

ORPHAN WORKS

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Form of Submission: Reply comment to Jule L. Sigall
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Background:

Viscopy is a full member of the International Confederation of Societies of Authors and Composers (CISAC), as is our American reciprocal royalty collecting affiliate, the Artists Rights Society (ARS). Through 42 such international CISAC agreements and our membership in Australia and New Zealand, Viscopy licenses the works of over 250,000 visual creator authors in our territory, and licenses the works of our Australian and New Zealander members overseas. In addition, Viscopy like other CISAC members, has an exclusive, unilateral CISAC agreement with the American Visual Artists and Galleries Association (VAGA) to represent their artists in our domestic territories. CISAC promotes the copyrights of professional creator authors.

Viscopy is also an associate member of the International Federation of Repographic Rights Organisations (IFRRO), as are the American organisations the Authors Coalition (consisting of the Artists Rights Society, Graphic Arts Guild (GAG), Society of Childrens Book Writers and Illustrators and the American Society of Media Photographers), GAG in its own right, and the Illustrators Partnership of America (IPA). None of our organisations represent copyright owners as well as visual creator authors, so all are associate members in the IFRRO whole-of-market paradigm. Copyright Clearance Center (CCC) is a full American member of IFRRO, because it is a repographic rights organisation that represents copyright owners as well. IFRRO promotes the copyrights of all copyright holders.

As yet, while there are several visual arts special interest associations and copyright collecting societies that represent narrow suites of visual rights in the United States, there is no single, broad based mechanism in place to collect for all visual authors, including the full suite of primary and repographic rights (and resale rights for the state of California). This has implications for domestic and international visual authors, because of the reciprocal nature of global royalty collections and copyright treaties.

Viscopy is concerned that should the United States develop legislation on orphan works where the definitions are too broad, this could preclude the future development of repographic and other rights for visual authors in the United States, with implications for visual authors around the world.

The notion of what constitutes an orphan work is subjective and differs between: the few genuine orphans that emerge from the current six year search term practiced by collecting societies world wide; consideration of the practical orientation of the Canadian Government provisions; the various pressures of market interests; and the reactionary, free software paradigm proposals of Professor Lessig.

It is our general concern that creator authors, who are freelancers dependent upon royalty income for survival, are not lost in the debate between reactionary licensee users and copyright owners.

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Dear Ms. Segall

RE: ORPHAN WORKS

Many thanks for the opportunity to make a submission on the subject of orphan works.

Background to the User Environment

Copyright was developed to protect the owners of published works, following the advent of the printing press. Composite works in this context would include anthologies and visual art illustrations in publications. Such uses generally respect the integrity of the original works, and provide attribution for the original author/s.

Creators

With the advance of new technologies in the 19th and 20th Century, authors and users became involved in mechanical and then electronic forms of expression ranging from photography, sound recordings, film, broadcasting, software, multimedia, multiplayer games and internet products such as websites. Many of the works generated are completely original, others are composite or derivative in nature. Copyright, and in international jurisdictions, moral rights, have been extended to cover these new works.

The post-modernist use of excerpts from extant works in a new work, such as "quoting" in rap music, fragments of artistic works in works of film and documentary, and similar examples of the Tarantino mentality, or what Professor Lessig denotes the "cultural mix" can occur in an international moral rights system, but they require the approval of the original creator author. This requires respect for the original author by the user or licensee.

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The trend in post-modernism, popularity of derivative works and nostalgia-driven works in all artistic forms over the past decade is a cultural style. This phenomenon is partly driven by technology, but also the desire to make social commentary. Without doubt these factors have increased the use of copyright works, and hence the volume of copyright licensing.

Derivative works or the practice of quoting is by no means universal in the multimedia age. Many authors continue to work in traditional art forms, or to create wholly original works for film, publishing, software, sound recording, blog websites and multiple forms of broadcast or exhibition. There are many parallel agendas and interdependent models, many of which rely upon copyright to maintain their professional status.

