

Failure Is an Orphan: Reflecting on the Fall of the University of Michigan Orphan Works Project

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Introduction

On May 16, 2011, the University of Michigan (U-M) announced that the U-M Library's Copyright Office was "launching the first serious effort to identify orphan works among the in-copyright holdings of the HathiTrust Digital Library."¹ HathiTrust, a partnership of libraries and major research institutions, has long worked to hold, preserve, and make available digital content to contribute to the common good. In conversation with this mission, the Orphan Works Project built on the earlier research of then executive director of HathiTrust John Wilkin. In his paper, "Bibliographic Indeterminacy and the Scale of Problems and Opportunities of 'Rights' in Digital Collection Building,"² Wilkin first identified the potential of the orphan works issue using, in part, data generated by the Copyright Review Management System (CRMS) grant project managed by the U-M Library and funded by the Institute for Museum and Library Services.

The CRMS grant, which ran from 2008 to 2011, sought to reliably determine the copyright status of works published in the United States between 1923 and 1963. By determining whether a work complied with historical aspects of US copyright law, the CRMS project identified nearly 87,000 volumes that were previously unknown in any meaningful sense to be in the public domain.³ Building upon the work of this previous grant, the Orphan Works Project sought to identify and publicly surface books that were determined to lack identifiable rights holders after being subjected to an investigation. The project was initially met with a good deal of optimism and there was significant buy-in from the U-M Library, the university, and the academic community at large.

On September 13, 2011, the Authors Guild, joined by several international partners and eight individual authors filed a lawsuit claiming that the Orphan Works Project was “an upsetting and outrageous attempt to dismiss authors’ rights,” and going on to say “[t]hese aren’t orphaned books, they’re abducted books.”⁴ The lawsuit arose after a series of revelations by the Authors Guild that several books on “Orphan Row” had identifiable, authors, publishers, or estates.⁵ Shortly after, the University of Michigan suspended the Orphan Works Project, “pledg[ing] to re-examine its procedures and create a ‘more robust, transparent, and fully documented process’ and continue the project.”⁶

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What happened in the five months between the inception of this bold, ambitious, even audacious, project and its untimely end? As a staff member and contributor to the Orphan Works Project I have done a good deal of thinking on the subject. During the time of the project I was a member of the University of Michigan Library Copyright Office, working as a relatively newly minted copyright librarian. I was one of several staff members responsible for the idea, one of many staff members responsible for the design and implementation, and one of many staff members ultimately responsible for the failure of the project. This essay is an attempt for me to make sense of what happened, to see my role in what transpired, and to provide potential lessons for other librarians who desire a little audacity for themselves.

Idea, Inception, Execution

At the core, the Orphan Works Project (OWP) was a big and bold idea that grew from a very reasonable set of assumptions. The data derived from the CRMS project seemed to suggest that a good number of works in the HathiTrust Digital Library were orphaned: of the

170,174 volumes reviewed during the granting period, approximately 87,000 of them either had not complied with copyright formalities or had not renewed their registration with the US Copyright Office, something which was required during the period of time the grant was investigating.⁷ Logic would seem to suggest that some proportion of authors who did comply with the requirements would no longer be extant or available, since such a high rate of attrition exists in the first place. That is, if nearly half of rights holders chose not to or neglected to exercise a simple renewal of their rights during the first 50 or so years of their term, a significant portion of those rights holders would no longer have any material investment in the remaining works.

Furthermore, the orphan works issue had already attained national salience, with the United States Register of Copyrights issuing a report in January 2006, which concluded, among other things, that “the orphan works problem is real” and that “the orphan works problem is elusive to quantify and describe comprehensively.”⁸ There had been some attempts to address the issue, with the Orphan Works Act of 2006⁹ and the more robust Shawn Bentley Orphan Works Act of 2008,¹⁰ which sought to provide a regime where reasonable uses of possible orphan works would be allowed under the US Copyright Act. However, due to the complexity of the issue, the lack of evidence on the actual scope of the problem, and the tangled vested interests of influential stakeholders, these efforts ultimately went nowhere.

So, faced with a real and elusive problem to tackle, the University of Michigan Copyright Office got to work, drafting memos for discussion in the fall of 2010, engaging senior library leadership, the office of the general counsel, and senior university leadership. This consultation was thorough and long. It involved a great deal of documentation, refinement, and input from the necessary stakeholders. It was this extensive communication and consultation that enabled the project to get off the ground, and, as discussed below, it was the discontinuation of this communication that helped contribute to the collapse of the project.

From the outset, the idea behind the OWP was to create a process that was accurate and scalable, and which would reduce the uncertainty about a work's orphan status to a sufficiently reasonable degree as to allow us to announce the work as a potential orphan. Core to this process was the idea that multiple individuals would review every book, checking first to see if it was in print and/or for sale, and then checking various sites to see if any contact information on the author, publisher, or estate could be located. Following documented workflows, the investigators would reasonably exhaust the avenues available to them, searching to what we believed was a sufficiently diligent point such that a reasonable user might feel comfortable using the work without permission from a rights holder. After achieving this level of confidence, the investigator reports were checked against each other via automation, and the results were used to generate a list of potential orphan works. This list would be made public with the idea that presumptive rights holders could identify books that were mischaracterized as orphans by the process. Even though the process was ostensibly designed to respond to errors in the investigation process, it was ultimately the scope of some of these mischaracterizations that led to the end of the OWP.

