

Dear Jule L. Sigall (on behalf of the Copyright Office, Library of Congress):

Thank you for the opportunity to comment on the orphan works issue, as requested in the Federal Register (January 26, 2005 (Volume 70, Number 16)).

I believe that the problem of orphan works needs to be addressed. As noted in the Federal Register, Congress acknowledged that its news system would have problems, and those problems have indeed surfaced and need to be corrected. Here are some answers to some of your questions:

1. Nature of the Problems Faced by Subsequent Creators and Users

One obvious example is in professionally-taken family photos. In theory, no one can reproduce pictures since their copyright is owned in many cases by the studio. But photo studios routinely shut down. This means that it is illegal, in many cases, to share family photos with your own descendants.

I enjoy old movies, yet increasingly these movies are being lost forever – because there are no “owners” to talk to.

I am a poor artist, but I sometimes like to add images to my presentations (etc.) to make them interesting or to illustrate a point; I thus create larger works using previous works as a starting point. There are many photos available (including through the Internet) whose copyright owner cannot be located. Thus, I have problems creating my own works using other works.

I have a very old Apple][(pre-Macintosh), and there is software I'd like to run with it. The manufacturers of these software have long since abandoned their work, and for the most part are out of business. How can I get software to use on these old systems? This is a hobby which harms no one, yet is forbidden by inappropriate laws. This is not just simply removal of a hobby; many court cases for patents require demonstration of prior art, and some security mechanisms are enhanced when obsolete systems are used (because so few people work to attack them).

I can use the information with a copyrighted work, but often in these cases there is no such information. When there is a name of an organization, I can use Google or the phone book to try to find them, but the organization probably disappeared years ago with no reasonable way to find it again. I am an individual; I cannot afford to pay for a private eye every time I want to reproduce a family photo, and even if I could, I doubt they would succeed.

2. Nature of “Orphan works”: Identification and Designation

I recommend **requiring registration by copyright owners** (some sort of filing) to maintain their copyrights past a certain age. Note that the result is actually a compromise: an automatic copyright for a time, followed by a longer copyright if the owner takes some action. If a copyright holder intends to enforce their copyrights, it is not unreasonable to require them to do *something* to enforce it.

I believe that asking people to register an “intent to use” is impractical and unfair to the public. It’s impractical on many levels – in many cases there’s no “title” to record, and for most materials a copyright owner is unlikely to look for (or notice) a listing. How would things be handled if the user registered a name different than the copyright holder expected? I’d expect that there would be a fee assessed for each posting, which is fine for large corporations but not for individuals trying to use the many abandoned works in the world. But worst of all, it’s unfair to users of abandoned works. After all, it is the copyright holder who has the hopes of making money from enforcing copyright, and who has instead abandoned the work. It is unfair to ask those who must pay to go through this extra effort. Let the person or organization who hopes to make money pay the price of registration; in general, those who expect reward should be asked to take the “risk” of paying for registration. If they can’t be bothered, then let the copyright lapse.

Asking people to “search” for copyright owners is an invitation to a lawsuit. After all, how do you know when you’re “done”? What is “good enough”? Even if you did a good job you can be hauled into court! The simplicity of “if it’s copyrighted before year X, it’s registered” will eliminate billions of dollars of wasted money on lawsuits. Simple rules are of great benefit to society as a whole. Make it simple: register, or the copyright lapses.

3. Nature of “Orphan Works”: Age

I recommend an age of 20 years from the date of publication– the length of a generation. Why should people who can’t be bothered to register their works receive benefits for more than a generation? These people who cannot be bothered are interfering with the activities and creative works of people worldwide. The works’ unknown status should not interfere with more than one generation of people. At **most**, use the 28-year term that was active before 1976. The current length of “forever due to repeated Congressional

extensions, and even if the copyright owner cannot be found” is unconscionable.

Make sure the starting date is the date of publication (if published), or creation (if not). After all, it is often impossible to figure out when someone died, or who the “organization” is.

It's worth noting that almost all of a videogame's profits are obtained in the first few months of its sales; a copyright that ended 5 years later would make little difference than the current length of time (“forever”). Most books make all their money in the first few years and cannot be sold after that. There's no sense in making laws that forbid other uses for a century or more, even though there's no advantage to the public or the creator in most cases.

Indeed, in general, copyright terms should be long enough to encourage creation of works, and not a second longer—the longer terms of copyright are inhibiting, not encouraging, creative works. Essentially all works build on previous works; most Walt Disney movies are retellings of older stories. Long copyright terms slow and inhibit this process. Unnecessarily long copyrights, due to orphaning of works, slows and inhibits creativity with absolutely no benefits to anyone.

5. Effect of a Work Being Designated “Orphaned”

If a creator cannot be bothered to register a work after several years (I suggest 20 years above), the best approach is to simply state that copyright is *lost, permanently*. The creator has had *many* years to recover their money and make a tidy profit. While it's nice that Congress is concerned about creators who forget to register their own works, it is unreasonable to cause this concern to harm the rest of the country's creators who cannot use the material at all. Besides, we expect people to register for a driver's license, for military service, to vote, and many other activities; it is not unreasonable to require them to register to extend a copyright far longer than most copyrighted works require. And it is unfair to users to spend their lives tracking down orphan work owners. Indeed, the recent changes in law over copyright have created an extremely impoverished public domain. By ensuring that copyright owners must do something to retain copyright, the public domain will be greatly enriched. And if copyright holders really wanted to hold onto their copyright, then they should be able to register their work.

I state all this as someone who has published several books and written many programs.

It would not be a hardship to register, indeed, it's somewhat bizarre that it currently isn't required.

6. International Implications

Article 5(2) of the Berne Convention generally prohibits formalities as a condition to the “enjoyment and exercise” of copyright, and TRIPS, Art. 13, requires that all limitations and exceptions to the exclusive rights be confined to “certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

But I believe requiring registration after a generation has grown up, or longer, is quite consistent with these general requirements, and does *not* run afoul of these provisions. Without registration a copyright holder can enjoy and exercise copyright for an extremely lengthy time. Most books, videogames, etc. are copyrighted and become obsolete within that time, indeed, the default without registration I propose here is more than enough for nearly all copyrighted materials. For the rare cases where more time is desired, it's reasonable to ask copyright owners to register for such an extension. After all, these extremely long copyrights are far in excess of what most copyright holders need.

Thank you for your time.

David A. Wheeler