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IIPSJ Comments to the United States Copyright Office, Library of Congress, Regarding Orphan Works and Mass Digitization

These comments are submitted by the Institute for Intellectual Property and Social Justice (IIPSJ) by its Director, Lateef Mtima, Professor of Law, Howard University School of Law, in response to the Notice of Inquiry of the United States Copyright Office, Library of Congress, requesting Public Comments and Reply Comments Regarding Orphan Works and Mass Digitization, as published in the Federal Register, Vo. 77, No. 204, p. 64555, Monday, October 22, 2012 (FR Doc. 2012-25926). IIPSJ was founded in 2002 to address the social justice implications of intellectual property law and policy, both domestically and globally. IIPSJ's work ranges broadly and includes scholarly examination of intellectual property law from the social justice perspective; advocacy for social-justice aware interpretation, application, and revision of intellectual property law; efforts to increase the diversity of those who practice intellectual property law; and programs to empower historically and currently disadvantaged and marginalized communities to exploit intellectual property effectively.

Introduction

As detailed in the Notice of Inquiry, the orphan works problem dramatically impedes the public access to millions of books. Obviously, when all of the rights owners to a work cannot be identified, it is not possible to make use of that work without risking suit for copyright infringement and the imposition of indeterminate damage awards. This state of affairs is in part due to the lack of a mandatory rights registration mechanism, but also due to judicial acceptance of the questionable presumption that unidentified rights holders would prefer that until all the relevant rights holders can be identified, the ideas embodied within their works should receive no further exposure and that no new royalties be collected on their behalf. Although this presumption is inconsistent with any socially rational theory of copyright, many orphan works nevertheless remain out of print and largely unavailable to the public, manifesting the greatest obstacle to copyright social utility in the developed world.

Moreover, the orphan works problem has an especially deleterious impact on copyright social justice, in that it can disproportionately impede access to works by and of special interest to marginalized communities and groups. Such works often enjoy limited commercial markets and exposure under the best of circumstances. Where the prospective user of such a work cannot be certain that she has identified all of the work's rights holders, the added risk of copyright infringement liability renders the use commercially infeasible and legally unsound.

With the advent of digital information technology, the perpetuation of the orphan works problem has become socially intolerable. While initiatives such as Project Gutenberg, the Universal Digital Library, and Europeana have established important and equitably accessible digital libraries, the orphan works issue precludes the inclusion of millions of works. The most ambitious effort to address the orphan works issue, the Google Books Project, would have resolved the problem by overturning the aforementioned "author's right to sit back and do nothing" presumption. Pursuant to the Project's provisions, millions of orphan works would have been digitized and made available to the public, while at the same time an "opt-out" mechanism would remain available to rights holders, such that they could step forward and claim their works. Thus, the Google Books "opt-out" approach to mass-digitization would not only have enabled the digitization of many genuine orphan works, but by placing the onus on rights holder to identify their interests, it would have solved the problem of "licensing gridlock" for many copyrighted works.

Unfortunately, because of the litigation surrounding the Google Books Project and the judicial prioritization of the copyright holder's purported right to "sit back and do nothing" to preserve her property interests, the "opt-out" solution to the orphan works problem was held to be an impermissible encroachment upon rights holders' interests. Although this interpretation of the law contravenes copyright social utility and social justice, current copyright jurisprudence has thus brought resolution of the orphan works problem full circle to Congress and other arbiters of copyright law and policy.

Digitizing Orphan Works and Promoting Copyright Social Justice

As other commentators have demonstrated, there are many viable approaches to managing the digitization of orphan works. An approach favored by many copyright stakeholders is the adoption of a copyright compulsory digitization license. Congress has typically resorted to the compulsory license mechanism to address the introduction of a new technological use for copyrighted material which presents socially beneficial but legally complex opportunities for promoting cultural advancement. The principal benefits of a compulsory license would be that it would provide for a simple and mandatory process for achieving mass-digitization and also promote the voluntary registration of copyright interests by providing recordation incentives to rights holders.

Alternatively, the Copyright Office could urge Congress to adopt an "opt-out" mechanism similar to that proposed under the Google Books Project. The benefit of an "opt-out" approach is that it would preserve the right of a copyright holder to negotiate individual licensing terms or otherwise maintain ultimate control over digital use of her works. Indeed, many of those

who opposed judicial sanction of the Google Books Project were only concerned with what they perceived as a usurpation of the legislative function, as opposed to opposition to the opt-out mechanism per se. Consequently, Congressional implementation of an “opt-out” mechanism might be well received.

Whatever approach is ultimately adopted by Congress, IIP SJ believes that in the interest of copyright social justice, it is imperative that the Copyright Office urge Congress to incorporate mechanisms that will ensure that works by and/or of special interest to marginalized communities, which may enjoy limited commercial appeal, are also digitized, and not left behind in “analog limbo”. This could be accomplished by providing for digitization rate reductions in connection with “mainstream” works, which rate reductions would be available to digitizers who include marginalized works in their digital offerings. By providing the reduced rates in connection with the digitization of mainstream works, marginalized authors would be protected from relegation to lower digital royalty rates for their works, as compared to the rates received by mainstream authors. To effectuate this approach, the Copyright Office should further urge Congress to permit the allocation of a portion of unclaimed digitization royalties to fund the creation of a permanent commission to review and select works for designation as “special interest works” the digitization of which would enable digitizers to qualify for the reduced mainstream digitization rates.

Conclusion

Whereas mass-digitization is vital to copyright social utility, it is also critical to copyright social justice in that it would make vast numbers of books, including public domain and out-of-print books, available to essentially everyone with Internet access. Mass-digitization thereby serves the inclusion and empowerment aims of copyright social justice. While it is important that mass-digitization be aggressively pursued, it is equally important that it is implemented in a manner calculated to level the access to information and culture playing field, and to avoid the creation of a second-generation digital divide. IIP SJ therefore commends the effort of the Copyright Office to advance the cause of mass-digitization, and urges that such efforts be coordinated so as to embrace and promote the social justice objectives of the copyright regime.

Respectfully Submitted,
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