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in RTF format. (Also founder and  
president of the non-profit foundation The Rational Link, Inc., although this  
submission is only marginally on behalf of that foundation.) To:

LIBRARY OF CONGRESS, Copyright Office, regarding “orphan” works

**Preamble:**

I am not a lawyer but a user with technical (hence rational and methodical thought processes) degrees and only a modest exposure to legal issues. I am both an owner of copyrights and an author wishing to take advantage of the knowledge available in copyrighted works. But I cannot pretend to offer “legalese” in this discussion.

Since my primary interest is in expression of ideas, I will refer to the creator of a copyrighted work as an “author.”

I take the purpose for securing a copyright to be primarily commercial in that the author and/or his agents wish to profit and hope there can be a continuing income stream from the market for the work. It is the rare author or his work that reaches such prominence as to be historically significant although the copyright system must operate to shelter authors from misappropriation of their works.

In today’s world it is a rare individual who does not have access to computers either in his immediate environment or at a local library. Of course it should always remain possible for a copyright owner or a prospective user to make contact by telephone or mail to learn the status of a work (or secure a copy from a data bank suggested later in this document), and discussion of use of the system and contact information should be forwarded with every inquiry for information or copyright forms.

**1. Nature of the problem:**

I recognize two aspects of the problem, one the realm of lawyers operating for personal gain and the other the practical difficulties of securing permission from the current owner of the copyright.

The first aspect concerns the desirability or necessity to secure permission. This is likely beyond the purview of your present inquiry, but a user is forever faced with the question of the degree to which quoting is fair use and where lies the boundary of plagiarism, which may deprive the author of recognition or profit. For the author's part there is always the risk that his copyright may be compromised and that due diligence on his part is not adequate to assure respect for his copyright. For the user's part he likely cannot know if a copyright has already been compromised to the extent it is meaningless and the work is for all practical purposes in the public domain. I suppose the only answer is diligence on the part of the user and the education that informs him of copyright concerns. Certainly, if left in the hands of lawyers, creativity would be such a great risk for a prospective author that nothing would ever be created and the whole notion of copyright would be pointless.

The second aspect results from the fluidity of society. People move; people die and heirs may be impossible to identify or may not be motivated to protect a copyright that is inherited. Publishers come and go; they move; they merge; they cease business or redirect their efforts. Published works commonly do not incorporate a mailing address for the author; if it did the passage of years is likely to make the address invalid and pursuit of forwarding addresses from the U.S. Post Office is hindered by their limitations in maintaining forwarding addresses. If the author is identified with an institution, such as a university, their personnel records with time become outdated. If the author is identified only with a publisher, it is often impossible to locate a current address or even know what name to search. Commercial traffic -- buying, selling and leasing -- adds a layer of uncertainty to the whole scheme.

Moreover, many authors, perhaps because the income stream has vanished or other reasons, lose interest in protecting their copyrights and may not be motivated to respond to inquiries. Thus the user, even after exercising diligence and being successful in identifying the current owner and his location, may be handicapped in evaluating the author's current interest in his own works and hence the prospective user remains ignorant of the need to secure permission.

## **2. Nature of "orphan works":**

A sound working definition of "orphan works" must be sought. I assume that would include:

1. Works which the author never intended to be copyrighted so that steps were never taken to identify the works as subject to copyright protection

A. Unpublished works fall under this designation. I find it fatuous for an author to withhold publication for half a generation and suddenly attempt to assert copyright when he discovers another author has presented similar ideas, regardless of any closeness of association between the two authors. An author who has attempted, but been denied, publication ought not be privileged to hold future users of similar material hostage to his own inability to gain publication unless he has previously undertaken registration of his copyright so there is a dated public record of his effort.

2. Works that, by whatever route, migrated to the public domain so the author has lost interest in protecting his copyright or found it futile to undertake or continue protection

3. Works whose author (or owner) cannot even be identified because of name change, estate liquidity, commercial activity or other cause

4. Works so timely in nature that copyright protection beyond a short time is meaningless or pointless

5. Works whose owner, even when identified, cannot be located because of difficulties in finding his address or that of his institution or publisher

6. Works in which the copyright owner has lost interest as evidenced by various unsuccessful (and recorded) attempts to secure a response

7. Passage of time cannot be ignored. So long as there is demonstrated continuing interest in maintaining a copyright, the limits established by current law are workable and appropriate. But, should there be no identifiable effort to maintain copyright protection, a time limit ought to be established after which the works will be defined as "orphaned." Our present difficulty hinges on what constitutes a demonstrated continuing interest, and time limits in years ought to be set by law.

8. Once a work has become recognized as orphaned, the original author or his heirs should not, even though they re-assert control, then be able to gain from their retrospective efforts or to penalize users who have innocently assumed orphaned status. This produces an incentive to maintain current information so the owner(s) may be located.

