Response to the Copyright Office Report on Orphan Works and Mass Digitization By RightsAssist, LLC

RightsAssist and its sister company PhotoAssist secure rights for use of copyrighted material for a wide range of users – government agencies, museums, non-profits and individual users. Over the past 20 years, we have that many of the conventions that enable users to locate copyright holders have disappeared.

Working with published materials on a particular topic, researchers could determine which were the iconic images and which photographers might have collections of images on the subject. The credit lines that appeared beneath those images and the listings at the back of the publication provided invaluable clues as to the copyright holders for any visual materials included in the publication.

Why did the publishers reproduce the images with the credit line next to the image? The use of the credit line was a part of the standard contract with the photographer. If the publisher failed to reproduce those credits and/or reproduced them incorrectly, the publisher was required to pay the copyright holder a pre-determined fee.

The credit line also served as advertising for the creator of the image. If a credit appeared on the page next to the image, then a reduced fee might be charged. Those credit lines guided other possible users directly to the source of those images.

The burden was clearly on the users to ensure that the image never became an orphan work due an oversight on the part of the end user. In exchange for the right to use the work, they were held responsible for managing the credit lines and reproducing them as necessary

In the last five years, we've seen the almost complete disappearance of credit lines on web-based publications and increasingly from some print publications. This has greatly added to the problem of "orphan works." Now users must first attempt to determine who the copyright holder might be, and then begin the often challenging task of locating him or her.

This is further complicated by software system used to upload images to the web; often this new software strips the metadata out of the image file. It is the metadata that can help users locate the copyright holder and once it is gone, it is impossible to retrieve. At that point, the only mechanism for finding the owner is an image recognition search tools that searches webpage to find similar images online. It is up to user to scan the pages to find any mention of the photographer and/or rights holder, clearly not an optimal situation.

The current Report does not attempt to codify the responsibilities of the users of copyrighted works. The report focuses heavily on the relief of monetary penalties of users but does not burden them with paying forward the information they have obtained about the copyright holders. By allowing them to publish without the credit's aligned with the images (particularly online) they are actually creating orphan works.

Responsibility of Users

We would strongly recommend any new legislation in this area require the display of copyright notices as an additional condition to establish the user as an active participant in the maintenance of the rights of copyright holders.

If a copyrighted work is being used, the user should be responsible for giving as much information as possible on the copyright holder – the full name and year of the image at a minimum. If the image is licensed this information could be added to the PLUS registry helping to grow the database of images exponentially. This will significantly reduce the number of images that become orphans in the short and long term.

This responsibility is even more critical when the user actually locates the copyright holder for an image that was thought to be an orphan works. By adding the contact information for copyright holder for the image to the PLUS registry, the user builds a knowledge base that all future users will benefit from – comparable in many ways to the copyright registration records.

The inability to contact a known copyright holder can be a temporary problem; the creator may be on assignment, in transition or temporarily incapacitated. Or there may be a constant stream of email or other communications that makes it difficult to distinguish between real inquiries from spam. It would be our recommendation that no work be classified as an orphan work until three (3) separate users tried to contact the rights holder and failed.

Once an image gets classified as an orphan work, there is absolutely no incentive for a user to attempt to track down a copyright holder. It is in the interest of everyone in the media/communications industry to make sure that the bar at which an image becomes an orphan work is not set too low. (See criteria for works becoming defined as orphan works below.)

Responsibility of Copyright Holders

In addition, the copyright holder should be required to update his or her contact information, provide secondary contact information for copyright holder and ideally, Individual copyright filers should be required to provide information that would designate who to contact for rights in the 75 years after their passing.

Criteria for defining adequate due diligence

The report focused on tools to be used to fulfill the requirement for sufficient due diligence. We would argue there should also be time requirements and frequency of contact requirements. There should also be separate guidelines for copyright holders who are deceased.

If one user finds and attempts to contact a rights holder and fails, but two months later the same contact information works for the next user, will that still be considered sufficient due diligence for the first user?

How close to the time of the potential use would be sufficient to qualify as an adequate search? If a rights holder responds a week after an initial contact is attempted, and the work is used what redress is available to him or her? Months, days or weeks before the use?

And how far is sufficient for a rights holder is deceased? Even if you can find a will, it is rare that the will contains any reference to the rights to a creator's image collection. There are serious problems with including this information in a will, since the potential valuation of the collection may create a taxable situation for an estate that would be an unfunded liability that could wipe out the assets of the estate.

For our clients, we conduct what amounts to the creation of a family tree in order to understand the relationships that might have created heirs to the intellectual property of copyright holders. And while we "enjoy the chase" of attempting to track down these individuals like the Mounties of lore, we would much rather have our clients easily and quickly obtain the rights to publish the visual materials they need rather than spending the time hunting through a vast trail of leads to find the rights holder.

Again it would be our strong recommendation that this information when it proves successful should be added to the PLUS registry.

Market Forces

Under the current plan, market forces will work against users making their best effort to locate the copyright holders. It will be more convenient for users to select the already identified Orphan works and be excused from making any payment to the copyright holder.

When we speak to groups of photographers there are always one or two who will ask about what recourse they have for getting paid for their images that have been used without their permission. They find it disheartening that the system that was created to protect them now works against them by making barriers to obtaining compensation.

If CMO's are going to be able to license images using an ECL model, they should be required to maintain the contact information for their members who "opt out" and forward any requests from potential users; in addition CMO's should be given the authority to directly collect statutory damages and legal fees from unauthorized users on behalf of their members.

Without these kinds of safeguards for copyright holders, this report and it's recommendations will only further dishearten them…

Douglas Hill

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