White Paper No. 1 – Orphan Works at NAIT

“Please, sir, I want some more.” Charles Dickens (1812-1870)
Oliver Twist, published serially 1837-1839
Illustration by George Cruikshank (1792-1878)*

The word orphan conjures up the wretched existence of too many children in Victorian England; perhaps for that reason it was attached as a label to the class of works where the copyright owner cannot be identified or a known owner cannot be found. In the eyes of some, using an orphan work is exploitative and not to be countenanced. The truth is more matter of fact; orphan works are still works. As such, they are governed by the system of copyright, including the exceptions within that system.

In recent years, an awareness of the obligations of copyright became sharper across the Canadian educational landscape. At NAIT, great effort was expended to ensure that all materials produced by NAIT were compliant with the Copyright Act and lived up to the ideals of academic integrity. That effort is commendable. Yet material that was legitimate in use may have been removed from learning materials purely because of its orphan status.** As NAIT moves forward, that prohibition is now being lifted. If any members of NAIT still have concerns as to the wellbeing of the institution, this document seeks to address and alleviate such anxiety.

Part I (Introduction) presents how a complaint might arise at NAIT in connection to use of orphan works, and clarifies that the provision of fair dealing refutes such a claim. Parts II and III expand upon these matters; Part II addresses the atmosphere concerning orphan works (both globally and in Canada), and Part III provides a scenario of orphan use, and the fair dealing analysis that supports such use. Part IV addresses the component of moral rights within the system of copyright (replete with its own principles concerning attribution) and further emphasizes that unattributed work may still be used at NAIT via fair dealing. Part V (Conclusion) makes explicit the two most pertinent questions staff should explore for themselves in consideration of fair dealing:

(i) Can the use of the work be reasonably explained as meeting a learning need?
(ii) Was only the necessary amount of the work used? (This question is usually superfluous in the context of imagery, but it is still something to be considered.)

Meera Nair, Ph.D
NAIT Copyright Officer, February 2015

**Conversations with Teaching Services staff and other faculty/staff at NAIT; the mantra was “If in doubt, pull it out.”
I. Introduction

As leaders in education, post-secondary institutions carry a responsibility to treat learning materials, and their creators, with respect. Related to that responsibility is the concern of unwanted attention from copyright holders, particularly the spectre of being challenged through legal action. As a matter both of ethics and prudence, it is incumbent on educational institutions to take pains to follow the law, and ensure that copyrighted material is handled appropriately. Quite often, materials must be (and are) licensed for use within the NAIT community. In addition, exceptions within the law afford instructors and students added protection when using copyrighted material without authorization.

This document focuses on one particular class of works in use, the category known as orphan works. Described as works lacking a known author, or works for which the copyright holder cannot be found, orphan works present challenges for copyright holders and users alike. Like many post-secondary institutions, NAIT adopted a play-safe policy and refrained from using orphan works. However, the law does not forbid using a work purely because of its orphan status.

Should NAIT’s use of an orphan work be questioned, the complainant will likely point to Canada’s existing system of licensing of such works through the Copyright Board of Canada. The argument will be that since a means of licensing exists, institutions are honour-bound to use that system. However, such an argument neglects to consider the realm of unauthorized use available within the system of copyright, either in the name of institutional exceptions or via the individual exception of fair dealing. The Copyright Board has unequivocally stated that fair dealing obviates the need for a license; moreover, in a unanimous decision, the Supreme Court of Canada declared that the option of a license is not relevant to a decision of fair dealing.

Staff at NAIT may include orphan works within teaching and learning materials, provided the use is consistent with fair dealing.

