

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.
U.S.C. Const. Art. I § 8, cl. 8

We cannot forget the origins of copyright law – to promote the progress of science and the useful arts. Accordingly, Copyright law should provide a sufficient incentive for progress, but does not require the optimal incentive. A balancing must be performed between the interests of copyright holders and the public benefit that is lost when a work becomes orphaned and subsequent access and derivations of the work are stifled.

I recently married. Before the wedding, my husband and I gathered family photos to display at the reception. Included was a beautiful photograph of my maternal great grandparents on their wedding day. The picture was over eighty years old and was starting to deteriorate. Rather than risk damage to this precious original, I tried to have it copied at several local photo shops; each of them refused to copy the “professional photograph” without copyright clearance. I’m not sure how I could ever obtain this clearance – there is no copyright notice on the picture, and for at least eighty to one-hundred more years I could not be sure that the copyright had expired. This is a small problem, but it is only one example of a reasonable use of an “orphaned work” that is silenced by current copyright laws.

In a broader context, consider the recent “internet bubble” and subsequent “bursting” of that bubble. Many copyrightable works were created by companies that are no longer in existence. If someone purchased a computer program from a now-closed shop that did not leave clear assignment of intellectual property rights and obligations, that purchaser may now find himself in a difficult position. As changes are required to upgrade for new technologies or new business needs, can he make the necessary changes to the program? If the program is compiled, is it a fair use to decompile it and make changes? What if he wants to install the program on a new system because of expansion of his business capacity – can he make that copy? Can he update the user’s manual to distribute to new employees? These issues are very real; possessors of presumably “defunct” systems are left holding something worth significantly less than what they originally bargained for. The copyright rights are being reserved for someone who may not even know he owns them and may place little or no economic value on them.

This comment recommends a potential system of identifying and designating “orphan works” as well as administering rights associated with these works. Obviously, this solution does not address all concerns, but it attempts to place a framework around many of the issues around which further exploration can be performed.

Identification and Designation of Orphaned Work:

Generally, I believe age and publication status are not necessarily indicative of orphan status. The two examples I included above describe an old unpublished work and a newer published work; each was equally “orphaned” and each could have consequences to a broad range of potential users. Furthermore, even official registration of a work with the copyright office does not guarantee that a work will never be orphaned. Registration

does not ensure that an author or owner will be locatable or accessible, nor does it ensure that a transfer of ownership has not occurred with an unidentifiable new owner.

The definition of an “orphaned work” should remain sufficiently narrow so as to maintain the balance of rights of the copyright owner and the public benefit from having access to these works. I propose that a centralized database be created to store two things: (1) intent to use orphaned works and (2) intent to enforce ownership rights. The system can be maintained and administered by a centralized agency, such as the Copyright Office. The information contained within this system, as well as the use and administration of this system will be described briefly below.

Intent to Use:

A work shall be “orphaned” only for a specific user, and a specific use, without the loss of the copyright per se for the owner of that work. When a potential user desires to use a work he believes is orphaned, he must first attempt in good faith to identify and locate the copyright owner. A reachable copyright owner that refuses to grant permissions does not orphan his work – his refusal is part of his grant of rights in his work. It is only when the owner or designated licensing agent cannot be reached that a work should be a candidate for “orphan” designation.

When a user performs a good faith and reasonable search (the specifics of which will be determined on a case-by-case analysis) and is unable to identify or reach the owner, the may file an “intent to use” the orphaned work in the centralized system. This filing should include information about the user, the intended use, a record of the search performed, and detailed information about the work to be used. Additionally, the filing should include a representative abstract of the work to be used.¹ The system administrators may also find it useful to provide categorization within this system for easier search by copyright owners and other potential users. Sample categories may include: non-commercial/commercial; type of work; medium; and source of work.

Once an “intent to use” has been filed, a designated period of time² should be imposed during which the potential user is enjoined from using the work. This waiting period allows a copyright owner to review the intent notices and object to a designation of orphan status for his work. The review can be done by providing a subscription service through the Copyright office, whereby summaries of intended uses are sent periodically to subscribers. Subscriptions could be limited by categories if a categorization system is employed. Alternatively, the entire burden could be placed upon the copyright owner to perform a periodic search within the system for potential infringing uses. This burden may be reasonable because an owner has other opportunities to ensure that his copyright is not considered abandoned. Specifically, he can place notice on his work and make efforts to identify himself and make himself available. He may also file an “Intent to Enforce” as described below.

¹ Where possible, a digital attachment should be included, representing an image of the work (e.g. for graphic, pictorial, sculptural, architectural works, etc.) or an identifiable subset of the work (e.g. for literary work, musical composition, phonorecord, film, computer program, etc.). Ideally, this electronic attachment would allow potential copyright owners and other potential users to more easily recognize the infringed work upon searching within the database.

² The time should be long enough to allow a reasonably active copyright holder to see the notice of intent to use, but not so long as to preclude a user from reasonably proceeding with his intended use. A period of 60-90 days may be appropriate, with perhaps a shorter period for a non-commercial use.

