July 21, 2015

To: US Copyright Office

Re: Orphan Works Proposal

Dear US Copyright Office,

The most recent Orphan Works bill is better than previous ones, as it at least has some specifics as to what they consider a “diligent search” for a piece of work. Still, it empowers anyone who does such a search and comes up empty to use the copyrighted work without real fear of repercussion. On the Internet today, almost any image where the copyright or signature has been removed and it has been used by someone as a meme would be considered orphaned. No one can explain to me how the creator of such a piece of work can prevent that from happening. I’ve had it happen to me many, many times. Technically every one of those images would be considered an “orphaned work”, unless I took the extra step to pay to register it with one of the register services that are bound to crop up and which will be (funny) all private enterprises and not government run.

In the real world what this law (should it become law) means is that entrepreneurs can start scanning the web, find images that meet the “orphaned” criteria, and create giant stock houses full of free images they license themselves for cheap. They need not fear infringement lawsuits if they get caught including images that were not truly “orphaned”, because they need only trot out the proof they did a “reasonably diligent search”, and then the courts say “oh, okay, sorry about that Mr. Illustrator.” That hurts those who create new images, because media publishers looking for images can buy the rights to ones in these stock houses for pennies on the dollar and do not need to hire illustrators to create new images for them. It also hurts those who *did* create the images because their work can be taken unknown to them, even if they take all precaution with copyright notices on the art, thanks to one thief with a scanner and minimal PhotoShop skills.

In the real world the Orphan Works act gives anyone carte blanche to use images they do not own with little risk even if they get caught doing it. That reduced risk will increase the number of legitimate publishers using these images many times over. Why not? It’s cheaper for them and the stock houses take the risk. At worst the stock houses, should they get caught, demonstrate they did that “reasonably diligent search” and they have to pay some undetermined fair market price to the copyright holder for use of the work and remove it from their stock inventory. How many times do you think they scenario will play out? One in every 100 uses of an image? I’m guessing that is a generous estimate. That’s pretty low risk, and with no ability to sue the infringer for damages past the cost of using the art, these stock houses are insulated from serious financial risk. Why do you think it’s internet companies lobbying for this thing? They are salivating over it.

The other problem with this proposed law is it is trying to fix a problem that does not exist, that being preserving creative works that have been abandoned from being lost to posterity. From a play found in an old trunk to Grandma’s rotting photo album, Orphan Works supporters seem to want to hang their hats on how much poorer a world it will be if these truly orphaned works cannot be preserved due to strangling copyright laws. Copyright law as it stands today **does not** prevent works of art, writing, film or other creative work from being archived and saved for posterity. There is an archiving exception to copyright law that allows for copies to be made to preserve a work, so long as it is not reasonably easy to purchase a new copy of said work. There is also an exception that allows archivers to make a copy of a work for a private individual’s “collection”, meaning you can make copies of Grandma’s rotting photo album even if you cannot contact the original photographer for permission. The main argument for needing the Orphan Works Act is a phantom argument.

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The real reason for this proposed law, and the reason creators are up in arms about it, is that is **will allow those who no not own the copyrights to a creative work to use it like the do own the copyrights to it**. Plain and simple. One indisputable fact is that SOMEONE owns the copyrights to whatever the second party wants to use (unless it's in the public domain), and it is *not* the second party. Those who create new works of art and literature think it's bad that people who might have paid them to create a new piece of work can cheaply buy the rights to use some old piece of work from someone who did not create it in the first place. I also think that's bad. Far from stimulating creativity and new creative works, it will hinder it. You will start seeing artists on the internet plastering big copyright watermarks across the center of pieces of art they put on the web, to prevent images from getting stolen and then becoming "orphaned" by the Orphan Works definition when they are not orphaned at all. You will start seeing artists not share their work on the 'net for fear it will get stolen, PhotoShopped, and then considered abandoned and open to these stock houses.

This proposed law is bad for everyone except those who want to exploit it.

Sincerely,

Tom Richmond
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