II. Orphan Works – Global and Canadian Contexts

NAIT’s discomfort with orphan works is by no means unique. Copyright today is extremely easy to achieve—the threshold of originality is low, no formalities of registration are required—and exists for very long durations.\(^1\) Coupled with the

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\(^1\) Copyright Act (R.S.C., 1985, c. C-42), http://laws-lois.justice.gc.ca/eng/acts/C-42/. In particular, Section 5—Works in which copyright may subsist, “...copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work ... .” Originality is a fluid concept; the Supreme Court provides the following guidance: “...an ‘original’ work under the Copyright Act is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise
heightened distribution of works made possible via digital technology, world-wide networks, and the phenomenon of social media, it is increasingly difficult to assess origins of works. Which leads to problems for copyright holders and users alike. Using orphan works could deny a copyright holder its due; using orphan works could result in stiff penalties for a user even when no copyright holder exists to receive compensation. Neither situation is desirable; regardless of where one sits on the copyright spectrum, there is unanimity that a problem exists.2

As countries and organizations have grappled with the problem, Canada’s particular legislative approach concerning orphan works has drawn both commendation and criticism.3 Briefly, in 1988, the Copyright Board of Canada was established with a mandate to:

… establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. The Board also has the right to

of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise;” see CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 [CCH Canadian] para. 25. Regarding copyright’s duration, see Section 6 – Term of Copyright, “The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.” Canada is a signatory to the Berne Convention and agrees to refrain from any regulatory or formal procedure to establish copyright in a work. “The enjoyment and the exercise of these rights shall not be subject to any formality;” see Article 5, Section 2, The Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P109_16834. Regrettably this provision of the Berne Convention has meant that no registry is kept of copyright owners


3 In a series produced by Berkeley Digital Library Copyright Project, David Hansen examined four alternatives to the status quo; one of which was “broader extended collective licensing” with Canada serving as the exemplar. “For users that require legal certainty and wish to use only one or a few works, the system presents a solution that may be attractive. … [But] commentators have noted the structure of the system may be too administratively burdensome on a larger scale and would require potentially wasteful payments to owners that may never collect them;” see David R. Hansen, Orphan Works: Mapping the Possible Solution Spaces (Berkeley Digital Library Copyright Project, White Paper No. 2, 2012) p.10-11, http://ssrn.com/abstract=2019121. Canada’s system has also attracted British and European review; “Arguably, Canada has implemented one of the most advanced legislative attempts at addressing the problem;” see Jeremy DeBeer and Mario Bouchard, “Canada’s ‘Orphan Works Regime’: Unlocateable Copyright Owners and the Copyright Board,” Oxford University Commonwealth Law Journal, Vol.10, No.2 (2010) 215-254, 217.
supervise agreements between users and licensing bodies and
issues licences when the copyright owner cannot be located.4

It is important to remember that copyright was historically an industry mechanism, and
the presumption of the Board is to assess applications with an eye to market operations.
To that end, when confronted with an application that effectively wishes to redistribute
an existing work in a commercial setting,5 the Board will permit use of a copyrighted
work of unknown origins, provided due diligence has been exercised to find the
copyright owner and some manner of fee is paid to a copyright collective such as Access
Copyright for literary works, Society of Composers, Authors and Publishers of Canada
(SOCAN) for performance rights, Canadian Artists’ Representation Copyright Collective
(CARCC) for artistic works, etc.6 The provision within the Copyright Act which gives
support to the Board’s activities is Section 77:

(1) Where, on application to the Board by a person who wishes to
obtain a licence to use
(a) a published work,
(b) a fixation of a performer’s performance,
(c) a published sound recording, or
(d) a fixation of a communication signal
in which copyright subsists, the Board is satisfied that the
applicant has made reasonable efforts to locate the owner of the
copyright and that the owner cannot be located, the Board may
issue to the applicant a licence to do an act mentioned in section
3, 15, 18 or 21, as the case may be.

