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Finding Them Forever Families: Suggested Changes to U.S. Copyright Law in Light of the Growing Orphan Works Problem

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Orphan works are works in which copyright protection still exists, but where the current owners are either unknown or cannot be identified. People who wish to use these works are unable to do so because of the risks associated with copyright infringement. If they do not get permission and go ahead with their project anyway, there is a possibility that the copyright owner could eventually turn up and sue for infringement. This paper summarizes some of the causes and effects of the orphan works phenomenon as it relates to the impact of orphan works on individual artists and media companies seeking to use the works of unknown or unlocatable authors. It points to certain changes in the copyright law statute and its various amendments that have given rise to this problem. Primary and secondary research conducted strengthens the author's conviction that certain changes need to be made at the statutory level by Congress.

Keywords: copyright, orphan works, legislation, law

Chapter One: Overview of U.S. Copyright Law

A. Copyright Law

Copyright law is a set of legal rights over literary and artistic expressions (Zelezny, p. 320, 2011). Once an author meets three requisite elements (discussed below), they are afforded certain limited legal monopolies over their works. These near monopoly rights act as an economic incentive to authors and publishers encouraging them to create works for the benefit of society and ensuring they will gain financially from their efforts (Zelezny, p. 320, 2011). Without this legal protection, writers, artists, and media organizations would be

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discouraged from producing and distributing their works (Trager, Ross, and Reynolds, p. 485, 2018).

Copyright law only applies to "original works of authorship, fixed in any tangible medium of expression" (Zelezny, p. 321, 2011). Out of this statutory language come three necessary elements for the application of copyright protection: 1) originality; 2) work of authorship (i.e., expression); and 3) fixation in a tangible medium (Zelezny, p. 321, 2011). Copyright protection begins at the moment when all three of these elements are present (Bouchoux, p. 186, 2013).

1. The "Bundle of Rights"

When copyright protection attaches to a given work of expression, the author or publisher is afforded not just one right, but a "bundle of rights" (Bouchoux, p. 210, 2013). This bundle is comprised of six exclusive rights: 1) the right of reproduction; 2) the right to prepare derivative works based on the original work (also called the right of adaptation) (discussed in more detail below); 3) the right of public distribution; 4) the right of public performance; 5) the right of public display; and 6) the right to perform a sound recording through a digital audio transmission (Trager et al., p. 493, 2018). Each one of these rights may be licensed, sold off, or withheld at the behest of the copyright holder. With limited exception (most notably the doctrine of Fair Use), these monopoly rights prevent others from copying or distributing a protected work without the author's permission (Trager et al., p. 493, 2018).

2. Duration of Copyright Protection

As mentioned above, copyright protection of a work begins at the moment when the elements of originality, authorship, and fixation are present (Zelezny, p. 321, 2011). But a copyright does not last forever. The Constitution only provides that authors and publishers shall have exclusive rights to their works of expression "for limited times" (Zelezny, p. 320, 2011). For all works created after January 1, 1978, the term of protection is the lifetime of the author, plus 50 years after that author's death, with no renewal term possible (Moser and Slay, p. 19, 2012). Later, the Bono Act (discussed below) increased the period of copyright protection to 70 years after the author's death (Bouchoux, p. 187, 2013). Works owned by companies and those created by joint authors have their own

durations (Bouchoux, p. 229, 2013).

When a work of expression's period of copyright protection ends, the work falls into the public domain (Trager et al., p. 498, 2018). At that moment, anyone can use the work without permission and without having to pay a fee to the original copyright holder (Zelezny, p. 330, 2011). With some exceptions, any work published in the U.S. before 1923 is in the public domain (Zelezny, p. 331, 2011).

Table 1 - Duration of Copyright

Date of Work	Protected From	Term
Published before 1923	In the public domain	None
Published from 1923 - 1963	When published with notice	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not renewed, now in the public domain
Published from 1964 - 1977	When published with notice	28 years for the first term; now automatic extension of 67 years for the second term
Created before January 1, 1978, but not published	January 1, 1978, the effective date of the Copyright Act of 1976, which eliminated common law copyright protection	Life of the author + 70 years or December 31, 2002, whichever is greater
Created before January 1, 1978, but published between then and December 31, 2002	January 1, 1978, the effective date of the Copyright Act of 1976, which eliminated common law copyright protection	Life of the author + 70 years or December 31, 2002, whichever is greater
Created after January 1, 1978	When work is fixed in a tangible medium of expression	Life of the author + 70 years or if work is of corporate ownership, the shorter of 95 years from

		publication or 120 from creation
(Stim, n.d.)		

