

UNITED STATES COPYRIGHT OFFICE

NOTICE OF INQUIRY
CONCERNING
ORPHAN WORKS
Published at 70 Fed. Reg. 3739 (January 26, 2005)

WRITTEN COMMENTS OF
COPYRIGHT CLEARANCE CENTER, INC.

March 25, 2005

I. INTRODUCTION

Copyright Clearance Center, Inc. (“CCC”), submits these written comments in response to the request of the Copyright Office set forth in its Notice published at 70 Fed. Reg. 3739 (January 26, 2005) in connection with the issue of orphan works.

CCC is currently engaged in the centralized licensing of text-based copyrighted materials, on behalf of rightsholders, to users of all kinds, including academic, business and government organizations; in the course of our business, we regularly need to address rights and royalties relating to what the Copyright Office has characterized in its Notice as orphan works. Because we are highly experienced in conducting rights-related research, and have substantial relationships with many parties involved in producing text-based works, our research efforts often reveal that orphan works are no more than “temporarily lost works” for which “parents” can be found.

CCC believes that establishing a voluntary works/ownership Registry, where information about works, rights and rightsholders can be recorded, is a viable choice for the Copyright Office, and that such a Registry can operate without the need for elaborate new government-operated structures. For example, CCC’s own existing systems, originally designed to help rightsholders and users address a relative market failure (how to license high volumes of low-value transactions around photocopies) that is conceptually similar to the orphan works issue, have proven that this kind of database-driven Registry is readily manageable and can serve all parties in an easy, convenient and efficient manner. Such a Registry would help provide a necessary service in support of the purposes of the Copyright Act.

II. BACKGROUND

CCC was created at the suggestion of Congress in the legislative history of the Copyright Act of 1976, and has been engaged in the licensing of the copyrighted works of others for over twenty-five years. As a not-for-profit corporation established by a group of authors, publishers and users that had worked with Congress in its revision of the Act, and continuing to this day (uniquely among collecting societies around the world) with representatives on our Board of Directors not only from the author and publisher communities but from user communities as well, CCC has created and maintained markets that have served all parties effectively and efficiently.

Since we opened our doors in 1978, we have evolved from a single, simple transactional service – still in use today – by which rightsholders and users can exchange, one-by-one if they choose, permissions and royalties relating to the licensing of photocopying on an as-needed basis, to an integrated licensing organization, offering transactional and repertory licenses for both photocopying and digital uses to business and governmental organizations, as well as coursepack licensing and digital-use licensing for academic organizations. Most recently, we have developed and operate an automated licensing facility that permits copyright rightsholders to issue licenses to use their materials right from the point of content on their Websites. This growth has led us to the point where we represent over 1.75 million copyrighted works, routinely process over two million individual licensing transactions a year (most through our Website at www.copyright.com), issue repertory licenses to thousands of businesses and other organizations with, collectively, 15 million employees in the United States, cooperate with counterpart organizations in other countries to license millions of uses and users abroad, and anticipate revenues in excess of \$130 million in our current fiscal year.

In the course of handling these millions of licensing transactions, our staff of customer service and bibliographic experts is regularly required to conduct research to connect “lost works” with their rightsholders, research that is quite frequently successful. As a result, we have built up substantial information about how and where to find such rightsholders efficiently, helping to reduce (though never to eliminate) the problem that a “lost work” is in fact an “orphan work”. Our development of these skills, ordinarily applied to bibliographically identifiable works in the hands of an interested user, suggests that the similar skills necessary to run a works/ownership Registry are readily available and can make the operations of such a Registry viable. We would be pleased to use those skills, combined with the experience we have gained in developing licensing services that address users’ needs and general copyright issues on a sophisticated level, to assist the Copyright Office as it develops any recommendation to create such a Registry.

III. QUESTIONS FROM THE COPYRIGHT OFFICE

In its January 26 Notice, the Copyright Office set forth groups of questions, answers to which will help it complete its study of orphan works for Congress. CCC addresses three

of those groups of questions below and then offers a proposal for a possible structure for a Registry.