The conduit for creative works is now vast, global and has many paradigms. It is not always appropriate, as Professor Lessig has done, to apply a software driven paradigm to all artistic works in all circumstances. Software developers are not typical creator authors. Their model lacks the economic imperative faced by the freelance creator author, who makes a living from the exploitation of creative works, and does not earn full time income.

Users

The social interactivity of using the internet, photocopier, video recorder, DVD and CD have increased the visceral familiarity of users with copyright works. They feel entitled to them, whether this is legally the case or not.

In addition, the observation of piracy has created a different type of user. While users have money to pay for tangible goods and services, it would seem the idea of intangible copyright requires continued, extensive public education programs to sustain. Many no longer accept the need to license intangible property, and the subsequent payment required.

A principle may exist in legislation, but given the numerically powerful interests of user groups and institutions, rewarding the author for use may not be as high priority a driver as budgetary cuts and the hip pocket nerve. Essentially the policy in this area reflects the commitment of a jurisdiction to its authors, who create not only works of art but economic drivers for the nation. This is a question of natural justice.

The internet has made large groups of copyright works theoretically accessible to users in a global way, including international works. It is a complex matter for the consumer to accept that what they might physically be able to download, because of technology advances, may not be legally available to them. Essentially the law has principles that need to be extended into the digital paradigm in a way that respects the consumer, licensee, copyright owner and author. This is particularly the case when they do not appear to respect each other.

There is also no argument that the use of copyright works has massively increased over time, but we live in a user pays world. This implies both intellectual capital and economic capital should be generated by increased use.

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SPECIFIC QUESTIONS

1. Nature of the Problems Faced by Subsequent Creators and Users

What are the difficulties faced by creators or other users in obtaining rights or clearances in pre-existing works?

If the user accepts the need for licensing pre-existing works, there is already a strong, extant international network of copyright collecting societies, with databases of repertoires that continues to operate efficiently and effectively in the area of locating authors and licensing works of authorship.

However the user must be directed to the appropriate mechanisms and databases, which requires continued education, commitment and enforcement from all jurisdictions.

Users who chose not to avail themselves of this system may find the alternative mechanisms of search engine library and research onerous. It should be pointed out that many legal firms in the US provide rights search services for individuals and the professional publishing, film, media, manufacturing and software industries.

Viscopy is not able to comment as to whether there exists, beyond the services of the United States collecting societies and the Copyright Office, public law facilities devoted to copyright and intellectual property in the United States to inform the public, users, owners and creators. However Viscopy can say that such services in Australia advise and inform the entire sector concerning rights copyright information.

Individual users may be more impacted by the cost of licensing than corporations, but in essence these costs are generally minimal. Sustained multiple users over a long period could find cost a factor, but in the case of professional use they will have a budget, and in the case of personal use, the author should not subsidize the entertainment of the user.

What types of creators or users are encountering these difficulties and for what type of proposed uses?

Creators

Creators most impacted by difficulties are those who work in a post modern "quoting" style, or who generate derivative, anthology or composite works in all art forms. Post modernism, a cultural movement currently in trend, is associated with certain new media technologies, although there are examples of it in all art forms. This type of work may also, although there are exceptions, be associated with social commentary. This does not represent the majority of creators however, only a certain proportion.

Creators who focus on originating original works in all artforms including software and websites, will generate new copyright inherent in their works that has no interaction with previous works. These types of creators will remain unaffected.

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As a collecting society, Viscopy's experience with creators suggests they are not always aware of the legal issues associated with their work, including more fundamental issues than orphan works. Copyright education is a continuous process and one of the major tasks of all parties in the copyright area, particularly collecting societies and Government.

Users

The need to copy or quote extant copyright works, within new works will be experienced in particular by the following groups of users: academics, students, librarians, archivists, multimedia, news and current affairs, documentary makers, publishers, non fiction writers such as journalists and internet users. These tasks focus on social commentary, comparison and investigation. They are essentially tasks of presentation or classification.