After the expiration of the required time period, an unchallenged work is designated as orphaned and available for *that user's specific use*. Subsequent users would each need to perform his own search, file an "intent to use", and wait for the defined period. This requirement retains maximum protection for the copyright owner. It also ensures that a single user's search cannot be relied upon by subsequent users, eliminating claims of reliance. Finally, it eliminates the possibility that a single user's search (which may not ultimately be deemed reasonable) will have the effect of placing a work into the public domain for all to use freely.

An owner's objection to an "intent to use" is presumptively valid and should enjoin use of the work until a finding is made as to the ownership of the copyright. A bad faith claim of ownership can be punished with statutory damages and loss of claim of rights to this work for all further purposes.

Intent to Enforce:

The centralized system can also provide for an owner to "register" his own work through an "intent to enforce." This filing should include the author, owner, contact information for inquiries, a detailed description of the work, and a representative digital attachment where possible (as described in footnote 1). Fraudulent filings or bad faith claims of ownership should be subject to statutory damages and loss of claim of rights to the identified work.

A filing within this system should not be mandatory. Rather, it should represent a presumptively valid copyright that is not orphaned. Furthermore, a record within this system should rebut a claim by a user that a good faith and reasonable search was performed. This presumption can, however, be rebutted by a showing that the record is out of date or the contact information did not enable the user to find the owner.

Administration and Effect of Designation of Orphan Status:

With few exceptions, the administrative agency should not be asked to validate a search or provide a declaratory judgment of orphan status. This administrative burden would be too great, and could create a delay within the system that would make some uses impractical. For all *non-commercial* uses, a designation of "orphan" status should follow automatically from a filing of intent to use after the passage of the required waiting period with no objections. The non-commercial use should be designated "fair use" for the *specific user* and the *specific use* claimed in the "intent to use" filing. The use should then be exempted from all claims of infringement and damages. This designation should greatly relieve a potential user from the risk of a lawsuit and should provide public access as is desired in one of the goals for copyright law.³

For *commercial* uses, a user can petition an administrative agency within the copyright office for a declaratory judgment that the search performed was "reasonable" and the work is designated as "orphaned" for the specific commercial use requested. This judgment, while wholly optional, would limit future damages to a copyright owner to a reasonable royalty rate. Without this judgment, a copyright owner could still seek the full range of remedies under the copyright act in the event the search is found to have

³ A user could still claim that a search was unreasonable. An administrative agency could review the search history and make a ruling on this before any court proceedings were initiated. The remedies available in the event of an "unreasonable search" for a non-commercial use should be limited to actual damages. This should deter copyright owners from initiating expensive litigation for a nominal use.

been “unreasonable” or not in good faith. The royalty rate could be established through several mechanisms. During the period of commercial use of the orphaned work, the user could be asked to pay a reasonable “compulsory licensing fee⁴” to the copyright office or administering agency. The collected fees during the orphaned period are not transferable to the copyright owner, but would instead be used for funding the administration of the orphaned works system.

An orphaned work can be “reclaimed” by a copyright owner. This reclamation will prevent future infringing uses. However, with respect to existing commercial users, the effect is less clear.⁵ Because the user has relied upon the orphan status of the work, it may be equitable to allow the user to continue using the work indefinitely. After reclamation, however, the established compulsory fee could be paid to the owner of the work rather than directly to the administrative agency. The agency is no longer “administering” this orphaned use and a rightful claim to the royalties has been made. Alternatively, the copyright owner could petition for a review of the compulsory license fee to readjust for the specific nature of the infringed work and the infringing use. A final option would grant the owner broader rights to his copyright; a commercial user could be granted a limited “use right” for a designated period of time during which the owner and user could negotiate for an ongoing license. This “use period” should be at least one year, perhaps longer. This equitable remedy allows the user to recover some of the benefit of his investment in his reliance on the orphaned status of the work. Additionally, it prevents overly benefiting the “sleeping owner” of the work in what may be a new market for his copyrighted work created by the effort of the “infringer.”

Conclusion:

I believe this system addresses many of the concerns related to orphaned works. It balances the interests of a copyright owner, maintaining his copyright in broad form while allowing limited uses based on the demonstrated reliance on an orphaned status. Furthermore, this approach provides for an administrable system through which commercial uses provide some funding for the maintenance and administration. The approaches recommended rely on the individuals involved to exercise their obligations in good faith and in a reasonable manner, and provides for appropriate statutory damages in the event of abuse or fraud within the system. Finally, I believe this system “frees up” orphaned works for non-commercial “fair uses” that would likely result in limited damages without encouraging commercial users to eviscerate a market for a protected work just because the owner was difficult to locate. I hope this submission provides “food for thought” on this important public policy issue that is sure to influence the creativity and progress of science and the arts going forward.

⁴ For ease of administration, a rate structure could be established for each category of work, type of use, and perhaps breadth of use. A more complex “case-by-case” system could alternatively be used where an administrative board could review the work and the intended use and establish a reasonable fee structure.

⁵ Non-commercial users have been “exempted” from any reclamation effect because their use was designated as “fair use.”