

## **COMMENT ON THE PROBLEM OF “ORPHAN WORKS”**

### **The Problem of Orphan Works**

The existence of works for which the owners cannot be found poses a huge problem for current creators who wish to use the work. The problem affects everyone from the documentary filmmaker looking to incorporate old footage of returning World War II soldiers to the hobbyist who cannot get Kinko's to copy her grandmother's professional wedding portrait. Whether the use is commercial or personal, the problem of orphan works have interrupted the very progress of “Science and the Useful Arts” that the copyright law was enacted to protect and encourage.

Works become orphaned for a number of different reasons. Because copyright law no longer requires either registration or registration renewal, the copyright records are often either out of date or non-existent. The copyright owner may move to parts unknown or die leaving the new user no way to track down her heirs. Businesses that create a work may dissolve or go bankrupt, making the ownership of the copyrights very difficult if not impossible to trace. The lack of a notice requirement has further exacerbated the problem as the new user of the orphaned work (henceforth called “the adopter”) may not even know when the work was created.

In the midst of such chaos how are these works to become useful to society as a whole? A policy of dealing with orphaned works should balance the rights of the copyright holder with those of society. This comment proposes a system that merges elements of the Canadian and UK provisions. In general, this comment proposes changes to laws allowing better access to orphan works as well as a commission to administer these new statutes.

### **An Orphan Works Commission**

This comment proposes an orphan works commission that will oversee the use of orphan works in this country. Due to value placed on copyrights, the initial burden of finding the copyright owner will be placed on the adopter. The adopter must perform a reasonable or good faith search for the copyright holder.

If she is unable to find the owner, the adopter may then file with the copyright commission a public intent-to-use notice for the specific use planned. A database of such notices should be kept for the copyright owners to search as a means for finding such adopters of copyrights. After a set period of time for the copyright holder to intervene, the adopter will pay for a compulsory license to the orphan works commission for the use of the copyrighted material.

Unlike the Canadian system, these licenses are given after compliance with the above regulations, not on a case by case basis. Also, these fees are not held in trust for

the copyright holder, but used to fund the commission. If copyright holder comes forward at a later date, he then will begin collecting the fees set up by the commission and the commission will no longer receive fees associated with the license.

Any further use of the work will then need to be negotiated with the copyright holder. It is important to note that this provision affects only the copyright owner rights against the adopter and the specific registered use. The copyright owner retains full rights against all other users.

### **Defending Against Fraud**

There is the possibility that adopters and putative copyright holders will try to game the system. Adopters may not really try to find the copyright holder or a stranger may try to claim a copyright as his own. This system safeguards against these eventualities within its implementation. For instance, the definition of a reasonable or good faith search for the copyright holder will have to be defined by the copyright office. The reasonableness of the search may depend on a variety of factors such as the availability of a copyright registration, the presence of notice on the copyrighted work, the type of use, and difficulties in determining the copyright holder if the original owner has died or dissolved (as in a business).

Within this framework, if a copyright owner comes forward and feels that the adopter did not conduct a reasonable search, he may sue the adopter for infringement. These proceedings may take place before the commission or in federal court as the copyright office thinks is most efficient. If the search is shown to be unreasonable, then the copyright holder may proceed against the adopter in a full infringement suit.

A person claiming to be the copyright holder may place a claim to the work hoping to reap the monies from the license arrangements of successful works. Such a person is then required to prove his copyright in the same manner as if he were seeking to establish authorship in court. Statutory damages could be imposed against those who fraudulently claimed copyright ownership to discourage such claims.

### **Declaratory Judgments**

Adopters who wish to use the orphaned work for large commercial projects may be uneasy about subjecting themselves to liability for infringement if they have been found to not have conducted a reasonable search for the owner. For this reason, there is an optional procedure in which the adopter goes before the commission to have her search declared reasonable. Such a declaratory judgment insulates the adopter from proceedings about the reasonableness of her search.

### **Exemptions for Non-Commercial Use**

Individuals who want to use an old photo in a scrapbook will be unlikely to have the same resources as an artist or institution looking to use the orphan work in a

commercial endeavor. The reasonable search for this category of adopters is likely to be much lower and the damages much lower. Therefore, the copyright laws should make an exemption to this process for non-commercial users. If an orphaned work is to be used in a non-commercial capacity, the adopter should be able to use the work without registering. If a copyright owner comes forward, he may only sue the adopter if the search was not reasonable *and the liability of the adopter will be limited to actual damages*. The effect of this exemption is to expand the fair use exception to be the default in the case of orphan works. It will also encourage negotiation rather than litigation between the adopter and copyright owner as litigation would be costly relative to what either stood to gain.

Non-profit organizations may fall into a gray area between the non-commercial and commercial users. The commission will require them to register in a manner similar to the commercial user, but will subject them to a similar liability as non-commercial users.

### **Determination of License Terms**

Finally, the commission will have to determine the license terms for each use of an orphan work. This can be done by posting a fee schedule based on the type of work, amount of the work to be used, breadth of the distribution of the contemplated work. The determination of the license arrangement will depend in large part where the Copyright Office wishes to place the entitlement for the orphan work. Entitlement to the copyright holder might entail a flat per use fee for the use of any amount of a copyrighted work. Shifting the entitlement to the adopter may entail making a license that is a one time fee scaled down based on the amount of the work to be used. Obviously, balancing these two entitlements will result in a fee schedule somewhere between these two.

### **Conclusion**

This proposal balances the copyright that vests in an author at the time of creation against the progress made by and adopter who uses the sleeping copyright owners' works. The establishment of a commission to oversee the administration of an orphan works solution accomplishes this balance. This proposal put the initial burden of finding the copyright owner on the adopter, but shifts that burden once a reasonable attempt has been made. The determination of license terms further allows the Copyright office to adjust the copyright entitlement as well as partially fund the proposal with proceeds from the licenses.