

The Constitution grants Congress the ability to protect intellectual property via copyright for the express purpose of promoting works that encourage artistic and scientific progress. By offering the economic incentive of a monopoly on created works, copyright law stimulates the creation of artistically valuable works. In return, Constitutionally requiring that this protection be only for “a limited time”¹ guarantees that these works will eventually be owned by the public domain. The Constitution only allows copyright law because of the expectation that these works will become part of public discourse, and eventually belong to the public.

When a work becomes “orphaned” these constitutional expectations are compromised and/or destroyed. Fear of litigation chills the comment, study, and use of these works from advancing the arts. Worse, this fear may even stop the reproduction of the works until the natural deterioration make them unusable. It should be the goal of any orphaned work legislation to prevent these outcomes. Just as copyright law creates economic incentives to see that works are created; it should be amended to create incentives to see those works maintained and preserved for history. Thus the goals sought by the Constitution of publicly available works might be fulfilled. In the following I will humbly suggest a basic

¹ US Const. Art I §8

bureaucratic/legal structure for dealing with orphan works by providing incentives to those who would preserve them, and explain why such a system is necessary.

Bureaucratic/Legal Structure

1) Identifying Orphaned Works

The first task of the new system would have to be the identification of the orphaned work. If a potential user encounters a possible orphaned work and wishes to use it she would first have to notify the Copyright Office, and supply the Copyright office with copy of the work in question. No liability should be possible for any copy made for the purposes of submitting to the Copyright Office. The Office would then maintain a registry and archive of the possible orphaned works. Listings of the works in the possible orphaned works registry would be made readily available to the public, in the hopes that the original owner would recognize and claim it.

If no owner materializes after a two year period, the potential user who first brought the work into the Copyright Office may petition to have it put into his control, upon a showing to the Copyright Office that it has undertaken a “reasonable good faith search” search for the proper right holder. “Reasonable” would be determined in light economic value and size of the work. Considerable

more research effort would be required to be “reasonable” to declare many editions of a magazine orphaned, than single photograph, unless the photograph was thought to be particularly valuable.

2) Limited Exclusive License

If reasonable research and listing do not identify an owner, the applicant would be granted a seven year exclusive license to use the work. After the license expires the work would enter the public domain. During the seven year period the applicant would control the work in the same way as if she were the original copyright owner. Thus, there would be an economic incentive for works discarded to history to be sought out. The finder could gain their exclusive use for only the reasonable cost of researching the ownership.

3) Reatianing/Reclaiming of the Copyright by the Original Owner

It should not be the goal of this new system to take away copyright ownership from parties, even those parties who are not exercising their rights of use. Such a system would invite rampant abuse. Thus, if the true owner of a orphaned work materialized during the licensed period, the true owner would have to be able to reclaim their copyright. However, the damages that owner could be awarded for infringement would be limited. While the licensed applicant would not have to pay any damages for use of the work unless the work in question had been distributed enough to recover the costs of the

reasonable search for the original owner. If that costs had been recovered, then damages would be limited to the greater of either a) 50% of the net profits from the works distribution, or b) some sort of flat licensed fee similar to that used for musical compositions.² Thus, if license holder has sold the copies of the work for more than the designated flat-rate fee, it is likely he will not lose money on the endeavor. The original owners copyright had been protected, and the work is now guaranteed to be preserved in the copies submitted to the Copyright Office.

Abuses of this system should be punishable by both criminal and civil measurers. Falsified applications, documentation of research, or claim ownership of rights should all be punishable as fraud against the Copyright Office. Further, any party who injured as result of such actions should have a cause of action for *treble* damages in Federal Court.

The Importance of this Project

The thrifty Congressmen asked to support this expansion of the Copyright office's power, responsibilities and bureaucracy may understandably ask "why it is so important to preserve works that have so little economic value that the have been abandoned?" The answer is that future generations understanding of the early to mid 20th century American culture will depend on access to these works.

² USC Title 17 §115. Different media could have different flat fees, newsprint and magazine could charge an amount per page, film an amount per frame ect.

This period in history will be remembered for the birth of popular culture, and the boom in inexpensive and media and widespread information.

Photography, cinema, national publications, television, and radio became staples of the American life during this period. While the extraordinary works from this period are likely to be maintained, the ordinary ones are likely to have little market value. Thus, they will be orphaned, and existing copies will decay into nothingness. Those ordinary works, the ones that characterized the realities of day to day life and culture must be available if future historians are to understand the public mindset of the last hundred years. The students of the next century will need these examples to see the through eyes that gazed upon the birth of the modern America. Even the mundane and disposable must be preserved if the future artists and scientists are to take full advantage of the last century's experience.