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United States Copyright Office
Washington, DC

Comment on proposed "orphan works" rule.

As an independent creator of visual intellectual property I would like to have my thoughts included in your consideration as you attempt to formulate a definition of "orphan work".

The fact is that no work is an orphan, since no work could come into existence without a creator, whether mammalian or not. The problem confronting works without attribution, of course, resides in locating the creator.

National and international law governing the dispensation and terms of permission to copy, commonly called copyright, allocates certain priviledges to the holder of that permission. Although the process of allocating that priviledge is badly polluted by power and money, the permission stands for the terms of the laws.

Setting aside questions about the validity of the terms of that permission, let me move on to the basic problem of locating the creator.

The advent of digitizing works has made that problem considerably easier. Works of all kinds can now have embedded in their digital format myriad identifiers about the works, including about their creators. Conscientious creators incorporate into their workflow the input of such identifiers. But many works continue to lack that data.

This is sometimes deliberate on the part of the creator (Creative Commons licenses), sometimes because the information is not important to the creator (material found throughout the digital culture) and sometimes a result of the methods of distribution of the works.

It is the last of these that I wish to briefly highlight.

There was a time when access to digital works was limited by a variety of factors which were a function of the access. Primary among them was limited space on the devices which served the works to those who came looking. Secondarily were concerns about tempo of delivery. Both of those factors have been resolved in the last five years. The only remaining limitation is one of sufficient energy to continue delivering.

In response to these limitations works suffered a variety of assaults. First was compression of creative data. Second was removal of non-essential data. Embedded information about creator, for instance (now called metadata) was stripped out by the software which managed and served the data to visitors.

The custom, no longer necessary, of stripping metadata from the works, thus, has created a serious problem for any visitor who wishes to locate the creator of the work.

We all know this. It is basic information which serious creators confront every day when they try to decide how to attract attention to their work.

Sadly, no effort has been made by the few organizations tasked with helping creators to protect their legal interest in their works.

Given organizations with a financial interest in the acquisition of the permission to copy, there is clearly no reason to look to them for assistance in the protection of it except for themselves. Without a financial interest, such organizations have no incentive to protect the wider range of works.

Instead those organizations have consistently moved to consolidate every possible right to the works, most frequently without recompense to the creators (for instance Facebook, Google etc.)

So the problem of protecting creators' rights has fallen to the indivicual creators themselves and the bargain has been between spending ones time creating or administering protection, or simply not letting anyone know that they have the works.

Sadly also, the authorities who adminsiter databases of those works, through tools like copyright registration, have failed to enable systems which make discovery of the copyright holder comparatively easy.

More sadly, those same authorities who might have advocated for the creators, have instead stayed silent or worse, proposed rules which facilitate the abrogation of those copyright rights. The worst concept of those is that of "orphan works".

Those authorities might have spent their effort advocating for rules governing distribution which removed the code which strips out the metadata across the entire digital system. They might have worked to create searchable databases of those works which enable the full metadata to be visible and enforce copyright law. They might have advocated for strenuous legal penalties for failure to respect the registrations in their databases.

Instead they appear to have hunkered down in their facilties claiming insufficient funding to even consider such ideas, or worse, being dominated by private organizations which would prefer that such searchable databases not come into existence at all.

And working consistently to resolve the "issue" of "orphan works" in favor of those same large organizations.

My suggestion for you, of course, is that you turn your "orphan works" energies to doing some of the items suggested above. There is no pressing reason to abrogate the copyright of someone not yet known when there is still no consistent rule to protect that someone, nor any tool for locating that person.

The pressing task to to protect creators and only organizations without a vested interest in acquisition of the copyright in works can do that task.