1. Nature of the Problems Faced by Subsequent Creators and Users

By the nature of its business, CCC frequently receives requests from users (including creators and other rightsholders seeking to use others' copyrighted works) for permission to use works that are unknown to us. CCC has thus become vastly experienced with the difficulties faced by creators and other users in the areas of text published in books and serial publications, and has become a principal resource for information about locating copyright owners in the text field.

As discussed in the 1970s within the Commission on New Technological Uses ("CONTU") – and probably before – users desiring to be copyright-compliant have always sought "100% identification" of rightsholders' rights, and yet have continually encountered difficulties in locating a single rightsholder among the entire field of potential rightsholders. Despite advances in Web-based tools, and as described by the Copyright Office in its Notice, the scope of this issue has only grown over time, in part due to the lifting in the United States of its "formalities," as required upon its 1988 accession to the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention").

CCC's experience in identifying and locating "lost" authors, estates and publishers that hold rights in bibliographically identifiable works indicates that these tasks can indeed sometimes entail significant amounts of time and resources. In our experience, however, such searches for works likely to be re-used often reveal that the purported "orphan works" are merely "lost" and that their rightsholders are findable with modest effort by skilled researchers. In fact, we are sometimes able to track down rightsholders, some of them household names doing business under alternate labels, simply as a result of long experience with changes in rightsholders (sales of catalogues or entire companies, bankruptcies, deaths and simple changes of residence) plus familiarity with the tools for locating them.

4. Nature of "Orphan works": Publication Status

While U.S. law accords some special status to unpublished works, as described in the January 26 Notice, it appears to CCC that, particularly in the Internet age (but not only in the Internet age), whether a work has been "published" in the legal sense is not always determinable. When users come to CCC seeking permissions for works, neither they nor we are always capable of determining whether a work has been published in a legal sense, but we pursue the rights on behalf of the user in the same way regardless of publication status. Based on our experience, it seems most appropriate that any Registry be agnostic as to the publication status of the works therein contained.

6. *International Implications*

The Copyright Office's January 26 Notice raises several valid questions about the impact that a voluntary Registry might have on U.S. international copyright relations. However, CCC believes that the concerns underlying those questions can readily be allayed. To that end, it should be noted that most of the international copyright treaty partners of the United States already operate involuntary statutory licenses for many forms of reproduction that are licensed voluntarily in the United States – many without even offering individual rightsholders a practical right to opt out of application of those licenses. Thus, statutory compulsory licensing, either complete or partial, exists in some countries (including the Netherlands); “extended collective licensing” (which extends somewhat voluntary licensing structures, involuntarily, to foreign rightsholders and other “outsiders” to the structures) exists in other countries (including Sweden and Norway); and forms of umbrella licensing (whereby participation in collective structures is not quite mandatory but is strongly encouraged through statutory limitations on the rights of non-participating rightsholders) exist in yet other countries (including the United Kingdom).

These involuntary systems in other countries explicitly wash away the orphan works issue altogether, leaving it to government agencies, collecting societies or “representative” unions and associations to compensate individual rightsholders who are able to identify themselves as entitled to a share of large pots of money designated in gross for entire classes of rightsholders, both domestic and foreign. However, under these systems rightsholders’ entitlement to exploit their own works has been completely washed away along with the orphan works issue – a result that is contrary to the ordinary expectations underlying U.S. intellectual property regimes.

A voluntary Registry is both more respectful of individual rightsholders’ rights – in the U.S. legal tradition – and in more careful compliance with the Berne Convention’s restrictions than these systems extant in any of these other countries. For example, CCC’s voluntary centralized text licensing systems in the United States offer all rightsholders and users the option whether or not to participate and options about what programs to participate in, and also offer rightsholders additional options about what works to include, and, in our transactional programs, what price to set for each use. Such a voluntary system provides all parties with the ability to use CCC’s services as an adjunct to, rather than a mandatory substitute for, their own in-house, individual licensing services or arrangements. A Registry operated on a similar voluntary basis would maximize users’ access to copyright-cleared materials while also ultimately maximizing the ability of rightsholders to lay public claim to their works as appropriate, results, we submit, that are consistent with Berne.

