

UNITED STATES COPYRIGHT OFFICE

NOTICE OF INQUIRY
CONCERNING
ORPHAN WORKS AND MASS DIGITIZATION
Published at 77 Fed. Reg. 64555 (October 22, 2012)

WRITTEN COMMENTS OF

COPYRIGHT CLEARANCE CENTER, INC.

February 4, 2013

I. INTRODUCTION

Copyright Clearance Center, Inc. (“CCC”), submits these written comments in response to the request of the Copyright Office set forth in its Notice published at 77 Fed. Reg. 64555 (October 22, 2012) in connection with orphan works and mass digitization.

CCC has been engaged for 35 years in the centralized licensing of text-based copyrighted materials on behalf of rightsholders to users of all kinds, including academic, business and government organizations; in the course of our business, we regularly need to address rights and royalties relating to apparently-orphaned works. We are highly experienced in conducting rights-related research, and have substantial relationships with many parties involved in producing text-based works. And our research efforts often reveal that works thought to be “orphaned” are no more than “temporarily lost works” for which “parents” can be found.

In response to the Copyright Office’s 2005 notice of inquiry about orphan works, we described our belief that a voluntary works/ownership Registry, where information about works, rights and rightsholders can be recorded, is a viable choice for management of most orphan works issues, and that such a Registry can operate without the need for elaborate new government-operated structures. If anything, events since 2005, as described below, suggest that that conclusion is even more accurate today, and that such a Registry – whether unitary and centralized or the effective result of a network of medium- or use-focused registries – can provide important support for virtually any legislative or regulatory framework contemplated by the Copyright Office or by Congress in addressing orphan works issues; we believe that it is likewise capable of addressing the mass digitization issues related to orphan works that are also the subject of this inquiry. Further, in the event that legislation provides a limitation of remedies associated with

certain uses of orphan works (as was contemplated by the Copyright Office), or some form of advance license fee (as is mentioned in the current Notice), such a Registry could, and we believe should, record uses seeking to benefit from the statute as one means of ensuring that whatever system is put in place continues to reflect the public policy of respecting the rights of copyright rightsholders.

As we said in 2005, CCC believes that any approach to the wide number of issues relating to orphan works will require “an exquisite amount of balancing of the rights and privileges of both rightsholders and users, particularly in the context of the international obligations of the United States” under Berne and other controlling treaties, and we appreciate an opportunity to provide information for consideration in that process.

II. BACKGROUND AND NEED FOR A REGISTRY

CCC was created at the suggestion of Congress in the legislative history of the Copyright Act of 1976, and has been engaged in the licensing of the copyrighted works of others since the effective date of the Act on January 1, 1978. As a not-for-profit corporation established by a group of authors, publishers and users that had worked with Congress in its revision of the Act, and continuing to this day with representatives on our Board of Directors not only from the author and publisher communities but from user communities as well, CCC has created and maintained markets that have served all parties effectively and efficiently.

Since 1978, CCC has evolved from a single, simple transactional service – still in use today – through which rightsholders and users can exchange, one-by-one if they choose, permissions and royalties relating to the licensing of photocopying on an as-needed basis, to being, today, an integrated licensing and copyright management organization, offering global transactional and repertory licenses for both photocopying and digital uses to business and governmental organizations, as well as for both paper coursepacks and various digital uses to academic organizations. We have also developed and operate an automated licensing facility that permits copyright rightsholders to issue licenses to use their materials directly from the point of content on their websites. And we also provide other rights management tools to both rightsholders and users. This growth has led us to the point where today we manage hundreds of millions of rights to tens of millions of works, and hold information relating to many more. Among other things: we issue repertory licenses to thousands of businesses and other organizations with, collectively, more than 25 million employees, we operate high-volume transactional licensing services over the Internet, we cooperate with counterpart organizations in other countries to license millions of uses and users abroad, and we have distributed over \$1 billion to participating rightsholders over the past seven years.

In the course of handling these many different kinds of licensing transactions in volume, our staff of customer service and bibliographic experts is regularly required to conduct research to connect “lost works” with their rightsholders, research that is quite frequently successful. As a result, we have built up substantial information about how and where

to find such rightsholders efficiently, helping to reduce (though, we acknowledge, never to eliminate) the likelihood that a merely “lost work” or “lost rightsholder” will result in an “orphan work”.

