

SUBMITTED AT <http://www.copyright.gov/orphan/comment-submission>

TO: Maria A. Pallante, Register of Copyrights.

FROM: [Internet Archive] submitted by Peter Brantley and Mary Minow

SUBJECT: Comment solicited by Notice of Inquiry, Orphan Works, Federal Register: October 22, 2012 (Volume 77, Number 204), Notices, Page 64555-64561.

Brief statement of problem:

Tension between copyright owners' rights and the cost to our cultural heritage with regard to orphan works is well documented, as the notice of inquiry recognizes. The confluence of new technology and new ideas gleaned from public inquiry can assist with crafting a legislative proposal for Congressional consideration.

Our focus is on the necessity of format shifts for digitization projects, with a primary emphasis on shifting analog works, such as printed books, to digital representations.

Due Diligence Standard and Duty of Care

Although copyright rights and remedies are well established as statutory law, the nuances of orphan works and the appropriate search strategies to identify and locate owners has made legislative solutions elusive. We suggest that a new approach be explored, that of a duty of care, imported from the common law. Unlike continental European legal tradition, the United States uses common law to settle difficult disputes that have amorphous array of standards.

Inasmuch as there is a wide array of methods and tools appropriate for identifying and locating authors of orphan works, a flexible negligence system has utility. It does not make sense to regulate a predefined set of specified standards for each format that would face inevitable pressures for subdivision due to technical features and special interests. Many media objects are complex and represent a range of component manipulations or inclusions. Modalities for recognizing such manipulations, e.g., Instagram filters, impact the ability to perform conclusive identifications.

Emerging search image tools are available today that were not available at the last notice of inquiry on orphan works. Such tools may go a long way towards identifying and locating works by some (though not all) visual artists. In a year's time these tools will likely improve and more approaches will be defined.

The genius of the common law duty of care is that an evolving standard or array of standards is determined by the relevant community of practice. In the case of a dispute, appropriate experts (as determined by the parties) are called upon to certify or testify as to what the standard of due care is for that type of work and use. For example, if a dispute arises over a late 20th century popular song, the plaintiff and the defendant will each bring forth expert witnesses who will testify as to the adequacy (or lack thereof) of the performed search. Determination is then resident with the judicial system. Jury instructions will be based on the negligence inquiry:

- 1- What was the duty of care?
- 2- Was there a breach?
- 3- Are there damages resulting from the breach?

As for the calculation of damages, the solutions preferred in past orphan works legislative efforts offer a viable solution. Instead of the stiff statutory damages currently in place that result in a chilling effect over worthwhile projects, and rather than the common law requirement to prove actual damages, which may be difficult or impossible for the small artist or author to show, a careful balanced approach can be utilized. The limitations on remedies, based on the diligent search (or here, meeting the standard of due care), coupled with the status of the use (e.g. nonprofit library use versus commercial use) strikes a balance that is reasonably fair to all parties.

Moreover, in recent years, excellent efforts have been made in segmented markets. For example, the Society of American Archivists has developed a set of best practices for a range of archival materials, documenting steps to take (or not) based on the likelihood of usefulness and other defensible reasons. The Cost/Effort of Search diagram is a particularly helpful guidepost based on years of collective archival professionals' experience. Society of American Archivists. Orphan Works: Statement of Best Practices. January 12, 2009. Rev. June 17, 2009. <http://www.archivists.org/standards/OWBP-V4.pdf>.

Examples of common law remedy for complex practices can be found in many professional occupations, including healthcare, insurance, and the legal industry itself. Physician negligence as recognized in medical malpractice is embodied in State-based common law that is framed by a statute of limitations. The American Medical Association is actively seeking liability reform while working with State medical associations to manage tort reform.

Segmentation by age of work

Digital content formats are by their nature highly malleable, and avoiding simplistic distinction in their treatment is unhelpful. The same work may shift formats both over time or across different types of manifestations. Narrative texts might have representations as simple text; a PDF file; a reflowable HTML-based EPUB ebook; or as a set of of static image files. Further, we expect to see a growing number of representation types for education and entertainment, taking advantage of mobile platforms and rapidly evolving web technologies. These expressions will be increasingly mutable, such as a geo-location based fictional story whose narrative structure is altered by the order in which the reader encounters chapters across an urban landscape with their mobile phone.

Use of orphan works by nonprofit museums, libraries and archives should not be dependent on extended collective licensing

A change in the law in this area to ensure that access or performance is based on the standards of due care specific to the particular type of work and use obviates the need for extended collective licensing. Practice guidelines can substitute for overly precise and brittle definitions covering approved actions across specific collections of materials. Normative uses are prone to evolution as technological capacities increase. In addition, collective licensing frameworks are often conservative once established, metastasizing in an attempt to preserve relevancy even as community practice evolves and innovation disrupts established business models.