Determining whether a work is in the public domain is no small task. Because of statutory changes no longer requiring authors to register their works or to provide copyright notices on them, determining whether a work is still under copyright protection can be difficult (Moser and Slay, p. 145, 2012). It is helpful to have a work's first date of publication (see Table 1), but that information is not always available ("Welcome to the public domain," n.d.).

3. Infringement

Copyright infringement occurs when one uses, without permission, one or more of the six exclusive rights given to a copyright holder, such the right of reproduction, the right to prepare derivative works, or the right of public distribution (Zelezny, p. 334, 2011). Infringement occurs when one improperly uses at least one of the "bundle of rights" of another. In most instances of copyright infringement, an author or publisher must prove there is substantial similarity between their work and the allegedly infringing work and that the copying is unauthorized (Middleton and Lee, p. 261, 2013).

4. Fair Use

Under the Fair Use doctrine, one may freely use the works of another without permission for the limited purposes of commentary, criticism, and parody (Bouchoux p. 274, 2013). For example, if one wishes to write a review critical of a new movie, the reviewer has the freedom to discuss the plot and dialog of the protected work without the copyright holder's permission. If Fair Use were not available, authors and publishers could potentially prevent anything other than positive comments about their works of expression (Stim, n.d.).

The courts have not yet addressed specifically how the Fair Use doctrine applies to orphan works ("Orphan works and mass digitization," p. 42, 2015). Many though consider it to be a solution to some, but not all, orphan works situations (Higgins, 2013). Some suggest that the Fair Use doctrine should be expanded to include the use of orphan works (Brito and Dooling, p. 107, 2005). The Copyright Office's stance is that use of an orphan

work does not automatically qualify as a fair use ("Orphan works and mass digitization," p. 46, 2015).

5. Copyright Licenses

The exclusive "bundle of rights" granted to rightsholders may be sold or transferred just like any other property (Trager et al., p. 486, 2018). Owners may completely transfer all their rights in and to their works in what is called an "assignment" (Tysver, n.d.). However, if they wish to retain their rights, they can transfer limited interests in a process known as copyright licensing (Zelezny, p. 337, 2011).

A license cannot be executed if the licensor cannot be located. Due to changes in the duration of copyright, scaled back registration and notice requirements, and other factors contributing to the development of orphan works, finding the owner may prove extremely difficult in a growing number of situations. In some instances, it may be next to impossible.

B. Copyright Act of 1976

The first half of the 20th century brought about major technological change. Developments in the recording, broadcasting, and software industries were increasingly making the current copyright statute unworkable (Middleton and Lee, p. 241, 2013). Calls for a new law were coming as far back as the early 1950s (Moser and Slay, p. 19, 2012). To keep pace, Congress passed the Copyright Act of 1976.

The Copyright Act of 1976 went into effect January 1, 1978 and was the first major revision of the nation's copyright law since 1909 (Bouchoux, p. 186, 2013). Notable changes to copyright law included: 1) seven works of authorship categories; 2) copyright protection at the moment of fixation; 3) duration of copyright based on the author's life, plus 50 years; 4) federal preemption of state common law; and 5) codification of the Fair Use doctrine (Moser and Slay, p. 19, 2012). Also, authors were given an opportunity to regain ownership of their works after 35 years when transferred to a record label, book publishing company, or any other third party (Holofcener, 2012).

The end of the 20th century also saw great technological change but at an even quicker pace. U.S. copyright law faced new challenges with the advent of home video

recording, file sharing, and digital recording technology. As a result, the Copyright Act of 1976 was amended several times. Many of these changes were implemented to bring the U.S. in line with the Berne Convention (discussed below) and also to extend the duration of copyright protection by 20 years (Bouchoux, p. 187, 2013).

C. *The Berne Convention* for the Protection of Literary and Artistic Works

The Berne Convention treaty contains three basic principles: 1) works created in any Berne signatory nation receive the same protections in any other signatory gives to its own artists; 2) protection is independent of the existence of protection in the country of origin of the work and 3) protection is not to be conditional upon formalities such as registering the work or placing a copyright notice on it ("Summary of the Berne convention," n.d.). Many experts consider this last principle as one of the major causes of the orphan works problem (Hansen, D. R., Hashimoto, K., Hinze, G., Samuelson, P., & Urban, J. M, p. 15, 2013).

D. The Sonny Bono Copyright Term Extension Act of 1998

The Sonny Bono Copyright Term Extension Act lengthens the time it will take for a work to enter the public domain ("The Incredible Shrinking Public Domain," 2012). The duration of copyright protection now lasts the rest of the author's lifetime, plus 70 years (Trager et al., p. 498, 2018). For corporate authors, works are protected for 95 years from the first date of publication (Moser and Slay, p. 143, 2012). The Bono Act did not restore copyright protection to any works of expression that were already in the public domain before October 27, 1998 (Bouchoux, p. 239, 2013).