I sincerely hope guidelines can be established and published describing orphan works and what should constitute due diligence on the part of users so they can feel

confident they are extending to the original author due courtesy and recognition and are not violating property rights of successor owners.

## **RESOLUTION of the problems**

1. Define and publish what constitutes “orphan works” Whether this would or should have international sanction or agreement, at least within the U.S. we could have standards that don’t require legal advice for every sentence. Include this information in each packet of information in response to inquiries for copyright information and forms.
2. Open Post Office records of forwarding addresses (and require certain standards if necessary) to those searching for copyright owners; and maintain records for an extended number of years consistent with #7 above. The Post Office should not be encumbered with following the courts for name changes, etc., but should retain records so a searcher may follow a chain of residences or primary addresses to whatever dead end it produces. And Post Office records should contain name changes by court order or marriage, etc., that are brought to their attention by action of mail addressees.
3. Establish data banks that can be used in tracking ownership of each copyright. One data bank must show information by which the searcher can identify a name or number associated with the object of his search as well as which or whose data bank contains the information. A second data bank should duplicate initial copyright data but also include, on a running basis, what information has been voluntarily submitted by copyright owners and interested parties as it pertains to wish to maintain protection of a copyright. Without rigorous verification procedures, this would include the chain of current addresses of author or his heirs, of institutions, of publishers; plus notations of efforts by prospective users who would profit from designation of the work as “orphan.”
  - A. Since I am unfamiliar with present practices, I assume that initial registration of a copyright results in a fixed or archived entry not subject to revision. Information subsequently received would then reside in a data bank that could and would be subject to revision when and if more reliable information is received, as by verifications by interested but independent operators.
  - B. Date of death of the author, when it becomes known to the Copyright

office, should be included so the 50-year period is known to have commenced.

4. The data bank should not include conclusions by personnel at the Copyright office as to orphan status, but the information would yield an informed basis by which a prospective user could assess his risk as a user. I will not hazard a suggestion whether the data bank should include declarations by users who have already assumed the work to be orphan. However, a notation from #5 (next) would be included indicating an apparent abandonment of the copyright by the last known owner.

5. Another data bank should be established that includes only works that are candidates for classification as “orphan.” Should there be no activity in the above data bank for a fixed term, say 24 years, the work should automatically be listed as a candidate. Should there be no response to listing within a period of, say four years, it should be presumed the owner of the copyright has abandoned it. There would, of course, be a one-time effort by the Copyright office to so inform the last known holder of that copyright or others (again, a one-time effort for each) in the known chain of ownership who might wish to reassert control. (I’ve no doubt the legal community will jump at the opportunity to assist copyright owners in resolving entries in this data bank.) Results of passage of the four-year interval would of course be inserted in the data bank of #4 above. And a copyright holder who can verify his ownership should be privileged to regain control of his orphaned copyright under conditions that protect the rights of users who may have in innocence used the copyrighted material (as evidenced by entries in the data bank).

## **DISCUSSION**

I offer no objection of the international notion of forbidding the imposition of formalities as a condition to copyright. But I do feel a copyright owner has an obligation to himself, to posterity and to prospective users to indicate in some fashion his interest in maintaining protection of his copyright beyond a certain stipulated time. Certainly there should be a time limit, except where the owner is fastidious in asserting (in the public record -- or this suggested data bank) his desire to maintain protection, beyond which using the author’s work is “fair use.” I am firmly convinced that, should an author by default fail to display an interest in his own work, his work should fall into the public domain; overt action on his part should be necessary.

We cannot command other nations to create and maintain data banks, but certainly

copyrights obtained in the U.S. can be tracked in this way.

I feel we must be cautious in the degree of protection afforded to authors. We would wish to avoid requiring a user to weigh the use of every phrase or clause in his own work because it might be duplicated elsewhere in a prior work. It is an invitation to members of the legal trade to aggressively seek conflicts that may enrich themselves.

Time limits for various kinds of works should be established. As an example, I copyrighted some songs years ago in the hope of introducing them to young people's groups. I have moved several times since, so that for practical purposes the copyright is orphaned because of the impossibility of reaching me to obtain permission for their use. With the suggested data bank I could, as long as interest persists, notify the operator of the data bank of a continuing interest and a means of contacting me; lacking this, those songs ought to fall into the public domain.

Again, I note in a current publication that even some advertisements are copyrighted. While I can recognize the wish of the advertiser not to have his work plagiarized by his competition, his interest is very timely and should be expected to expire within a very few years. Such works should be "orphaned" within a set interval of time, perhaps five years. Extending that idea, it would be wholly within reason to ask an author, in his initial copyright application, to set a fixed interval during which he wishes copyright protection so that the data bank can include a date after which that work will fall into the public domain.

