

## **The Orphan and the Unknown Soldier re: Orphan Copyright Works**

Article By:

Brent Rasmussen

---

As noted in various outlets in the past few days, museums in the UK are drawing the public's attention to the problem of orphan works and the need for copyright reform to address the problem.

Orphan works are copyrighted works whose owners cannot be located by a reasonably diligent search. This creates a problem for parties wishing to reproduce such works. If the parties cannot locate the works' owners, then they can't obtain the necessary authorization to absolve themselves of potential liability. As a result, many orphan works go unpublished, waiting in darkened archives for the copyrights in those works to expire.

The orphan works problem is causing particular consternation for a group of museums in the UK, who are seeking to open their archives to the public in commemoration of the 100th anniversary since the outbreak of First World War. For example, Imperial War Museums ("IWM") recently posted the following on its Twitter account:

---

The “#catch2039” is a reference to the year when the copyright in many unpublished works is set to expire in the UK. IWM’s move is part of a broader “Free Our History” campaign started by CILIP, a leading professional body for librarians and information specialists in the UK.

CILIP described the campaign as follows:

During the First World War Centenary . . . [d]isplay cases in the Imperial War Museum, National Library of Scotland and University of Leeds sit empty. They should contain letters from the First World War; from a young girl to her father serving as a soldier and from soldiers to their families back home . . . At the moment the duration of copyright in certain unpublished works is to the end of the year 2039, regardless how old the work is. The Free Our History campaign wants the term of copyright protection in unpublished texts to be reduced to the author’s lifetime plus 70 years.<sup>[1]</sup>

An interesting question is how these UK museums would fair under U.S. copyright law. According to US law, a work created but not published or copyrighted before January 1, 1978 is entitled to copyright protection for 70 years after the author’s death. 17 U.S.C. §§ 302(a), 303(a). This comports with the museums’ demand, but it doesn’t necessarily solve their orphan works problem.

Consider CILIP’s reference to the letter from a young girl to her soldier father. Let’s assume this girl was a precocious four year old who could already write. Let’s also assume that her letter was written in 1914, the first year of the war. Under this set of facts, the girl would now be 104 and would likely have already passed away. But as long as she lived to be older than 34, her letter would still be protected by copyright under the “life plus 70” term. So the museums’ demand for a shortened copyright duration may not be the panacea they are looking for.

Governments worldwide have undertaken various efforts to address the orphan works problem. In fact, the UK recently enacted legislation that would create a central license regime for orphan works. In essence, parties who can show that a diligent search of an orphaned work’s author was conducted can apply for a nonexclusive license from a government agency on payment of a license fee.<sup>[2]</sup> The problem with this approach is that many institutions don’t have the resources to undertake the requisite “diligent searches” or to pay the necessary licensee fees. Indeed, CILIP expressed concerns that the UK’s new orphan works licensing scheme “creates unnecessary costs and administration for cultural heritage organisations.”<sup>[3]</sup>

In the U.S., while patent reform has been hogging the headlines, the Copyright Office has quietly collected public comments on the issue of copyright reform—specifically the issue of orphan works.<sup>[4]</sup> As the Office considers the various proposals, it would be wise to examine the experience of our friends across the pond and resist calls for the implementation of a licensing scheme. For many stakeholders, such a scheme would be a non-starter (as it apparently is for the UK museums involved in the Free Our History campaign).

---

[1] <http://www.cilip.org.uk/cilip/news/campaign-free-our-history-reform-copyright>.

[2] A good summary of the legislation is provided by David R. Hansen et al., Solving the Orphan Works Problem for the United States, 37 Colum. J. L. & Arts 1, 41-42 (Fall 2013).

[3] <http://www.cilip.org.uk/cilip/news/government-responds-free-our-history-campaign>.

[4] <http://copyright.gov/orphan>

©2025 All Rights Reserved. Lewis Roca Rothgerber LLP

---

National Law Review, Volume IV, Number 309

Source URL: <https://natlawreview.com/article/orphan-and-unknown-soldier-re-orphan-copyright-works>