

**Clarinda Mac Low**  
**MFA Candidate, Digital and Interdisciplinary Art Practice at the City College of New York,**  
**CUNY**

## **Free the Orphans**

The term “orphan work” refers to works of all sorts that are protected by copyright, but for which the copyright holder is unknown or cannot be traced,<sup>1,2</sup> rendering it impossible to gain permission for distribution or use. Through their state of existential limbo, orphan works expose the paradox between the current ease of digital distribution and the existing regime of long-term copyright and granular control. Current copyright legislation renders a huge chunk of creative output from the 20<sup>th</sup> and 21<sup>st</sup> centuries difficult to access or distribute and eliminates it from the cultural conversation,<sup>3</sup> eroding the cultural commons. Meanwhile, an explosion of creative acts that use collage and found materials to create new work is flooding the Internet, spilling over into corporeal life, and threatening existing ideas of authorship and creative control. I suggest that we seek out these “orphan” prisoners and “free” them, bringing them back into circulation.

Orphan works are a moving target; shifting copyright legislation can suddenly make orphans of work that was formerly in the public domain, and this fluidity mirrors the mutability of ideas around intellectual property. The challenge presented by works whose owners cannot be located has grown in recent years as a game of legal hopscotch continues to extend copyright. This legislation is usually driven by large content providers rather than individual creators.<sup>4</sup> In the United States the 1976 Copyright Act eliminated the need for copyright registration and automatically extended copyright protection to virtually every creative work as soon as it is in a

---

<sup>1</sup> Jennifer Urban, David Hansen, Peter Jaszi, and Meredith Jacob. “Report on Orphan Works Challenges for libraries, archives, and other memory institutions.” *Center for Media and Social Impact (CMSI)*. January, 2013, 3. Available at:

<sup>2</sup> Naomi Korn. “In From the Cold: An assessment of the scope of ‘Orphan Works’ and its impact on the delivery of services to the public.” *Jisc Content, Collections Trust*. April, 2009, 5. Accessed October 1, 2013, <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>.

<sup>3</sup> Ibid, 7

<sup>4</sup> Timothy Lee. “The Switch: 15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?” *Washington Post*. (Washington, D.C.), October, 25, 2013.

fixed form.<sup>5</sup> The Disney corporation, the Gershwin estate, and a few other owners of iconic culture lobbied heavily for the Act.<sup>6</sup> In the EU, after a long campaign by the music industry, recent legislation extended the copyright on sound recordings from 50 years to 70 years, removing 20 years worth of work from the public domain and plunging many works into orphanhood.<sup>7</sup> As artists from the Open Music Archive point out, “The field of culture is increasingly colonized for private interests as proprietors of intellectual property continually lobby for the extension of their control.”<sup>8</sup> Orphan works rarely start out as products of powerful interests, so large corporations, in protecting their own interests, heedlessly sweep the little guys under the rug of history.

Orphanhood is problematic because, without a known copyright owner, the distribution or use of a work can be legally risky. There is no way to contact the copyright owner, so the normal recourse of licensing or permissions is not available. There have been several recent reports on the impact that orphaned works have on the distribution of culture. These reports are often driven by the difficulties that arise during attempts to digitize the collections of so-called “memory institutions,” such as archives, museums, and libraries.<sup>9,10</sup> Orphan works can include fine art, fine art and documentary photographs, commercial and documentary films, published text-based works (including books and journals), unpublished text-based works (such as letters, theses, diaries, and manuscripts), sound recordings (e.g. music, lectures, and oral history), maps, charts, and engineering/design drawings, and personal ephemera (family photos, shopping lists, etc.). Many of these products of human ingenuity end up in collections, and not all of them have a clear line of provenance. So what then?

---

<sup>5</sup> Urban et al., 3-4.

<sup>6</sup> Lee

<sup>7</sup> Glenn Peebles. “EU Extends Copyright Term To 70 Years.” *Billboard*. Sept. 12, 2011.

