

To: Jul e L. Si gal l
Associate Register for Policy & International Affairs

Date: 05/05/2005

From: Mi chael Sal sbury

Comment:

Looking back over the history of mankind, one thing should become obvious. Our history is one of invention and reinvention. Someone gets a good idea and acts on it. Someone else improves on that idea. Someone else improves on that improvement. And so on. This is as true of copyrighted works as it is of patented inventions. For example, William Shakespeare writes Romeo and Juliet. Centuries later, someone turns that into a musical called West Side Story. The musical becomes a movie. Someone else translates the story into a science-fiction epic. If copyrighted works remain "permanently protected" even when the original author is dead and buried, artists will be afraid to build on those original works for fear of litigation, and our culture will suffer.

Even Walt Disney should agree on that. After all, as much as they might like us to think so, they didn't invent the story of Snow White and the Seven Dwarves, Aladdin, or Cinderella. They just created beautiful animated features based earlier written works. Imagine how much the world's children would have lost if Disney couldn't have produced those films because a 300-year-old copyright existed on the original written version and they couldn't find the copyright holders or their heirs to seek permission? And what about the people living 300 years from now who want to build on those Disney works using some new medium and can't because the Disney Corporation is long since gone but the works are still under copyright?

Few artists, programmers, authors, musicians, or other creative professionals would argue that copyright law is of value to them. It protects the investment of time and effort that went into their works, giving them time to profit from those works. Unfortunately, due to the overzealous efforts of corporations, I think the current copyright law provides "too much" protection, for too long a term. When it comes to "orphaned works," that's doubly true.

When I was much younger, I wrote some programs that ran on a computer system that is long since obsolete. I copyrighted those works to guard against others making a profit from them without my permission. But today, a historian charged with compiling information about that old computer system would be unable to do much with my old software because of the copyright protection. If they could find me, which would certainly be possible (though unlikely), I'd probably tell them it's perfectly OK to use my software. In fact, I'd be honored. It would be good to know that my old creations still have some value to someone, somewhere.

On the flip side of the issue, recently I was remembering an old game that I used to play on the now-obsolete Apple II computer. I was considering writing a version of that game to run on modern hardware and a modern operating system. I wanted to see if I could get access to the original program code used in the game, and permission from the holder of the copyright to do that. Unfortunately, the copyright holder of the software is a game manufacturer who has been out of business for probably 20 years, and I have no idea how to get in touch with the original programmer to see if he could grant the rights or share the program code with me. So if I do decide to go about creating my own modern version of the game, I'm going to have to "reinvent the wheel" and write the entire game from the ground up on my own. The original author's hard work is, essentially, lost.

Perhaps what we need isn't a "blanket" legislation to protect all copyrighted works, but a flexible system that allows for works being actively used by the copyright holders to remain copyrighted almost indefinitely, while giving a clear indication that an "orphaned" work is definitely orphaned. Consider a system that works

something like the following:

- A work is created and submitted to the Copyright Office for registration.
- The copyright office issues a unique number to the work (like a patent number) and records information about the copyright holder and the work itself.
- The creator of the work receives an automatic copyright protection term of a pre-defined length (e.g., 20 years).
- Near the end of the copyright protection term (e.g., 19.5 years later), the copyright owner can submit a request to have the protection extended another 1-20 years, indicating the item whose copyright is to be extended by its unique number.
- If the copyright owner hasn't renewed the copyright within some pre-defined grace period (e.g., within a year of expiration), the work is automatically considered orphaned and released to the public domain.
- Works that are not registered formally with the copyright office are protected only for the initial pre-defined term (e.g., 20 years). However, a creator can register such a work at any time to make its protection renewable.
- Creators of copyrighted works should include the registration number in the copyright notice on the work itself, for example:

Copyright © 2005 by John Doe, Registration Number 01-98254-88235-87

- Anyone seeking permission to reproduce a copyrighted work can take the published registration number, look it up with the Copyright Office, and instantly determine the availability of the work (e.g., still protected, orphaned, expired but within grace period, etc.)
- Works in existence at the time this system is put into place would retain their then-current copyright protection status until it expired, at which time the holder of the copyright would need to register it if they intended to retain copyright protection. From that point on, the work would only be protected under the new system.
- Renewal of copyright protection would NOT be permitted to happen automatically. A copyright holder would have to submit a request at the end of the copyright term to protect the work for an additional term (i.e., the copyright holder could not register "100 years" in advance).
- Some reasonable number of limitations on renewals would be set, so that a copyrighted work would eventually become freely available (e.g., 100 years).

In a system like the one described above, a company like Walt Disney can protect its creative works indefinitely. All they need to do is contact the Copyright Office every 20 years and indicate that the work still has commercial value to them and still requires protection. If a work stops having commercial value, it stops receiving that protection and becomes available to everyone.

Because copyrights are registered and those records uniquely accessible, copyrights can be transferred, willed to heirs, or placed in the public domain by the current holder at any time. Copyright owners can register their current contact information with the Copyright Office if they so choose, making it easier for potential licensors of the work to contact them and negotiate the rights to use the work. Copyright terms can have a more reasonable length than the current 75 years, allowing economically unviable works to become available more quickly while the viable works can be protected indefinitely.

I believe that such a system would retain the inexpensive nature of the current copyright system (i.e., registration is not necessary for protection, but registered works gain additional protection by virtue of the registration system). It would also permit corporate copyright holders to retain indefinite control over those protected assets that remain economically viable for them, while relinquishing their control over assets that the corporation chooses not to protect by allowing the registration to expire. It allows those who want to utilize a copyrighted work to have a mechanism to find those who own the copyright and seek their permission. And it allows copyright holders who don't want to be found to remain hidden but still protect their work. It could even lead to something of a "National Archive" if the Copyright Office kept electronic representations of the copyrighted works and made

Salisbury-Michael -20050505143005

them available online after the copyright expired.

Even if we don't implement such a system, which would be a shame, the bottom line of this diatribe is that for the good of our culture and our society, we MUST allow orphaned works to be available for others to build on and enjoy. Otherwise, when we are dead and gone, the creative works we leave behind may in a sense die with us. How can you calculate this loss to future societies?