

COMMENT

TO: Jule L. Sigall, Associate Register for Policy & International Affairs
FROM: Melissa DeGaetano
RE: Orphan Works
DATE: March 25, 2005

INTRODUCTION

Current Copyright law imposes inappropriate burdens on users of orphan works without conferring significant benefits on the missing copyright owners. This comment begins with a discussion of some of the practical problems that arise when copyright owners cannot be located, placing those problems within the context of copyright law's purpose. It concludes by comparing different possible solutions to those problems and evaluates the compatibility of those solutions to the Berne Convention and to the purpose of copyright law.

I. Problems Faced by Subsequent Creators and Users

"Orphan works" are a problem because they conflict with the purpose of copyright law. Article I of the U.S. Constitution grants Congress the authority to enact copyright law: "The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., Art I, §8, cl. 8. Theoretically, securing for "limited

times” to creators the “exclusive right” to their works promotes the progress of science and arts by providing people with an economic incentive to create.

However, in the case of orphan works, the economic incentive is absent.

When a copyright owner cannot be located, people cannot pay that owner for the use of the copyrighted work. Assuming the copyright owner wishes to be paid, copyright law should make it easier for that person to be found. If the copyright owner does not want to be paid, the work should pass in to the public domain so that others can benefit from it. Instead of creating an economic incentive to create, orphan works inhibit the progress of science and arts by limiting the use of such works.

Last week a musician e-mailed me with an orphan works problem, and I think his problem, and the way he phrased it, is illustrative of the need legislation to deal with this issue. The musician wants to use an excerpt from an old movie in a song he is writing. Several weeks ago, he contacted the producer, but has not heard back from anyone. He asked me, “what is the reasonable effort I need to make in order to get permission to use this?” I did not have an answer other than to suggest alternate means of locating the author. However, the question raised several orphaned works issues. First, he was in a hurry to deal with the problem-- it is the nature of the muse to create first, ask questions later. When creative juices start flowing, creative people want to roll with the idea and do not want to be slowed down by a manhunt for permission. Second, even though the work this musician seeks to use is not completely orphaned (it does have a

producer), the obvious avenue for contacting the copyright owner has come to a dead end. Third, while the search for permission continues, this musician's work remains in his studio, hidden from the public for the purpose of avoiding possible future litigation.

II. Solving the Orphan Works Problem

The way the musician above posed his question suggests to me the basis for a solution. He wanted to know when it would be reasonable to give up his search for permission. With current copyright law, that question is very difficult to answer. How many times should he continue to contact the producer? Must he place ads in the newspaper? Or consult the copyright registry? If he knows the name of the author, should he contact every person in the yellow pages who shares the author's name? Ironically, the creative players who have the time and energy and resources to go through all those steps are also the ones who are most likely to have their calls to producers returned, and are most likely to afford (and survive) a lawsuit should they infringe. On the other hand, smaller individuals who lack power in the industry will have the most difficulty obtaining permission and surviving a lawsuit.

For that reason, the obvious solution is to create some sort of clearinghouse for the licensing of copyrighted works. Ignoring the Berne Convention, the solution most consonant with the purpose of copyright law

would be a compromise between the 1909 Copyright Act and the 1976 Copyright Act. This compromise would retain the length of copyright protection without mandating registration, but it would encourage registration. Unfortunately, the Berne Convention might limit the amount of “encouragement” copyright law can provide because of the “no formalities” requirement. However, there is probably some room for compromise.