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Copyright Reform: Amend Section 108 to Advance the Use of Orphan Works

US copyright law should be reformed to allow for wider use of orphan works by cultural institutions through an amendment to Section 108. Former Register of Copyrights, Maria Pallante, defines orphan works as ones "for which authors cannot be identified and located by prospective users in situations that would otherwise require permission and licenses" (7). The law as it exists does not provide an explicit exemption for the use of orphan works under Section 108. According to Peter Hirtle the current iteration of the law often results in orphan works not being used, "even when there is no one who would object to the use" (171). This is in opposition to the law's aim to promote the creation of new works and poses problems for cultural institutions that are mandated to preserve and provide access to such works. For example, if the carrier for an orphan work is deteriorating and the holding institution cannot legally create a copy because the rights-holders cannot be located, the work might perish. Users of cultural material, be it purposes of further creation, scholarship, or entertainment, also suffer under the current law as they are robbed of access to a plethora of inaccessible orphan works

This proposed amendment to Section 108 should provide realistic best practices and guidelines that are meant to assist libraries and archives in locating rights-holders, so that once an institution has exhausted those guidelines they can confidently label the item "orphan". In their 2015 report, "Orphan Works and Mass Digitization," the US Copyright Office suggests defining such actions "as at a minimum, searching Copyright Office records; searching sources

of copyright authorship, ownership, and licensing; using technology tools; and using databases, all as reasonable and appropriate under the circumstances" (3). The proposed reform should also require institutions that intend to make use of an orphan work to clearly document steps taken to locate rights-holders. Once a diligent search turns up an orphan work, the institution in possession of the work should be able to preserve and provide access to the work. Such works should be treated as if the rights-holder had agreed to any use that the holding institution might potentially make. The amendment should also include a component that addresses what should happen if a rights-holder were to appear and lay claim to the orphan work in question after it has been made accessible. In their 2006 "Report on Orphan Works," the US Copyright Office suggest a "limitation on remedies when a user uses an orphan work," and a similar proposition included in the proposed reform to section 108 would indeed provide sufficient protection to cultural institutions in case a rights-holder emerges (5).

Such a reform would allow orphan works to be preserved, made accessible, and possibly even de-orphaned. Once cultural institutions harboring orphan works are no longer open to "monetary, statutory, and criminal penalties found in current copyright law," they can distribute such material more widely and confidently (Hirtle 171). Libraries can digitize their obscure, crumbling orphan books without fear of litigation, regional film archives could digitize and provide access to amateur films and home movies for which they cannot locate the rights-holders, artists can utilize such works for further creation, scholars can rewrite history and redefine cannons, and potential rights-holders can identify their own, perhaps long-lost, works.

Major efforts have been undertaken by the Copyright Office and other stakeholders to promote legislation allowing for even wider usage of orphan works than what is proposed here (US Copyright Office, "Report on Orphan Works"; US Copyright Office, "Orphan Works and

Mass Digitization"). The Copyright Office is a proponent of reform on the subject, pointing out rather bluntly in their June 2015 report "Orphan Works and Mass Digitization" that current law regarding orphan works does not "serve the goals of the copyright system" (3). Cultural institutions to which Section 108 applies would also be receptive to such reform.

The general public, especially public library patrons, would benefit from this reform considering it is likely to spark the release of more free digital content. Many documentary filmmakers who often rely heavily on novel archival footage and photographs to create their works will likely be proponents of this reform as well. In his 2014 testimony on behalf of the International Documentary Association to the Committee on the Judiciary's Subcommittee on Courts, Michael C. Donaldson lamented that "the orphan works problem is perhaps the single greatest impediment to creating new works" in the golden age of digital production (1).

Some creators, especially groups whose works are more prone to becoming untraceable over time, are potential opponents of orphan works reform. Photographers are especially concerned that their works, usually lacking clear identification marks more often than not found on books or moving image works, might too easily assumed to be orphaned (US Copyright Office, "Report on Orphan Works", 24). Music publishers and record companies are unlikely to ally with such legislation. The potential access to hours of previously unreleased orphan musical recordings could cut into the market for streaming services and music licensing businesses. There are understandable rationales for creators opposing such a reform. They might argue that the copyright terms are written into the law to protect the financial well-being of content creators and that orphan works legislation has the potential to severely undermine such terms. Another concern might be that institutions might rush in labelling works as orphan so that they can increase their visibility and accessible holdings.

Works Cited

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