, careful consideration.

Control of Law

The local, nation-specific approaches to the orphan works problem and the limitations on local solutions should be considered important to technical communicators because a patchwork of only partially effective solutions will make functioning within a global environment incredibly difficult. An important and practical question for technical communicators is, “Which country’s laws govern how orphan works are treated, especially in situations in which work is transmitted via the Internet wherein potential infringement can be taking place in many locations simultaneously?” For a practitioner working for U.S. organizations that single-sources material to France, understanding this control-of-law question is important for determining how to proceed in approaching potentially orphaned works. For technical communicators who access online materials that are potentially orphaned works originating from other countries, the control-of-law question

⁵ A strict interpretation suggests that TRIPS’s expansion of the three-step test applies only to new rights set out in TRIPS, and thus Berne’s minor exceptions doctrine focusing on *de minimis* exceptions would be applicable to any proposed exceptions to rights set out originally in Berne. Another prevailing interpretation is that TRIPS applies the three-step test to all rights set out in Berne, and thus the three-step test should be applicable to proposed exceptions. See WTO (2000), Thompson (2006), and Ginsburg and Goldstein (2005).

affects which orphan works legislation would govern his or her actions regarding searches and the associated, necessary requirements for the copyright holder. In the end, control of law as it relates to the international IP framework affects all technical communicators in almost all situations, regardless of whether the works are orphaned, because control of law affects how all copyrighted works are treated transnationally (Wilson, 2009).

Yet control of law in the international intellectual property framework is currently out-of-date, especially as it pertains to questions of infringement on the Internet (Wilson, 2009). The primary control-of-law clause is in the Berne Convention, and this clause states that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed” (Art. 5[2]). Whereas in traditional cases of infringements this “exclusivity” requirement is reasonable, the country of infringement is much harder to determine in an environment in which copyrighted works are disseminated cheaply and easily. Thus, infringement is possibly widespread. Consider a hypothetical situation in which a person in the United States puts illegally copied manuscripts (of Canadian authorship) onto a server (located in the United States), and these manuscripts are accessed by users in Canada. In this situation, which country’s laws should apply to infringement by the person illegally providing copies?

A similar question was raised in the French court case of *Société des auteurs des arts visuels et de l’image fixe (SAIF) v. SARL Google France* (2008) (SAIF). In this case, the court addressed a challenge to Google’s Image Search for violation of the French copyright holders’ exclusive rights to reproduce their works. The court chose to apply U.S. law, as the United States was the location of Google’s servers where the literal infringement (the accessing of the servers where Google’s Image Search linked to the French copyright holders’ images) occurred. Wilson (2009) suggests that the SAIF court’s decision to apply the United States as the place of causation instead of French law, as the place of effect has potential harms for future developments in this area. Under the SAIF reasoning, a savvy infringer could place servers in a country with minimal IP protections and be free from infringement claims.

As this case and others demonstrate, the control-of-law clause in the Berne Convention provides little guidance for courts in cases in which infringement takes place across the globe, especially via the Internet (Wilson,

2009). This factor is important to orphan works, particularly as they pertain to technical communicators, for control of law necessarily dictates which orphan works solution applies in which instances. Currently, there are no solutions that rectify this control-of-law quandary. As long as this problem persists, the ability of solutions to the orphan works problem to take hold on a global scale is limited. If, for instance, future developments in Berne's control-of-law clause require that the search requirements for an orphan work be consistent with the work's country of origin, it would likely still require a great deal of funds to simply identify the country of origin in order for a potential user to even know which requirements apply (Ginsburg, 2008). While the possible solutions to this problem are beyond the scope of this chapter, it is important to recognize that technical communicators should have an interest in which laws apply not only for cases of orphan works but for all works. All technical communicators produce works that are affected by control of law and any possible future developments in it. Thus, technical communicators should maintain an interest in the developments in this area of international IP law as they take place throughout the next decade as the Internet further challenges the traditional notions of physicality upon which Berne is based.

“HARMONIZATION?”: ORPHAN WORKS AND HUMANISTIC CONCERNS

The notion of harmonization is significant throughout all of intellectual property law. After all, consistency across borders served as some of the primary motivations for the Berne Convention and the TRIPS Agreement (Herrington, 2010). Consistency allows for more efficiency and reduces the transaction costs of working in a global environment. A globally consistent solution would likely improve the ability of technical communicators to conduct business efficiently and effectively. For example, those technical communicators working with single-sourcing would likely benefit from greater access to copyrighted materials from the environments to which they are distributing content. Increased access would allow these practitioners to make more effective decisions about how to convey content in a means consistent with that environment or community's expectations. Even technical communicators who function within a single domestic environment would experience positive effects from a harmonized orphan works solution. This is because harmonization would likely increase global access to

information, thus increasing the strength of the democratic process and furthering the development of knowledge.

However, the overriding rhetoric regarding orphan works and harmonization in general should be assessed carefully. As with the creation of an international fair use doctrine, there are broader humanistic implications that are important to consider. Any global solution would likely set forth precise guidelines for search requirements that rely on the use of electronic databases. Imposing requirements for the construction of databases on developing countries or least-developed countries could be incredibly problematic.

