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To: Julie L. Sigall  
Associate Register for Policy & International Affairs

Date: 03/25/2005

From: Ray Saintonge

Comment:

I write as an active member and contributor in the Wikipedia family of projects. In particular, much of my participation in that project has been focused on the Wikisource project. This project is concerned with making old texts available on the internet, and because of that needs to be more attentive of copyright issues than the other projects. Because the servers for the project are located in the United States, the law of the United States is the most directly applicable, but because it is our intention that the texts should be fully reproducible by users of the text we must ever be mindful of the fact that many users will be in other countries and subject to other laws.

The average citizen of any country is law-abiding, and to this end is prone to err to his disadvantage. In the absence of any significant financial interest on his part he is not willing to risk litigation that could arise from his action no matter how remote the risk. He ignores the fact that a potential claimant must satisfy certain requirements before he can undertake a formal legal action, and tends to see copyright law as primarily a criminal law issue rather than the primarily civil issue that it is. To some extent he has been intimidated by the dire warnings that the movie industry puts at the beginning of its movie videos. If he sees a copyright notice on the back of the title page for a modern reprinting of a 19th century work, he interprets that as applicable to the entire work rather than to just the material that the new editor has added.

The former renewal provision was perhaps one of the more interesting features of United States copyright law, not only because it allowed orphan works to go into the public domain more quickly, but also because it allowed an author who may have lost his rights through a poor publishing deal to regain those rights and the possibility of an improved contract. The rigid time limit for renewals did indeed have unfortunate consequences, but that could have been ameliorated by specifying less drastic results for failing to renew such as allowing a copyright to be revived.

Copyrights, like other intellectual property rights are first of all property rights. Can they continue to survive in the absence of anyone to own those rights? Take this plausible scenario. My grandfather, who was not a writer, died in 1948 leaving 14 children, but no will. He did not own enough to make a will worthwhile. Now, all of his children, and many of his nearly 40 grandchildren have died. Under a life plus 70 regime if I were to discover a long lost work of his such as a collection of love poems related to his 1895 marriage, determining the ownership of the copyright would be a nightmare since no single descendant would have the authority to permit the publication of the work.

If a corporation is dissolved or becomes bankrupt the copyrights may not be mentioned at the time of dissolution, or in the listing of assets during the bankruptcy process. Is this tantamount to a declaration of worthlessness? Worse still for a non-profit corporation that by law is not allowed to distribute its residual assets to its members.

It should be stated in law that copyright cannot exist in the absence of an owner.

Such a statement should, of course, depend on evidence. Simply being unable to find

an owner is not evidence that he does not exist. There should be more than that, but good evidence requires proving a negative, and that is something which in reality can be very difficult if not impossible. It could be stated that failure to mention a copyright in the course of a corporate bankruptcy would be definitive proof that the copyright was abandoned, but in the case of a personal bankruptcy this could lead to unjust results.

I would put the concept of an orphaned copyright directly in the law. It might have a different name, and for the purposes of these comments I will call it "dormant" to distinguish my usage from the term "orphan" as used in the Notice of Inquiry.

A dormant copyright is a copyright that has not been protected by its owners by a positive act. With reference to the old law a copyright that was not properly renewed would become dormant rather than go into the public domain. Dormancy alone would not terminate a copyright. A copyright would still continue to be valid until its normal expiry date unless it can be clearly proved that there is no owner, or that the owner has taken definite steps to put it into the public domain.

As things stand the basic patent rule is that patents last for twenty years. This is a very modest term when compared to copyright terms. (As an aside I would keep the copyright rule that expiry takes place on the last day of the year; it would be wasteful of everybody's resources to have disputes that depend on the specific date in the year when a copyright became effective.) A twenty year "no dormancy" rule could be reasonable. During that time the burden of proof would be on the user to show that he had the right to use the material, or that there was clear evidence that the copyright was terminated.

A twenty-year no dormancy period would be a rolling period. Any protective act would cause the period to be extended. Legal republication would be a protective act. Thus, in the case of a popular novel, it would not be uncommon for it to be reprinted many times in the five years following its first publication; after that it is no longer produced by the publisher. Each such reprint would reset the dormancy clock. Of course no such resetting could serve to extend copyrights beyond the normal expiry period. A copyright extension registration notice at any time could be another positive act that prolongs the no dormancy period. Filing a will or corporate dissolution documents showing the transfer of copyrights would be yet other such steps.

