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11/14/2015

Assignment 3 - Copyright Reform

Orphan works and their copyright statutes present a real problem for any institution, especially like libraries, archives, and museums, who wish to use them. Some collections are so large that to pay respect to the work and exhaust all avenues of possibility in locating the author of these orphan works is actually impossible. At best, in most scenarios, this endeavor is impractical and borderline irresponsible on the behalf of the searching party on a financial level. Furthermore, the current state of the copyright law truly limits accessibility of these works. This effect is the exact opposite aim of the copyright law. While it does indeed protect the creator of the work, when there is no author to be found, what is the point in protecting this phantom figure? While it is impossible for an individual to babysit all of the content they may create at all times, there nearly always some way of taking responsibility for one's work. When determining whether content is an orphan or not, institutions should be able to participate in a type of fail safe system that prevents them from legal prosecution, should the author come out of the woodwork. For example, if an institution files a claim of orphanage, with proof of a diligent search for the owner, said institution should be allowed to use that work as long as the the situation maintains status quo.

Currently, each infringement is subject to fines, and if some institution's collections of orphan works were fined, the price tags would be astronomical. The threat of impending fair use litigation against their publications - most likely in digital form - is sometimes too risky for institutions to risk. There are recommendations on legislation by the Copyright Office on how to deal with future issues (US Copyright Office, Page 4). Some mentions are made of providing relief for infringed works provided that they retract the offending works. While this recommendation would provide orphan works legislation - something that is sorely lacking - it still leaves some room for grey area within the legal system, and therefore still is risky for institutions. The implications of using this idea for any commercial gains are shaky and would be a slippery slope. If this were to be included in the legislation severe limitations would have to be placed on the reproduction, for if the author does appear, the exemption of paying back the author for sales they missed out on would be a direct violation of the copyright act in the first place.

Objectors to this are existing content creators. Much discussion taken place on the topic within the creative communities warning about any changes along these lines (Holland). Artists fear, within regards to a new, impending Copyright Act that their rights as content creators will be threatened. Most of this concern is aimed at the commercial implications of the new developing Act, and a company's abilities to use an artist's content without due compensation. In essence, artists view it as a threat to the exclusive control they have over their works. This in

theory would provide less incentive for works to be created, which is in direct opposition to the idea of copyright as introduced by the constitution.

This proposed idea, however, despite artist fears, has sister legislation in Canada and the UK. In Canada, after a Board approves an application on an orphan work, and it has been shown that the author cannot be found, fees and terms will be set for the proposed usage. These fees go towards any author that may surface within the five following years. In the United Kingdom, if it is “not possible by reasonable inquiry to ascertain the identity of the author and reasonable to assume that copyright has expired or that the author died 50 years or more before”, then copyright infringement will never be allowed (Center, Page 6).

In 2008, the United States Congress tried to give orphan works legislation, but it died in the House of Representatives. This bill would have exempted users of orphan works of any fees or damages were the creator of the work to show up, provided they follow five guidelines. The guidelines are 1) a diligent search, 2) identifying a locatable owner, 3) user stops using the work upon owner appearing, 4) the user acted in good faith, and 5) paying back royalties if the use was commercial. This bill is similar to this same proposal, and it is a shame that the House of Representatives failed to pass it. (Berman)

While there is proposed legislation in the works, some law experts like Lawrence Lessig from Stanford University, thinks that the legislation isn't specific enough. Lessig thinks that each work should be individually registered with the copyright office, similar to domain names (Varian). While this would obviously help with the ‘due diligence’ search, it wouldn't necessarily make any other part of the copyright system any easier to navigate. In fact, it would probably make the rest of the process cumbersome for content creators. If this registration would become essential to holding copyright over works, it would serve as an incentive to not create.

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