As has been demonstrated in the push to construct an international fair use doctrine, developing countries lack an ideological foundation for intellectual property law. Moreover, many of these nations are bound by TRIPS simply because they need to be members of WTO in order to successfully trade in all areas of commerce (Birnhack, 2006). Yet the orphan works problem arises through changing attitudes about technology, access, and copyright. Developing countries have neither a strong IP foundation nor technological capabilities. As a result, they are unlikely to be positively affected by orphan works developments. In fact, of great concern to technical communicators should be that a global orphan works solution incorporated into TRIPS would likely devastate the body of intellectual products in developing countries and LDCs.

This devastating power can be seen in how an orphan works solution, whether focused on a limitation of remedies or some form of a licensing system, would function. Regardless of the form, a system would in some way prescribe the necessary conditions for conducting a diligent search for the copyright holder. Given the global nature of the problem, these searches would likely entail use of the Internet.

While developed countries have at their disposal resources to create these databases, developing and least-developed countries do not. Any "search" for most copyright holders in these countries would likely prove unsuccessful given the lack of technological resources that could possibly be devoted to the orphan works problem. This situation opens the door for exploiters of the system to severely damage the cultural heritage contained within the copyrighted works of these countries by conducting "searches"

(which the exploiter likely knows will be unsuccessful) in order to declare the vast amounts of cultural works “orphaned” and thus, consistent with the means of going forward dictated in the solution, may proceed in using the copyrights. This abuse of the system may seem extreme, but its potential of occurring is increased in light of recent abuses of culturally valuable works from developing countries (Herrington, 2010).

Even though it may be possible to develop a globally consistent orphan works solution to the mutual benefit of creators and users, the potential marginalization of developing and least-developed countries should be of concern to technical communicators who carry out their work with humanistic interests in mind. While the speech and innovation interests of technical communicators may be furthered by a consistent solution, I believe that technical communicators, whose work is unique in that it affects how society perceives content, should thoroughly consider the wisdom of imposing an orphan works solution on countries that are not prepared (by ideological foundation or by technology) to address the orphan works solution at this time.

BEST PRACTICES FOR TECHNICAL COMMUNICATORS

As St.Amant and Rife (2010) suggest, cross-cultural “friction points” arise through the work of technical communicators and should be addressed by technical communicators who work at the center of the global exchange of content (p. 249). The orphan works problem, which arises in the friction point of copyright, affects how technical communicators speak and innovate in their daily practices. Therefore, all technical communicators should have an interest in participating in the ongoing dialogue about orphan works and how they should be treated on a global scale. Through their work, technical communicators should keep in mind the negative impacts that orphan works have on the broader notions of access, democratic interactions, and self-actualization. What follows are strategies technical communicators can use to approach orphan works effectively and proactively:

Strategy 1: Participate in Ongoing Discussions About Types of Works That Should be Addressed with Orphan Works Legislation

Some technical communicators work in environments such as medical communication that require an understanding of how the notions of privacy

and disclosure vary across borders. Applying their understanding about constructs of privacy, these technical communicators could help to address the unanswered questions about unpublished works and whether these should be included in orphan works legislation, or whether the concerns for privacy and the notion of the moral right of *droit de divulgation* should take precedence.

Strategy 2: Contribute to the Development of Effective Databases for Copyright Holder Inquiries

In their work, technical communicators evaluate the efficacy of existing communicative structures or work to develop new ones. Therefore, they have a unique understanding of the significance of certain developmental choices that may affect the efficacy and “user-friendliness” of a product or structure. Technical communicators should use this knowledge to participate in ongoing projects to create robust databases containing copyright holder information for works of various media that allow users who would not be able to benefit from copyright exceptions such as fair use to find copyright holders more easily.

Strategy 3: Advocate for Human Rights Interests in Global Solutions to Orphan Works

As noted earlier, the potential marginalization of developing and least-developed countries threatens their abilities to participate in the development of the international intellectual property framework. For practitioners, this possibly means making the sometimes difficult ethical choices of working for employers who support human rights interests (Herrington, 2010). For academicians, this could mean focusing on how technology and new means of communication affect societal constructs that may impact orphan works, particularly in how developed countries view the problems as compared to other, less-developed countries.

Strategy 4: Embrace Orphan Works

Technical communicators likely interact on a daily basis with works that are potentially orphaned. Therefore, technical communicators should advocate for a solution to orphan works that would help to address the fundamental disconnect in access that currently exists. Technical

communicators should also initiate discussions about control of law, particularly in how it pertains to copy- righted works on the Internet for which there are no clear answers about control of law for search requirements for copyright holders and possible ensuing infringements. Practitioners who produce digital works in a work-for-hire setting could possibly attempt to initiate discussions with employers about the advantages of archiving older copyrighted materials so that society can still benefit from the ideas and expressions contained within them. These discussions will likely be difficult but could potentially improve the ability of society to access copyrighted works that would otherwise be lost.

CONCLUSION

Orphan works arise at an interesting intersection of technology and copyright law, and the local and the global. At both crossroads, technical communicators emerge as important players. Understanding the global significance of the orphan works problem requires consideration of how they affect the ability of technical communicators to work effectively. Furthermore, orphan works have an effect on democracy itself—how we interact to create new knowledge. Ultimately, it is these motivations, as well as the effects on speech and innovation, that should drive technical communicators to address the problems in their own work. By participating in the ongoing dialogue, technical communicators can potentially shape the development of a feasible orphan works solution, not only locally but globally. In doing so, technical communicators should keep in mind the potential effects on those who are limited in speech abilities, whether it is a portion of society or, in the case of developing or least-developed countries, entire nations. Through these discussions and the work of technical communicators, I strongly believe that there is hope for access, democracy, and the notions of self-actualization on the front of orphan works.

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