When a copyright goes into dormancy the burden of proof on the user would be diminished. Proof of having searched public databases for relevant information may be sufficient to discharge his duty of due diligence. These searches would not be limited to copyright office records, but could include, among other things, searching the Social Security Death Index for evidence of the author's death, or national on-line telephone records. A report of a company that does on-line searches could also be evidence. Keeping printed records of these searches could be prima facie evidence that the searches were made and when. Perhaps too a notice should go on the back of the republisher's title page to the effect that the material is being published under dormancy provisions.

What happens then when a person has done his due diligence, and published the desired dormant material, only to have the copyright owner reappear. The republisher should have limited rights. He should not be penalized for what he did prior to the reappearance of the copyright owner, and he should be allowed to print and distribute copies that are already subject to a printing contract. If the number of undistributed copies exceeds a certain number a reasonable statutorily determined royalty could be required on a sliding scale. Federal Court litigation in these circumstances would be ridiculously expensive when small amounts are under consideration. If the republisher wishes to produce even more perhaps a compulsory licensing scheme could be considered.

The technical ability of anyone to easily republish anything electronically presents special challenges to copyright. Often this is done in blissful unawareness of copyright law. The concept of take-down request should certainly continue, and

should continue to include the requirement that the person requesting the take-down have some legal standing in the matter. No-one should be required to respond to a do-gooder who only has half of the facts even though would dictate that the republisher review the situation. Apart from that an electronic republisher should face the same duty of due diligence as a paper republisher. In addition a dormancy notice should be essential as a caveat to additional downstream publishers.

The small publisher, the person who puts a work on a website, or the scholar is not motivated by profit in his undertakings. The entire demand for the republished work may not exceed 100 copies. At that level even cost recovery would make the price prohibitive to his potential market. This is no different from original works with a low demand. Amateur genealogists have certainly discovered that when they try to recover costs from family members. But rather than trying to develop complicated provisions about defining small producers their interests should be built into copyright system in a way that minimizes the effects when small quantities are produced. Such quantities would be determined on a cumulative basis to prevent possible abuse of the provision.

Although the present Canadian provision for copyright licensing has only been used since 1990, provisions of this sort have been in Canadian law much longer, but were simply never used. The mere 143 licenses that have been issued suggest that the procedure is unduly bureaucratic. Reading the three licence rejections that have been published makes clear that the Canadian Copyright Board functions as some kind of quasi-judicial body. This is not consistent with any kind of efficient treatment of these issues.

The introduction of copyright collectives does not help much either. Such bodies only serve to create added costs for their own administration. They may have some use as voluntary associations of authors, but even there there needs to be a mechanism to limit their rights to accumulate funds for authors with whom they no longer have any contact. Worse still is the apparent situation under Romanian law where the ownership of orphan works defaults to the collective.

Any registration system must be easy to use by all concerned. Needless paperwork can be the greatest disincentive to compliance in any law, and can be filled with traps for the unwary. For the copyright holder registration should be optional rather than a requirement. This should satisfy the Berne Convention requirement that copyrights cannot be limited by formalities. The registration would be strictly evidentiary in nature for establishing an author's rights. This would not bar a possible requirement that publishers file a monthly report of what they have published in that month. For the user the registration system would best be in the form of a searchable on-line database that is capable of producing a report to the effect that "This person has today searched the date for Xxxxx, but nothing was found in the database." Numerous variations are possible to cover all conceivable situations.

Only government are in a position to produce such a registration database at a reasonable cost. Low or non-existent fees to the owner will encourage registration. The absence of fees to the user will encourage compliance. It is important to remember that while a single fee for searching the copyright status of a book may be reasonable, this same fee can become considerable for a user who wants to publish a series of extracts from a wide range of books. Private industry cannot do this without a means of recovering costs. In our electronic age it may become necessary to put this task in the hands of an appropriate international body. An international registry could also help to determine what country's copyright laws apply to any given work.

I should also speak of the public domain. When a copyright expires it characterized as having "fallen into the public domain". This suggests that being in the public domain is something less than ownership. I would suggest rather that "public domain" means ownership by the general public, and that governments are the protectors of the public domain. There is a provision in the law now that allows for penalties when something is improperly claimed as copyrighted, but it should

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also be made clear that this also applies for wrongful claims on material that is in the public domain.

Finally, I would assert that in order to balance interests related to copyright both the owner and the user have rights and responsibilities. The owner in particular has a responsibility to make a small effort to protect his copyrights. He should not depend solely on blunt legal instruments to protect it on his behalf. If he fails to take a few fundamental steps he may find that his copyright is still valid but impaired.