<sup>8</sup> Open Music Archive: Eileen Simpson and Ben White, “The Edges of the Public Domain,” in *Undoing Property?* eds. Marsia Lewandowska and Laurel Ptak (Sternberg Press: Stockholm), 131.

<sup>9</sup> Urban et al., 4

<sup>10</sup> Korn, 5

In 2005 Senators Orrin Hatch and Patrick Leahy, on behalf of the Subcommittee on Intellectual Property and goaded by the Sonny Bono Copyright Term Extension Act, 1998 (Pub. L. No. 105-298, 105th Cong., 1st. Sess. (October 28, 1998), U.S. Copyright Office online)<sup>11</sup> requested a study of orphan works from the United States copyright office.<sup>12</sup> There were more than 850 responses to the initial inquiry, and an overwhelming response to public roundtables and requests for online comments<sup>13</sup>. The report found that many organizations described situations involving works that had no information about copyright; “..no name of the author, no copyright notice, no title in short, no indicia of ownership on a particular copy of the work *at all*.”<sup>14</sup>

In January 2013, researchers from the University of California at Berkeley and the American University published a report on the challenges that orphan works pose to non-profit memory institutions.<sup>15</sup> They noted a “core institutional mission” of these institutions is to “preserve and provide access to knowledge.”<sup>16</sup> These days, providing access to knowledge translates to digitization and digital access.<sup>17</sup> As comments submitted to the Copyright Office during the 2005 study made clear, orphan works are a major obstacle to digitization for libraries, archives, and other similar collections.<sup>18</sup>

To create any copy of a work, a library requires permission from the copyright owner. A digital copy counts as a copy, so digitizing works requires permission. For orphan works the copyright owner is ostensibly unknown, but the institution must show that they attempted to find the owner nonetheless. This process is known as performing “due diligence” in the parlance of

---

<sup>11</sup> The law extended the existing copyright by another 20 years and extended copyright retroactively to works published before 1978.

<sup>12</sup> “Report on Orphan Works: A Report of the Register of Copyrights,” Library of Congress: U.S. Copyright Office. January 2006, 17

<sup>13</sup> Ibid, 17

<sup>14</sup> Report on Orphan Works, 26

<sup>15</sup> Urban et al., 1

<sup>16</sup> Ibid, 7

<sup>17</sup> Ibid, 7

<sup>18</sup> Report on Orphan Works, 18

copyright law. Just how much diligence counts as “due” is ill-defined in most countries, and performing these searches takes valuable time and effort, especially for institutions that house millions of items.<sup>19</sup> The researchers on the UC report found that orphan works impeded efforts to provide digital access, on a copy-by-copy basis and through mass digitization, and made it difficult to digitally preserve and provide access to “born-digital” content.<sup>20</sup>

Certain types of work are more prone to orphanhood than others—audio, film, photos, ephemera, and letters tend to become more quickly unmoored from their authors.<sup>21</sup> This is often affected by the vulnerable nature of the material used to create the original—celluloid, for example, requires continual care, and without that care, the film will vanish. Photographic prints, unsigned, are hard to connect to copyright owners, while photographic negatives without context float free. Letters may only contain a first name, with no other clues, or a long-outdated address. This form of vulnerability extends to all analog and digital recording media—video and audiotape disintegrates, digital media platforms become obsolete. Works that have little commercial value are also likely to enter orphanhood more easily, even though they may be the work that has most academic or historical value.<sup>22</sup>



Figure 1: Page from Tacita Dean's *Floh*

The state of orphanhood has metaphysical as well as legal ramifications. This becomes especially apparent in our current regime of free-floating digital information. If the metadata<sup>23</sup> of a photo or text has been stripped or lost, that image becomes an orphan, no matter that it may

---

<sup>19</sup> Korn, 21

<sup>20</sup> Urban et al., 8

<sup>21</sup> Liza Harrell-Edge (Manager of Digital Collections, Archives and Special Collections, New School, New School Archives and Libraries) in discussion with the author, October 2013.