CCC's experience in identifying and locating “lost” authors, estates and publishers that hold rights in bibliographically identifiable works indicates that these tasks can indeed entail significant amounts of time and resources. In our experience, such searches for works likely to be re-used often reveal that the purported “orphan works” are merely “temporarily lost works” and that their rightsholders are findable with modest effort by skilled researchers. In fact, we are sometimes able to track down rightsholders, some of them household names doing business under alternate labels, simply as a result of long experience with changes in rightsholders (sales of catalogues or entire companies, bankruptcies, deaths and simple changes of residence) plus familiarity with the tools for locating them.

Our development of these skills suggests that the similar skills necessary to run a works/ownership Registry – whether unitary or the embodiment of a network – in fulfillment of the tasks envisioned by the Copyright Office are readily available and can make the operations of such a Registry, including recordation of uses or proposed uses of works, viable. Through such a Registry we believe it is possible to best serve the purposes of copyright law, which include encouraging respect for copyright, finding rightsholders wherever possible, and facilitating good faith use by users with copyright-consistent intentions.

Perhaps more importantly, CCC’s experience has proven that such a system is viable, convenient and valuable for both rightsholders and users. CCC’s own existing systems for, and expertise in, managing rights and works and recording uses – originally designed to help rightsholders and users address a relative market failure (how to license high volumes of transactions of relatively low value, in that case primarily photocopies) – is conceptually similar to the approach suggested here. In essence, the orphan works issue would be addressed in part through creation of a Registry containing ownership and rights data/metadata, whether (i) centralized in one database or (ii) created by networking databases in existing sector specific registries (such as those maintained by collecting societies for performance and mechanical reproduction rights in music,¹ the wider Global Repertoire Database being created in the music industry,² or the image registry maintained by the Picture Licensing Universal System or PLUS³) and offering single points of entry for research across all. As we said previously, this sort of Registry service, helping users to identify the rightsholders whose rights they need in order to build new creative works, and helping rightsholders to publicize their claims to rights in existing creative works, is not only desirable but susceptible of straightforward design and implementation.

Further, such a Registry should serve not only as a place for rightsholders to surface their rights, but also as a place for users to record their uses or proposed uses. Whether orphan

¹ See notes 5 and 6 below.

² <http://globalrepertoiredatabase.com/>

³ <http://www.useplus.com>

works legislation provides for (1) advance remuneration through a collective or statutory scheme, (2) limitation of liability or remedies, or (3) some combination of these, the public interest in locating the rightsholder is best served by a recordation of use sufficient – to the extent practical in the circumstances – for a “lost” rightsholder to discover the use and claim a reasonable payment.

In CCC’s conception, a voluntary Web-based Registry would, on the one hand, hold information about works, rights and their rightsholders, and would offer simple search tools for potential users to locate information that they seek about existing works. On the other hand, searching the Registry alone would and probably should carry with it no legal presumption of having completed the necessary diligence in seeking a rightsholder. However, users’ voluntary recordation of what information they have found would serve as evidence of their efforts and as a contribution to a database that would ultimately increase the likelihood of finding rightsholders or, for example, determining a work’s public domain status (by recording an author’s date of death) – any of which would be a benefit to all users interested in respecting copyright. Further, as noted, as an incentive to users to provide information about uses or proposed uses in this voluntary recordation process, the benefit of any limitation of liability or remedies under possible legislation could be linked to the provision of such information. Then too, this information could also form part of subsequent users’ good faith searches (even though it should not constitute the whole of such searches).

A voluntary Registry of this nature would provide important benefits to users interested in carrying forward copyright policy. And it would do so while imposing a minimal burden on copyright rightsholders and without altering the existing copyright registration system. In fact, it would provide users with a central source of information (supplemented, preferably through network connections, by the private-sector sources noted below) that would be directly relevant to finding a rightsholder even when the work at issue has not been registered in the Copyright Office. The Registry, being voluntary, would not require the filing of formal ownership or transfer documents, and yet has the potential to eventually provide users with precisely the information they need on how to find a rightsholder.

Meanwhile, such a voluntary Registry would encourage rightsholders to submit information, and in particular regularly updated contact information, to help ensure that their works do not fall into the category of orphans. Further, if establishment of the Registry were announced with sufficient advance notice before beginning operations, and if it were publicized widely enough (with the assistance of rightsholder groups and other industry experts), a substantial number of hitherto-“lost” rightsholders would likely appear and enter their rights into the Registry’s database – even before a user inquires – itself a step that could go a substantial way towards addressing the orphan works problem altogether. Such incentives to both rightsholders and users suggest that, with the passage of time and growing confidence in its abilities from rightsholders and users alike, the Registry would produce a steady accumulation of information that would always move in the direction of maximizing the information publicly available about rights, works and rightsholders.