The Bono Act was not without controversy. Passage of it was largely supported by big media companies such as Disney and the Gershwin estate whose early works were close to entering the public domain (Moser and Slay 144). Disney reportedly spent $6.3 million lobbying Congress to lengthen the copyright protection period (Trager, Reynolds, and Ross 563). Between 1997 and 2015, Disney spent more than $87 million in lobbying efforts mostly to influence copyright legislation (Crockett).

Perhaps the most controversial aspect of the Bono Act was to which works it pertained. Instead of applying to works of expression created after it went into effect, it was applied retroactively to all works still under copyright protection (Trager et al., p. 498,

2018). Because of the Bono Act's passage, the Mickey Mouse character has copyright protection until 2023 (Schlackman, 2014). Critics claim that each time Disney's early works inch closer to falling into the public domain, the duration of copyright protection is extended (Bell, 2009).

The additional 20 years of copyright protection guaranteed by The Bono Act and other amendments have contributed to the current orphan works problem. They increased the likelihood that some copyright owners will be harder to find ("Orphan works and mass digitization," p. 10, 2015). Marybeth Peters (2008), Former Register of Copyrights, states that: "The net result of these amendments has been that more and more copyright owners may go missing...There is no denying that they diminished the public record of copyright ownership and made it more difficult for the business of copyright to function" (p. 1).

E. The U.S. Copyright Office

The main function of the Copyright Office is to process registration requests and to record other documents related to copyright ownership (Bouchoux, p. 188, 2013). For over a decade, the Copyright Office has studied the orphan works problem. It has produced two reports on the matter and has made various proposals to Congress on how best to fix the situation ("Orphan works and mass digitization," p. 37, 2015). Congress has yet to enact any of the Copyright Office's recommendations.

Chapter Two: Orphan Works

An orphan work is a work of expression in which copyright protection presumably still exists, but where the current owner is either unknown or cannot be identified ("Orphan works and mass digitization," p. 34-5, 2015). This ownership ambiguity continues even after a diligent search ("Orphan works and mass digitization," p. 34-5, 2015). Artists and cultural institutions who wish to use orphan works are unable to do so because of potential copyright infringement liability ("Orphan works and mass digitization," p. 34-5, 2015). If they cannot get permission but go ahead with their project anyway, there is a possibility that the copyright owner could eventually turn up and sue for infringement (Hansen et. al, p. 3, 2013).

A. Causes

Most experts agree the orphan works problem started with passage of the Copyright

Act of 1976. The problem was compounded later when the U.S. became a Berne Convention signatory and passed The Bono Act.

The Copyright Act of 1976 made it much easier for authors and publishers to obtain legal protection for their works. As soon as the rightsholder fixes their original work of expression in a tangible form, their copyright privileges begin at that moment (Zelezny, p. 321, 2011). No longer are creators required to publish their works or register them with the Copyright Office ("Orphan works and mass digitization," p. 10, 2015). Also, rightsholders are no longer obligated to provide a copyright notice on their works which would give some hint as to their identity (Hansen et. al, p. 12, 2013).

Most of the above changes to copyright law were made to bring the United States in line with the Berne Convention and other international intellectual property laws. But they had many unintended consequences. As Professor Hansen (2013) states, "The result of these changes is tens of millions of works created every year in the United States, each of which is protected for well over one hundred years with little information about copyright ownership and the location of the rightsholders" (p. 14).

B. Impact Research

Studies by various groups, including the Copyright Office, have found the orphan works problem to be "widespread and significant" ("Orphan works and mass digitization," p. 2, 2015). In fact, it is so great that one observer called it "perhaps the single greatest impediment to creating new works" ("Orphan works and mass digitization," p. 1, 2015). The data was sufficient enough for the Copyright Office to designate the orphan works situation a top priority (Hansen et. al, p. 4, 2013).

One of the largest and most recent efforts to quantify the number of orphan works was a series of reviews conducted in the United Kingdom. The 2012 U.K. Impact Assessment gathered data from various cultural institutions across a broad of spectrum of different types of works (Hansen et. al, p. 6, 2013). The study revealed a large number of suspected orphaned works. See Table 3 below. Similar studies were had throughout the European Union and all had comparable results ("Orphan works and mass digitization," p. 36, 2015).

