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Assignment #3: Copyright Reform

According to the Constitution, the goal of copyright is to “promote the Progress of Science and useful Arts.” One way to promote this progress is to build off of past copyrighted expressions. For this reason, copyright reform should address the difficulty of using orphan works. With orphan works, “a user’s ability to seek permission or to negotiate licensing terms is compromised by the fact that, despite his or her diligent efforts, the user cannot identify or locate the copyright owner” (Amer and Weston 1).

Though orphan works would exist under nearly any copyright scheme, the vast quantity of orphan works in the United States today can be attributed to the lack of registration and notice requirements, as well as the long duration of copyright protection. The notice requirement “was eliminated when the United States adhered to the Berne Convention, effective March 1, 1989.” (U.S. Copyright Office 4). Copyright, which can be obtained without notice, generally lasts much longer than the life of the creator. As noted by Hirtle, “Copyrighted works published since 1978 are protected for a period of life of the author plus 70 years, or if a work was made for hire, 95 years from publication” (48). If unpublished or not copyrighted before 1978, “copyright endures for life of the author plus 70 years [17 U.S.C. § 302(a), 303(b)]” (Hirtle 42). More detailed information on the duration of copyright depending on the date of creation can be found in 17 U.S.C. § 302(a), 303(a), and 304. As a result of the long duration of copyrights,

many rights holders will die or cease to exploit their copyrights long before the term ends. For these reasons, many works become detached from their rights holders.

Orphan works hurt the public at large because no one can use the materials without risk of a legal suit if a copyright holder emerges and objects. Without the ability to apply for a license, businesses cannot get incorporate orphan works into products, libraries and archives cannot provide access, and artists cannot create derivative works. The cost to the public is high while the benefits to the rights holder are negligible. While his or her work is protected from uses he or she may not like, the rights holder, because unknown, is able to license work in desirable situations. Many activities are prevented by not being able to find the rights holder for a work because working with orphan works requires the assumption of legal risk. Libraries and archives often rely on fair use to digitize holdings and provide access to materials online.

My proposed reform would be to introduce a government-run collective licensing organization, with variable pricing depending on status of the license seeker or stated purpose. The Nordic countries already have experience with extended collective licensing (ECL). According to the Copyright Office, “Under an ECL system, representatives of copyright owners and representatives of users negotiate terms that are binding on all members of the group by operation of law (e.g., all textbook publishers), unless a particular copyright owner opts out” (Amer and Weston 19). An advantage of this system is that it does not carry the risk of litigation that relying upon fair use does. This reform could be included at the end of Chapter One of the Copyright Act, perhaps as a new section, §123. It would be a limitation or modification of the scope of exclusive rights for copyrighted materials.

My proposal for an ECL system would differ from others in requiring that ECLs give libraries and archives privileged terms: a free or reduced rate for licenses. Though this provision would probably be unpopular with the ECLs, the government has set a precedent for offering libraries and archives economic benefits at the expense of others. For example, 17 U.S.C. §504(c)(2) indicates that,

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords...

This provision indicates that the government is comfortable limiting legal redress to injured parties for the sake of maintaining nonprofit institutions that provide a significant public good. Requiring ECLs to give libraries and archives special privileges would be a similar gesture. ECLs would still be able to profit from selling licenses for commercial projects that would not have a chance of appealing to fair use.

The Author's Guild might be an ally for my reform. In a letter to the Copyright office on orphan works, they wrote, "Foreign licensing and collecting organizations have been efficiently licensing orphan works for decades. We should learn from their examples. Collective licensing for a well-defined, limited set of uses may be the only means of addressing the complex compensation, control, and security issues raised by the mass digitization of books" (Aiken 2). Since a collecting organization would collect

money for orphan works whose owners may never be found, there is the potential for the ECLs to make money. Rights holders might support this if the surplus funds are used to lobby for their rights.

A potential, initial foe might be libraries. In their letter to the Copyright Office, New York Public Library wrote they did not believe orphan works legislation was required, and that potential legislation should “not require extended collective licensing or other licensing schemes” (Thornton 3). Libraries might consider the process of applying for licenses more burdensome than simply relying on fair use. Also, some materials might not be covered by ECLs. However, if ECLs are created as a supplement for fair use, libraries could use both options. They might apply for licenses for riskier orphan works and rely on fair use where infringement claims are unlikely. This would allow libraries to prioritize orphan works projects according to interest rather than according to legal risk.

Works Cited

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