In brief, the keys to meeting the core public interest goals embedded in the copyright system lie in technology, data, databases and registries. As will be discussed further below, since 2005 the available data about works and rights, and technological advances in finding rights even in the absence of basic data, have made it easier to locate copyright holders. CCC believes that existing and new registries, instantiated and constantly fed by qualified and authoritative data, and interoperable among themselves, would well serve the public policy interests of all concerned. While we do not think all issues would be solved immediately, these systems will over time both reduce the number of orphan works and make it easier for users to either acquire necessary licenses with less effort or exercise their legal privileges with greater certainty.

III. QUESTIONS FROM THE COPYRIGHT OFFICE

In the October 22 Federal Register Notice, the Copyright Office set forth two questions, answers to which it believes will help it update its study of orphan works for Congress.

1. *Does the 2008 Framework Proposed by the Copyright Office for Addressing Orphan Works on an Occasional or Case-by-Case Basis Remain Viable?*

In 2008, the Copyright Office proposed a general outline of a solution for orphan works legislation that comprised “a good faith, reasonably diligent search for the copyright owner; (b) attribution to the author and copyright owner, if possible and appropriate under the circumstances; and (c) a limitation on remedies that would be available if the user proves that he or she conducted a reasonably diligent search.” Notice at 64560.

The Copyright Office’s first requirement – the need for a “good faith, reasonably diligent search” in the context of a proposed use of an apparently orphan work, remains key in CCC’s view. Fortunately, many new and improved resources are available for increasing discoverability and search since the previous inquiry process.⁴

As we wrote in 2005, CCC believes that any structure of registries (however and by whoever operated) would be best served by calling on the skills and experience of those of us who function in this domain every day. We ourselves have already developed rights-oriented, as well as works-oriented, databases of relevant information which have grown substantially over the last several years. And we know that we are not alone: this is equally true for other collective management organizations, including, for example, ASCAP⁵ and the Harry Fox Agency,⁶ and is the subject of new inter-organization efforts such as those identified at notes 2 and 3 above.

⁴ For example, with respect to images, so-called “fingerprinting technology” has developed to an advanced degree and is currently being used to identify images on the Internet even in the absence of rights metadata. This kind of new technology is in addition to, and often interoperable with, the new collections of data and metadata described in the text.

⁵ www.ascap.org

⁶ www.harryfox.com

Even as collective management organizations have grown their own services, large inter-organizational projects directed specifically to addressing orphan works issues have also proliferated since 2005, particularly outside of the United States. These include the ARROW (“Accessible Registries of Rights Information and Orphan Works”) project in Europe,⁷ the MILE (“Metadata Image Library Exploitation”) project in the UK,⁸ and the Digital Copyright Exchange proposal also in the UK.⁹ Underlying these European projects, of course, is the recent Directive on Certain Uses of Orphan Works issued by the European Union.¹⁰ Each of these projects seeks, in its own way, to reduce the number of orphan works as well as to reduce the complexity of locating copyright owners, although each of them is still in early stages of development. In light of the global nature of copyright – where works of value may be created anywhere in the world and, regardless of their source, used anywhere in the world – any system for addressing orphan works in the United States will have to take account of these efforts in other countries; short-run study of, and long-term collaboration with, these efforts seems a necessary component of any proposal advanced by the Copyright Office.

Finally in this regard, CCC’s experience also demonstrates that the operation of such systems is not cost-free. Not-for-profit entities that operate in a commercial, market-driven manner are structurally better positioned than federal agencies to handle monies involved in remuneration or escrow systems. Therefore, CCC believes that appropriate provision for cost-recovery in participating registries is a critical component of any effective legislation for addressing the orphan works problem.

As to the second and third prongs of the Copyright Office’s 2008 proposal, at this time CCC takes no position as to whether the attribution requirement or the limitation of remedies requirement are the best such requirements to fit the purpose. CCC does believe that attribution to the extent practicable is always the best legal and ethical practice. We note, however, that attribution information is neither always available to a user nor necessarily adequate for a rightsholder, especially in the context of images, to be able to identify a work; this marketplace failure arises from the frequent stripping of such information intentionally or unintentionally by whoever has provided the allegedly orphan work to a prospective user.

