

## **A Proposal On The Treatment Of Orphan Works: Striking a Balance Between The Rights Of Copyright Owners and Advancing Public Learning**

The goal of copyright law is to advance public learning. The United States copyright regime has tried to meet this goal by incentivizing authors through copyright protection, granting them a limited monopoly on certain uses of their copyrighted works. However, the current copyright regime fails regarding the treatment of orphan works, because the balance between the rights of copyright owners and the benefit to society is not met, leaving some potential creators of new works afraid to use works that may or may not be entitled to copyright protection. Something must be done to solve this imbalance of interests. Rather than reinvent the wheel, my plan involves using principles from various aspects of United States and Canadian law<sup>1</sup> to create a viable solution.

### **DEFINING AND MANAGING ORPHAN WORKS**

At the outset, it is necessary to define an orphan work. I suggest that the definition of an orphan work should be: any copyrighted material, either registered or unregistered with the United States Copyright Office (“Copyright Office”), whose owner is not known and cannot be identified through reasonable investigation<sup>2</sup> by the person that intends to use the work and is relying on its status as an orphan (“reliance party”).

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<sup>1</sup> From United States law, I apply the concept of limited property rights (as exemplified by the doctrines of adverse possession and abandoned property), and the concept of reliance interests (as exemplified by promissory estoppel in contract law); from Canadian law, I adopt a compulsory license regime with respect to orphans.

<sup>2</sup> In determining which works are orphans, the Copyright Office will need to determine what constitutes a “reasonable investigation.” I suggest that it include, at a minimum, a search of registered copyrights and a search of the ORWD (described below). If the proposed orphan work is listed in either of these resources as of the date of the search, it should be prima facie evidence that the reliance party’s investigation was not, in fact, reasonable. However, I think more requirements should be added (perhaps those steps detailed on

This definition encompasses those copyrighted works that have never been registered with the Copyright Office, and those works that have been registered with the Copyright Office, but whose owners cannot be located through reasonable effort on the part of the reliance party. It should also include published and unpublished works, because the loss to the advancement of public learning is probably even greater with respect to unpublished works, since the public may not be able to experience the work at all if it remains unpublished and protected.

The reliance party should have the burden of demonstrating that a work is, in fact, an orphan. In order to do this, a reliance party must 1) certify, under penalty of perjury and statutory damages,<sup>3</sup> that they have made a reasonable investigation; 2) document such an investigation; and 3) register the work as an orphan work in the newly created Users of Orphan Works Database (“UOWD”).

The UOWD should be available over the Internet for public search. It should contain the date of submission, descriptions (and perhaps thumbnails, sound bytes, etc. when applicable) of the orphans utilized by each reliance party, and a description of the way in which the orphan will be used.<sup>4</sup> The UOWD will allow copyright owners of orphans to search through the orphans, determine if their works are being used, and reclaim them. The owner should be able to contact the Copyright Office and submit documentation, showing ownership of the orphan. Moreover, once the owner of the work is identified, the work should lose its status as an orphan. If the work is registered with the Copyright Office, the registration should be updated to reflect the current

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the Copyright Office’s Web Site at <http://www.copyright.gov/circs/circ22.html>), as long as they do not make the reasonable investigation unduly burdensome for potential reliance parties.

<sup>3</sup> A fair amount should be determined by the Copyright Office.

ownership information. If the work is not registered with the Copyright Office, the work should be submitted to the Owners of Reclaimed Works Database (“ORWD”).

The ORWD should also be available on the Internet for public search. Similar to the UOWD, the ORWD should contain the date of submission, descriptions (and perhaps thumbnails, sound bytes, etc. when applicable) of the owner’s reclaimed works.<sup>5</sup> It will provide a means for owners of orphans to reclaim their works without going through the formal process of registering with the Copyright Office.<sup>6</sup> Copyright owners will be able to submit their works and establish their ownership of potential orphans, under penalty of perjury and statutory damages.<sup>7</sup>

### **TREATMENT OF ORPHAN WORKS**

Once the reliance party has demonstrated that the works are orphans, I suggest that s/he have the right to use the work for the purposes set forth in his/her registration. Moreover, I suggest that the reliance parties be charged a compulsory license fee<sup>8</sup> to be awarded to the owner of copyrighted orphan if they are later identified. Until such owners are identified, this fee should be paid to the Copyright Office to help defray the administrative costs of creating and maintaining the UOWD and the ORWD and paying other related costs. However, if a user of a supposed orphan fails to take any of these

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<sup>4</sup> In addition, each entry in the UOWD should contain certain other identifying fields, but I leave it to the Copyright Office to determine which fields are necessary.

<sup>5</sup> In addition, each entry in the ORWD should contain certain other identifying fields, but I leave it to the Copyright Office to determine which fields are necessary.

<sup>6</sup> I suggest that this process be much simpler than the formal registration process in order to encourage owners to reclaim their orphans.

<sup>7</sup> A fair amount should be determined by the Copyright Office.

<sup>8</sup> Compulsory license fee should be determined by the United States Copyright Office. Perhaps, the compulsory license fee should be different for non-commercial versus commercial works.

steps in good faith (as determined by the court), s/he should not be afforded any of the rights or protections recommended for reliance parties.

### **IMPLICATIONS OF PROPOSED TREATMENT OF ORPHAN WORKS**

Under my proposed regime, registered users of orphans would be able to use such works without fear of reprisal from unknown copyright owners. This will allow the dissemination of orphan works and the creation of derivative works, which will benefit society through enhancing public learning. My proposal certainly limits the rights of the owners of copyrights in orphan works. However, since these rights are only limited with regard to reliance parties, copyright owners will have the opportunity to receive a compulsory fee from these reliance parties, and copyright owners will be able to register with the Copyright Office or in the ORWD as the current owner in order to protect themselves, I believe that these limitations on the rights of copyright owners are justified. Moreover, American jurisprudence has already recognized similar limitations on the rights of property owners through the doctrines of adverse possession and abandoned property, which satisfy many lawmakers' goals of putting property to its best and highest use. Similarly, society should use orphan works, rather than allowing them to remain dormant. The societal benefits of this regime outweigh the limited costs.