(2) A licence issued under subsection (1) is non-exclusive and is
subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after
the expiration of a licence issued pursuant to subsection (1) in
respect of the copyright, collect the royalties fixed in the licence

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5 A noteworthy and recent example of the Board’s work was the re-release of Bye Bye Blues (1989), a film
written and directed by Anne Wheeler. “The licence authorizes the reproduction and communication to
the public by telecommunication of a film entitled ‘Bye Bye Blues’ for distribution through various means
including, but not limited to, television (free, pay, cable, satellite, etc.) and Internet, in Canada;” see
http://www.cb-cda.gc.ca/uncocatable-introuvables/licenses/274-E.pdf. This gem of a film was in danger of
being lost forever: “The rights to the film had become so confused they could not be located. As a result,
broadcasters had stopped broadcasting the film, there were only a handful of battered VHS copies for sale
on line and in the few video stores still operating, and a digital version of the film was impossible due to
the unlocatability of the rights...”; see http://www.viff.org/festival/films/f12398-bye-bye-blues.
6 At last count, Canada had 38 collective societies; see http://cb-cda.gc.ca/societies-societes/index-e.html.
or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1)\(^7\)

However, the Board is cognizant that not all uses of copyrighted works fall within market operations. The Board reminds us that works used via an exception to copyright do not require a license:

You also do not need a licence if the intended use is not protected by copyright. There are a few specific exceptions to the copyright owners' exclusive right to authorize the use of their works "or any substantial part thereof in any material form whatever". For instance, *fair dealing for the purposes of research or private study* is allowed (emphasis in original).\(^8\)

Furthermore, the same section reminds educational institutions that they are eligible for other exceptional uses, if defined in the *Copyright Act*. While the language is somewhat dated (it indicates that courts interpret fair dealing restrictively which was the precedent prior to 2004\(^9\) its own starting point should alleviate concerns of educational institutions; no license need be sought if the intended use is not protected by copyright.

*Thus, while Canadian educational institutions may need licenses for some uses of copyrighted works, uses that fall within fair dealing do not require licenses whether the source of the work is known or not.*

### III. Determining Fair Dealing

A common concern at NAIT is the use of an unattributed image in class notes or lecture slides. If the use qualifies as fair dealing, the orphan status is irrelevant to the question

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8 *Unlocatable Copyright Owners*, [http://cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html](http://cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html).

9 “Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively;” see *CCH Canadian*, note 1 above, para. 48. And in the famed pentalogy set of decisions in 2012, the Supreme Court of Canada continued to emphasize that fair dealing should not be interpreted restrictively; “the cases provided an unequivocal affirmation that copyright exceptions such as fair dealing should be treated as users’ rights ... [and] the Court continued its expansion of fair dealing by interpreting it in a broad and liberal manner.” See Michael Geist, “Introduction,” in ed. Michael Geist, *The Copyright Pentalogy—How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), p.iii-iv.
of copyright infringement. Bearing in mind, of course, that an educational institution should always aspire to proper citation; indeed moral rights also prod us to be polite and commend others’ works (see Part IV). But when dealing with legacy content, good intentions are not always sufficient to meet the goal of courtesy. If maintaining the content improves the effect of a lesson, arguably, students are better off with an unattributed image than no image at all.

As to how to determine fair dealing, it is not as difficult as one might think. Essentially, the image must be more than simply eye-candy or distraction. The image must serve the purpose of the lesson at hand. The idiom of a picture being worth a thousand words is particularly apropos to a teaching and learning context.

**Fair Dealing of an Orphan Image**

The following analysis is taken from a real event involving a map, a potential book chapter, and a publisher. The publisher was uneasy about the use of an orphan work (a map), but when the author presented an explanation relying on exceptions, the publisher agreed to use the map. The publishing community is extremely risk-averse and has a long history of seeking permission when none is needed. The acquiescence of the publisher is illustrative of the degree to which uses via exceptions are supported by courts.

The role of the map within the chapter is paradigmatic of the manner in which an image might be incorporated into learning materials at NAIT; that is, to reinforce a process or concept, or evoke a sense of history or context, or conjure up emotion that is relevant to the subject at hand. Inclusion of material to these ends, sits well as fair dealing.