IV. A POSSIBLE STRUCTURE

CCC believes that a works/ownership Registry would be of significant benefit to both copyright rightsholders and users (including subsequent creators). In our conception, a

voluntary Web-based Registry would, on the one hand, hold information about works, rights and their rightsholders, and would offer simple search tools for potential users to locate information that they seek about existing works. On the other hand, while searching the Registry alone would and should carry with it no legal presumption of having completed the necessary diligence in seeking a rightsholder, users would be invited to record what information they have found both as evidence of their efforts and as a contribution to a centralized database that would increase the likelihood of finding rightsholders or, for example, determining a work's public domain status (by recording an author's date of death) – any of which would be a benefit to all users interested in respecting copyright.

A voluntary Registry would impose a minimal burden on copyright rightsholders and would require no alteration of the existing copyright registration system, while providing users with a central source of information (supplemented by the private-sector sources noted below) that would be directly relevant to finding a rightsholder even when the work at issue has not been registered in the Copyright Office. The Registry, being voluntary, would not require the filing of formal ownership or transfer documents, and yet would provide users with precisely the information on how to find the rightsholder.

This structure would encourage rightsholders to submit information, and in particular regularly updated contact information, to help ensure that their works do not fall into the category of orphans. While, being voluntary, the Registry would be one possible location to record such information, so would many other locations where such information is ordinarily sought by users. If the point is to avoid having works orphaned, then the multiplicity of channels that exist in the private sector for the transmission of such information may in fact be superior to any single location (although the Registry would inevitably collect much of this data as well). Further, if establishment of the Registry were announced with sufficient advance notice before beginning operations, and if it were publicized widely enough (with the assistance of rightsholder groups and other industry experts), a substantial number of hitherto-“lost” rightsholders would likely appear and enter their rights into the Registry's database – even before a user inquires – itself a step that could go a substantial way towards addressing the orphan works problem altogether. While such a Registry would likely start its life with relatively modest amounts of information, the passage of time and growing confidence in its abilities from rightsholders and users alike would produce a steady accumulation of information that would always move in the direction of maximizing the information publicly available about rights, works and rightsholders.

Two important distinctions between United States law and practice and that of other countries could then come into play to help minimize some of the concerns expressed by the Copyright Office in its Notice. First, it is important that the Registry minimize its intrusion onto rightsholders' right to authorize (or refuse to authorize) uses, in keeping not only with Section 9(2) of the Berne Convention but with the U.S. preference for voluntary, private action wherever possible in connection with private property rights of any kind. To that end, the invitation to record information with the Registry, but not to make such recordation mandatory, gives any interested party an easy way to invite

interest in a license transaction. Second, after some years of growth in data and of all parties' familiarity with the Registry, the availability of such a voluntary recordation facility would, from users' point of view, increase the user's ability to evaluate the risks associated with the use of apparently-orphan works and, from rightsholders' point of view, increase their ability to assert their rights in a fashion designed to maximize notice to the world.

V. CONCLUSION

In its January 26 Notice, the Copyright Office identified a number of issues relating to orphan works that will require an exquisite amount of balancing of the rights and privileges of both rightsholders and users, particularly in the context of the international obligations of the United States. CCC has, through its voluntary and flexible licensing services founded on a steady accumulation of rights and rights information, proven that such a system is both viable and reasonable. A Registry service, helping users to identify the rightsholders whose rights they need in order to build new creative works, and helping rightsholders to publicize their claims to rights in existing creative works, is not only desirable but susceptible of straightforward design and implementation should the Copyright Office deem its establishment appropriate to recommend.

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