

The policy dilemma created by “orphaned works” in the United States is they engender tension between the need to insulate small users against liability for fear of inhibiting creativity and new works, and protecting authors from inadvertent loss of copyright, a key to Berne Convention compliance. The Copyright Office can resolve the difficulties presented by “orphan works” through a four-point process: (1) working to update existing databases, with particular attention paid to digitizing copyright registration and renewal records from 1923-1978; (2) creation of a specific, accepted methodology by which individuals looking to utilize existing works may research the copyright; (3) institution of a Berne-compliant dual system of obligation by which owners and licensors bear responsibility for maintaining copyright integrity; (4) adoption of “case-by-case” analysis similar to Canada, and of a compulsory licensing system similar to that of Japan.

First: Researching a copyright is an imprecise process, often lacking in conclusive resolution. The Copyright Office lists three primary methods to investigate a copyright, noting that completion of all three may prove inadequate to determine copyright. Working to improve the success of individuals searching for ownership of copyright is an important first step to ameliorating inconclusive searches. The Copyright Office, which published the Catalog of Copyright Entries (CCE) in printed format from 1891 through 1978, should work to digitize registration and renewal records from this period, thereby streamlining the research process, which at present requires manual search of paper records. While the CCE does not include entries for assignments or other recorded documents, it does contain certain essential facts that may serve as a starting point for the process. The Copyright Office must look to digitize existing documentation that would be

beneficial to individuals investigating copyright, and work to make these accessible offsite.

Second: The next step is for Congress or the Copyright Office to determine a definitive process by which an individual searching for the owner of a copyright can establish the presumption the work in question is “orphaned.” Completing this process should (a) raise the rebuttable presumption the work is “orphaned,” and (b) result in the restriction of remedies for the author as explained *infra*. This will remedy the existing financial uncertainty for subsequent creators and users with respect to utilizing works whose ownership is uncertain. While an entirely new process may certainly be considered, there exist two ways to do this that incorporate existing processes.

- The first would allow an individual to search for the author of the work on her own, incorporating existing steps (for example, those described in Copyright Office Circular 22), beginning with a physical search of the work for: (1) copyright notice, (2) title of the work, (3) name(s) of author(s), (4) name of copyright owner, (5) year of publication or registration, and then a subsequent search of the Copyright Office catalogs and other records. As there exist industries that have received Congressional sanction to omit the year of the copyright, additional research with the Copyright Office will be required. The existing sequence of points to be considered: (1) if the work is a serialized publication, it may include a title, a volume or issue number; (2) if it is a derivative work, identifying and researching the original work must be explored; (3) if any identifying numbers exist (LCCN, ISBN, ISSN, etc.), the issuing agency ought be contacted.

- The second would allow the individual to pay the Copyright Office the hourly search fee to conduct the search for them.

Both of these processes should be ratified as sufficient to establish adequate steps having been taken to establish the identity of the author. Paying the Copyright Office to conduct the search would establish the presumption that an adequate search had been completed, whereas the individual-conducted search would establish the same presumption but would be open to rebuttal via demonstration that it had not been performed adequately under the requirements. Upon completion of the process, the individual researching the copyright would submit completed documents certifying the steps taken in conducting the search.

Third: The two prior steps form the basis for establishing the presumption the subsequent creator has performed the necessary steps to establish a work has been “orphaned.” Now the author’s responsibility must be considered. Article 5(2) of the Berne Convention is designed to guard against formalities resulting in the inadvertent loss of copyright, and the United States should work to maintain the international consistency achieved via the 1976 Copyright Act embracement of this principle. However, the logic of establishing a dual-system of responsibility with respect to “orphaned works” is irresistible. Placing the onus on the individual looking to utilize the existing work should only be one-half of the framework; indeed, to prevent their works from potentially being labeled “orphaned,” authors should be compelled to register their works with the Copyright Office. Note that this is not a reversion to the former requirement of mandatory copyright registration, as there is no opportunity for the

ultimate loss of copyright. Comparable systems, like those of Canada and Japan, currently utilize similar processes while maintaining their Berne compliance.

This dual-system would have an important impact on the remedies available in the event an author wishes to seek damages for use of his “orphaned work.” The subsequent creator may still incur extensive liability for either failure to conduct the copyright search, or for a demonstrably incomplete search (in theory, if the process has been completed and submitted to the Copyright Office, it makes sense it be plaintiff’s burden to demonstrate the search was incomplete). In such a situation, the author of the “orphan work” would be able to explore all available remedies under the Copyright Act.

However, copyright law exists for the benefit of not only the author, but the public as well. As a consequence, the author, in order to assure her work does not at some point receive the “orphaned work” designation, must affirmatively indicate the work ought not be released for the public benefit via registration with the Copyright office. Failure to register with the Copyright Office should create a rebuttable presumption the work is orphaned. While authors would not lose their copyright, their remedies for the use of their work would be limited to the amount collected by the Copyright Office for use of the “orphaned work,” discussed *infra*.

Fourth: The adoption of the “opt-out” system for copyright protection, which replaced the conditional copyright system that restricted copyright protection to those authors who undertook positive steps to retain it, has been criticized, perhaps unfairly, as creating this enormous body of “orphaned works.” In fact, many countries effectively deal with the difficulties associated with orphaned works while retaining copyright laws similar to those of the United States. This proposal suggests the enactment of a system similar to

those used by Canada and Japan would provide the United States with a system by which to effectively deal with “orphaned works.” To effectuate such a result, the United States would introduce a two-step process:

First, the United States would adopt the Canadian “case-by-case” approach, utilizing the designated copyright search process discussed supra to set the parameters for the level of search that would need to be undertaken in order to establish that a particular work was “orphaned.”

Second, the United States would establish a compulsory licensing system similar to that of Japan. The Japanese allow “orphaned works” to be “exploited under the authority of a compulsory license issued by the Commissioner of the Agency for Cultural Affairs.” (Copyright law of Japan, §8 Article 67). Such licenses require the subsequent creator deposit a fixed amount to compensate the copyright owner, should he or she come forward or be found. This might best be done under the flag of the Licensing Division of the Copyright Office, which at present collects royalty fees from cable operators for retransmission of works, would probably be best-prepared to assume this function. Copyright Royalty Judges, which determine rates and terms for the copyright statutory licenses and make determinations on distribution of statutory license royalties collected by the Copyright Office, would be a logical choice for administering setting function.

In conclusion, it is unnecessary for the United States to return to the registration system of copyright protection to solve the problem of “orphaned works.” Reconciling the existing system with solutions such as those contained in this paper will engender improvements sufficient to eliminate most of the “orphaned work” difficulties in existence today.