T-Mitchell-John-20050324213002

To: Jule L. Sigall
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Date: 03/24/2005

From: John T. Mitchell

Comment:
Based on the plain reading of the Supreme Court's explanation of the interplay between the First Amendment to and the Copyright Clause of the Constitution, United States copyright law must be corrected with respect to the treatment of orphan works. For purposes of this comment, I define an "orphan work" as a work for which the copyright owner cannot be reasonably located.

Others, such as the Glushko-Samuelson Intellectual Property Law Clinic, have made specific recommendations for correction. My comments are intended to underscore the legal imperative for corrective action - an imperative of constitutional proportions.

The Supreme Court made clear in Eldred v. Ashcroft, that copyright law must accommodate the imperatives of the First Amendment. The doctrine of "fair use," for example, codified in Section 107 of the Copyright Act, serves to give the First Amendment breathing room.

Although orphan works were not addressed in Eldred, the Court's analysis suggests that the constitutional justification for copyright law and the demands of the First Amendment together require special treatment for orphan works. Otherwise, neither the purpose of copyright law nor freedom of speech will be advanced.

First, the Copyright Clause authorizes Congress to advance the purpose of promoting the progress of science, but Congress' choice of methods need only be rationally related to that interest. The current condition with respect to orphan works fails to advance that interest in any way whatsoever. If, for example, Congress had decreed that no one could lawfully reproduce, display or perform publicly, or make derivative works from a work whose author was unknown and could not reasonably be found, it is clear that such a decree would not be rationally related to any legitimate interest no matter how broadly the Copyright Clause is interpreted. The exclusive rights under copyright are granted so that authors may choose how and whether to exploit them, but in the case of orphan works, we have no way of knowing whether the author wished to refuse permission or dedicate the work to the public domain. Thus, without any opportunity for the author to choose whether to exercise any of the rights conferred by copyright, the law creates an irrebutable presumption that the author has chosen to refuse any licensing request whatsoever.

Second, in addition to being an irrational way to advance the constitutional interest authorized in the Copyright Clause, this irrebutable presumption burdens freedom of speech - including the speech of the copyright owner. Those who wish to use the work in their own speech are muzzled without in any way contributing to the advancement of science and the useful arts. The copyright owner, who may well have wished that a particular work be reproduced, published, distributed, displayed, performed, or improved upon, finds that due to the mere fact that he or she cannot reasonably be found, the voice they lent to their expressive material is also stifled. Authors who could have continued to communicate through their works find that, without inquiry into whether they wished to permit wider dissemination or not, the law has chosen to silence them.

The Supreme Court noted in Eldred that the Copyright Act incorporates its own free speech safeguards. But in light of the fact that millions of known authors regularly, and daily, authorize all manner of use of their works without compensation, we must conclude that, a fortiori, a large percentage of the authors of orphan works would also welcome unfettered dissemination of their works. It is ironic that, at a time when courts of law and public opinion are struggling with the decision whether to reinsert a feeding tube into a patient incapable of expressing her own preference, we have until now held such a cavalier disregard for developing a means of protecting the wishes of the authors of orphan works - authors who may well be appalled that their voices were silenced merely because they could not reasonably be found.

Accordingly, the only way to avoid irrationality and prevent abridgment of speech for no authorized purpose, Congress should amend the Copyright Act to remove the presumption of suppression, to permit reasonable means for people to use orphan works, and to allow, in the event that the author eventually comes forward and objects, some reasonable means of redress. Given that, as between the risk of erroneously suppressing speech against the author's wishes and erroneously permitting speech against the author's wishes, the first abridges the First Amendment rights of the author while the second only abridges the statutory copyright, and the first abridges the public's First Amendment rights while the second does not, the balance of harms weighs heavily in favor erring on the side of willing authors. Thus, in developing a legislative solution, Congress should strive to create incentives for authors to express their wishes, and incentives for the public to act on the presumption that, in the case of orphaned works, consent would have been granted.

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