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Comment on Orphan Works

Emphasizing that the ultimate goal of copyright law is to advance public learning, the Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 - 350 (1991), stated that: "The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." A system that eases and legitimates the use and distribution of "orphan works" would further the Constitutional aim of "promot[ing] the Progress of Science and the useful Arts."¹

I believe that the purposes of copyright law would be best effectuated by a system in which the potential user of an work, after making a "reasonable effort" to locate the copyright owner, files her intent to use, and is then able to use it if the copyright owner does not object within, say, 2 years. At this point, the work would officially be deemed "orphan." The Copyright Office should manage these requests and could deny them if they did not meet criteria, established by the Copyright Office, which indicate a "reasonable effort." The copyright owner would retain his copyright in the work, and the user would merely have an implied license. Under this system, a copyright owner whose work was licensed could then sue for reimbursement of this license but could not sue for copyright infringement. Courts would settle disputes and set remedies on a case-by-case

¹ U.S. Const., Art. I, §8, cl. 8.

basis. However, available remedies should be capped at a reasonable rate so that licensees do not have to fear future liability. Because I believe that many orphan works would be claimed after the filing date and before an implied license issued, I do not think that this system would result in a flood of lawsuits that would unduly burden the courts.

An “orphan work” should be defined as a work for which the copyright owner cannot be identified after a reasonable inquiry. To protect authors’ work from inadvertently becoming “orphaned”, however, a work should only be considered an “orphan” only after an established period of time. Licensing of orphan works should be added to the list of uses that are allowable in the last twenty years of the copyright term that was extended by the Copyright Term Extension Act of 1998 and should be subject to the same limitations. If, however, a work’s term is unknown, the Copyright Office should estimate a date of creation or death and then apply the established CTEA terms. However, a copyright owner could refute this date. The described system should apply to all types of works so that it is easily learned and applied.

Some commentators are undoubtedly touting the advantages of a formal approach to orphan works issues. If copyright owners had to register in order to hold on to their copyrights, like under the 1909 Act, “unwanted” works would more easily enter the public domain. For many reasons, however, I believe that imposing formalities on copyright owners would be a serious mistake. First of all, a burdensome formal system would prevent many “unprofessional” authors who desire copyright protection from receiving it. Secondly, numerous works would inadvertently enter the public domain. Finally, imposing formalities would put the U.S. in derogation of the Berne Convention.²

² Berne Convention for Protection of Literary and Artistic Works, 1971, art. 5, para. 2.

The international law justification, however, is ancillary to those that further U.S. Copyright's goal of promoting public knowledge. One of the major arguments for passage of the Copyright Term Extension Act of 1998 was to put the U.S. in compliance with international law. Although adding 20 years to the copyright term may have served the international goal of "harmonization", it exacerbated the orphan works problem in our country. The Constitution, in the Intellectual Property Clause, is silent on adhering to international law or furthering international trade. In the U.S., potential users of orphan works now must wait a very long time before the work officially enters the public domain, even if the copyright owner is no longer interested in the work or if the work is no longer commercially viable. If such works could be licensed, however, a composer, for example, could make use and even improve upon a little-known symphony written years ago, thus furthering our copyright law's ultimate goal of public progress.

Furthermore, I believe that the suggested filing/licensing system is actually in line with international law. Although a potential licensee of an orphan work must adhere to certain formalities, she is not the copyright holder. Also, the copyright owner is reimbursed for an implied license if his work is inadvertently deemed "orphan." Regardless, to the extent that this limitation on the copyright owner's remedy arguably infringes upon his rights, thus putting the U.S. in violation of international law, we must remember that the U.S. copyright law's goal of progress is of paramount importance. Treaty obligations cannot violate the U.S. Constitution.

Finally, I believe that the suggested filing/licensing scheme should apply to published and unpublished works alike. Regarding unpublished works, critics will point out that §106(5) provides that a copyright owner has exclusive rights to publicly display,

or authorize public display, of his work. As the Court pointed out in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 551: “Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public...” At some point, however, an author’s right of first publication must yield to the overarching goal of promoting public learning. The Constitution implicitly recognizes this since it grants authors exclusive rights in their work only for “limited Times.”³ Because the suggested system follows the current CTEA terms, authors are still granted monopoly rights for an extended period of time. Further, a copyright owner who surfaces after his work is deemed “orphan” is order to reclaim ownership of his work, subject only to the mandatory license granted to the filer.

Such a system provides an incentive for authors to register their copyrights, so that their work won’t inadvertently be deemed an orphan. If, however, a copyright owner does not care to clearly assert his ownership, a licensee can “adopt” this work. In this way, old works may be preserved by archivers and may inspire even more creation. Often, works are abandoned because they are no longer commercially viable. Rather than keep these works locked up, our copyright system should enable the public to benefit from these works.

³ *Supra*, note 1.