



Before the Library of Congress
Copyright Office
IN THE MATTER OF ORPHAN WORKS
70 Fed. Reg. 3739 (Jan. 26, 2005)

REPLY COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

Orphan Works: A Public Problem Requiring Private Solutions

The Competitive Enterprise Institute (CEI)¹ submits this reply comment regarding the notice of inquiry and the filed responses thereto. CEI is generally in agreement with most of the commentators that advocate for limiting liability to those infringers that make a reasonable effort to identify a copyright owner.² However, an approach that addresses only defenses to infringement – and not on how to avoid infringement in the first place – retains a system with high transaction costs and legal uncertainty. While a due diligence safe harbor approach may be one component of a comprehensive solution to the orphan works problem, the underlying issue is the lack of a system for identifying orphan works.

The orphan works problem can be broken down into the past and future. Abating orphaned works may well require a bifurcated approach, or at least a cognizance that we need to break down the issue into one of existing works and works of the future. For existing works, a safe harbor approach may be the best legal mechanism to shield liability from users of orphaned works. This approach balances the lack of registration formalities on copyright owners at its

¹ CEI is a non-profit public policy organization that works on a broad range of regulatory issues, including intellectual property and technology policy. CEI is particularly interested in analyzing alternatives to government regulation and promoting private technological solutions to copyright issues.

² See Comments of Public Knowledge and *also see* Glushko Samuelson Intellectual Property Law Clinic Response to Notice of Inquiry on the Issue of “Orphan Works.”

formation versus the lack of predictability this system provides for the subsequent use of copyrighted works by third parties.

However, going forward there will be a significant need for a system of copyright cataloguing. Weblogs, photo hosting and printing and audio and video download services will produce an increased amount of copyrighted works, and there should be a way to catalogue and identify these works. Prospective users of copyrighted works (which could be almost everyone) deserve an *ex ante* solution.

I. The Need for IP Registration Systems

The inability to locate and contact the owner of an orphaned work is a worsening condition that demands a solution. For other forms of intellectual property (IP), namely patent and trademark, a government operated registration service has been successful in addressing this problem. However, the attributes of a patent that makes the Patent and Trademark Office a successful registry will not work for copyright and Copyright Office operated registry. Patents are generally created with a purpose and *ipso facto* have sufficient value (or at least the possibility of value) to justify the cost of prosecuting an application. By contrast, copyright is automatically granted to created works that often have no specific marketable purpose and a value that is impossible to ascertain. Whereas patent requires skilled review to determine novelty and non-obviousness, copyright requires little examination beyond that of specimen review. Patent applications are growing, but patented works are far less in number than copyrighted works.

What is needed is a registry system that conforms to the wide range of uses and values in copyright, ubiquity of copyrighted works, and easy registration process. A compulsory

registration requirement would go against the requirements of the Berne Convention for the Protection of Literary and Artistic Works. However, this treaty does not preclude private registries. Private registries that are not compulsory but have legal recognition might provide the proper incentives for creators to register their works, thus diminishing the future instances of orphan works.

A private framework that could serve as the basis for a solution to orphaned works is the domain name registration system.³ This system offers insight as to how a private registration service can flourish but more importantly highlights limitations that will help further refine a solution for copyright. Originally a government granted central authority, the privatization and decentralization of domain name registration has produced lower cost and greater services for owners. For potential purchasers it permits rapid queries to locate and contact the owner and administrators of each named property. Where it falls short is the compulsory registration requirement. Domain names, unlike copyright works, are essentially finite properties that naturally lend themselves to the principal of first possession. A domain name conforms to a defined naming format that can be easily stored within a database. Copyright works are not bound by character limitations and suffixes. They are an infinite combination of text, sound and images that are published in a constantly evolving manner. These characteristics make compulsory registration difficult and a central database impractical.

The examination of public and private registration solutions highlights the three challenges a copyright registry must solve: volume, uniqueness and incentive. Volume stems from the inherent protection created works are given. Uniqueness arises from the many forms of work that this protection is granted to and the changing mechanisms for their publication.

³ See Comments of Creative Commons and Save the Music at p. 18 for the proposition that a private database for registration and renewal could exist independent of the U.S. Copyright Office.

Incentive is a necessary component to drive registration without a compulsory requirement to do so. Developing a scalable, adaptable system that is marketable to copyright creators is what the private, free-market economy has proven itself adept at providing.

II. Orphaned Works: The Market Solution

With guidelines for registration clearly enumerated, private copyright registrars can begin to develop the basic technical infrastructure to store and exchange information regarding registered works. This back-end infrastructure, with finite, defined fields that associate ownership and contact information to created works, will have the capacity to scale according to the pace of creation.