<sup>22</sup> Korn, 18

<sup>23</sup> The data that describes how and when and by whom a particular set of data was collected.

be a work jealously protected by copyright. This can take place in the physical as well as digital realm, where one person's found photo is another person's copyrighted work. Tacita Dean's *Floh* (2001) is an artwork made up exclusively of a collection of orphan works, that is, photos of unknown provenance found at flea markets.<sup>24</sup> (See Fig. 1) However, all of these photos are also copyrighted works, and though at the time the photos were anonymous, these days a simple Google image search could identify provenance for some of them.

This type of situation is further complicated by new digital tools. Joy Garnett, a painter who based a work on a fragment of a photo found on the Internet and was later sued for copyright infringement, had no idea of the provenance of the photo. Her work was clearly within rights as fair use,<sup>25</sup> but as far as she knew, the free-floating image was an orphan.<sup>26</sup> (See Fig. 2)



Figure 2: Joy Garnett  
*Molotov Man*

The digital revolution has led to a democratization of the impulse to research and archive. The ability to “search” easily for information creates inveterate researchers of all stripes. Digitization is considered a positive public good by most memory institutions, as it allows a wide variety of people access to an unprecedented amount of information of many types. It is quickly becoming the standard form of information retrieval, and the inability to digitize content effectively locks it away.<sup>27</sup> This is true even for orphan works that are “fostered” in archives—they are accessible to researchers who are able to gain access on site, but cut off from a larger audience.<sup>28</sup> This regime of mass digitization is one of the elements that have led to tensions around orphan

---

<sup>24</sup>Tacita Dean. “Floh.” Marian Goodman Gallery, accessed October 14, 2013, [http://www.mariangoodman.com/exhibitions/2001-05-04\\_tacita-dean/](http://www.mariangoodman.com/exhibitions/2001-05-04_tacita-dean/)

<sup>25</sup> **Sec. 107. - Limitations on exclusive rights: Fair use** Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

<sup>26</sup> Joy Garnett, “Steal this Look,” *intelligent agent* 4, no. 2 (2004): 2.

<sup>27</sup> Korn, 7

<sup>28</sup> Harrell-Edge.

works.<sup>29,30</sup> and the desire to digitize collections was a large part of the impetus behind the most recent studies.

The flip side to mass access is mass control. Digital content is much more vulnerable to granular control than other types of content. For commercial interests, this may be a saving grace, but it makes a mockery of the idea of free and open access to information. Access to online resources is already limited by access to the Internet—the specter of total content control always hovers at the edges of arguments about mass digitization.<sup>31</sup>

And what about creator's rights? Copyright is “technology's child”<sup>32</sup> and was at first exclusively the province of printed text. The impulse to copyright has been led by corporate interests from the beginning,<sup>33</sup> but eventually became twinned to the interests of individual makers. In France the “droit moral” asserted the rights of the author to receive remuneration for his or her product in perpetuity.<sup>34</sup> This right, however, developed only after the power of the monarchy faded, and mercantile interests came to the fore.<sup>35</sup> It is a complex issue, because copyright does help individual creators turn a profit. It just helps publishers, content providers and others who distribute information, and so profit from controlling access, far more. Orphan works highlight the ways that the current copyright laws can obscure the interests of the individual creator. As the Office of the Register of Copyrights stated in the initial inquiry that led to the 2011 report:

The Office has long shared the concern with many in the copyright community that the uncertainty surrounding the ownership status of

---

<sup>29</sup> Korn, 6

<sup>30</sup> Harrell-Edge.

<sup>31</sup> Library of Congress, Copyright Office [Docket No. 2012–12] Orphan Works and Mass Digitization. *Federal Register* 77, 204. October 22, 2012, 3

<sup>32</sup> Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Highway, Revised Ed.* (Stanford University Press: Stanford, CA, 2003), 21

<sup>33</sup> Goldstein, 31-33, Copyright started, in England, after the advent of the printing press, with the Stationers Company, a guild made up of bookbinders, booksellers and other printing-related activities. They recruited authors to their cause only after they were unsuccessful in obtaining sufficiently lengthy copyrights on their own.

