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If You Cannot Find the Owner

The situation is common: You want to use a copyrighted work beyond the limits of fair use or other copyright exception. You tracked down a likely copyright owner and have attempted to seek permission, but the effort simply has produced no conclusion. Worse, perhaps you did receive permission, but with burdensome conditions or a high price. Perhaps you wrote for permission, and the permission was flatly denied.

In some situations, you might have little choice but to absorb the bad news and change your plans. Much more complex and frustrating, however, is when you exert an honest effort, but you simply cannot find a copyright owner or your efforts go unanswered. When you cannot identify or locate the current owner, the copyright materials are sometimes called “orphan works.” Congress has considered legislation to address the problem of orphan works, but statutory protection is not yet forthcoming. In the meantime, what do you do when you reach that mysterious “dead end” of the quest?

Problems

1. You cannot identify a copyright owner

The work itself does not have a name, and you have searched through various different catalogs, databases, and other sources, according to the title or description of the work. Under copyright law, anonymous and pseudonymous works are still fully protected. Simply because you cannot find the name of the copyright owner does not mean that it is not under copyright. Nevertheless, you are left to ponder whom to ask for permission. Similarly, you may well be able to identify the original author or copyright owner, but that individual has died, or the company has gone out of business. You have not been able to track any heirs or successors.

2. You cannot locate the copyright owner

You have concluded that the work is protected, and you have been able to identify the likely copyright owner, but you simply cannot find that person or entity. No listing appears in any of the usual reference guides or directories. You also have conducted a search of the records of the U.S. Copyright Office, and you have found no current registration of a copyright claimant or any documentation assigning the copyright to a new owner. Perhaps the original copyright owner was a company or organization that ceased doing business years ago, and you have not been able to find any person or entity that currently holds the rights. Perhaps the copyright owner died, but the heirs are untraceable. The copyright, nevertheless, lives on.

3. You have contacted the copyright owner, but received no response

The copyright owner seems to really exist and to have an address or telephone number, but all of your efforts to obtain permission have been in vain. Your telephone calls go unanswered, and your letters drop into a bottomless pit. You even write a letter to the copyright owner declaring, "I will assume you are giving me permission unless you send me an explicit denial." That creative effort might be helpful motivation, but silence is not a "yes."

The diligence with which you pursue and explore the possibilities for identifying, locating, and contacting the copyright owner may vary under the circumstances of each project. You might only invest extensive effort when the project is of great importance or the use of that particular copyrighted work is essential to achieving your goals. Regardless, after expending much effort, you may simply find yourself reaching this dead end far too often.

Possible Solutions

1. Return to fair use

When you originally evaluated fair use, you may have focused on an assumption about the "potential market" for the work in question, and the possible harm to that market caused by your use of the work. Remember that "market effect" is one of the four factors to analyze in fair use. Now that you have immersed yourself into the quest for permission, you may have discovered that no permission seems to be forthcoming at all. If you really are at this "dead end," you may very well have found that there is no realistic market asserted for this work. You may accordingly be able to reevaluate fair use a bit more generously than you had expected. For more information, visit the fair use section.

2. Replace the materials with alternative works

You may have indulged in your project with firm commitment to using particular images, specific paragraphs, or exact selections of music. You need to ask yourself whether those specific copyrighted works are the only materials that will satisfy your goals. In many cases, you can achieve your desired end results with a selection of copyrighted works that come from more cooperative copyright owners or that may be in the public domain and available for use without copyright restriction.

3. Alter your planned use of the copyrighted works

Your ambitious plans may have involved scanning, digitizing, uploading, dissemination, Internet access, and multiple copies for students and colleagues. Requests for broad or variable rights of use often scare copyright owners or leave them pessimistic. As a result, your inquiries can get tossed into the bottomless pit. If you simply cannot get permission, you might revise your ambitious plans to something more modest and controllable, thus increasing the likelihood that you are within fair use. When you rein in the

number of copies, or the scope of access, or the potential for duplication and dissemination, you may find that you have strengthened your claim to fair use under both the “purpose” and the “market effect” factors.

4. Conduct a risk-benefit analysis

You have diligently investigated your alternatives. You do not want to change your project, and you remain in need of the elusive copyright permission. The remaining alternative is to explore a risk-benefit analysis. You need to balance the benefits of using that particular material in your given project against the risks that a copyright owner may see your project, identify the materials, and assert the owner’s legal claims against you. Numerous factual circumstances may be important in this evaluation. The “benefit” may depend upon the importance of your project and the importance of using that particular material. The “risks” may depend upon whether your project will be published or available on the Internet for widespread access. You ought to investigate whether the work is registered with the U.S. Copyright Office and weigh the thoroughness of your search for the copyright owner and your quest for appropriate permission.

Undertaking this analysis can be sensitive and must be advanced with caution and with careful documentation. You may be acting to reduce the risk of liability, but you have not eliminated liability. A copyright owner may still hold rights to the material and may still bring a legal action against you, based on copyright infringement. Your good faith efforts can be helpful, but they are not necessarily protection from legal liability. Members of the Columbia University community should consult with the Copyright Advisory Office or University Counsel for assistance with this decision.

Most Recent Revision: 062309

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