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Writing with any measure of clarity (or certainty) about current copyright law presents quite a challenge because it is a moving target. Copyright terms have gone up eleven times in the past 40 years: existing copyrights were extended by 19 years in 1976 (The Copyright Act), and both existing and future copyrights were extended by 20 years in 1998 (The Sonny Bono Copyright Act). What is interesting is that copyright regulation has grown stronger in an age where digital technology would challenge and radically redefine what a “copy” can mean. I think it appropriate that Shakespeare would write his famous line “What’s past is prologue…” in a play focused on the “tempest” of the New World. Our copyright past is only a prologue to the digital frontier, and the degree to which it foretells plight or possibility may lie in our own hands.

What is an Orphan Work?
An “Orphan Work” is a copyrighted work (book, film, photograph, music, record, etc) whose author/owner is unknown. The Orphan Work problem is the logical product of an “opt-out” system of copyright. Lawrence Lessig, in his Google video posting “Against the Current ‘Orphan Works’ Proposals” explains the orphan works problem as one that necessarily occurs in the “radical” shift from the “opt in” system of copyright first articulated in 1790 to the “opt-out” system that was ushered in with the 1976 Copyright Act. Before 1976,
copyright was an “opt in” system: if you wanted copyright protection, you registered for it. With the 1976 Copyright Act, the law was changed to an “opt-out” system: as soon as you create an “original, fixed” work, you get copyright protection automatically, even if you don’t necessarily need or want it, which lasts (effectively) “forever.” This is more than just a change in law, it is a change in the way we understand the Public Domain: the 1976 act “flipped us from an environment in which most works defaulted to the public domain to one in which all [works] were born copyrighted.”

The Orphan Works Problem and Its Implications
On March 13, 2008, Marybeth Peters, the Register of Copyrights, appeared before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property to identify the scope of the Orphan Works problem. Her information came from a comprehensive investigation conducted by the Copyright Office in 2005; this investigation invited feedback from “average citizens” to “scholars” and was compiled in a study entitled Report on Orphan Works published in 2006. This report “documents the nature of the Orphan Works problem as synthesized from the more than 850 written comments…and the various accounts brought to [the attention of the Copyright office] during three public roundtables and numerous other meetings and discussions.”

What is striking about the findings of the Copyright Office reports how far the Orphan Works problem extends. Peters notes that the Copyright Office heard from “average citizens who wished to have old photos retouched or repaired, but were denied service by photo shops [because]…under the current law, the photographer, not the customer, holds the
copyright in the photograph [and] of course the customer has no idea who the photographer at his parents’ wedding was.”iv This very localized problem becomes nationalized when “museums who want to use images in their archival collections [or] documentary filmmakers who want to use old footage” are denied access on similar grounds. But the problem of Orphan Works extends even into projects that do not yet exist:

When a copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage. Scholars cannot use the important letters, images, and manuscripts they search out in archives or private homes….Publishers cannot recirculate works or publish obscure materials that have been all but lost to the world. Museums are stymied in their creation of exhibitions, books, websites, and other educational programs, particularly when the project would include the use of multiple works. Archives cannot make rare footage available to wider audiences. Documentary filmmakers must exclude certain manuscripts, images, sound recordings, and other important source material from their films.v

What is lost here is completely antithetical to the original aims of copyright. Lawrence Lessig reminds us (as he so often and aptly does) that the framers of the Constitution advocated that by “securing for limited times to authors and inventors the exclusive right to their respective writings and inventions” we could “promote the progress of science and useful arts.”vi The ultimate goal of copyright protection is to encourage innovation to promote progress; that is, by giving creators “exclusive rights” for a “limited time,” both the creator and the country
would benefit from their labors. The Orphan Works problem illuminates the problems that come with a copyright system that has grown far beyond its original “limited time, exclusive right” protection and now serves to protect the millions of copyright owners who may never have wanted protection in the first place. As Peters emphatically notes in her report to the House subcommittee, “if there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous waste.”

Possible Solutions?
The problem of Orphan Works is not a new problem, it just gained a new sense of urgency. The Copyright Office’s request for feedback about Orphan Works in 2005 catalyzed many detailed reports from those most affected by the problem, such as the College Art Association, the Library Copyright Alliance, and the Duke Center for the Study of the Public Domain (who wrote a report about the problem of access to Orphan Films). But other reports emerged as well. From NPR stories, and Op-Eds in the New York Times, to blog postings and YouTube rants; there was no shortage of opinions about what should (and shouldn’t) be done to solve the problem. And after the Report on Orphan Works was published in January of 2006, the debate about possible solutions to this problem was well underway.

Part of the reason for the urgency is that on September 27, 2008, the Senate unanimously passed S. 2913 -- The Shawn Bentley Orphan Works Act of 2008 -- a bill designed to “provide a limitation on judicial remedies in copyright infringement cases involving orphan works.” In brief, the bill “attempts to create a system where new creators can use old works without fear of massive lawsuits, provided that a good faith effort has been
made to find out if the work in question is copyrighted [and, if so, to obtain permission to use the work].

To some, the solutions contained in this bill were important first steps to solving the problem of orphan works; to others, the bill represented a more sinister purpose. The fact that the bill was named after a former aide to Senator Orrin Hatch who helped write major IP bills (like the Digital Millennium Copyright Act) and then left to become Time Warner’s Vice President of Intellectual Property and Global Public Policy can seem a salient fact when coupled with the observation that the bill seems to shift the “burden” of proving copyright to the owner, instead of the infringer (not a problem for large corporations, to be sure, but a real problem for everyone else).

But aside from symbolic conspiracy theories and devil-in-the-details wrangling with the mess that is our current copyright law, there are some profound philosophical questions that need to be addressed. How much of our current (mis)understanding of Intellectual Property comes from “our cultural shift from an understanding of creativity as something indelibly individual…to the post-modern sense of a more collective creativity”? Can we solve the Orphan Works problem the same way it was created: with additional government regulations?

Mark Dery sums up the practical problems of the Orphan Works Act in an end of the year article for *Print* magazine:

> As written, the OWA won’t solve anything. With its impossibly vague talk of “reasonable compensation” and “diligent” searches, its fundamentalist faith in the private sector (commercial registries) and technological quick-fixes (image-
search technologies), the OWA is, as Lessig argued on his blog, a bill that both “goes too far, and not far enough.” Too far because the weasel phrase “reasonably diligent search” will provide legal cover for unwitting—as well as willful—infringers of copyrighted works that have washed up on the web without identifying information, yet are not listed in commercial registries. Not far enough because the line the OWA draws in the sand between a good-faith effort to determine the copyright status of a putatively orphaned work and intentional infringement is, in Lessig’s wonderfully pungent phrase, “just mush.”

And “mush” it is. The Orphan Works act was referred to the House on September 27, 2008, but because the House had much bigger, much more urgent National problems to address, no action was taken on H.R. 5889. It has effectively become an orphan work of the 110th Congress. In many ways, the Orphan Works Act of 2008 is a true Intellectual Property “development”, not in the sense of coming to any conclusions, but as a prologue to a much larger conversation, one that we should be inclined to join.


iii Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet,

vi The United States Constitution. Article I. Section 8. 8. http://www.usconstitution.net/const.html#A1Sec8

viii The full reports mentioned here can be accessed as follows:
Library Copyright Alliance http://www.copyright.gov/orphan/comments/OW0658-LCA.pdf


xii Dery. Page 3.

Additional References:


Orphan Works Opposition Headquarters. www.owoh.org


