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SECOND CIRCUIT: EDNY, SDNY

NEW YORK  
ILLINOIS

**Orphan Works Testimony**

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The “orphan works” issue is based on the notion that it is currently impossible to trace the ownership of many works. Allegedly, this inability to contact the author or rightsholder results in many works being kept out of use for fear of liability. The corollary to this claim is that this fear of liability results in a chilling effect upon creative activity that is at odds with the oft-stated purpose of the copyright law “to promote the progress of science and the useful arts.”

Those who make much of the “orphan works” issue propose various means by which this alleged problem might be addressed. Proposals generally take the form of limiting copyright protection as it is currently afforded the author or rightsholder; suggestions have been made to return to a shorter, renewable copyright term, or even reduce the copyright term, so that works, rather than become “orphaned,” more quickly enter the public domain, whether from non-renewal or from expiration of the decreased term. There have also been various extensive proposals to set up statutory remedies that would create search requirements which, if satisfied, would enable the unlicensed user of an alleged “orphan work” to be assured of reduced liability; to create a registry or database of such user searches which authors and rightsholders could then access to determine if their works were being used as “orphans”; and to create a “copyright small claims court” to handle whatever litigation might then arise from the use of such “orphan” works.

All of these proposed remedies propose to largely shift any burden arising from a work’s alleged “orphan” status onto the author or rightsholder. Requirements that an author be searched out exist now; documentation of such a search is merely the prudent part of such a search. Accordingly, no such requirements, formally written into law, would materially change the would-be user’s duties. Writing them into law and creating an “orphan works” substructure to the copyright law would, however, materially limit, and thereby diminish, the remedies available to the author or rightsholder.

The presumption which underlies this shift is that the public, or “society,” has some colorable claim upon an author’s work once it has been created and/or published, and that “society”—or at least that portion of “society” represented by a would-be user—therefore has not merely the ability to enjoy that work for itself in the way the author has chosen to present it, but the right to demand the author or rightsholder permit the work to be used, whether willing or not, in ways the author may not care to permit.

This belief that the public interest demands encroachment upon the author’s rights is due to a grossly one-sided reading of the underlying purpose of the copyright law. While it is well accepted that the protection copyright affords to authors is intended to benefit the public by promoting creativity, orphan works advocates—and many others who propose various plans for chopping and changing copyright protection—mistakenly presume that the authors of existing work thereby owe something to the public. This is not the case; the copyright law contains no duty to publish; no duty to reproduce, to distribute, to display or to perform, much less to license a work to others to do with it as they will. The author is in no way obligated under law to make the works available—he or she is merely protected should he or she choose to do so.

What orphan works advocates, and others, either minimize or refuse to recognize, is that creativity is promoted, and the public benefits, by the **unavailability** of works which copyright protection makes possible, every bit as much as by the **incentive** which that protection offers to place a work before the public. If someone cannot obtain a license to use a particular work, whether because the author demands too high a licensing fee, because the author does not approve of the proposed usage, or merely because the author cannot be found, the person seeking the license is forced to find a different way to express his or her idea—is forced, in short, to become more creative, and more original, precisely as the copyright law intended. Those seeking wider availability for “orphan works” frequently come close to maligning authors as misers, or as dragons sitting on a hoard of gold, because the author or the author’s heirs either choose not to make a work available or cannot be found to do so.

There are, of course, genuine problems in the digital world regarding the tracking of works; identifying information, watermarks, or data can be easily stripped from digitized works whether on- or offline—but that should not serve as an excuse to institutionalize such stripping—and that is precisely what creating a structure of mitigation and reduced infringement penalties for “orphan works” will do. It will provide an incentive for more such data removal, not less.

It is ironic indeed that the alleged problem of "orphan works" has arisen precisely at a time when "you can find anything and anyone online" has become an axiom. To the extent any actual issue exists regarding "orphan works," it is a problem of searchable databases, not a copyright problem as such. Any sincere effort to address the problem posed by "orphan works" would be accompanied by a plan under which the Copyright Office would partner with one or more of the major search engines to create a more-readily searchable and cross-indexed database which would have comprehensive information regarding the content of registrations, possibly including thumbnails and updated contact information. Such a database might also require that copyright registrations be updated at no-more-than-five-year intervals following the death of the author, so that rightsholder information would never be terribly out of date. This could be easily done online by password, using current technology. It would not be just to cause the copyright to fail if the information were not thus updated, but it would be appropriate to insert an incentive provision that explicitly permitted courts the discretion to limit recovery in the event that the contact information was not updated.

The courts currently take evidence of innocent infringement and of the amount of commercial activity into account when adjudicating copyright claims. There is no evidence that they are incapable of continuing to do so, under current law, in instances where an infringement claim is made for a so-called "orphan" work. Furthermore, under current law anyone making use of an "orphan work" knows that he or she is doing so; it is, therefore, reasonable for the user to make a provision against an "orphan" claim by placing a percentage of profits from the use in escrow until the statute of limitations has run.

In short, the problems faced by any casual user of a so-called "orphan work" are for the most part easily addressed—to the extent they even exist—by the provisions of current law. To the extent they are not addressed, the problems can, and should, be solved by improving the availability of records, not by creating new legal structures and categories.

There are, of course, entities that seek to digitize great quantities of works, without the bother of having to search out the authors of these works, or their successors, and obtain the permission necessary to do so, and to insulate themselves from liability should they choose to flagrantly disregard existing rights. It is the necessity of paying licensing fees that such "orphan works" advocates object to, and the fact that they cannot make free with them that they wish to change. Most works in copyright are actually available—they simply are not available for free, and may require some minor inconvenience to

search out permission. There is no compelling reason to aid such entities in their desire to bolster their own libraries at low cost.

The extent that a problem of "orphan works" actually exists is questionable at best; largely anecdotal; and capable of being addressed, in the main, by sensible applications of the current law. To the extent that problems exist beyond that which current law and jurisprudence can solve, such problems can and should be solved by better, more comprehensive databases, not by altering the structure of the copyright law itself.

Respectfully submitted,

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