<sup>34</sup> Ibid, 136

<sup>35</sup> Ibid, 139-140

orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.<sup>36</sup>

There is a cognitive dissonance at play in the current legal culture of copyright—it is problematic to encourage digitization but fight the likely result, that is, use. A 2009 report from Jisc (formerly the Joint Information Systems Committee), an organization in the UK that supports education through the use of digital technologies<sup>37</sup> also examined the problem of orphan works, bringing in concerns about the likely status of more recent work.<sup>38</sup> The authors point out that the use of digital tools to “create, adapt, mash, repurpose, copy and publish,” married to lack of standards around provenance, has increased the chances that content that may “consist of a number of works, created by a number of people, containing a number of different rights, mashed together, with uncertain ownership of rights and often uncertain permissions.”<sup>39</sup> They state that, “the user generated content of today is likely to be the Orphan Works of tomorrow.”<sup>40</sup>

Respondents to the survey by Jisc posited a technological fix for the problem of unauthorized digital copying. They suggested creating software that allows viewing but not download, or software that distorts or lowers the resolution of copied digital images.<sup>41</sup> This would be difficult to develop and enforce, and may, in the end, backfire. There are other possibilities for approaching the “problem” of copying. The Rijksmuseum in Amsterdam recently created the “Rijksstudio”, which offers ultra high-resolution images of 125,000 of the works in their collection. Visitors are invited to download and manipulate the images.<sup>42</sup> Taco Dibbets, director of collections at the Rijksmuseum said, in an interview with the New York Times, “We’re

---

<sup>36</sup> Library of Congress, 1

<sup>37</sup> Jisc: *About us*, accessed October 3, 2013, <http://jisc.ac.uk/about>.

<sup>38</sup> Korn, 9

<sup>39</sup> Ibid, 10

<sup>40</sup> Ibid, 10

<sup>41</sup> Ibid, 26

<sup>42</sup> “Rijksmuseum reopens and makes its digital collection of 125,000 masterpieces free to all, *Digital Meets Heritage*, October 31, 2013, Accessed October 31, 2013, <http://www.digitalmeetsculture.net/article/rijksmuseum-reopens-and-makes-its-digital-collection-of-125000-masterpieces-free-to-all>.

a public institution, and so the art and objects we have are, in a way, everyone's property. With the Internet, it's so difficult to control your copyright or use of images that we decided we'd rather people use a very good high-resolution image of the 'Milkmaid' from the Rijksmuseum rather than using a very bad reproduction."<sup>43</sup> The Rijksmuseum has currently put online only th parts of their collection that predate Dutch copyright laws, but they plan to eventually share their entire collection.<sup>44</sup>

Orphan works may be the Lost Boys of the digitized world, but digital content is already more free than creators or content providers may wish it to be. Today, the human magpie instinct for stealing and transforming culture has been greatly enabled by the development of digital content. The exuberant mix-and-match that has created a cauldron of creativity online is flourishing, even in the face of legal challenges and take-down bots. Preventing people from using online content to create new culture is like making paint illegal—it stifles a healthy creative impulse, it is difficult to effect, and probably more trouble than it is worth.

Hal Foster, in *An Archival Impulse*, identifies “an archival impulse at work ...in contemporary art.”<sup>45</sup> He talks about the tendency towards creating informal archives, and arranging materials in according to “a quasi-archival logic.”<sup>46</sup> While Foster was discussing so-called fine art, he could have been describing a large chunk of contemporary culture. From “fan fiction”<sup>47</sup> to Penelope Umbrico (with her collections of sunsets and televisions),<sup>48</sup> to humorous *detournements* of advertising (My Imaginary Well-Dressed Toddler Daughter (MIWDTD))<sup>49</sup> and

---

<sup>43</sup> Nina Siegal, “Masterworks for One and All,” *New York Times* (New York, NY) May 28, 2013.