Non-professional users may copy or quote works for their entertainment. This form of use should never be subsidized by a creator author.

It is Viscopy's understanding that young users can be particularly unaware of their obligations to the creator. There may be a strong need for a targeted education campaign to meet the needs of these users, possibly through schools.

How often is identifying and locating the copyright owner a problem?

Viscopy refers the Copyright Office to the submissions made by CCC and other American collecting societies concerning the case in the United States.

In Australia licensees are directed to collecting societies through the internet, legal services, previous licensing experience as a manufacturer, publisher, cultural institution, art gallery, auction house, business, film producer, public body, educational institution etc.

Viscopy's licensing manager advises that less than 15% of licensing requests would fall into the complex category. Most concern authors that either fall outside the membership of our 42 international affiliate collecting societies, or concern works which may have a disputed term of copyright.

This 15% is followed up in a process we call "country of origin" where the collecting society responsible for the territory of non members accepts income on their behalf and undertakes to locate them to pay the royalty. Viscopy undertakes this process with our affiliates on behalf of the licensee with the query.

On very rare occasions (less than 1%) there is doubt as to the term of copyright because of the transaction covering several jurisdictions with different terms. In these circumstances we are advised by our affiliates and there are mechanisms to cover disputes at the global body level.

Territories that are not adequately covered by collecting societies such as ASEAN countries can present isolated problems but lawyers usually act on behalf of authors in these circumstances.

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Individual Users

Viscopy refers to the submission of the CCC and other American collecting societies concerning the specifics of user groups in the United States.

Individual copyright users can find the process of identification difficult if they do not use the resources provided by collecting societies, search engines, libraries, collecting societies or legal resources. Rural licensees may fall into this category, for instance, or young users without permanent income. Persons with physical or learning disabilities, or literacy problems may also require additional resources to assist the process.

The Copyright Office could undertake targeted research to ascertain the degree to which finding and locating copyright owners proves a problem for these groups of individuals. However it would seem that additional educational resources are required to assist, rather than a changed approach to copyright or licensing.

What steps are usually taken to locate copyright owners?

Collecting societies rely upon the advice of their international affiliates concerning their members and repertoires, and advise licensees accordingly.

Individuals typically rely upon collecting societies, internet search engines and library services, with some contact with public funded entities and on some professional occasions, private law firms who specialise in rights, to secure information.

There is currently an industry that services the rights needs of users. This includes lawyers, librarians, archivists and rights administrators. It is a global system that accommodates different copyright laws.

There are several systems of locator technology that operate in a similar manner to an ISBN number. In Australia the Copyright Agency Limited holds the license for the developing Digital Object Identifier system. A bar code can be attached to copyright works, with details of the collecting society who represents the member and the work. A download or copy on the internet would register payment. It will take several years to institute this positive development.

Are difficulties often encountered even after the copyright owner is identified?

A difficulty might include the lack of awareness of copyright law exhibited by authors, owners, licensees and users alike, particularly where public funded entities such as the Copyright Office or collecting societies such as CCC are unable to resolve copyright queries, and the party has no access to legal services.

The major issue would be the creator of the original work objecting to the proposed use. Under Article 9 of the Berne Convention this is their right, to control the reproduction of all their artistic works. This right is further protected internationally through moral rights, where the future users of a work must obtain permission to alter the work in any way, including cropping, overprinting, misrepresentation, or presentation without acknowledgement of the original creator.

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These provisions are there for very good reasons, for instance to stop a religious design from being used as part of a cigarette commercial without the knowledge of the creator.

While this may present a difficulty for the value-free user, it is even more of a difficulty for the original creator if their work is used without permission, or used in a form unapproved by the original creator. This is considered as a copyright infringement. These concepts collide with the new forms of licensing rights that occur when works are published through the internet without the knowledge of the original creators.

Creators occasionally instruct collecting societies that certain of their works are not to be licensed for any purpose, because they have been overexposed. It is their right to make this judgement, or to withdraw works from circulation in the protection of their works and careers.