In the U.S., Cornell University Library performed an internal study of 343 out-of-

print monographs (Hansen et. al, p. 8, 2013). After spending nearly $50,000 in staff time to locate or identify the copyright holders, Cornell was unable verify clear title to 198 (or 58%)

Table 3: 2012 U.K. Orphan Impact Assessment		
Media Type	Sample	Percentage Orphaned
Artwork	548,000	20-25%
Sounds recordings (hrs.)	750,000	5-10%
Commercial film (hrs.)	21,800,000	0-7%
Archive film (hrs.)	513,000	5-35%
Photo libraries	> 100,000,000	0%
Archive photos	28,280,000	5-90%
Written material	10,400,000	4-30%
Mixed collections	38,000,000	8-40%
("Orphan Works Impact Assessment (Final)," 2012)		

of the works (Hansen et. al, p. 8, 2013). A similar undertaking by Carnegie Mellon University revealed that location and ownership information for 68% of their 368-book sample could not be verified (Hansen et. al, p. 8, 2013). This data, combined with the 2006 and 2015 Copyright Office reports, leads many observers to believe that the orphan works problem is just as prevalent in the U.S. and is growing ("Orphan works and mass digitization," p. 37, 2015).

C. Consequences of Orphan Works

As mentioned earlier, using a copyrighted work without first acquiring permission may result in a damages award, an injunction, and an assessment of attorney's fees and court costs ("Orphan works and mass digitization," p. 34-5, 2015). Because of this infringement danger, some artists elect to not make use of orphan works ("Orphan works and mass digitization," p. 34-5, 2015). According to Marybeth Peters, Former Register of Copyrights, "[w]hen a copyright owner cannot be identified or is un-locatable, potential users abandon important, productive projects, many of which would be beneficial to our

national heritage" (Hansen et. al, p. 3, 2013). As one observer remarked, these works are "trapped in the cultural black hole" (Boyle, 2009).

Productive and beneficial uses of works may be inhibited merely because the user cannot identify and/or locate the owner and therefore cannot determine whether, or under what conditions, he or she may make use of the work ("Orphan Works and Mass Digitization" 39). This has the potential to throw off the delicate balance of interests protected by the copyright law system. The rights of authors are secured, but the public's reasonable and legitimate access to works is inhibited.

Much of the attention given to the orphan works situation centers around the affect this phenomenon has on libraries and academic institutions. But this issue also affects the creative class. Take, for example, artists who create collages. These artists incorporate old photographs, post cards, magazine art, and other pre-existing elements into their projects. Tracking down each component's respective rightsholder for permission is already difficult and time-consuming. The process is made even more arduous when the material does not give any indication as to its source. The artist is now faced with a tough choice: move forward with the project at the risk of an infringement suit or discontinue their pursuit to avoid any potential liability.

While the orphan works problem goes back several decades, only recently have academics, artist groups, librarians, politicians, and others been talking about it. The orphan works problem impacts two major areas: 1) the creation of new media; and 2) mass digitization projects. Most of the research into the existence of orphan works and their impact has been had by the Copyright Office. Libraries and other memory institutions have also published internal studies in relation to their digitization projects. Very little study, however, has been performed on the impact of orphan works on individual artists and media companies seeking to use the works of others.

A survey on this issue was administered by this author in an effort to see how orphan works may be impacting the creative class. A link to this survey on Survey Monkey was circulated in 15 arts-related Facebook groups and pages, and the author's personal Facebook page, and LinkedIn, Twitter, and Instagram profiles. One hundred responses were received over the course of a year.

Participants were asked to select their arts discipline, their age group, and their income range. Respondents were required to answer all questions presented. Additionally, participants were asked a dichotomous question and an open-ended question (see below). The questions asked were as follows:

Table 4 - Survey Questions

Questions	Possible Answers
1. Choose the field that best describes your arts discipline.	Visual Arts (drawing, graphic design, painting, textiles, ceramics, or sculpture, but not photography or film), Photography, Film (including TV), Performing Arts (theatre and dance, but not music), Music, Literary Arts, Video Games, or Multidisciplinary.
2. Which of the following best describes your age group?	Under 21, 21-24, 25-34, 35-44, 45-54, 55-64, or 65 or older
3. Which of the following best describes your annual income from arts activities?	Less than $25,000, $25,000 - $49,999, $50,000 - $74,999, $75,000 - $99,999, 100,000 - $149,999, $150,000 - $199,999, or $200,000 or greater
4. If you wanted to incorporate the work of another artist into a new project you were working on, but were unable to identify and/or locate the copyright owner, would you go forward with the project anyway? Assume you have performed a diligent search for this owner. Also, assume the original work is protected by copyright and that fair use does not apply in this situation.	Yes or no
5. Based on your response to the above question, why would or why wouldn't you move forward with your new project? Include any thoughts you might have on your due diligence used in finding the copyright holder (if applicable).	Varies

Visual artists represented the largest segment of respondents (Simon, 2019). Numbers for the remaining categories are set forth below in Table 5:

Table 5 - Question 1 Answer Choices	Responses
Visual Arts (drawing, graphic design, painting, textiles, ceramics, or sculpture, but not photography or film)	34
Photography	13
Film (including TV)	5
Performing Arts (theatre and dance, but not music)	4
Music	23
Literary Arts	9
Video Games	0
Multidisciplinary	12
Total	**100**
(Simon, 2019)	

Next, participants were asked to state their age group. Most fell into the 35-44 age group with the 45-54 age group coming in a close second (Simon, 2019). See Table 6 below:

Table 6 - Question 2 Answer Choices	Responses
Under 21	0
21-24	3
25-34	24
35-44	29
45-54	23
55-64	17

65 or older	4
Total	**100**
(Simon, 2019)	

The third question asked was about their annual income range from arts-related activities. An overwhelming percentage (62%) selected less than $25,000. Eighteen percent of respondents selected the $25,000-$49,999 range and only 5% chose $50,000-$74,999 (Simon, 2019). Numbers for the remaining income ranges are set forth below in Table 7:

Table 7 - Question 3 Answer Choices	Responses
Less than $25,000	62
$25,000 - $49,999	18
$50,000 - $74,999	9
$75,000 - $99,999	4
100,000 - $149,999	2
$150,000 - $199,999	4
$200,000 or greater	1
Total	**100**
(Simon, 2019)	

For question four, seventy-five percent of respondents reported they would not move forward with their projects while 25% stated they would (Simon, 2019). See Table 8 below:

Table 8 - Question 4 Answer Choices	Responses
Yes	25

No	75
Total	**100**
(Simon, 2019)	

Most of the "no" responses to the final question were premised on the fear of potential legal consequences surrounding the unauthorized use. "In the scenario presented, and considering my current income from my artistic career, the risks are greater than the reward" wrote one filmmaker. "Financially speaking, my assets could not survive a lawsuit that may result" (Simon, 2019). One performing artist shared this same concern. "None of us make enough money to get into a legal battle" (Simon, 2019).

Some based their "no" responses on moral grounds. "Do unto others," wrote one visual artist (Simon, 2019). A filmmaker respondent wrote, "I would be uncomfortable moving forward without the rights to use the media because it will likely cause problems down the road for me and anyone else associated with the project. Also, using someone's work, especially if it is a piece that generates income for me, is a type of theft and outside of what I believe is ethical" (Simon, 2019).

A number of participants wrote they would not use the work of another out of respect for the original artist. "If it's not my work, I won't use it or of respect for the artist" wrote one photographer. "If it was crucial to a project, I might try to recreate the work in my own way/style" (Simon, 2019). One visual artist responded with: "I have told clients that I will create something in a similar style but will not copy someone's work" (Simon, 2019).

Several artists wrote they would try to strike a balance between their private projects and those in which they intended to make money. "I would never knowingly sell something owned by another artist without their written permission" wrote one multidisciplinary artist. "Having said that, if it were a personal project such as an addition to an art journal, vision board, personal piece, etc. I would not consider it a violation of use" (Simon, 2019). "It really depends on the project and if any monetary value would come from it" (Simon, 2019).

A few participants voiced their frustrations in seeking out rightsholders. "I found a poem I wanted to include for a photo book that I thought would complement my photos well, stated one photographer. "I sent a few emails I could find as well as to a defunct Twitter account with no response. Unless I am certain the copyright has expired, I assume someone is the copyright holder. I would not want anyone to use my copyrighted works without permission, so I did not use this poem and went another route" (Simon, 2019). "If an owner surfaces and adopts the orphan content my creative ship is sunk," wrote one literary artist (Simon, 2019).

Twenty-five percent of respondents indicated they would use the work even if unable to locate the rightsholder. Several of these responses were premised on misunderstandings of copyright law. One such response from a musician shows this in relation to copyright ownership. "If all due diligence has been done and no copyright holder found, I'd assume no copyright existed unless I knew it would be widely distributed" (Simon, 2019).

Some of the "yes" respondents thought they might be able to work out something with the rightsholders should they come forward. One musician wrote, "If I were to continue with use of the work, it would be fair and prudent to set aside a portion of any monetary gain for the purpose of remittance to the owner of the original work, should they eventually be found" (Simon, 2019). One filmmaker was willing to take a chance as well. "I would move forward because I know that the situation would rectify itself at a later time regardless" (Simon, 2019).

One musician stated that his decision to move forward would depend on who the rightsholder might be. "Unless I was (very unlikely) stealing note for note, word for word, I wouldn't even bother worrying about who the copyright holder was...There would also be thoughts on who holds the copyright? After careful and thoughtful deliberation, I would almost always go forward" (Simon, 2019).

