

Submitted by:  
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### Orphan Works Comments

How can optimal access to use of orphan works be granted to the public, while adequately preserving the incentives to create by protecting the economic rights of authors and copyright owners?

Ideally, potential users would easily be able to discover the copyright status of any given work and contact information to reach the copyright owner if there is an owner who claims copyright protection. Likewise, copyright owners would ideally be able to discover if there are any potential users out there who wish to gain permission to use the copyright owner's work. A searchable copyright database might help facilitate such discovery, similar to the US Patent Office's searchable patent database.

A searchable copyright database could be created through which copyright owners could enter descriptions of their works, images, samples, and excerpts, and contact information. They could list the copyright status of their work, such as if the owner demands that a user acquire a license for use, if the owner retains copyright but does not demand acquisition of a license for use, or if the owner wishes to dedicate the work to the public domain, among other options. Entering information about their works into such a copyright database should be optional for copyright owners as opposed to a mandatory condition necessary to receive copyright protection. Entering information could be independent of the current copyright registration process, but perhaps requiring entry into the database at the time of registration would be useful.

Potential users who are searching for the copyright status of a work they wish to use could then search the copyright database in search of that copyright information. A potential user could search by entering keywords based on description of the work and other details such as author name, publisher, and any other relevant details. If technology allows, the database might be able to compare images or samples of the work scanned in by the potential user with images or samples scanned in by copyright owners and other potential users to attempt to match up potential users of a work and information about the work, such as discovery of the owner of the copyright in the work. (There is ongoing research in such image matching technology but I am not sure how effective the technology is or will be any time in the near future.) At this stage, a best result would be if the potential user has found the correct information about the copyright status of the work, including contact information of any owner of the copyright in the work, so that the potential user can get permission to use the work or use the work if it is in the public domain.

If the potential user couldn't find information about the work, or found information about the copyright owner but still could not contact the copyright owner, the user should be able to submit an application through the database asking for a special "orphan works use" license from the copyright office, which, if granted, would allow the

user permission to use the work. The “orphan works use” license applications submitted by the potential users would be searchable and posted publicly in the database, so that copyright owners could periodically search the database to find out if anyone has requested an “orphan works use” license to use their copyrighted work.

The Copyright Office could employ special examiners to examine the applications for “orphan works” use licenses. (The examiners would also examine materials submitted for inclusion into the database from those claiming to be copyright owners of a work, in order to try to prevent fraudulent claims of copyright ownership.)

The copyright examiners would assess whether the potential user has made a reasonable, good faith search to discover the copyright status of the work, and to find any copyright owner that might exist. Assessment of such a search would be based on many factors, including whether the potential user hired a lawyer, hired licensing services, put ads in local newspapers or relevant publications, among many other factors. The standard for a reasonable search must not entail actions that would be overly expensive in a manner that would discourage or prevent potential users from applying for “orphan works use” licenses. The level of search required might vary based on the potential user’s desired use of the work, based on factors such as commercial or nonprofit use, and taking into consideration potential damage to a copyright owner’s market for the work, since there is a chance that the potential user has been unable to locate a copyright owner, but one exists, and is in fact preparing to commercially exploiting the work him/herself.

If the user is determined to have made a good faith, reasonable search up to that point in time, the examiner could decide to grant a special “orphan works” use license to the potential user. There would first be a waiting period of maybe 6 months to a year, to allow time for copyright owners to search the database and potentially find the user’s application for a license to use the copyright owner’s work. After the waiting period is over, the examiner could then grant the potential user a license to use the work, under special conditions.

Based on commercial or noncommercial use, and on how much examiners determine that the desired use could hurt a copyright owner’s market for the work, the type of license the examiners grant would vary. The license would be a compulsory license, which would set a maximum royalty that the user would have to pay to a copyright owner if a copyright owner did come forth eventually and object to the user’s use of the work.

The user might have to pay royalties even before a copyrighter shows up. Users with nonprofit uses and uses that would not hurt a copyright owner’s market much could get a license by paying a small one-time fee, or perhaps would have to pay a small one-time fee and plus small yearly royalties to be put into a fund in case a copyright owner shows up. Commercial uses and uses that would hurt a copyright owner’s market much would warrant a larger one-time fee as well as larger yearly royalties to be put into a fund in case a copyright owner shows up. The yearly royalties might be adjusted depending on how much profit a user makes using the work, and if the level of potential damage to a copyright owner’s market changes. The Copyright Office might keep a certain percentage of the royalties to pay for copyright examiners and for maintaining the database.

To protect the economic incentives of copyright owners, it is important to consider the effect of a user’s use, after a good faith, reasonable search, on the copyright

owner's economic interests in the work. If a copyright owner comes forth, upon proving that she is the owner, she could receive the yearly royalty money paid by the user that has been put into a fund held by the Copyright Office. A copyright owner also should be granted certain rights if she can both prove that she had been in the process of preparing for commercial exploitation of her copyrighted work before the time she discovered the user's unauthorized use of the work, and if she can also prove that the user's use has damaged or will damage her ability to economically exploit her work.

If she can prove both of these elements, the copyright owner should receive a higher royalty rate on the "orphan works use" license to compensate for the damage to her own planned economic exploitation of the work. In extreme cases, the copyright owner should be granted an injunction on the user's use of the work, at the discretion of a court or an arbitration panel. This would occur if the copyright owner has proven that she has expended a great degree of planning, effort and money to prepare for the economic exploitation of her work at a time reasonable soon in the future, and if she can prove that the user's continued use of the work will damage the copyright owner's market for the work to an unreasonable degree. A reasonable window of time should be allotted to the user, in order to wrap up any activities based around the work, before the injunction takes effect.

If the user made sufficient profits to compensate the owner in the future through a high royalty rate and through the royalties already paid which have accrued in the royalty fund, and if an injunction would cause unreasonable harm to the good faith and licensed user, perhaps a compulsory license with a high royalty rate would be appropriate so as not to unduly disadvantage either party.

In any case, an "orphan works use" license would limit the liability a user would face. Damage would be limited to cases where it is discovered that the user lied in the application or otherwise committed some wrongdoing. Good faith users would face only increased royalty payments for continued use if the copyright owner had been preparing to commercially exploit the work, and could face an injunction in extreme cases as mentioned above. Ideally this system would make it easier for people to use orphan works without the threat of litigation, and yet adequately protect copyright owners' economic interests.

The chance that this database could link together potential users and copyright owners efficiently could mean that both users and owners could economically maximize the use of these works. These economic factors could incentivize copyright owners to register their works in the database. A database full of works could attract many people looking to use works. Ideally such a database could in effect evolve into a one-stop shop for copyright licensing, lowering transaction costs, with the result that the public can gain greater use of works, and the economic incentives for authors to create works will be preserved or will perhaps even increase.

Other comments:

This scheme would apply to published and unpublished works. There would be no loss of copyright by the owner. Registration in the database would not be required by copyright owners so as not to constitute a formality requirement for copyright protection which would be prohibited by international law. If such a database is not feasible,

perhaps a similar system could be set up using a monthly print publication published by the copyright office. Copyright ownership details might be made available on microfilm, and applications for “orphan works use” licenses could be printed monthly in a paper format.