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Orphan Works

One of the “hot topics” in copyright for 2009 is surely to be what has become known as the “orphan works” problem. The “problem” pertains to the countless copyrighted works for which the owners cannot be readily identified. As a result, people who have a good-faith desire to use copyrighted content are unable to do so because they cannot contact the copyright owner to secure a license.

Because of the way copyright law is currently structured, such users, should they ultimately use the copyrighted content without permission, could be liable for infringement, even if they took reasonable steps to identify the copyright owner.

Marybeth Peters, the U.S. Register of Copyrights, recently noted in a web posting that thousands of “historically significant images that are removed from documentaries and never reach the public because ownership [of the images] cannot be determined.” Ms. Peters also noted that there are “millions of pages of archival documents, photographs, oral histories, and reels of film” that museums cannot

safely publish or digitize, for fear of incurring copyright infringement liability.

The problem largely stems from the Copyright Act of 1976, which eliminated many of the formalities once necessary to obtain copyright protection, including the registration and notice requirements. Absent the registration requirement, which provided a database of copyrighted works, and the notice requirement, which helped identify the owner of particular copyright, prospective users of copyrighted content have little to go on when trying to identify the appropriate party from which to obtain a license.

Considering the Problem

The Copyright Office began considering the orphan works problem in 2005, requesting comments from various users of copyrighted material, such as filmmakers, museums, archives, and libraries, and holding hearings with various copyright constituencies. In January of 2006 the Copyright Office issued a report that analyzed key characteristics of the orphan works problem and ultimately concluded that although some orphan work situations can be addressed by existing copyright law (e.g., fair use), a meaningful solution of the problem requires legislative action.

Over the past several years, Congress has considered several versions of orphan works legislation, the most recent of which was introduced in 2008 in both the Senate and House of Representatives. Although the two bills were distinct, they shared substantially similar provisions. In essence, the proposed law would limit the remedies that are available to copyright owners if they come forward and sue for infringement of works that were orphaned at the time of use. The bills’ primary substantive provisions include:

Reasonable search efforts. A prospective user of a copyrighted work must make a diligent effort to identify the copyright owner. The prospective user must document the search process.

Notice of Use filing requirement. If the prospective user cannot identify the copyright owner, the user must file a Notice of Use

with the Copyright Office prior to using the orphaned work. Failure to file such a Notice of Use would preclude the user from claiming an orphaned work defense in the event that the copyright owner subsequently sues for infringement.

Good faith negotiation. If the copyright owner comes forward, the owner and the user must negotiate in good faith to determine reasonable compensation for use of the copy-



righted work. If the user fails to negotiate in good faith, or fails to pay the agreed upon compensation in a reasonable time after the negotiation, the user loses the orphan work defense.

Safe harbor provision. Nonprofit educational institutions (presumably including planetariums and museums), libraries, archives, and public broadcasters, are immunized from infringement liability if they use an orphaned work (1) without purpose of commercial advantage; (2) the use was primarily educational, religious, or charitable in nature; and (3) the user stops using the orphaned work when the copyright owner steps forward. Assuming a user complies with each of the provisions, a copyright owner is not entitled to damages for infringement, but may be entitled to whatever revenue the user generated as a result of its use of the copyrighted work.

No useful articles. The orphan works protections do not extend to uses of copyrighted material on “useful articles,” which essentially means products, such as t-shirts.

Of course, as with most legislative efforts, the orphan works bill was not without its critics. Although most copyright scholars agree

General Counsel is intended to serve as a source of general information on legal issues of interest to the planetarium community. Planetarians seeking information on how the principles discussed in a General Counsel column apply to their own circumstances should seek the advice of their own attorneys.

that we need some form of orphan works legislation, many content that creators (photographers, artists, authors), and their respective trade associations, have led valiant efforts to stymie orphan works legislation.

The creative lobby argues that immunities for orphan works effectively reduces the value of their constituent's copyrights, and will require that copyright owners take additional, potentially costly, steps to preserve their copyrights.

Of course, if copyright owners take appropriate steps to identify themselves on their works and properly register those works with the Copyright Office, then the risk of their work becoming an orphan is greatly reduced. Although the legislation does provide for the certification of private (presumably fee-based) database services, there is nothing in the proposed law that would require copyright owners to use such databases. Although the Senate version of the bill passed by a unanimous voice vote in September of 2008, the House failed to pass its own version. Critics on both sides of the issue agree that orphan works legislation, in some form, is almost guaranteed.

The current Congress is, as I write this in mid-January, busy trying to right our economic woes and confirm President Obama's political appointees. But the orphan works problem is very real, and legislation is supported by some of the world's biggest names in media, entertainment, and publishing. It is quite likely that we will see a new orphan works proposal sooner rather than later.

In my view, the orphan works legislation is a net positive for the planetarium community. As I have written before, planetarium professionals are both content users and creators, and as such, the profession must be sensitive to the copyright concerns of both sides.

Avoid Creating Orphans

As creators, planetarians must take steps to ensure that their work is protected, by including copyright notice (typically "© [Year] by [owner]") and registering new work with the Copyright Office. But these are best practices for copyright owners in the first place; the orphan works legislation may enhance the incentive to engage in those practices, but it incurs no additional burden by doing so.

As users of copyrighted content, planetarians should benefit from orphan works legislation, as the safe harbor provisions, as drafted in the 2008 bill, would seem to include planetariums and museums, thereby allowing planetarium producers and exhibit designers to use potentially copyrighted material even when the copyright owner cannot be readily identified, understanding, of course, that were the copyright owner to come forward, the user would be required to negotiate for a license, or cease using the copyrighted material.

For More Information

Much has been written about the orphan works problem and the various attempts at crafting a legislative solution. The best resource for learning more about the problem and various proposed responses is the Copyright Office's orphan works website, available at <http://www.copyright.gov/orphan>. You can read the full text of the 2008 bills at <http://www.gov-track.us/congress/bill.xpd?bill=s110-2913> (Senate version; S. 2913), and <http://www.gov-track.us/congress/bill.xpd?bill=h110-5889> (House version; H.R. 5889). ☆

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