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## Finding a Home for Orphan Works: Copyright Office Seeks Public Comment for Report to Congress

IP Buzz

The United States Copyright Office recently issued a broad notice of inquiry in the Federal Register, seeking comments from the public “regarding the current state of play for orphan works.” An orphan work is an original work of authorship, such as a photograph, for which a copyright owner cannot be located. The issue of orphan works has been a top priority of the Copyright Office for several years, and the Copyright Office plans to advise Congress on legislation to address orphan works in the near future.

In 1976, Congress eliminated the requirement that works be registered with the Copyright Office prior to receiving the protections of the copyright laws. The 1976 legislation effectively did away with any central repository for information about a work’s author or owner. Despite relaxing the requirements imposed upon authors and copyright owners to obtain copyright protection, under current law, those who use an orphan work remain subject to civil penalties, including damages and—if the work is registered—attorneys’ fees.

The current situation arguably inhibits the productive use of many orphan works, not because an owner is asserting rights under the Copyright Act, but simply because the owner cannot be located or identified. Good faith users seeking to reproduce, display, or incorporate into their work an orphan work may be discouraged by copyright law and their inability to locate and obtain a license from the rights holder. The Copyright Office has stated that “[t]his outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public.” However, many authors oppose orphan works legislation because recent proposals permit the unauthorized and unlimited use of copyrighted material, provided the user has attempted to locate the rights holder to the satisfaction of legislators or administrators. This approach is seen by some as a concession of rights without the consent of the rights holder.

The issue of orphan works is not new. In 2006, the Copyright Office prepared a report to Congress in which it recommended limiting the remedies available to authors and owners of orphan works if they later appear and challenge the use of their works. The 2006 report to Congress also suggested a requirement that users of orphan works perform a “reasonably diligent search” for the owner of the work.

Shortly after the 2006 report, the United States Senate passed the Shawn Bentley Orphan Works Act of 2008, which incorporated many of the Copyright Office’s suggestions. The Orphan Works Act of 2008 fleshed out the concept of a “reasonably diligent search,” and it made clear that the federal courts would be the ultimate arbiters of orphan work disputes. The Orphan Works Act was introduced in the House of Representatives, but it failed to receive a vote prior to the lower chamber adjourning for the year.

Orphan works are once again at the forefront of copyright law, both domestically and internationally. In recent months, the European Union adopted a directive on orphan works that resembles the 2008 proposed legislation in several ways. The EU directive appears to have triggered renewed interest in domestic legislation regarding orphan works as well. The Copyright Office’s recent notice of general inquiry, issued on Monday, October 22, 2012, makes clear that additional input on the topic of orphan works likely will be solicited through subsequent notices. The current notice specifically seeks input on how the legal and business environments have changed since the Office made its 2006 report to Congress, and it contains an open call for proposed resolutions to the orphan works issue, whether legislative, regulatory, or voluntary in nature. The comment period closes at 5:00 p.m. EST on January 4, 2013.

For more information regarding orphan works or to discuss commenting to the Copyright Office on any aspect of the orphan works issue, contact Venable’s **Intellectual Property Group**.

