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Copyright, Legal Issues and Policy

### Assignment #3: Copyright Reform

One issue that United States copyright law needs to address is that of orphan works. Works are considered orphans when their copyright holder is unknown and/or cannot be located. Subsequently, these works cannot be used by the general public, even for preservation and digitization purposes and are thus at risk of being lost forever. People who wish to make copies or derivatives of orphan works should gain some legal protection to do so. Not providing a provision for this in copyright law would be going against the very purpose of copyright law itself, which is to promote the progress of science and the useful arts. Orphan works are a part of our cultural heritage and if the rights locator cannot be found or even identified, then keeping the public from utilizing them would be detrimental to the very kind of societal progress that copyright law is intended to promote. The Copyright Office itself even admits: "...the orphan works problem is widespread and significant."<sup>1</sup> This being the case, it is time for the law to be reformed in order for uses of orphan works to be protected.

Orphan works legislation has actually been considered several times over the last decade, but Congress has yet to approve any of the proposed measures. While it is right and fair for a copyright owner to be able to profit from their own creative works, it also advances society when the public can freely use such works. Thus, in the case of orphan

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<sup>1</sup> United States Copyright Office. "Orphan Works and Mass Digitization," Jun. 2015.

works the law should try to find a middle ground between protecting the rights of users and of potential copyright owners that may only come out of the woodwork when they see that their work has been infringed. As Chris Meadows puts it, “We need to reach some kind of balance between respecting the rights of people who created the old stuff and respecting the rights of people who want to make something new with it.”<sup>2</sup> In an ideal world, copyright law would achieve that balance of protecting both the rights of the original creator and the new creator.

One of the issues is that current copyright law in the United States exacerbates the problem of orphan works in two ways. First, a creator no longer has to register or renew their work through the Copyright Office in order for it to be protected. Second, the copyright term has only lengthened. With works being protected for the life of the author plus seventy years, it gets harder and harder to locate the heirs of copyrighted material, especially if the transfer of copyright goes undocumented by the Copyright Office. As it would go against the Berne Treaty for the U.S. to require registration and to shorten the copyright term to less than the life of the author plus fifty years, other changes would have to be made in order to make an exception for orphan works.

A solution to this is for the law to make a provision for users of orphan works to receive significantly reduced penalties if they are sued for copyright infringement. The thing that makes orphan works tricky is that a copyright holder may or may not ever come out of the woodwork. As such, users of orphan works should receive fewer penalties for using these works, especially if the use is for preservation, educational, or

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<sup>2</sup> Chris Meadows. “Orphan Works Copyright Law Controversy: Don’t Panic!” 17 Nov. 2015. Web.

otherwise non-commercial purposes. In their “Orphan Works: Statement of Best Practices”, the Society of American Archivists suggest that archivists conduct a diligent search for the copyright owner to prove that they wish to use the work in good faith.<sup>3</sup> Not only does the Society of American Archivists provide several avenues for searching for rights holders, but they also advocate for documenting the search to help establish that a good-faith effort was made. The copyright law should include a provision for such good-faith users of orphan works, where they used a work only after conducting a thorough and well-documented search for the copyright owner. If it can be proven that all reasonable efforts to locate the rights holder was made, then the user of the orphan work should be protected from paying exorbitant damages fees. This was even proposed in the Copyright Office’s 2006 report on orphan works, but no actual legislation has been put in place.<sup>4</sup>

Finally, some institutions argue against any orphan works legislation because they believe that the use of orphan works qualifies as fair use. The question here is, what about uses of orphan works that would not otherwise qualify as fair use? This would include uses that are not transformative, such as digitization and making preservation copies. Some institutions acknowledge this dilemma and advocate for concrete legislation. For instance, the College Art Association recognizes this problem, stating that, “...some uses of copyrighted material may not constitute ‘fair use.’ Thus CAA continues to appreciate the value of such legislation to clarify the class known as ‘orphan

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<sup>3</sup> Society of American Archivists. “Orphan Works: Statement of Best Practices,” 17 Jun. 2009.

<sup>4</sup> “Orphan Works and Mass Digitization”

works.”<sup>5</sup>. Thus, to ensure the protected use of orphan works, relying on fair use is not enough.

To conclude, orphan works are at risk of becoming lost and society loses out by not having access to these works. Some say that these works are being held hostage by copyright law because without the owner’s identity known their uses cannot even be licensed for use. As Mike Masnick puts it, “They need to be freed, not given adoptive parents.”<sup>6</sup> The best course of action to free these works is to amend copyright law to enable their use among good-faith users. Remedies should be limited for those who make copies and derivatives of orphan works, and should be eliminated entirely for those working to preserve them and using them for educational and non-commercial purposes.

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<sup>5</sup> Linda Downs. “CAA Participates in Roundtables on ‘Orphan Works and Mass Digitization,” 26 Mar. 2015. Web.

<sup>6</sup> Mike Masnick, “Only the Copyright Office Would ‘Fix’ the Problem of Orphan Works by Doubling Down on the Problem Itself,” 8 Jun. 2015. Web

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