These and other responses shed light on the impact of orphan works on individual artists. They help to understand why the orphan works situation needs to be addressed and why a diligent search for the unknown or un-locatable copyright holder should be part of that solution.

As many of the responses also involve common misconceptions about copyright, they make a broader case for increased education on basic copyright law concepts. From basic misunderstanding about what copyright protects to confusion over what constitutes Fair Use, there are a lot of mistaken beliefs about this area of law. For example, a visual artists stated this: "If I have performed a diligent search for the copyright holder, can't find the copyright holder, use the work in question, and then a copyright holder materializes to file suit against me, I can circumvent any potential adverse judgement or award for damages by providing evidence to the court that I performed a diligent search and that the results of that search merited no copyright holder" (Simon, 2019). "If I can't find them, then they probably don't want to be found, and that's on them," said one performing artist. "If they came forward after my project was completed, then I would want to negotiate a fair arrangement, which would include a financial component" (Simon, 2019). The current state of the law does not support these artists' assumptions.

Chapter Three: Proposed Solutions

A. Previous Legislative Efforts

1. Public Domain Enhancement Act of 2003

Introduced in June 2003 by Rep. Zoe Lofgren, the Public Domain Enhancement Act was an attempt at lessening some of the impact of long copyright protection terms (Skladany, p. 145, 2012). In her press conference introducing the bill, Lofgren stated, "This bill will breathe life into 98% of older works...those long-forgotten stories, songs, pictures, and movies that are no longer published, read, heard, or seen. It is time to give these treasures back to the public" (Harwood, 2003).

The bill required the Register of Copyrights to charge a $1 fee for maintaining in force the copyright in any published U.S. work ("H.R.2601," 2003). When a copyright holder paid the fee, their most recent contact information would be recorded so anyone wishing to license their work could find the appropriate rightsholder (Brito and Dooling, p. 87, 2005). The Public Domain Enhancement Act would have required the fee to be due 50 years after the date of first publication or on December 31, 2004, whichever occurs later, and then every ten years thereafter until the end of applicable the copyright term (Brito and Dooling, p. 87, 2005). The work would fall automatically into the public domain

if the payment were not received in the Copyright Office before the due date or within the six-month grace period ("H.R.2601," 2003).

The Public Domain Enhancement Act was supported by libraries, archives, and other memory institutions as well as noted copyright law activist Lawrence Lessig (Skladany, p. 145, 2012). The bill was opposed by large entertainment companies and their trade organizations, such as the Motion Picture Association of America ("Opposition to the PDEA"). The Public Domain Enhancement Act did not become law.

2. Shawn Bentley Orphan Works Act of 2008

The Shawn Bentley Orphan Works Act took a completely different approach to solving the orphan works problem. Introduced by Senators Leahy and Hatch, it was meant to limit the remedies available to rightsholders when an unlicensed user performed and documented a diligent search for the owner of the work ("Orphan works and mass digitization," p. 12, 2015). "This legislation will help bring together potential users and owners of orphan works," said Leahy. "With this bill, we can preserve important parts of our personal and national heritage, without giving a free license to infringe on established copyright protections" ("Introduction of the Bentley Act," 2008).

Additionally, the Bentley Act would have required the user to identify or give attribution to the copyright owner if that information were available ("Introduction of the Bentley Act"). Also required was some type of symbol or notice to be affixed to the work indicating that the proper rightsholder could not be located ("Orphan works and mass digitization," p. 12, 2015). The Copyright Office would decide exactly what that symbol or notice would have been ("Introduction of the Bentley Act," 2008).

With regard to injunctions, the bill gave some relief to those who make use of the works of others in the creation of new media. "A court may impose injunctive relief except in the case of a work that has been recast or integrated with a significant amount of the infringer's original expression" ("Introduction of the Bentley Act"). The new user would also have to agree to pay the legal owner reasonable compensation ("Orphan works and mass digitization," p. 13, 2018).

The most controversial aspect of The Bentley Act was the section detailing "qualifying searches." The unlicensed user's limited liability hinged upon whether or not

they performed and documented a reasonably diligent search for the rightful owner ("Orphan works and mass digitization," p. 12, 2018). Critics complained the language of the statute gave no direction as to what a reasonably diligent search entailed (Taylor, 2008). Opponents of the bill charged that it made it too easy to strip a copyright owner of their rights even though the bill's drafters insisted it was not a "license to infringe" ("Introduction of the Bentley Act," 2008). The Bentley Act did not become law.

B. Current Statutory Solutions

It is important recognize that there are already some orphan works provisions scattered throughout U.S. copyright law, although they are not called that. These provisions permit certain users in certain situations the use of certain types of orphan works ("Report on orphan works," p. 44, 2006). Other provisions reduce the potential legal risk found in using an orphan work. These provisions include sections 108(h), 115(b), 504(c)(2) of the Copyright Act.

