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Solution: Registration of Intent of Use of Copyrighted Works

The following proposal is primarily composed of a registration system where subsequent artists can use orphaned works and be partially or fully indemnified. This registration will serve as prima facie evidence of non-infringement, and subsequent artists can file for a declaratory judgment in federal district court in order to certify their good faith efforts prior to use of the copyrighted work.

I. Registration Mechanism

A. Definition of Orphan Works

Orphan works are works where the copyright may or may not have expired and the copyright holder cannot be found after a “good faith search.” A “good faith search” would include at minimum: search of registrations with the Copyright Office and Library of Congress, an attempt to contact the entity listed on any copyright registration, due diligence done to contact any subsequent entities that may have held at one time or currently hold the copyright in the

work, and a search of previous owners of the current copy of the work in possession of the subsequent artist.

B. Design of the Orphan Works Registration System

The registration system should require subsequent artists to be proactive in their searches for the authors. When they have exhausted the search options, only then should they file a petition with the Copyright Office.

This petition should clearly delineate the search conducted and include the avenues the petitioners went down. It should also include the subsequent artists' intentions with regard to the work in order to best determine the proper payment scheme. Each petition should be filed and numbered. If the Copyright Office determines that the minimal efforts have been made, a numbered registration receipt should be issued. It can then be referenced in any subsequent copyright action. Any work derived from the orphan work should come with some notice of it being an orphan work and not in the public domain and should reference the registration number.

When the same subsequent artist who filed a petition with the Copyright Office wishes to create another work from the same work referenced in a previous petition, it should not be necessary to file an additional petition. Instead an amended petition, with the same reference number, should be filed. However, if a different subsequent artist wishes to use that same work, they should have to file a petition of their own.

There then arises the issue of whether or not the second subsequent artist must do their own search or rely on the efforts of the previous search done. This is potentially a thorny issue, especially if the first search was found to not be adequate, in bad faith, or simply deceptive. However, it would be grossly wasteful and overly burdensome for organizations with fewer resources to have to retread that ground. The second artist should, instead of conducting an

additional search, be able to petition the Copyright Office with a reference (including the reference number) to the previous accepted petition.

III. Legal Impact of the Registration Receipt

A. Prima Facie Defense

These registration receipts should be considered sufficient as a prima facie defense against charges of copyright infringement. In these actions, the burden on the plaintiff must be to show that the registration was in bad faith and is invalid. This would have the effect of partially indemnifying subsequent artists who register their intents with the Copyright Office and encourages the use of orphan works.

B. Declaratory Judgment

Many subsequent artists will refuse to use orphan works without full indemnity. These artists can proactively go to district court and file for a declaratory judgment. Even without the copyright holder present, the court is competent to determine whether or not a sufficient amount of effort has been exerted in the search for the copyright holder. This would serve as total bar against an infringement action. However, if the copyright holder were to later assert themselves, any further unauthorized use would be considered infringing. This should be seen as analogous to a quiet title action. This action would simply certify that the subsequent artist has a right to use the work subject to a determined payment mechanism.

The declaratory judgment route will likely only be taken by commercial interests who find the risk of a potential later suit too large to bear. Pursuing the judgment would be insurance against potential lawsuits if and when a copyright owner were to emerge. If a court were to grant

a judgment in favor of an individual subsequent artist, other subsequent artists could also rely on the court's decision.

V. Copyright Registration Incentivized

This system for determining orphan works would not require that the copyright holders register their copyright with the Copyright Office. However, registration should be streamlined to foster connection between the holders of copyrights and those who would license the copyrights. Copyright owners would benefit more from negotiating with potential licensees now rather than go to court with a presumption in favor of the subsequent artist using the work.

This results in a system where copyright owners have a greater incentive to register their works with the Copyright Office. A streamlined system would allow copyright holders to update the registration to keep current with the copyright holders. If the registration is up to date, then the Copyright Office would not grant an orphan work receipt to a subsequent artist. The subsequent artist would then have to negotiate directly with the copyright holder. This would likely result in higher licensing fees for the copyright holder than she would receive under the payment mechanism described below.

VI. Payment Mechanism

In order for copyright holders to be properly compensated, there should be some sort of payment mechanism implemented so that subsequent artists can license the work at reasonable rates. This kind of compulsory licensing scheme should be administered by a body certified by the government, but would itself not be an arm of the government. One relevant example of this kind of system would be Internet Corporation for Assigned Names and Numbers (ICANN).

ICANN is the administrative body that runs the Internet top level domains such as the .com domain and administers other Internet issues.

This not-for-profit and non-governmental agency would be insulated from politics. Politicians would not be able to affect registration fees on content in a discriminatory manner. This kind of independence is important and not new to the idea of governance as this is how the Federal Reserve Bank, which generally controls the United States' currency, is insulated from the whims of politicians.

The prices for licensing can be determined by this entity and should be administered on a non-discriminatory basis. If the work is sufficiently old as to be more likely than not in the public domain, the work can be licensed at zero cost. Similarly licenses can be granted to libraries and non-commercial use at no cost to those institutions. However, there can still be charges levied for fees and expenses.

Money should be kept in escrow for some predetermined amount of time and held for the copyright holder. After some period of time, the money can be either kept by the corporation or the Copyright Office or returned to the licensees.

If the copyright owner were to later materialize it would be unfair for current licensees to have to renegotiate. Those who licensed the works under the orphan works payment system would be able to continue licensing at the same rates. Future licensees would negotiate directly with the copyright holder.

VI. Fraud upon the Copyright Office

Entities that abuse the system and submit falsified statements to the Copyright Office in order to secure favored licensing without doing a proper search should be subject to additional

penalties. A penalty system for a bad faith filing should be something like treble damages for infringement paid to the copyright holder plus fees and statutory fees paid to the Copyright Office and imprisonment. The penalties need to be sufficiently harsh as to discourage these improper filings. Subsequent artists who relied in good faith on the bad faith filing would still receive the benefits of proper filings, but would have to be subject to an inquiry. This inquiry would look into their filings as to whether or not their reliance was proper.

The foregoing system for dealing with orphan works appropriately balances the interests of the public at large with those of the copyright holders. In any system there will be administrative issues in execution, and there will likely be additional litigation. Ultimately, any system that allows for orphan works to reenter the marketplace of ideas is positive and beneficial for society.