<sup>44</sup> Ibid

<sup>45</sup> Hal Foster, “An Archival Impulse,” *October* 110, Fall 2004, 3

<sup>46</sup> Ibid, 5

<sup>47</sup> Alexis Lothian, “An Archive of One's Own: Subcultural Creativity and the Politics of Conservation.” *Transformative Works and Cultures*, no. 6. 2011, 1.1, accessed October 28, 2013, <http://journal.transformativeworks.org/index.php/twc/article/view/267/197>.

<sup>48</sup> Penelope Umbrico. *Suns (From Sunsets) from Flickr, 2006-ongoing* and *For Sale TVs from Craigslist*. Available at: [http://www.penelopeumbrico.net/Suns/Suns\\_Index.html](http://www.penelopeumbrico.net/Suns/Suns_Index.html) and [http://www.penelopeumbrico.net/tvsforsale/CL\\_TV\\_Index.html](http://www.penelopeumbrico.net/tvsforsale/CL_TV_Index.html)

<sup>49</sup> Tiffany Beveridge. *My Imaganary Well-Dressed Toddler Daughter*. Available at <http://www.pinterest.com/tiffanywbwg/my-imaginary-well-dressed-toddler-daughter/>



activist projects like *FORCE: YES Consent is Sexy* (where the Victoria's Secret Pink campaign was co-opted for a conversation on rape culture),<sup>50</sup> online content is turned to other uses; the archival impulse is everyday now. (See Figs. 3, 4, and 5). Umbrico says, "I take the sheer quantity of images online as a collective archive that represents us - a constantly changing auto-portrait,"<sup>51</sup> and I think she speaks for many creators.

Memory institutions want to make orphan works accessible, and even this can be legally risky. I want to take this one step farther by putting the orphans to work and bringing them into the cultural conversation. This means finding orphan works and exposing them—using them in new creations, distributing them, putting them into play. This will require due diligence on my part (to determine that the works are truly orphaned), and a back-up fair use defense in case of trouble. It will require finding what nobody knows is lost, because if the work is orphaned, where is it placed in an archive? How do you search for what is unnamed and unclaimed? This is the question I am approaching, and the answers will bring the voices of the orphans clamoring into our consciousness.

Through the advent of digitization, intellectual property has become both entirely fluid and more controlled than ever. Orphan works contain within them the reigning existential crisis, a battle between total control of content and an embrace of the possibilities presented by the free flow of information. They reveal the lie at the heart of the idea of intellectual "property;" the fallacy that even the fixed form of an idea can have perpetual protection. Eventually, all human endeavor is cannibalized by other humans into new uses. Copyright in perpetuity will not protect work from that eventual fate, nor should it. The current supremacy of collage-based creativity, in a world where all work is becoming easy to parse and fragment, challenges the idea that any work will survive intact. The orphans should be free; the others will follow.

---

<sup>50</sup> Rachel Monroe, "Baltimore Feminists Prank Victoria's Secret — And Spark an Internet Revolution," *Baltimore Fishbowl* (Baltimore, MD), Monday, Dec. 10, 2012. Accessed April 20, 2013, <http://www.baltimorefishbowl.com/stories/baltimore-feminists-prank-victorias-secret-and-spark-an-internet-revolution>.

<sup>51</sup> Penelope Umbrico. "Some Notes on My Work," *Words*. Accessed October 27, 2013, <http://www.penelopeumbrico.net/Info/Words.html>.