1. Section 108(h)

Section 108(h) allows libraries and archives to reproduce, distribute, or display one copy of a work under certain circumstances ("Section 108," n.d.). The memory institution may also make up to three copies of an unpublished work for the purposes of preservation, scholarship, or research, including digital copies ("Section 108," n.d.). Section 108(h) is conditioned upon a copy of the work not being obtainable at a reasonable price ("Report on orphan works," p. 46, 2006). This provision applies to orphan and non-orphan works ("Report on orphan works," p. 46, 2006).

2. Section 115(b)

This provision allows for the statutory or compulsory licensing of copies of musical works ("phonorecords") if those recordings have been distributed in the United States ("Report on orphan works," p. 47, 2006). Would be licensees need only give notice to the rightsholder and pay royalty set by statute (called a "mechanical royalty") ("Orphan works and mass digitization," p. 71, 2015). Like Section 108(h), 115(b) applies to orphan and non-orphan works ("Report on orphan works," p. 47, 2006).

3. Section 504(c)(2)

In an infringement action, a rightsholder can ask for out-of-pocket damages, plus the defendant's profits from the unlicensed use of the work (Bouchoux, p. 282, 2018). If the rightsholder's actual loss, or defendant's profits, is/are hard to determine, the plaintiff may ask for an amount specified in the Copyright statute (Zelenzy, p. 336, 2011). Section 504(c)(2) acts as a limitation on the amount of "statutory" damages the plaintiff may seek in an infringement action ("Report on orphan works," p. 49, 2006). This can be important if a potential user is weighing the risk of a damages award versus the benefit of using an orphan work ("Report on orphan works," p. 50, 2006).

C. New and Improved Bentley Act

Although the elimination of the registration and notice formalities are the main culprits behind the orphan works problem, it is not likely the U.S will re-institute these requirements any time soon (Brito and Dooling, p. 107, 2005). In order for that to happen, the U.S. would have to remove itself from the Berne Convention. That is not likely. In addition, the Bono Act was found to be constitutional by the Supreme Court, so it is most likely here to stay as well (Middleton and Lee, p. 245, 2013).

Therefore, a workable solution must take these aspects into consideration while continuing to balance the rights of copyright owners and the rights of those who seek to use their works. The most appropriate way to accomplish this is to limit the infringement liability of those who engage in good faith, documented searches for rightsholders. If the author or publisher subsequently reveals themselves, they will not be left without any recourse. They will, however, be limited to "reasonable compensation" for the use of their works ("Orphan works and mass digitization," p. 63, 2015).

The Shawn Bentley Orphan Works Act is a good place to start. It passed in the Senate and received considerable support from many arts organizations and cultural institutions ("Orphan works and mass digitization," p. 50, 2015). "For many people, the Bentley Act represents a deliberate, technology-neutral, innovative, and balanced approach to the orphan works problem" ("Orphan works and mass digitization," p. 50, 2015). The following are some suggested modifications to the Bentley Act:

1. Diligent Search

One major modification of the Bentley Act would be a better definition of what constitutes a "diligent search." Because copyright infringement liability would be contingent upon a good faith search, it is important for parties to know where the line is drawn. The Bentley Act, as drafted in 2008, lacked specific information on what users needed to do to perform a "diligent search."

The first step would be for users to search the Copyright Office's online database. Users can search by author's name, date of publication, publisher's name, and subject matter. Obviously, a Copyright Office search will be limited if the work lacks identifying information. The lack of identifying information, however, should not excuse users from engaging in other search mechanisms.

If the Copyright Office search proves unsuccessful, the next step would be for users to employ a professional search firm or an attorney. There is precedence for this in trademark law. Under the law, trademarks need not be registered with the Patent and Trademark Office in order for exclusive rights to attach (Trager et al., p. 516, 2018). Therefore, trademark registrants are strongly encouraged, but are not required, to enlist the services of a search firm before using a trademark and filing a registration on it. It is then reasonable to expect at least the same of users of orphan works.

Users must also retain all documentation evidencing their diligent search and provide copies of those documents to the Copyright Office. This would include, but is not limited to, any correspondence with potential rightsholders and their representatives, search firm search results, and copies of Copyright Office database findings. Failure to perform a reasonably diligent search does not mean that the user cannot move forward with their contemplated use of the orphan work. It just means that in the event the true author or publisher comes forward and wins an infringement suit, the user will have no limitation of liability ("Orphan works and mass digitization," p. 58, 2015).