Failure to Communicate

The OWP was a large and complicated endeavor, involving many library staff at many levels of the organization. It is beyond the scope of this essay to engage with the mechanics of how things ended up going awry, and while there were many points of failure in the process I only feel competent to focus upon my own.

For my part, I never fully expressed the agency I needed to express to successfully complete my role. I was both over- and under-responsible for certain decisions. I allowed my belief in the established process to override issues I saw in the implementation of the process. For example, it became clear to me that different on-the-ground investigators had varying levels of commitment to and expertise in

tracking down possible rights holders. As someone responsible for the day-to-day supervision of these workers I did insufficient work to hold them accountable to the process and to the documentation. Furthermore, and this is a lesson I have learned well and deeply, I was too invested in my personal relationships with the people with and for whom I was working. My desire for a collegial and supportive working environment, both with those who were accountable to me and to whom I was accountable, overlapped my judgement and critical insight about how the project was starting to come apart.

Fundamentally I believe that the broader failure of the OWP was a failure of communication. The work of the OWP was undertaken by library staff ranging from casual graduate students, who did the actual on-the-ground research, to the dean of libraries, who represented the OWP on the national and international stage, in addition to several layers of management and accountability between them. When the normal and necessary adjustments to the workflow and administration of a complicated process occurred, there weren't formal and clear mechanisms to communicate those changes. All staff involved in the project were hard working, diligent, and well intentioned, but as pieces, processes, and priorities shifted, cracks began to open in the process, which became increasingly attenuated from the original planning. When the decision was made to go ahead with the process and make public the first batch of orphan works candidates, this drift became apparent. Conversations that needed to happen did not happen. Processes that needed to be evaluated at various points in the accountability chain were not evaluated. Brakes were not put on elements of the project that had become increasingly out of control. And when the lawsuit was filed and the initial shock hit the project, there weren't sufficient communication channels between the staff on the ground and the broader leadership who were responsible for the decision to halt the project.

The failure of communication was not limited to internal staff and stakeholders. In retrospect it seems obvious that we should have

engaged more deeply with groups like the Authors Guild and other potential interests. While we were to some degree responding to the absolute inability of previous attempts to reach a consensus on process, a lack of involvement with possible rights holders made nearly certain that we would come into conflict at some point. Additionally, we did not adequately communicate to external observers, the media, and our community at large that we expected, even intended, to make mistakes. The entire purpose of the waiting period between identifying a prospective orphan and making said orphan available was to identify areas where we made mistakes. While the scope of some of our mistakes was fairly significant, the process was operating as designed. Finally, and this may seem to be a minor point but it is a lesson well learned by me, “optics” matter. I can only assume that if we had named this project the Rights Holder Identification project we may have met with different attitudes from external stakeholders.

Snatching Victory from Failure’s Grasp

The details of the lawsuit that brought the OWP to a premature end are readily available and have been commented on extensively elsewhere. That said, while certainly not welcome, the eventual lawsuit was never really unexpected by the university. Engaging in the creation of HathiTrust alone was a high-risk activity; taking the further step of the OWP, particularly without significant rights holder buy-in, was so bold as to almost guarantee a legal response. While the time and initial facts of the lawsuit might not have been the ones we would have chosen for ourselves, we were always prepared for the eventuality.

This strategy ended up proving effective in the long run. While the OWP has remained in stasis, the underlying issue—the legality of the digitizing of library books done by Google and the subsequent hosting and making available of those copies by HathiTrust—has been ruled in several venues to be a fair use, culminating with the Second Court of Appeals whose ruling is summarized below:

On June 10, 2014, the Second Circuit ruled in favor of HathiTrust on most issues. The Court's opinion was a major victory for fair use. The Court upheld HathiTrust's right to maintain a full-text database to search for books, stating that "the creation of a full-text searchable database is a quintessentially transformative use." The Court also approved, as fair use, HathiTrust's service to make text available in formats accessible to print-disabled people. Finally, the Court remanded the case to the district court regarding the long-term preservation of books.¹¹

While the missteps of the OWP provoked the initial suit, the subsequent litigation revealed the soundness of the underlying assumptions. We believed that what we were doing was fair, reasonable, and responsible in theory. While practice slipped, the foundation was always strong.

Conclusion and Lessons Learned

The OWP was one of the most important projects I undertook in the early stages of my career. It was bold, ambitious, and it failed spectacularly and publicly. This is far from my only professional failure, but it is, to the best of my knowledge, the only one which may have near-permanently ended any possibility for work in the area. In his post, "HathiTrust Single-Handedly Sinks Orphan Works Reform," noted legal scholar James Grimmelmann laid out very persuasively that our process had failed, stating that "once is a mistake, twice is bad luck, and three times is a broken process."¹² He was right, but the fact that this one project went bad wasn't the end of the world, or much less crucially, my career. I, and every other member of the OWP team, have gone on to do new and interesting work, some of which we have failed at, some

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of which we have succeeded at. Beyond the more particular lessons of engaging stakeholders and developing and preserving internal lines of communication and reporting, the broader lesson I hope that we as a community take is that failure, even truly spectacular failure, is just that. It's a failure, you lick your wounds, you dust yourself off, you look back at what you could have done differently, and you get back to work.

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Endnotes

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