Part of the globally accepted duties of a collecting society, which is a non profit owned by its creator or creator/owner members, is to seek payment from infringers of their members works, and in the case of moral rights infringements, the removal of the work from communication to the public.

2. Nature of "Orphan Works": Identification and Designation

A. Case by Case Approach

There is a very small group of works that are actual orphans in the sense of the few narrow applications to the Canadian process. That is, that the potential licensee has attempted to locate the author through the Canadian collecting societies, the author was not available on any of the membership lists of global affiliates, and library, legal and internet searches have listed no results, perhaps the corporate owner of the work has been wound up. It is worth noting the very small number of cases that made it through the Canadian process.

The case by case process allows the extant systems already in place to complete adequate searches for the creator first. It is usually the case that the creator has moved or not kept their address details up to date, and is very happy to receive the royalty once they advise their collecting society of their new particulars. For this reason, both the CISAC and IFRRO global affiliation agreements between collecting societies provide for six years in which to find the owner of a copyright work.

If the US Copyright Office was to recommend provisions that do not reproduce this globally agreed six year term, it would make it very difficult to provide royalties for a proportion of creators who are fully entitled to them.

The Case by Case approach would avoid the potential for whole classes of works in copyright such as the visual arts in publication, to be unofficially deemed orphan works because of contract practices, or the market power of certain groups in the copyright paradigm.

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B. Formal Approach

Viscopy would not support the imposition of further registrations by the US Copyright Office as a mechanism for identifying orphan works, or the reintroduction of a renewable term of copyright that creates orphaned works through omission. The average creator conceives many works and should be enabled to focus on the process of creation.

This is the advantage of collective management for authors rights through collecting societies. Many creators do not have an interest in copyright or orphan works. However this fact should have no bearing on whether their works are covered by copyright or not, or on the income they derive from their works.

In the American case, the initial registration of works with the Library of Congress provides a measure of comfort for the creator in the event of infringement. A similar registration service is also provided, for example, by Writers Guilds around the world. But this type of service should not have the power to restrict the coverage of copyright laws. If it were able to do so, the works of persons with an awareness of the copyright term (for instance lawyers and librarians) would be much better represented in copyright than the works of creators!

This type of approach is hardly in the interests of professional creators, nor does it bode well for the potentially massive economic loss to the nation that could result from the impact of such a mechanism, particularly with regard to business copyright applications and products.

3. Nature of Orphan Works: Age

Seventy years from the death of the creator is the standard term in Australia, following the *Free Trade Agreement with the United States*. Previously the term was fifty years from the death of the creator. Seventy years following the death of the creator is also the standard term in the European Union, and in most circumstances, the United States.

The renewable term of copyright in the United States has no equivalent in our current law. It would appear to increase the administrative burden for creators and collecting societies to reimpose such a provision, with few advantages. It would certainly make it very complicated to generalise about the copyright term in the United States for the purpose of the administration of copyrights, and would very likely increase the associated costs of collective administration. While this system may massively increase the number of works designated as orphans, it would not appear to have many benefits to offer as a system, and to put copyright creators, who are dependent on royalty income, at a disadvantage.

4. Nature of Orphan Works: Publication Status

The definition of orphan work is more key than the publication status. There are many creative works that are covered by copyright and never published, such as some works of visual art, manuscripts and community works such as local histories. In the case of unpublished works of visual art they can be licensed directly through primary rights. There may be instances where manuscripts and original copies of musical compositions merit copyright as objects separate to the published work.

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If the system introduced only covers published works, then this will have more effect for copyright owners than creators by virtue of the private contracts that are used for published works. If the system covers all copyright works then it will have equal impact for creators of works that have not yet been published.

There would be merit in examining the magnitude of works that might be repackaged for resale by publishers, filmmakers, and other copyright owners, should unpublished works be designated orphans. The Canadian standard may be the most practical one to follow, if a balance of copyright interests is desired.