The front-end will accommodate the various forms of creative works and the constantly evolving methods of publication. Rather than checking-in a copy of a created work, the registrars can extend their services to the edges where publication occurs. By turning the database inside-out existing digital works can become registered and new creations can be registered in an automated fashion as they are created. This is accomplished by registrars delivering the necessary infrastructure to publishers and allowing the state-of-the-art publication systems to become the front-end. Examples of this would be:

- **Weblogs:** A source of considerable textual content creation, blogs provide insight that many established news agencies track and utilize. Providers tying into the registration system will allow existing content to be registered and can automatically submit new works for registration utilizing RSS⁴ feeds back to the registrar. A blog owner could be

⁴ RSS is a format for syndicating news and the content of news-like sites, including major news sites like Wired, news-oriented community sites like Slashdot, and personal weblogs. But it's not just for news. Pretty much anything that can be broken down into discrete items can be syndicated via RSS: the "recent changes" page of a wiki, a changelog of CVS checkins, even the revision history of a book. Once information about each item is in RSS

anonymous under this system. A registrar could offer anonymous accounts that would allow the true author to be validated with an anonymous ID and authentication.

- **Photo hosting and printing:** Digital picture hosting and printing services are the online publication points for many end users. Existing catalogs of images can be registered and new uploaded photos can be automatically submitted for registration.
- **Audio and video download services:** Despite an established process of registration for commercial music and video, new works of audio and video are being independently created by authors not serviced by the commercial industry.⁵ Utilizing a method similar to weblog and photo services, AV hosting providers can register prior works and make available to authors the option to automatically registered new uploaded content.

Many of these publication services did not exist five years ago. With that in mind, it will be difficult to speculate what publication services will be in use five years from now. What is certain is that the private market, not the federal government is better equipped to bear the burden or incorporating the services of registrars in any new publication technology as it develops.

format, an RSS-aware program can check the feed for changes and react to the changes in an appropriate way. Mark Pilgrim, *What is RSS*, O'Reilly Media Inc., available at <http://www.xml.com/pub/a/2002/12/18/dive-into-xml.html> (Dec. 18, 2002).

⁵ Podcasting is a way of publishing sound files to the internet, allowing users to subscribe to a feed and receive new audio files automatically. Podcasting is distinct from other types of audio content delivery because it uses the RSS protocol. This technique has enabled many producers to create self-published, syndicated radio shows. Users subscribe to podcasts using "podcatching" software (also called "aggregator" software) which periodically checks for and downloads new content. It can then sync the content to the user's portable music player, hence the portmanteau of Apple's "iPod" and "broadcasting." Podcasting does not require an iPod, however; any digital audio player or computer with the appropriate software can play podcasts. *Podcasting*, Wikipedia, available at <http://en.wikipedia.org/wiki/Podcasting> (Apr. 29, 2005).

III. Market Incentives for Registration

Congress does not need to amend the copyright law to require registration.⁶ But why else would a creator opt to register their created works? With protection inherent at the time of publication without registration some incentive must exist to draw the participation of creators. This critical step is explicitly where the private market excels over government services by being closer to the end-user, understanding their needs, being able to rapidly adjust to market trends, and motivated by revenue growth. Inherent to all forms of created works is the incentive for authors to license and sell their creations. Registrars can offer, either through the publication channels or their own proprietary search technology, a method for authors to increase the visibility of their publication and automate the licensing and payment process. A network broadcaster can instantly license a blogger's entry. An advertiser can purchase the rights to use a vacation photo. A radio station can air a podcast. For authors not interested in generating commercial interest, registrars may offer other specialized services such as archival, search and retrieval of works registered with them.

IV. Conclusion

A government sponsored registration guideline is the necessary catalyst for private registrars to begin reducing the amount of existing orphaned works. It will also serve to stem the tide of works that will themselves become orphaned if a method to attribute their ownership and control is not established. Private registrars can incorporate best-of-breed technology to provide scalable systems, existing publishers can instantly draw in the authors they service, and both publishers

⁶ CEI does not necessarily disagree with the proposal by the Creative Commons and Save the Music that would mandate registration of copyright works within a certain time after publication. However, we do not need to go down this regulatory road if the market provides sufficient incentives for the registration of works.

and registrars can offer the necessary incentives to encourage widespread, non-compulsory registration of their works.

Respectfully submitted,

Braden Cox
Technology Counsel
Competitive Enterprise Institute
1001 Connecticut Ave. NW
Suite 1250
Washington DC 20036
Tel: (202) 331-1010

Rudy Rouhana
Technologist
Comlaw.org
rudy@comlaw.org

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