

## Copyright Office Submission: Orphaned Works

The focus of this response is primarily on changes to the existing copyright registration system that may alleviate the current strains created by the orphaned works. The three concerns that appear to be of utmost importance in the orphaned works context are 1) providing clear rules that the public of potential users and owners can easily apply; 2) allowing the most access possible for orphaned works for subsequent users; and 3) preventing the inadvertent loss of copyright owners' rights in accordance with the Berne Convention. My recommendations are for a definition for a orphaned works and a new system for infringement suits over orphaned works. First, I suggest providing a definition for orphaned works that provides a bright-line evidentiary presumption for unavailable contact and reasonable search that will be applicable *ex ante* by all involved parties. Additionally, I suggest adding a grace period and renewal registration for owners of works classified as "orphaned works" as a prerequisite for infringement litigation to allow a damage-free exit for potential users. By focusing on the standing for infringement suits there may be a way to improve availability of works for potential users without sacrificing the rights of the owners of such works.

### *Nature of the Problem*

There are huge obstacles facing those interested in using what they believe are orphaned works. Searching at large could become very costly in both money and time. Such users have numerous avenues to search, as there is no comprehensive registry for owners who chose not to register with the Copyright Office. Additionally, without an *ex ante* standard for a "reasonable search" users will never know when to stop searching, leading to an inevitable gamble against the reappearance of the work's owner, inefficiency through unnecessary searching, or disuse of potentially viable material. What may be most troubling is the differential effect on the pool of

potential users. The costs will be felt more deeply by more experimental, less “bankable” artists who may not have big financial incentives waiting to compensate them for extensive preliminary searches. These are the vanguards of the artistic world who could potentially create the works integral to the “progress of science” at the heart of all copyright law.<sup>1</sup>

Yet there are the competing interests of these works’ owners that must be considered in any possible changes. These owners are such a varied group of people, from reclusive, original authors who are nearly untraceable to transferees of interests from a distant origin. Though one may argue these owners brought possible infringement upon themselves by not providing the necessary contact information to the public they still possess rights and labeling such owners as somehow undeserving of full copyright protection will not solve the current dilemma.

Moreover, stripping the rights of such owner could also hinder the promotion of science, as much if not more than denying use of existing works for subsequent users. These users could still use these works without copying authorship and go on to create works of science, yet once copyright owners feel their rights can be lost inadvertently the whole incentive system driving the creative forces in art could topple into chaos and removal of works from the public eye.

### *Defining “Orphaned Works”*

When approaching how to define “orphaned works” we are faced with the age old question of which is better: easy to administer, yet potentially unfair bright-line rules and typically fair, yet time-consuming and potentially inconsistent case-by-case analysis. I believe a definition closer to a bright-line rule is better to define orphaned works, given the need for clarity *ex ante* to assist copyright owners in knowing the current state of their interests and to assist subsequent users in knowing the availability of any work for use.

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<sup>1</sup> U.S.. CONST., ART. I, §8, CL.8

Two avenues for defining orphaned works seem to be by some measure of age (of the work itself, last registration, or publication) or by degree of transfer. There are benefits and detriments to each approach. Age may not correlate to the ease of finding the owner and may unjustifiably label a work “orphaned.” Time will assuredly add to the difficulty in tracking copyright owners, yet the successive transfer through death or other transfers can also lead to the dead ends that hamper subsequent users’ searches to contact the owners. Yet a definition solely based on number of transfer could be very hard to administer, requiring every party to accurately trace the history of the work, and would prove ineffective against a single reclusive owner holding the copyright in perpetuity. I would suggest a blended definition, one that incorporates both approaches, as well as an exception for owners who are easily accessible. What may prove best is a definition that creates a rebuttable presumption of permissible use if there are 1) either a) a certain number of years since the creation of a work (or other measure of age that is deemed appropriate) or b) a certain number of transfers of ownership, *and* 2) the current owner of the work cannot be found.