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10 A former colleague wished to display a map in his chapter of an upcoming scholarly book; however, his publisher balked at reproducing the map without permission of the copyright holder. The original book was in my colleague’s possession, thus he had the name of the author at hand. However, the author had long since passed away, no estate details were to be had, and the publishing company of that book was no longer in business. With no traceable/locateable copyright-holder, the map was now an orphan; See Meera Nair, “To Promote the Progress,” in *Fair Duty*, https://fairduty.wordpress.com/2012/09/16/to-promote-the-progress/. Note that in the actual event, the publisher was an American entity, nevertheless the contextual analysis is common to both jurisdictions.

11 Unlike the situation in Canada where robust support was given to exceptional uses by the Supreme Court over a decade ago, the United States judiciary has only recently become comfortable with exceptions. Thus, it is doubly illuminating that an American publisher would stand behind unauthorized use; see Meera Nair, “Fair Dealing at a Crossroads” in ed. Michael Geist, *From Radical Extremism to Balanced Copyright—Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) p.90-120. See also Meera Nair, “second circuit stays on message,” *Fair Duty*, 15 June 2014, https://fairduty.wordpress.com/2014/06/15/second-circuit-stays-on-message.
Fair Dealing is defined in the Copyright Act in Sections 29, 29.1 and 29.2: For NAIT’s purposes Section 29 should suffice: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”

The Supreme Court of Canada stipulates that assessments of fair dealing are contextual and rely on a comprehensive examination of each situation. The Court provides a framework of questions, with the caveat that the framework itself be malleable to each situation:

i. The Purpose of the Dealing
ii. The Character of the Dealing
iii. The Amount of the Dealing
iv. Alternatives to the Dealing
v. The Nature of the Work
vi. Effect of the Dealing on the Work

Applying the law to the situation described, yields the following.

i. The Purpose of the Dealing. In the example of the map, the chapter was prepared under the auspices of research, allowable under the terms of Section 29. In a teaching and learning situation at a credible educational institution, the assessment would rely upon “education” in Section 29.

ii. The Character of the Dealing. Character refers to how the copyrighted work is dealt with. A limited form of distribution is most likely to be fair. Note that in the example cited, the distribution of a scholarly book would not be considered limited but after consideration of all factors, the publisher agreed to use the map. It is a reminder that not every factor must result in a status of “fair” but that the overall assessment should lean towards fairness. In the context of teaching and learning, the audience is limited to a known set of students and thus would be fair.

iii. The amount of the dealing. A general guideline is that the less of a work used, the greater the fairness. That said, some works cannot be portioned into representative segments. Maps are challenged this way, as indeed are all images. Thus it was fair to reproduce the map as it served a contextual purpose. Generally speaking, reproducing entire images is fair, if displaying only a portion is inadequate for the purpose for which it was intended.

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13 “The Copyright Act does not define what will be ‘fair’; whether something is fair is a question of fact and depends on the facts of each case;” see CCH Canadian, note 1 above, para. 52.
14 Ibid. para. 53-60.
iv. Alternatives to the dealing. If a suitable substitute can be found with relative ease, that will influence an assessment of fairness. However, the substitute must meet with the intentions of the person who chose the work to serve a particular purpose. In the case of the map, with the time period of the subject matter, no suitable alternative was available.

v. The nature of the work. This could be described as the original intention of the work to be used. Was it an unpublished diary, or widely available? Is further dissemination of the work supportive of the overall goals of the system of copyright? With respect to the map, it was clearly a previously-published work and thus had been in circulation already. Extending its circulation gave renewed life to the history it embodied; a worthy outcome in the context of promoting creativity and disseminating knowledge. With respect to the consideration of orphan images in teaching and learning settings; their orphan status likely impedes knowledge of their creator’s original intentions for the work and hence this factor has less prominence. Or, if evaluation of this factor is insisted upon, the fact that the work is being used in the context of teaching and learning is supportive of copyright’s goals.

vi. Effect of the dealing upon the work. By far, this is the most contentious element. Copyright holders are quick to point out that an unlicensed use of a work is a lost license fee. However, the examination is more nuanced; the question is did the unauthorized use impede the expected (original) market for the work? In the matter of the map, with the original book no longer in production and very little circulation of the surviving print copies, there was no market to compete with (even if one could argue that reproduction of one map was a possible substitute for an entire book). On this factor we are also well served by our Supreme Court’s insistence that the presence of a license does not settle the matter.15

While the rigour of the preceding analysis may be intimidating, it is not incumbent upon any user to provide an explanation to the depth of Chief Justice Beverley McLachlin.16 A more informal explanation can be sufficient, as was the case with the map:

[The map is] a sketch of the political boundaries of early 20th century Southeast Asia, with shipping routes and distances marked in. A fitting backdrop to any contemporary discussion of

15 “The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests;” see CCH Canadian, note 1 above, para. 70.

