The Importance of Orphan Works Legislation

September 25, 2008

Legislation is pending in Congress that would ease the “orphan works” problem. Here is why I believe this legislation is important, and here is what it would accomplish.

Based on the recommendation of my office, as published in our 2006 *Report on Orphan Works*, the legislation would allow good-faith users of copyrighted content to move forward in cases where they wish to license a use but cannot locate the copyright owner after a diligent search. It has benefited from many months of discussion, reflection and fine-tuning under the leadership of Senators Patrick Leahy and Orrin Hatch and Representatives Howard Berman and Lamar Smith.

The problem is pervasive. Our study recounts the challenges that publishers, film makers, museums, libraries, universities, and private citizens, among others, have had in managing risk and liability when a copyright owner cannot be identified or located. In testimony before the Senate, a filmmaker spoke of the historically significant images that are removed from documentaries and never reach the public because ownership cannot be determined. In testimony before the House, the U.S. Holocaust Museum spoke of the millions of pages of archival documents, photographs, oral histories, and reels of film that it and other museums cannot publish or digitize.

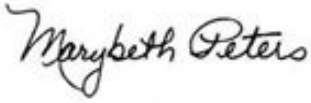
In many respects, these orphans are a by-product of three decades of change that has slowly but surely relaxed the obligations of copyright owners to assert and manage their rights. Protection has become automatic. The term of copyright, once tied to the affirmative act (and dates) of publication, registration and renewal, has been extended twice, in 1978 and 1998, and was prospectively reconfigured to track the less obvious period of life-of-the-author-plus-70-years. In 1989, Congress removed the condition that published works must contain a copyright notice. In 1992, it removed the last vestiges of the renewal registration requirement. In 1994, many foreign copyrights were extracted from the public domain. The net result of these amendments has been that more and more copyright owners may go missing. To be sure, such revisions were enacted to protect authors from technical traps in the law and to ensure United States compliance with international conventions. But there is no denying that they diminished the public record of copyright ownership and made it more difficult for the business of copyright to function.

The legislation is sensible: it would ease the orphan problem by reducing, but not eliminating, the exposure of good faith users. But there are clear conditions designed to protect copyright owners. A user must take all reasonable steps, employ all reasonable technology, and execute the applicable search practices to be submitted to the Copyright Office by authors, associations, and other experts. The user must meet other hurdles, including attaching an orphan symbol to the use, to increase transparency and the possibility that an owner may emerge. If an owner does emerge, the user must pay “reasonable compensation” or face full liability. Reasonable compensation will be mutually agreed by the owner and the user or, failing that, be decided by a court; but it must also reflect objective market values for the work and the use. This framework would facilitate projects that are global (think rare text in the hands of a book publisher) as well as local (think family portraits in the hands of a photo finisher), while preserving the purpose and potential of copyright law. It would not inject orphan works prematurely into the public domain, create an automatic

exception for all uses, or create a permanent class of orphan works. Nor would it minimize the value of any one orphan work by mandating a government license and statutory rate.

Some critics believe that the legislation is unfair because it will deprive copyright owners of injunctive relief, statutory damages, and actual damages. I do not agree. First, all of these remedies will remain available (to the extent they apply in the first place) if the copyright owner exists and is findable. Second, the legislation will not limit injunctive relief, except in instances where the user has invested significant new authorship and, in doing so, has relied in good faith on the absence of the owner. Third, statutory damages, which are available only when a work has been timely registered, will usually not apply at all because the overwhelming majority of orphan works are not registered by owners but languishing in institutions and private collections. Fourth, one of the basic tenets of the legislation is that the available remedy will be proportionate to the nature of the infringement. Reasonable compensation, a standard derived from a leading case on copyright damages, will usually be within the range an owner could expect to recover in an ordinary infringement suit. And it should certainly reflect a reasonable license fee. The Association of American Publishers put it this way: "In those cases where an owner does surface, the point is to put the owner and user to the greatest extent possible, in the respective positions they would have occupied in an ordinary marketplace negotiation at the time of use."

In my view, a solution to the orphan works problem is overdue and the pending legislation is both fair and responsible.



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Background

As requested by Senator Orrin Hatch and Senator Patrick Leahy, the Office submitted its Report on Orphan Works to the Senate Judiciary Committee on January 31, 2006. The Report is also available for download on this page in two versions, the Full Report with Appendices (200 pages), and the Main Text (no appendices, 130 pages).

During 2005, the Copyright Office studied issues raised by "orphan works"— copyrighted works whose owners may be impossible to identify and locate. Concerns had been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public.

The Office issued a Federal Register Notice summarizing issues raised by orphan works, and soliciting written comments from all interested parties. The Office asked specifically whether there were compelling concerns raised by orphan works that merit a legislative, regulatory, or other solution, and if so, what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders. Initial comments received were posted here. Reply comments received were posted here.

The Office also hosted public roundtable discussions on orphan works in Washington, D.C., on July 26 and 27, 2005, and in Berkeley, California, on August 2, 2005. Transcripts of the roundtables were made

available on this website (see left column). Additionally, audio recordings of the Berkeley, California roundtable are available as well.

The Office also hosted several informal meetings with various parties in late 2005 to address issues in further detail.