

The main goal of American copyright law, as explicitly stated in the Constitution, is to promote the dissemination of knowledge to enhance public welfare. An intermediate product of that goal is the grant of a limited monopoly right to the author. Our copyright law presents a delicate balance of two major concerns: optimal creation of information and its optimal use. The limited monopoly is designed to give the author an incentive to create more work, but at the same time make sure that the diffusion of information occurs. In the case of orphan works, there's more interest in the use of the work than the protection of authors' rights. A case-by-case application system maintained by the Copyright Office would allow those with interests to have access to the work while still maintaining the incentive for creativity. In deciding the course to take with regards to orphan works, we must keep in mind the optimal balance between creation and use of the work. First, the two sides of the argument must be examined.

Potential licensees of the work are concerned that the current Copyright Act limits creativity and optimal use of works and therefore runs contrary to the goals of copyright law. Authors who would like to use the orphan work are prohibited from using the work, the dissemination of which is limited. Due to the discard of the renewal system, a copyrighted work could be under protection even when the original author cannot be located. Work that has been seemingly abandoned by the author should be allowed to enter the public domain, so that subsequent uses can ensue. Many of the orphan works actually have little economic value. If this were false, then it seems likely that the copyright owner would come forth to claim the economic benefits. In such cases, it seems that the current Copyright Act would inhibit, rather than promote public interests.

Protection of authors' rights is essential to the optimal creation of information. An author's rights should be protected regardless of whether potential licensees are able to find the author. It is possible to conceive that all attempts to locate the author failed because the author was out of the country or did not receive the notices. To strip his right in the work for a reason that the author cannot even control seems to run contrary to the goal of encouraging creativity. One important point is that just because a copyright owner could not be located does not mean that he/she does not exist. It will serve as a disincentive to potential authors to know that the rights in the work would be lost without compensation if he/she cannot be identified or located later. The Copyright Act serves as an assurance that all copyrightable work will be protected.

Copyright formalities including registration, notice and removal were taken out of the 1976 Copyright Act. Before the removal, these formalities acted as filters which only left those copyrights deemed economically-sound to protect. The change was Congress's response to complaints from authors who had an economic interest in the property rights regarding inadvertent failures with the formalities. To lose protection of the work completely due to an error in complying with the Act greatly hindered creativity. By responding to the concerns and changing the copyright regime, Congress now allows copyright protection for the entire term of the copyright, regardless of economic interests of the authors. While such a system is more beneficial to authors concerned with protecting their works, certain exceptions should be allowed in copyright law for it to serve its ultimate goal of promoting progress in society. In orphan works, the absence of information regarding the author fully prohibits the use of the work. Orphan works present a considerable block to any type of licensing because no negotiation can take

place without knowing the identity of the author. From an economic standpoint, orphan works no longer provide any benefit for the original author or for society as a whole. An early release of orphan works into the public domain could actually strengthen incentives to preserve existing works. Owners of copyright would be more protective and attentive of their intellectual property to avoid having their work fall into the public domain before the appropriate time.

The establishment of a filing system whereby the potential user is required to file an intent to use an orphan work is the most sensible approach suggested. Individuals who wish to use a particular work and have given reasonable effort to locate the author would notify the Copyright Office of the request to license the orphan work. The Copyright Office, after affirming that reasonable effort has been taken, would act as a temporary holder of the orphan work and use the authority to grant a license for rights in the work. The Copyright Office would be set the terms of the rights to be licensed and the license fee for the use of the orphan work. The Copyright Office should also categorize the list and provide the database on the web to allow for convenient searches by the authors of orphan works. Several components of this system will be considered in more detail.

One major question is how to be sure that the work is indeed orphan, i.e. abandoned, or the author cannot be found. The proposed filing system would answer this question through several steps of the process.

The first step is through the approval process of granting the licenses to use orphan works. When a person or entity submits a request for use of orphan work, a detailed record stating the steps taken in finding the author must be provided for the Copyright Office. The Copyright Office should examine the application and approve the

request only if the effort in identifying the author of the work surpasses a certain threshold.

The next step in the process should be a formal notice published by the Copyright Office of the request. The notice should describe the orphan work in as much detail as possible, and instruct the author of the orphan work to come forward and claim the work in a specified period (perhaps up to ninety days). The Copyright Office would only license the rights to the work after the expiration of said period.

The actual use of the orphan work by the requesting entity would provide the final step in this solution. It would serve as the ultimate notice to the author of the orphan work. If the economic exploitation of their work still cannot induce the authors to claim their works, then we can be quite certain that the work is truly an orphan work.

The identification of orphan works in this method satisfies the balancing goals of copyright law. It removes the rigid system of preserving all rights of a work for its entire term. It allows the revitalization of a work that is basically dead asset and the creation of something novel and beneficial to society. At the same time, it does not significantly decrease the incentive to create new works. The system allows enough checkpoints in the process to protect the rights of the original authors.

Another question stems from the system described above – what should be the threshold for the efforts to locate the copyright owner? The Canadian system instructs applicants to “try as many [methods] as [the applicant] can” before applying and states that a license will only granted if the applicant has “done everything [the applicant] can” to locate the owner. Such an instruction would be inappropriate for the American copyright system. It would create too high an economic barrier for the applicants as to be

prohibitive in function. This requirement likely contributed to the Copyright Board of Canada granting only 143 licenses in fifteen years. The demand for licensing rights of orphan works is much higher in America, and a high threshold of effort would not significantly increase the use of orphan works. However, there are some steps that must be taken before a license should be granted. A search of registrations with the Copyright Office and attempts to reach the copyright owner must be completed before filing of the application. Efforts to reach the copyright owner should contain internet searches, contacting the appropriate government departments, libraries, and any other logical sources.

U.S. copyright law is constructed as a system that, through providing incentive to the author, produces an optimal quantity of works of authorship, and thereby enhances public welfare. The ideal solution for any copyright problem aims to increase copyright works' accessibility to increase creativity without decreasing the incentives for authors to create original work. The application system described fulfills both of the goals.