In connection with the limitation of remedies prong of the 2008 proposal, CCC believes that public recordation of uses as well as of works, with such information as is available for identifying the allegedly orphan work proposed to be used (possibly including a copy of the work itself), should be a condition for benefitting from the protections under any legislation. New uses, even by the same user, should likewise require a new search, given that the existing databases are updated, and that discovery tools improve, regularly.

⁷ www.arrow-net.eu

⁸ Currently at www.orphanworks.ssl.co.uk; ordinarily at www.mileproject.eu and linking to other such registries.

⁹ www.ipo.gov.uk/hargreaves-copyright-dce

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF> (October 25, 2012).

And, of course, all of these steps must be undertaken in good faith to receive those benefits.

2. *Can the 2008 Framework Proposed by the Copyright Office for Addressing Orphan Works Be Extended to Issues of Mass Digitization?*

CCC believes that the 2008 framework proposed by the Copyright Office for addressing orphan works can be extended to issues of mass digitization to the extent that the works being digitized are orphan works. However, it does not seem necessary to otherwise alter the fundamental balance between the interests of rightsholders and users already existing in copyright law merely because of mass digitization.

In the domain of mass digitization, including digitization of works clearly under copyright as well as of those works for which the copyright status is unknown or uncertain, since 2008 there have been multiple significant developments of quite public notice. The Book Rights Registry, a component of the attempted Google Book Search Settlement,¹¹ was never actually created but made clear the attractiveness, to both users and rightsholders, of the use of a registry for managing rights relating to both attributed and orphan works. The Digital Public Library of America is well on its way to starting operations, including garnering initial and mid-term funding, suggesting in its early development the significance of identifying and keeping track of the works that would be “contained” within it.¹² The long-standing Internet Archive and Project Gutenberg continue their steady significant expansion in collections and scope.¹³ More generally in the marketplace, cloud storage services have become far more common and much less expensive, meaning that more content and more data and metadata can be collected and maintained than ever before.¹⁴ There is no question but that more of these forms of technological advances and larger-scale projects, some of which have at least been discussed within interested groups, can be expected quite soon.

What have the various constituencies for copyright learned from these experiences and innovations? One lesson is that a significant proportion of orphan works that are caught up in these mass scanning projects are ephemera – that is, posters, pamphlets, publications of defunct groups of short duration, etc. Mass digitization for that category of works has great potential for creating new value to the public, and enabling a legal means to realize that potential – while respecting copyright through, for example, diligent searches, attribution and new statutory provisions (such as advance license fees or limitations of remedies) where appropriate – should be a goal honored by all.

Second, CCC believes that digitization for preservation purposes by libraries and archives, and perhaps by museums, is best handled under Section 108 of the Copyright

¹¹ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

¹² <http://dp.la/>

¹³ www.archive.org; www.gutenberg.org

¹⁴ See generally http://en.wikipedia.org/wiki/Cloud_storage

Act,¹⁵ and not as a specific part of orphan works legislation. On the other hand, uses to which any of these digitized materials may be put – to the extent that they are still protected by copyright – should be governed by the same Registry and “good faith, reasonably diligent search” structure outlined above. In other words, the fact that mass digitization may be involved should not alter the process by which works whose rightsholders are unknown or unlocatable should be treated – that is, allegedly orphan works should follow the process above and other works under copyright should be subject to ordinary rights-assertion and -licensing processes.

Further, we believe that mass digitization for commercial purposes – for example, to perform “text and data mining” for commercial goals, to drive advertising revenues, to develop new products, to sell new (and even old) works – is outside the framework of Section 108 and is best handled by copyright and licensing where the copyright owner is known or knowable after diligent search. In no event should the then-current commercial status of a work (for example, “in print” or “out of print”) be used as a proxy for concluding that a work is an “orphan”; particularly in the new digital environment, the old categories (such as “out of print”) are by themselves meaningless. As noted above, other jurisdictions have started to move ahead of the United States on orphan works issues and mass digitization projects, and these continue to take traditional copyright rules as a starting point and to move away from them only as little as possible in an effort to balance the interests of both rightsholders and users.

IV. CONCLUSION

CCC looks forward to assisting the Copyright Office and other participants in this effort by helping to design and build the hub-and-spoke network of interoperable and sustainable sub-registries that appears likely to form a cornerstone of any successful approach to the challenges of orphan works. In this way, the public interest will best be served, as all of us – rightsholders, users and intermediaries – continue to work toward resolving the issues while respecting the balance of interests inherent in copyright law.

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¹⁵ Perhaps in accordance with the proposals for revision of the Section 108 Study Group, <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.