

Copyright Office Proposes Giving Infringers Cart Blanc Rights to Infringe!

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A large threat is looming over the art community and it is coming from Washington, DC. Surprisingly the enemy is the US Copyright office usually a friend and supporter of artists but not on this issue. They have adopted a position, which in trying to address one real problem have created a greater one. Falling back on clichés, “they have thrown out the baby with the bath water”.

The issue is what to do with works which are or might be protected under copyright law but whose owners can not be identified or found, therefore called, *Orphan Works*. The copyright office sought comments to address this issue they laid out the issue as they saw it as follows (their complete statement can be found in the Federal Register Volume 70, Number 16 or at, <http://www.copyright.gov/fedreg/2005/70fr3739.html>).

“The Copyright Office seeks to examine the issues raised by “orphan works,” i.e., copyrighted works whose owners are difficult or even impossible to locate. Concerns have been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public...The Copyright Act of 1976 made it substantially easier for an author to obtain and maintain copyright in his or her creative works. Today, copyright subsists the moment an original work of authorship is fixed in a tangible form--it need not be registered with the Copyright Office or published with notice to obtain protection. While registration of claims to copyright with the Copyright Office is encouraged and provides important benefits to copyright holders, it is not required as a condition to copyright protection.”

“Concerns have been raised, however, as to whether current copyright law imposes inappropriate burdens on users, including subsequent creators, of works for which the copyright owner cannot be located (hereinafter referred to as “orphan” works). The issue is whether orphan works are being needlessly removed from public access and their dissemination inhibited. If no one claims the copyright in a work, it appears likely that the public benefit of having access to the work would outweigh whatever copyright interest there might be.”

“A situation often described is one where a creator seeks to incorporate an older work into a new work (e.g., old photos, footage or recordings) and is willing to seek permission, but is not able to identify or locate the copyright owner(s) in order to seek permission. While in such circumstances the user might be reasonably confident that the risk of an infringement claim against this use is unlikely, under the current system the copyright in the work is still valid and enforceable, and the risk cannot be completely eliminated. Moreover, even where the user only copies portions of the work in a manner that would not likely be deemed infringing under the doctrine of fair use, it is asserted by

some that the fair use defense is often too unpredictable as a general matter to remove the uncertainty in the user's mind”.

“Some have claimed that many potential users of orphan works, namely individuals and small entities, may not have access to legal advice on these issues and cannot fully assess risk themselves. Moreover, even if they are able to determine with some certainty that there is little or no risk of losing a lawsuit, they may not be able to afford any risk of having to bear the cost of defending themselves in litigation.”

“Given the high costs of litigation and the inability of most creators, scholars and small publishers to bear those costs, the result is that orphan works often are not used--even where there is no one who would object to the use.”

“This uncertainty created by copyright in orphan works has the potential to harm an important public policy behind copyright: To promote the dissemination of works by creating incentives for their creation and dissemination to the public. First, the economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works. Subsequent creators may be dissuaded from creating new works incorporating existing works for which the owner cannot be found because they cannot afford the risk of potential liability or even of litigation. Second, the public interest may be harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.”

That is how the “Problem” with Orphan Works was perceived. Written public comments were solicited and a series of round tables were held in order to allow interested parties to provide their input. Unfortunately for those in the fine arts (visual artists and art publishers) we have no overall trade association which could testify and present our poison. The only art related groups out in force were the photographers who were well and ably represented. The Art Copyright Coalition (ACC) did attend some of the meetings and made their concerns known for those in the fine arts to the Copyright Office but was limited by their mandate and budget from becoming the strong united voice the fine art community needed.