This definition would provide a bright line to apply a presumption of the work being “orphaned.” Below the assigned values for transfers or years the court would have to make a case-by-case determination. The incentive for an *ex ante* designation by the court in these situations would be high for subsequent users, as they would be able to confidently rely on the changes to 17 U.S.C.S. §411 that would protect them from infringement suits, as described below. For the first prong, assigning a specific number to either of these terms unfortunately may prove arbitrary at best, yet reference to the real data from present users’ searches may prove enlightening. For the second prong, proof of accurate contact information for the copyright owner would rebut the presumptive application of this definition to the work in question. This

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definition would still have litigation and judicial proceedings, both to determine the inclusion of the work as “orphaned” in less clear cases and whether such determinations were justified, yet overall the availability of a bright-line presumption in the extreme cases will streamline the majority of such situations. Additionally, there may be categorical exceptions that arise, as with any new definitional laws, and Congress should look to the courts as they apply this definition where they advocate amendments to codify such exceptions.

This definition would have a limited scope. For the changes in the system recommended below, this definition would only need to be applied in the context of the 17 U.S.C.S. §411 registration requirement for infringement litigation. As this definition will be applicable solely for infringement suits it should be added as an amendment to the registration requirement under 17 U.S.C.S. § 411, with the appropriate references for the infringement provision in 17 U.S.C.S. § 501 and full definition in the definitions of 17 U.S.C.S. §101, to allow the all parties the broadest statutory notice.

#### *Copyright Infringement Suits*

Once a definition of orphaned works is codified, I would suggest its use to create a separate category of infringement that would have a “grace period,” creating a window for action by the subsequent user once the orphaned work’s owner decides to invoke his or her right to sue for infringement. This grace period would work off the basic framework of 17 U.S.C.S. §411, requiring registration prior to initiating an infringement suit. The burden would fall on the owner to determine whether his or her work was an “orphaned work,” as failure to follow the proper steps for filing as an orphaned work would have to lead to dismissal of the claim under this system to work. If the person had no prior registration, the Copyright Office would have to grant registration as a renewed orphan work or reject the registration, but still under the designation as

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an orphan work and notice of the rejection would have to be available in the same catalog for registrations to provide notice for the subsequent user. If the owner had previously registered he or she would have to file a renewal form, with current contact information, that would be made available in the same catalog.

Once the registration, registration rejection or renewal form had been filed a grace period would begin. A certain number of days would elapse before the owner could file an infringement suit. During this time the subsequent user would be on notice that the owner is now available to contact and that he or she is prepared to sue in protection of his or her rights. The subsequent user would have three options: 1) use the new contact information for the owner to enter negotiations and solidify a licensing agreement; 2) do nothing and prepare for the suit; or 3) completely discontinue the use of the work in question. The best scenario is for the user to contact the owner and create a licensing agreement, which is conceivably what he or she would have undertaken if given the opportunity. Voluntary registration for subsequent users would very beneficial in this system, as it would ensure the user would have notice from the very beginning of the grace period, by contact from the copyright office, requiring a cross-referencing and notification system. Otherwise the user will have to perform periodic searches of the registration system, which would still impose a far smaller burden than continuing to search at large for the owner.

The lynchpin of this system would be the grace period's effect on damages, completely barring distribution of damages for the actions of the subsequent user for any activity prior to and during the grace period if the user gains a licensing agreement or completely discontinues use. The subsequent user could safely use the work with immunity for truly orphaned works and have very good incentives to negotiate a license if the owner reappears. The owner has incentive to

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create a licensing agreement with the user, as the user could simply discontinue use without incurring liability if the negotiations fail. A caveat would be required for negotiations not completed by the expiration of the grace period, as negotiations could easily require long periods of time. A waiver for additional time or a consideration for reduction of damages for failed negotiations may assist the burdens created by such a mandatory negotiation requirement.

One may view this suggested change as a limitation on the rights conferred upon a copyright owner. In a sense this perception is accurate, as the right to collect damages for infringement will be limited or foreclosed by this proposed change, yet I believe this limitation is the least invasive way to approach balancing all interests in orphaned works. Additionally, though damages for infringement are a large part of the incentive system for copyright protection I believe this system will not lead to widespread infringement free from damages. By the time the grace period begins the subsequent user will likely have deeply invested in his or her work so that he or she will either chose to fight the suit, hoping to win the suit based on an invalid copyright or lack of sufficient copying to constitute infringement, or enter into negotiations for licenses that he or she already attempted to obtain prior to creation. Overall, I believe the current state of orphaned works would benefit from such a systemic change to the infringement policy and that these recommendations could improve the availability of works for the public domain, without causing the inadvertent loss of rights to copyright owners.