Figure 3: Penelope Umbrico *For Sale TVs From Craigslist*



Figure 4: FORCE *YES Consent is Sexy* campaign

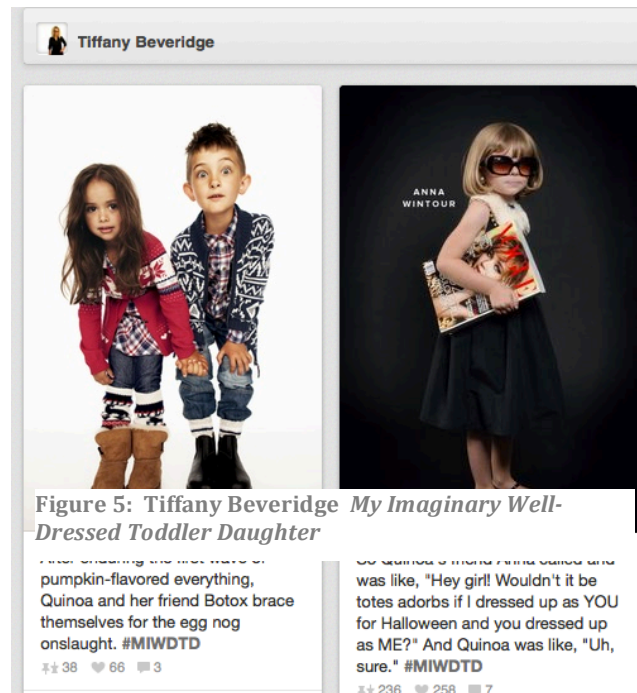


Figure 5: Tiffany Beveridge *My Imaginary Well-Dressed Toddler Daughter*

## Bibliography

"Rijksmuseum reopens and makes its digital collection of 125,000 masterpieces free to all, *Digital Meets Heritage*, October 31, 2013. Accessed October 31, 2013.  
<http://www.digitalmeetsculture.net/article/rijksmuseum-reopens-and-makes-its-digital-collection-of-125000-masterpieces-free-to-all>.

Foster, Hal . "An Archival Impulse," *October* 110, Fall 2004.

Garnett, Joy, "Steal this Look," *intelligent agent* 4, no. 2 (2004)

Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Highway, Revised Ed.* Stanford University Press: Stanford, CA , 2003.

Korn, Naomi. "In From the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public." *Jisc Content, Collections Trust*. April, 2009. Accessed October 1, 2013, <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>.

Lee, Timothy. "The Switch: 15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?" *Washington Post*. (Washington, D.C.), October, 25, 2013.

Library of Congress, Copyright Office [Docket No. 2012–12] Orphan Works and Mass Digitization. *Federal Register* 77, 204. October 22, 2012.

Lothian, Alexis. "An Archive of One's Own: Subcultural Creativity and the Politics of Conservation." *Transformative Works and Cultures*, no. 6 (2011). Available at <http://journal.transformativeworks.org/index.php/twc/article/view/267/197>. Accessed October 28, 2013.

Monroe, Rachel. "Baltimore Feminists Prank Victoria's Secret — And Spark an Internet Revolution," *Baltimore Fishbowl* (Baltimore, MD), Monday, Dec. 10, 2012. Accessed April 20, 2013, <http://www.baltimorefishbowl.com/stories/baltimore-feminists-prank-victorias-secret-and-spark-an-internet-revolution>.

Open Music Archive: Simpson, Eileen and White Ben, Ben "The Edges of the Public Domain," in *Undoing Property?* eds. Lewandowska, Marsia and Ptak, Laurel (Sternberg Press: Stockholm), 129-135.

Peebles, Glenn. "EU Extends Copyright Term To 70 Years." *Billboard*. Sept. 12, 2011.

"Report on Orphan Works: A Report of the Register of Copyrights," Library of Congress: U.S. Copyright Office. January 2006.

Siegal, Nina. "Masterworks for One and All," *New York Times* (New York, NY) May 28, 2013.

Umbrico. Penelope. "Some Notes on My Work," *Words*. Accessed October 27, 2013, <http://www.penelopeumbrico.net/Info/Words.html>.

Urban, Jennifer; Hansen, David; Jaszi, Peter and Jacob, Meredith. "Report on Orphan Works Challenges for libraries, archives, and other memory institutions." *Center for Media and Social Impact (CMSI)*. January, 2013. Available at <http://www.cmsimpact.org/fair-use/related-materials/documents/report-orphan-works-challenges-libraries-archives-and-other-mem>. Accessed October 20, 2013.