And that publication carrying the advertisement, which is timely and will be of only historical interest in weeks or months, is itself copyrighted. Except for archive and literary publications, there should be a shorter time limit for copyright protection since the authors whose efforts appear on those pages will have absolutely no interest in those words after a decade or so.

International agreements are good, but I note there are nations who, whether signatories to treaty or not, do not respect intellectual property of any kind. There is, therefore, no system that will guarantee to any author international respect for his works. I feel it wise to, in the U.S., establish law that seems just in an absolute and practical sense, leaving it to others of the international community to judge our laws and duplicate them if they agree. "Orphan works" is a category where we must lead in producing solutions.

## **RESPONSES TO SPECIFIC QUESTIONS:**

## 2. Nature of orphan works:

“... It has been suggested that a register or other filing system be adopted whereby copyright owners ...” That is the data bank I am suggesting. I also have suggested another data bank listing works currently candidates for assignment to orphan status. In my view an owner who has a continuing interest in his work has an obligation to himself as well as to potential users to make known his continuing interest. That being the case, it should be presumed that he has kept the data bank current on means of contacting him, and his failure to do so is one of several factors suggesting his work be a candidate for orphan status.

“... would the Copyright Office publish lists ...” Likely this should be a function of the Copyright office. Lists of notices of intent to enforce restored copyrights should also be rendered as a separate data bank of limited life, say four years. Further, such notations should be included in the data bank of running status.

### A. Case-by-case approach:

“Do resources like inheritance records, archives, ... , need to be searched?” With the proviso that a copyright owner having an interest in continuing protection should periodically announce his interest, such searches would not ordinarily be necessary. The death of the owner does present a problem in the data bank since there is no one with the responsibility for reporting and thus incorporating the death. But, requiring a prospective user to advertise -- that borders on the ridiculous: Where, and for how long?

### B. Formal approach:

“... how could fraud and abuse of such a registry be avoided ...” Since the owner of a copyright would presumably keep the data bank updated, diligence on the part of the persons accepting data for entry should prevent most fraud, such as, for instance, a person surreptitiously representing himself as the copyright owner and providing false contact data. That diligence should include accessing Post Office forwarding address information if necessary, thence contacting the owner of record, in an effort to verify questionable information.

“Does this tread too closely to the copyright registration system? What would be the effect on the user ...” Since I am not privy to the kinds of information included in this system, I cannot comment. A user would be foolish to fail to check the data bank, but that is a duty presumably imposed on him. My question here is how it

could be determined that he did or did not check the data bank.

### 3. Nature . . . Age

“. . . time have elapsed since first publication . . .” As I have suggested, there should be categories of works such as advertisements, current interest magazines, archive journals, literary magazines, vanity publications, e-mail, etc., each with a specified time period after which the works become candidates for orphan status. And the copyright application should include information on category.

“. . . where the date of creation or death of the author will be unknown . . .” As I understand, the principal benefit of registering a work is establishing a verifiable date (for defense of claims of prior art) from which various elapsed times can be calculated; while creation may have preceded registration or publication, it falls to the author to demonstrate a claimed earlier date and hence prior art. The author of unregistered works who fails to seek publication must devise some means of establishing prior art; that obligation is his.

### 4. Nature . . . Publication status

“. . . how would such a system . . . first publication . . .” By definition an unregistered and unpublished work is an orphan since there is no automatic means of incorporating it into the system of records. How can the date of creation of an unregistered and unpublished work be determined? I assume the right of first publication requires demonstration of prior art, else the right is fraught with potential for fraud.

### 5. Effect of orphan status

“. . . Should this loss of rights apply only to the particular work at the time of use . . .” Should the owner of a copyright, who has not been diligent in keeping current information in the data bank, suddenly discover, after publication by a user, that his rights have been violated by the user, then if the user can demonstrate a diligent search (or if the work has already been presumed to be orphan) that user should be exempt from any penalties since it was a failure on the part of the copyright owner that produced the violation. While I prefer that a work that has been designated orphan be in the public domain, I recognize the potential unfairness of such a doctrine. But the owner should be allowed to regain his rights against later users, with the exception that works that are derivative of the allowed violation should also be exempted. In other words, the portion of the copyrighted work that has fallen into the public domain should remain so.

“. . . appropriate fee . . .” With the provision that the work was orphaned at the time of violation because of failure on the part of the owner, it would not be appropriate to assess a fee; that use of the work should be regarded as fair use.

## 6. International implications

Since I am not schooled on international provisions I cannot offer comment, except that someone must take the lead in arriving at reasonable and equitable treatment of orphan works. If creation of a set of reasonable and equitable rules runs counter to international obligations, that must be accepted as a consequence of trying to establish the most equitable system possible.