16 In CCH Canadian, the Chief Justice of the Supreme Court of Canada authored the (unanimous) decision.
trade in that region. The purpose of the use melds with fair dealing’s category of research. The amount taken is reasonable – when discussing regions, it may be necessary to reproduce an entire map to convey the geographic boundaries and political nuances of the time. (David Vaver points out this challenge for both images and poetry; see Copyright Law) ... .

Note: the map itself is shown in Appendix A (last page).

The Copyright Office intends to bring NAIT staff to this level of analysis in their dealings with copyrighted work. The task is not unachievable; NAIT has already established conduits of assistance to teaching faculty via the Library and the Teaching Services group. Furthermore, the Copyright Office offers its own outreach and education program.

IV. What About Moral Rights?

The presence of Moral Rights within the Copyright Act may provoke further anxiety concerning attribution. An outcome of the civil law tradition as it evolved in Europe through the 18th century and 19th centuries, moral rights address the personal, or emotional, connection a creator may have with his or her work. In particular, the right to be associated with one’s work, by whatever means chosen (from attribution to anonymity) is reserved to the creator of each work. Section 14.1 of the Copyright Act states:

The author of a work has ... the right to the integrity of the work and, in connection with an act mentioned in [the scope of copyright] the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous (emphasis mine).

In the context of the use of an orphan work, if a reasonable effort was made to identify the work’s creator, it is not unreasonable then to use the work uncited if the effort did not yield the identity. Again, the critical question is: is the use fair dealing?

In the unlikely scenario that a creator later comes forward and identifies him or herself as the creator of work used by NAIT, NAIT would (finally) have a name to attach to the

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17 Note 10, above.
work and thus can cite the work properly in all subsequent uses. But such an event would not remove the legitimacy of the fair dealing.

V. Conclusion

NAIT’s prior concerns and actions are understandable given the climate of copyright in the post-secondary community of Canada. Some copyright collectives are only too eager to point to seeming-wrongdoing in connection to use of copyrighted materials, and argue for licensing revenue and/or a copyright suit. It is appropriate to consider how NAIT would respond if a complaint arises.

With the stance of the Copyright Board comfortably in hand, NAIT’s only concern is whether the use of the orphan work falls within the tenets of fair dealing. The person best able to explain that choice is the user of the orphan work. Thus, in the context of teaching and learning materials, the instructor should be able to provide a reasoned explanation for his or her choices.

As teaching and learning fall within the allowed purpose of “education” within fair dealing, and the status of orphan reduces/eliminates some elements of the multi-factor analysis, staff need only consider the following two questions:

(i) Can the use of the work be reasonably explained as meeting a learning need—to reinforce concepts, set context, and/or evoke emotion—and was not chosen merely as a distraction to break up a body of text or enliven a PowerPoint slide?

(ii) Was only the necessary amount of the work used? (This question is likely superfluous in the context of imagery, but it is still something to be considered.)

When such assurance can be given, and instructors exhibit good practices of citations with all newly-acquired material, NAIT’s conduct is appropriate to its mandate of serving students, and stands on secure law-abiding ground.

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19 At the time of this writing, Access Copyright has brought forward a suit against York University, and Copibec is presenting similar action against Université Laval. Details are not in abundance concerning either complaint.
Appendix A

Section III provides a contextual example of determining fair dealing with an orphan image. The image in question, and its parent publication are as follows:


Image provided by David Newman, Ph.D.