To the US Copyright Office

RE Orphan Works Pilot Program

From Cindy Schnackel, artist

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With the difficulty of enforcing copyright law, Orphan Works would add to the burden for creatives, especially those who work independently. Even a voluntary pilot program is likely to add to public misconceptions, increased infringements, and increased burden for creatives.

Individuals artists can rarely afford to sue. Lawyers rarely take these cases on true contingency, so just initiating a lawsuit costs thousands.

Losses from numerous “small” infringements add up and eat into independent artists’ profits much more noticeably than for the large companies that have enjoyed the ability to enforce their rights and which essentially sell in much larger volume.

For independent artists, the law has effectively been replaced by myths. E.g., many people mistakenly believe unidentified images or online images are free to use, and many confuse public visibility with public domain. Orphan Works will increase the burden on copyright owners trying to protect their creative product, not just because of misconceptions, but because of more registration costs, the law setting what their licensing fee should be, and reducing the consequences for infringers who claim the work was an “orphan”.

Will Disney have to register all their characters? I doubt it, though they could probably afford it, unlike independents. Famous works/characters are ‘recognizable’ and no one would believe an infringer who claimed they were orphans. An orphan works related registry would recognize it as not an orphan, (you would hope), even without it being registered. No one in their right mind would believe an infringer who said they’d done a “diligent search” for the owner of Mickey Mouse but could not find them.

This means large well known co’s again don’t pay the same kind of price, proportionately, as independents do, who are not global household words, and would be forced to use registries. My point isn’t that I want big co’s to pay, too; it’s that independents cannot!

Realistically, nothing ‘modern’ should even fall under orphan works. I recognize the libraries, museums and archivists’ need that pertains to older items for which an owner really is hard to find. I also recognize archival uses are not the infringing uses that most

independent and living creatives encounter. Virtually nothing uploaded online by modern day artists would come close to that category. No one “needs” to use these modern day images they find online without asking and paying the owner.

How will the US Copyright Office educate the public and give copyright owners the tools they need to enforce their rights in a practical way that sends the message to infringers that they may not just take whatever is technically possible to take? We, as artists, have not been given the tools to send that message, because the cost of enforcing our rights is usually out of reach.

There are even efforts to erode the DMCA takedown process, which is the only free, do it yourself, tool creatives have. I am opposed to weakening the takedown process in any way, and in fact, it needs to be strengthened, as site hosts are getting bolder about playing games and not adhering to the points needed to maintain their safe harbor. If Orphan Works were to become US law, I believe the takedown process would be severely weakened. Hosts are already trying to decide ‘fair use’ and it’s not a huge leap to see them claiming the material was claimed as an ‘orphan.’ It’s like lending weight to the ridiculous disclaimers seen all over the internet, like “No copyright infringement intended.”

The most memorable message that one has done something wrong is to have to pay consequences that are in themselves memorable. Paying money damages, for example.

I am all for the large statutory damages possible in court, and do not wish to do away with that.

We need something in addition that is realistic and doable by the average person who can’t use the courts. Either that, or change it so we CAN use the courts.

The proposed Small Claims process, so far, allows a defendant to simply not agree to be sued! How convenient (for infringers)! This is of no help at all to copyright owners, and when I supported the concept of a small claims process a few years ago in public comments, I certainly didn’t support a meaningless system, or another layer of bureaucracy to eat up more money and time for the copyright owner. I cautioned then, too, not to turn a small claims process into a rigged arbitration process.

I have seen some supposedly pro-copyright organizations and individuals attempting to downplay the importance of artists paying attention to the Orphan Works issue, and attempting to dissuade artists from submitting comments to the Copyright Office. This makes me wonder if some plan to set up a potentially lucrative private registry should Orphan Works pass eventually. It is a conflict of interest to put on a pro-copyright

façade while actually supporting new laws that trap independents into an unaffordable system that further parasitizes creatives.

Fewer creative people will choose the arts a profession if the costs to do so increasingly outweigh the ability to actually make a living at it. It is also not merely an emotional issue that creatives have a need and desire to protect their work product and be the ones to profit from it.

The very purpose of copyright protection in the first place is to encourage creative new works. Not destroy it. As it is proposed, I believe Orphan Works will hamper creativity and make creative careers less viable or desireable. I do not see that the massive fixes it would require to make it work are even being considered.

Therefore, I am opposed to Orphan Works laws in the US which is a country that cannot seem to get right the necessity of individuals being able to enforce their rights. Complicating what is already an insurmountable burden for most is not a way to encourage more creativity.

Thank you,

Cindy Schnackel