After the round tables, industry lobbying and receiving over 850 written comments on January 23, 2006 the Copyright office issued its report for Congress which included a proposed amendment to the Copyright Act in order to implement the recommendations (the full text of the report can be found at, <http://www.copyright.gov/orphan/orphan-report-full.pdf>). The recommendation has two main components: the threshold requirements of a reasonably diligent search for the copyright owner and attribution to the author and copyright owner; and the limitation of remedies that would be available if the user proves that he conducted a reasonably diligent search. The Language of the amendment is as follows:

Recommended Statutory Language

SECTION 514: LIMITATIONS ON REMEDIES:
ORPHAN WORKS

(a) Notwithstanding sections 502 through 505, where the infringer:

(1) prior to the commencement of the infringement, performed a good faith, reasonably diligent search to locate the owner of the infringed copyright and the infringer did not locate that owner, and

(2) throughout the course of the infringement, provided attribution to the author and copyright owner of the work, if possible and as appropriate under the circumstances, the remedies for the infringement shall be limited as set forth in subsection (b).

(b) LIMITATIONS ON REMEDIES

(1) MONETARY RELIEF

(A) no award for monetary damages (including actual damages, statutory damages, costs or attorney's fees) shall be made other than an order requiring the infringer to pay reasonable compensation for the use of the infringed work; *provided*, however, that where the infringement is performed without any purpose of direct or indirect commercial advantage, such as through the sale of copies or phonorecords of the infringed work, and the infringer ceases the infringement expeditiously after receiving notice of the claim for infringement, no award of monetary relief shall be made.

(2) INJUNCTIVE RELIEF

(A) in the case where the infringer has prepared or commenced preparation of a derivative work that recasts, transforms or adapts the infringed work with a significant amount of the infringer's expression, any injunctive or equitable relief granted by the court shall not restrain the infringer's continued preparation and use of the derivative work, provided that the infringer makes payment of reasonable compensation to the copyright owner for such preparation and ongoing use and provides attribution to the author and copyright owner in a manner determined by the court as reasonable under the circumstances; and

(B) in all other cases, the court may impose injunctive relief to prevent or restrain the infringement in its entirety, but the relief shall to the extent practicable account for any harm that the relief would cause the infringer due to the infringer's reliance on this section in making the infringing use.

(c) Nothing in this section shall affect rights, limitations or defenses to copyright infringement, including fair use, under this title.

(d) This section shall not apply to any infringement occurring after the date that is ten years from date of enactment of this Act.

An excellent statement outlining the incredible dangers to a fine artist which will be caused by the enactment in law of this amendment can be found in the comment of Jeff Sedlik of the Advertising Photographers of America (APA) which can be found at, http://www.asmp.org/news/spec2006/orphan_APAstatement.pdf. I strongly suggest everyone read it.

In short what the amendment provides if a user can not find the work's creator and they tweak the work they have carte blanc to use an artist's work without any fees being paid even when the creating artist identifies themselves they do not even have to stop infringing. After catching them, the infringer can offer an artist a lousy royalty and if you do not like it you can go sue. Considering that most artworks do not have contact information attached to them, or even if they did when published if it gets "removed" in cropping, copying or the like artists are out of luck. So if your work is published in a book with identifying material but the art is removed from the book and scanned and disseminated without a name too bad. You have your publishers contact information on the bottom of a poster and it gets cut off you are out of luck. How can one find the artist? In light of the fact that there are no search engines or data banks where you can search for a picture based on an image (e.g. Google Search does not look at the picture look rather at the text surrounding the picture) if one finds a work with no name on it will be impossible to identify the copyright owner. All the literally millions of knock off images coming if from China with fake or no names, under this amendment they will all be "Orphaned Works" and artists and their publishers will be powerless to prevent infringements.

While we strongly encourage registering your copyright for many reasons having a registration might be of little help if your name has been removed by the infringer (or earlier) because you can not search the copyright office for images.

Now when you catch an infringer, they know they are caught, have exposure and they will generally negotiate a settlement, if this amendment becomes law you can be sure

every infringer caught will claim the work they copied had no name on it so it is an “Orphan Work” so they are not liable. Instead of coming to a compromise it will be “so sue me.” The ramifications for this proposed amendment on the fine art community are huge and devastating; the Copyright Office’s complete abandonment of its responsibility to the creative community in furtherance commercial interests who would use artist’s work without compensating the artist is both shocking and disappointing in the extreme.

If you want to become involved you can contact the ACC at info@artcc.org and put “Orphan Work Task Force” in the subject line.