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Rockville MD 20851

February 4, 2013

Ms. Maria A. Pallante
Register of Copyrights
United States Copyright Office
101 Independence Avenue, S.W.
Washington, D.C. 20559-6000

Re: Comments Submitted Pursuant to “Notice of Inquiry, Orphan Works and Mass Digitization”, 77 Federal Register 64555 (Oct. 22, 2012)

Dear Ms. Pallante,

My name is Victoria K. Hall, and I am writing in response to the Copyright Office’s request for comments relating to orphan works. Although I currently work for the federal government, the opinions I express in this comment are mine, and not of my employer nor of any client.

Before I joined the federal government, I advised clients, primarily individuals, start-ups, and small businesses, on copyright matters. I was lead counsel for Bob Jacobsen in Jacobsen v. Katzer, which led to the landmark Federal Circuit decision, Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008), relating to open source licenses, and which was brought to a successive conclusion in early 2010. I was also co-counsel for a group of computers scientists who filed an amicus brief in Metro-Goldwyn-Mayer, Inc. v. Grokster. The amicus brief was cited by Justice Breyer in his concurring opinion.

These comments are in response to the Copyright Office’s request for interested parties to raise pertinent matters that are not discussed in the main portion of the Notice of Inquiry. The pertinent matter is when the orphan work is subject to an open source, free software, or similar, license. In short, if the Copyright Office drafts legislation relating to the use of orphan works, the Office should consider how it will address orphan works covered by open source, free software, and similar, licenses, since these licenses regulate downstream users’ usage in lieu of license fees.

Some rights holders use open source, free software, and similar licenses, to regulate the use of their works by requiring downstream users to take specific actions. Typical requirements are to maintain copyright notices and warranty disclaimers. Other requirements for some, but not all, licenses might be to distribute, or make available, altered source code, if its executable code is distributed. These licenses were drafted because the rights holders wanted to encourage certain behaviors in downstream users. A license fee is typically insufficient to remedy a violation of license terms.

Orphan works can arise several ways for open source, free software, and similar works. For instance, a rights holder unfamiliar with copyright law might forget to place a copyright notice on its work. Occasionally, downstream users, seeking a shortcut, copy open source or free software code and place it in their own software code without proper attribution and without meeting other license requirements, and then distribute the infringing software code. From time to time, a third party copies the software code and intentionally removes the copyright notice and license. Conceivably, when faced with a license that a third party finds burdensome, a third party could copy software code governed by that license and remove the copyright notice and license terms, and re-post anonymously. These scenarios create orphan works.

Given these scenarios, I recommend drafting legislation that avoids inadvertently creating a loophole for when an orphan work violates open source, free software, and similar, licenses. Specifically, a user whose reproduction, modification, distribution, etc., violates these licenses should not be able to remedy the violation with a license fee.

On a related note: Software vendors provide tools for identifying open source and free software code in a code database. The performance of these tools varies and they are expensive to use. Some companies, such as Google and possibly IBM, rely on their own internally developed tools to do these checks. To my knowledge, there has been no independent test using the same test files across all tools to compare the performance of these tools against one another. If use of these tools would be required by legislation, then I recommend using a standardized test to determine the performance of these tools in identifying open source, free software, or similar works.

If you have any questions, please contact me at 240-447-2925.

Regards,

/s/ Victoria K. Hall