

The issue for this comment is how to treat orphan works so as to fulfill both the purposes of copyright law, namely, encouraging the creation and dissemination of creative works and the ensuring the proper compensation for authors and creators of those works?

The problem is analyzed here from the perspective of an author creating a derivative work using an orphan work. The paradigm might be a documentary filmmaker who comes across archival footage and cannot locate the original author, and does not know whether the work is under copyright. The incentive of the documentarian is to not use the work, for fear of litigation exposure.<sup>1</sup> As well, many authors may not have the means to hire those necessary to ensure that they'd face no litigation exposure if they use the orphan work. This situation, then, clearly frustrates the constitutional imperative of encouraging "progress in science and the useful arts" via the creation and dissemination of creative works: the derivative works that fit this model will not be released for fear of lawsuits.<sup>2</sup>

The solution to this problem, one that allows for the dissemination of creative works, improves the chances of finding authors, and compensates the authors of orphan works, is a modified version of the Canadian system, but with two major changes. First, the philosophy of the Copyright Office with respect to notification and search criteria should be that it will require a very low level of effort in finding the author – a sort of rational basis review, so to speak. It may be true that the Canadian office, since it has only issued 125 licenses during the time its orphan works procedures have been in effect, may have a more exacting standard for determining what actions suffice for the search for

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<sup>1</sup> This may not be a real concern, because if exhaustive steps have been taken to locate the author or rights holder, there is no litigation exposure. However, this is the asserted problem with orphan works, so this comment will follow that assumption.

<sup>2</sup> Some examples of the problems faced by users of orphan works are detailed on the web. See Save Orphan Works website, available at: <http://www.eldred.cc/> (last visited Mar. 23, 2005). Other testimonials have begun to be assembled. See Free Culture.org website, available at: [http://freeculture.org/orphans/show\\_posts.php](http://freeculture.org/orphans/show_posts.php) (last visited Mar. 23, 2005).

authors of orphan works. The U.S. Copyright Office should err on the side of allowing works to be disseminated; the fact that a work is an “orphan” is enough of a bar to exploitation, and the copyright office should not erect artificial barriers through bureaucratic requirements.

Second, it should be made clear that the copyright office, when it issues a license to use an orphan work, is merely placing the work, on a conditional basis, into the public domain. In this way, the Office’s action can’t properly be called a “license,” because the Office does not hold title to the work. Rather, we might call this an “administrative notification of allowable infringement.” The potential user of the work would be required to notify the Copyright Office, within 90 days of use of the work, that she intends to use the work and that she has taken steps (laid out in the application) to find the author. Only on a clear showing of inadequate effort would the Office deny the application.

With the application, the applicant pays a fairly high fee (say, \$1,000) for use of the work. This fee accomplishes two things. One, it ensures that creators of orphan works who appear after the derivative work is released will be compensated, via the pool of orphan works application fees. Second, it, and the application it accompanies, will indemnify against litigation risk the user of the orphan work, by creating a presumption of “good faith” in notifying the Office and proving that they’ve taken adequate steps toward finding the original author. So, the production and dissemination of creative works would be encouraged and the producers of creative works would be compensated for their labor. Setting the fee at a set rate would eliminate the problem of having to value different types/lengths/sizes of orphan works on a case-by-case basis. The fee should also be high enough so that, in some circumstances, it would be cheaper to simply work harder to find the owner and obtain rights clearance, probably for some amount much lower than the orphan works filing fee.

The problem of unpublished orphan works arises as well. In this case, a party intends to simply release a work (say, an unpublished novel, or an unreleased film), or complete an unfinished, unreleased work for release to the world. In this case, the only difference in terms of the solution would be the amount of the fee payable for such use. After all, in the case of a derivative work, the potential harm is infringement of a small part of the work. For this latter category, the new user would be, in effect, appropriating the entirety of the work, thereby taking the value of the entire work. For this reason, the fee for this should be at least five times the fee for a derivative work (\$5,000). Again, simply taking greater, more effective measures to find the author and settling on a compensation amount may be quite a bit cheaper than paying the filing fee.

Here's a breakdown of how the system would work:

1. user applies to Copyright Office, within 90 days of use, for "license"
  - a. application details methods used to locate owner
  - b. application also certifies that owner cannot feasibly be located
  - c. \$1,000 fee (\$5,000 for use of entire orphan work)
  - d. Copyright Office approves nearly all applications
2. once user gets the license, user gets:
  - a. right to use orphan work in manner specified;
  - b. immunity from copyright infringement suit
  - c. notice occurs when user uses orphan work

One aspect of this proposal could be a public notice of intent to use an orphan work. However, such notice function would be fulfilled when the work is put into use. As well, there are competition concerns with placing public notice and not allowing use of orphan works until the end of the notice period. One can imagine a situation where a large corporate entity, with an arguable claim (or perhaps not even an arguable claim, but merely a wish to hold up the application (which would be stayed pending challenge) by

making a claim. In such a case, the corporate challenger would be able to impose financial costs of the use of the orphan work, until the cost of justifying/defending against challenge would exceed the \$1,000 or \$5,000 fee paid. We can see that those with more financial strength could, if they wanted, simply pay for the rights to use orphan works, since the Copyright Office would not interfere or determine the ownership of the works. For example, filmmaker A seeks to use Orphan Work O. Upon a notice regime, Corporation C objects within the 90-day window, thereby triggering a stay (which would likely be required under due process). C then offers A money to withdraw the application in exchange for the right in the orphan work. In this way, the actual right to the work is not ever litigated, since the filmmaker can't afford the litigation, and the public never really knows who owns the work. C then registers the work and locks it away or exploits it on its own.