2. Notice of Use

After a diligent search has been had and documented, a user of an orphan work would be required to file a Notice of Use with the Copyright Office. This would include the name and contact information of the user, a description of the work to be used, a summary of the search conducted prior to filing the Notice of Use, and a description of

how the orphan work will be used ("Orphan works and mass digitization," p. 61, 2015). That information would then be searchable by copyright owners interested in seeing if any of their works have been identified as an orphan work ("Orphan works and mass digitization," p. 61, 2015).

Not in the original Bentley Act, the Notice of Use requirement has drawn some criticism. "The Copyright Office fails to recognize that its proposed burdensome legislation that requires extremely time and resource intensive searches as well as notice of use requirements, could also cause users to forego the use of the work" (Cox, 2015). The Copyright Office opined this requirement would only be potential arduous in large scale digitization projects ("Orphan works and mass digitization," p. 60, 2015).

3. Reasonable Compensation

Under the Bentley Act's proposed changes to the Copyright Act, a rightsholder would be limited to "reasonable compensation" instead of a compensatory or statutory damages award ("Orphan Works and mass digitization," p. 63, 2015). Reasonable compensation is defined as "the amount on which a willing buyer and willing seller would have agreed upon for use of the infringed work immediately before infringement began" ("Orphan Works and mass digitization," Appendix A, 2015). To assist in the calculation of "reasonable compensation," the rightsholder is allowed to present evidence related to the market value of their work ("Orphan works and mass digitization," p. 64, 2015). If the accused infringer performed and documented their diligent search for the proper author or publisher, their potential liability would be limited to an amount equal to a reasonable license fee.

4. Injunctive Relief

In addition to a damages award, a copyright owner may ask for the court for an injunction (Hansen et. al, p. 3, 2013). An injunction is a type of equitable (non-monetary) remedy whereby a court issues an order requiring a person or entity to do or not do something ("Injunction," n.d.). With regard to copyright infringement actions, an injunction stops a defendant from further copying or distribution of a work ("Orphan Works and mass digitization," p. 67, 2015). Here, new legislation should differentiate

between distribution of orphan works which are direct reproductions of the original and those that are derivative works of the originals.

For direct reproductions, an injunction would still available, but its use would be somewhat curtailed. If the true owner of a work steps forward, they could ask the court for an injunction to prevent further distribution of their work, but the infringer may still be able sell off the rest of the inventory of remaining copies. This can help balance the interests of the rightsholder and those of the unlicensed user who performed their proper due diligence ("Orphan works and mass digitization," p. 67, 2015).

For new works that incorporate some or all of an orphan work, the injunction tool may be even more limited. If the unlicensed user created a derivative work that contained a "significant amount of original expression," the rightsholders would not be able to enjoin its distribution ("Orphan works and mass digitization," p. 67, 2015). For some authors and publishers, it may be more important for them to monitor the impact an unlicensed use may have on their reputation more than any monetary concern. For them, the injunction device should still be available but only if they can prove continued distribution of the work will cause reputational harm.

D. Better Copyright Education

If these changes are instituted, the Copyright Office, artist groups, media companies, libraries and other preservationist organizations, colleges and universities must do a better job of educating their constituents. As gleaned from the artist survey results mentioned above, there are a lot of mistaken beliefs about copyright. From basic misunderstanding about what copyright protects to confusion over what constitutes Fair Use, there are a lot of misconceptions about this area of law.

One of the major initiatives of the Copyright Office is the disbursement of information on copyright (Moser and Slay 153-54). The Copyright Office should continue to lead the way in educating the public on proposed orphan works legislation and its associated issues. Because recommended changes to the Copyright Act involve the limitation of a copyright holder's rights, it is important to disseminate information that can be easily understood by various stakeholders, such as recommended best practices for rightsholder searches.

But the Copyright Office can only do so much. It is up to artist groups, libraries, learning institutions, and other organizations that are impacted by, or that service those who are impacted by, orphan works and its corrective legislation, to make sure their constituents understand the implications.

Chapter Four: Conclusion

There is a tug-of-war between the interests of authors and publishers, who seek to produce and profit from their creations, and the interests of those who wish to use the works of others to create new ones. Copyright law attempts to balance these two competing interests. Equilibrium cannot be achieved, however, when works lay dormant because of unknown or unverifiable provenance. The rights of authors are secured, but the public's reasonable and legitimate access to copyrighted works is inhibited.

Our society is enriched through access to works of expression. These proposed changes to the Copyright Act can help stimulate the use of works that have been up to now stuck in legal limbo. The objectives of the copyright system are not furthered by protecting works which have no known owner. In the words of one observer, "The prevalence of the orphan works problem breeds uncertainty. As a result, [users] may forgo socially beneficial use[s] thereby...threatening to impoverish our national cultural heritage" ("Orphan works and mass digitization," p. 67, 2015).

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