5. Effect of a Work Being Designated as Orphaned

Viscopy opposes all proposals that result in a loss of *grave*, or the right to assert ones exclusive rights over a work of copyright during the period of its full term. Any orphan works definition that rests on a system of registration and omission will disadvantage professional copyright creators who depend upon royalties for their income.

Both the approach of the Canadian Government, and the “reasonable royalty” focus of the Copyright Clearance Initiative of the Glushko Samuelson Intellectual Law Property Clinic to limit the liability on a user who has genuinely sought to find the copyright owner, seem worthy of additional investigation.

However Viscopy notes that what constitutes a thorough search for the copyright owner may differ to different parties in the copyright balance, and urges the Copyright Office to consider the inclusion of definitions and proofs of what such a search should consist of.

Viscopy is unable to comment on the need to adapt US Copyright legislation to limit liability for users who have attempted to locate the authors or owners of orphans.

6. International Implications

Background - Summary of the Australian Model:

In Australia the major copyright collecting societies (CAL – publishing, Screenrights – film and broadcasting, APRA/AMCOS/PPCA – music, and Viscopy – visual arts), are non-profit companies limited by guarantee, where royalty distributions are passed on to the member in a trust relationship, following the deduction of the costs of collective administration.

Our performance is covered by the Corporations Law, privacy and competition legislation and an annual independent review, administered by Justice Burchett QC. Reviews of the copyright interests of owners, users and authors occur through matters brought to the Copyright Tribunal. Free general legal advice on copyright is provided to licensees, users and authors through the Australian Copyright Council and the Arts Law Centre of Australia. Copyright legislation was recently updated following the *Free Trade Agreement with the United States*.

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International Agreements

Article 9 of the Berne Convention states "Authors of artistic works shall have the exclusive right of authorizing the reproduction of these works". The Berne convention supports the rights of the original author in this principle and the conditions of use in Article 5(2). Viscopy urges the Copyright Office to consider these principles and the TRIPS three step test when considering the case of orphan works.

The internet has drawn the world together, enhancing the need for all jurisdictions to be mindful of international agreements and obligations.

Moral Rights

Outside of the United States many legislatures including Australia, New Zealand and the European Union have moral rights legislation. These laws protect the integrity of creative works for the creator author.

Moral rights takes this beyond the issue of reward, for instance a visual artwork cannot be cropped, overprinted or misrepresented without approval from the original author. The moral rights perspective, one which Viscopy supports, is that any use that is approved by the original creator is acceptable, but any user that does not respect the right of integrity without permission from the original author, has infringed their moral rights.

Private Contracts

While Viscopy notes that copyright owners are free to negotiate private contracts with all copyright creators in all jurisdictions, it is likely that the absence of effective collective management for a domestic reprographic right for visual artists in the United States has had a negative impact on their market power as a group, and the capacity for international visual artists to generate royalties when their works are used in America.

Under certain definitions of orphan, the entire category of published visual artworks could be considered as orphans if instances are not considered on a case by case basis. This would have far reaching implications.

Conclusion

Viscopy notes that the current debate concerning orphans in the United States appears focused around reactionary user concerns regarding the increased concentration of rights in the hands of a number of copyright owners. There does not appear to be a position for copyright creator authors in this debate, and yet they are clearly dependent upon royalty income as freelancers.

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Professor Lessig recently said at a seminar in Brisbane, Australia that it was “irrelevant” whether there was an economic model to support his free licensing structure. It may well be so, for users, particularly if they are amateurs or academics who have no need to derive income from their works. But there is no professional creator, who struggles daily to make ends meet from freelance income, who is not concerned with their capacity to exploit the copyrights they create.

The notion of orphan works requires the consideration of how such works are defined, by whom, and for what purpose. This makes the role of the US Copyright Office, the desirability of balance between copyright stakeholders and the definition of orphan work, the key elements to whether a scheme is fair or workable.

Yours sincerely

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