

Orphan Works

Background.

Many of the works (books, movies, photographs, etc.) created in the twentieth century are out-of-print, yet still under copyright protection. Due to retroactive copyright term extensions, the number of such works is increasing.

Many of these works have known copyright holders. Anyone wishing to make use of many of these works can simply contact and negotiate with the copyright holder. But for many reasons, the current copyright holder of some works is unknown. Potential users of these works are therefore unable to obtain permission for use of these “orphans” for use in their own creative and commercial endeavors. As a result, these orphans go unused and hidden from the public.

Why are many copyright holders so hard to find?

There are a number of reasons. For example, copyrights are assigned to companies that might have gone out of business. Some works, such as photographs, may be published without any attribution. The reasons multiply with the years as it becomes increasingly more difficult to determine who the original rights-holder of a work is, much less her heirs.

Different proposals.

The Copyright Office proposes that should the owner emerge, the user would have to pay a “reasonable compensation” to the copyright owner. This figure based is on what amount the user and the copyright owner would have agreed to had they found each other and been able to negotiate. If the copyright owner asks, a court would be able to enjoin what it determines to be non-transformative uses. Transformative uses, however, would be allowed to continue.

The Copyright Office proposal potentially leaves too many uncertainties, which may discourage potential use of orphan works. While Public Knowledge believes such a proposal may encourage protracted litigation between emerging owners and users of orphan works in order to determine just what “reasonable compensation” is, and we are committed to working with policy makers to address this issue.

Public Knowledge proposes that a potential user should be allowed to use an orphan work after a reasonably diligent search for the copyright owner. Such a search must be conducted in good faith with resources and technology reasonably available to the user. The user would have to provide attribution to the fullest extent possible. Should the owner emerge, the user's liability should be limited and the use should be allowed to continue. However, no new uses would be allowed for the no-longer-orphaned work without the owner's permission. Additionally, we propose that a voluntary visual copyright registry be created and be freely searchable online. Rights-holders who choose to use such a system could then be assured that their works never become orphaned. Such a registry could also lead to increased publicity for rights-holders, exposing them to potential licensors.

Our Position.

- ✓ User should be able to use the work after a diligent search for the owner.
- ✓ User should provide attribution.
- ✓ If the owner emerges after the use has commenced, liability should be limited, and the user should be allowed to continue with the existing use of the work.
- ✓ Creation of a voluntary visual registry of copyrighted works.
- ✓ Industry groups can establish best practices guidelines for conducting copyright searches.