Statement on Orphan works

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This statement's premises are the following self-evident truths:

1. that all works of the human mind belong by right to all mankind;
2. that exclusive privileges in intellectual creations may be granted only by statute, only for a legitimate public purpose, and may exist only for limited times;
3. that the only legitimate public purpose for creating such exclusive privilieges is the creation of a stable primary market for new books (the word "new books" is here used to refer to all tangible items incorporating new, original intellectual creations) in which such new books may be sold with a reasonable chance of moderate profit to the author and publisher;
4. that the public benefits of granting these exclusive privileges, which are the stability of the market for new books and the slight reduction of the economic risk in bringing new books to market from what would exist absent these exclusive privileges, are subject to the law of diminishing returns from expansions of the scope of the exclusive privileges or extensions of their duration, beyond what is necessary to achieve their public purpose;
5. that the broader and longer-lasting are the exclusive privileges in new intellectual creations, the greater the economic burden on the public in the form of reduced competition in the market for books; and
6. that the broader and longer-lasting are the exclusive privileges in new intellectual creations, the greater the cultural burden on the public in the form of reduced opportunities for making other new, original intellectual works, and in reduced opportunities for enjoying or learning from existing works.

In the latter half of the 20th century the duration of copyright was extended to such extremes that some of the burdens of this legislative folly are becoming apparent even to its supporters. Indeed they knew of them even before the most recent extension on the duration of copyright:

> [F]inding the current owner can be almost impossible. Where the copyright registration records show that the author is the owner finding a current address or the appropriate heir can be extremely difficult. Where the original owner was a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works. (Senate Hearings 104-817: Hearing before the Committee on the Judiciary, United States Senate, 104th Congress, 1st Session, on S. 483, September 20, 1995, pages 18-19.)

But at that time they merely shrugged these concerns off as being of little importance.

Now the Library of Congress's Copyright Office is requesting comments concerning so-called orphan works, that is, works for which the owner of the copyright is difficult or impossible to determine. In one sense, the Copyright Office's request is an insult to the public. It is as if a slave-master were to ask his slave how he might lighten the slave's chains without removing them. The problem of orphan works is largely an artifact of long copyright terms. The obvious solution to the problem is to reduce the duration of copyright.

Nevertheless, hard-to-trace copyrights, and other closely-related difficulties, will exist even in a copyright system characterised by narrower and shorter-lived copyrights than the U.S. system presently provides. A discussion of these copyright-imposed burdens is valuable even when initiated from a quarter where many reside, the soundness of whose judgement in matters of public policy we have reason to doubt.

This comment will discuss the problem of hard-to-trace copyrights as a species of a more general phenomenon of works whose copyright status is characterised by uncertainty.

I begin by describing a recent experience, of tracing very easily those authorized to license the copyright of a short musical work. An internet search revealed that the work had been published in a recent book by a Canadian publisher. A customer service representative at the Canadian publisher, reached by electronic mail, directed me to a charitable organization in New York. The charitable organization, reached also by electronic mail, directed me to the late composer's U.S. spokesman. The spokesman, also reached by electronic mail, directed me back to the charitable organization, stating that the organization was authorized to make all necessary arrangements. The entire process took three days.

Here are some factors that made this process straightforward and inexpensive:

1. The original composer was only recently dead, having died in 1999, and his U.S. agent for the work was clearly identifiable.
2. Information about a recent publication of the work was available on the World Wide Web.
3. The recent publisher was still in existence.
4. The entity from whom the recent publisher had licensed the copyright was still in existence.
5. The individual from whom the licensor drew its authority was alive and resident in the U.S.
6. All the parties were able to be reached by electronic mail.
7. All the parties involved were courteous (in particular, they answered their electronic mail promptly), businesslike, and reasonable.

If even one of these conditions had failed to apply to the case, the process could have taken days, weeks, or even months longer, and even so might finally have proved futile. Deaths, probate disputes, fragmentation of rights, bankruptcies, fading of human memories, and long desuetude can all make the authorized licensor of a particular copyright difficult or impossible to find. And

this assumes that it is certain that the work is still under copyright at all. In some cases, the copyright status itself of a work is not easy to determine. The government, which creates the copyright monopolies and provides a mechanism of their enforcement through its civil courts, has a duty to let the public know clearly what its rights and responsibilities are in works of the human mind.

Here then are some proposals for reducing uncertainty in determining whether a work is still under copyright, and if so, who is the authorized licensor of the particular right within the copyright bundle that a user might desire to license. All of these proposals will require legislative action.

1. Withdraw from the Berne Union

The Universal Copyright Convention provides an adequate basis for international copyright relations. Furthermore, the Berne Convention's philosophical presuppositions concerning copyright are hostile to those of the U.S. Constitution. As long as the U.S. maintains a well-balanced copyright statute, no author or publisher will lack a reasonable opportunity to realise a return from the U.S. market.

It should also be noted that the Berne Convention is not self-executing in the United States. Even without withdrawing from the Berne Union the U.S. retains considerable discretion in whether and how it will implement the Berne Convention's norms. A single example will suffice. The Berne Convention requires a minimum copyright duration for author's works of fifty years beyond the death of the author. This copyright is to exist without any formal prerequisites. The U.S. copyright law presently provides a copyright term longer than this, namely the lifetime of the author plus seventy years. There is no inconsistency if the United States copyright law requires formalities to be satisfied if the copyright is to last for the final twenty years of this period (see proposal #3 below). If the author's estate complied with the formalities for a particular copyright, then that copyright would last for the full seventy years beyond the author's death. Otherwise it would expire fifty years after the author's death. Since the formalities were not required for the copyright to endure for the fifty years, the Berne Convention would be satisfied.

2. Reduce the duration of copryright

Many cases of status-uncertainty and rightsholder-untraceability would vanish if the duration of copyright were reduced. The transition to a shorter copyright term would be simple. If it were desired to reduce the term of author copyrights from life+70 years to life+50 years, then the copyrights in works af all authors dying between, say, January 1 2010 and December 31 2030 inclusive would expire on January 1st, 2081. If it were desired to reduce the term of copyright in works for hire from 95 to 65 years from publication, then all copyrights in works for hire

published between, say, January 1 2010 and December 31 2040 inclusive would expire on January 1st, 2106. Other copyright terms would be handled similarly.

3. Require formalities in order for a copyright to endure beyond the Berne minimum

If the duration of copyright be not reduced below the Berne minimum, then that part of the term that exceeds the Berne minimum should be dependent on compliance with formalities. Within some reasonable time before the beginning of the additional years, anyone who claims to be the holder of any of the rights in the copyright bundle should register the claim with the Copyright Office, specifying which right or rights of the bundle are being claimed, and providing a current mailing address.

4. Require maintenance of the right to bring actions for infringement.

The current statute requires no compliance with formalities before the copyright in an original work will exist, but it nevertheless requires that the claim be registered before an action for infringement can be brought (17 U.S.C. 411). There is therefore no inconsistency in requiring renewal of the registration at periodic intervals in order for the ability to bring infringement actions to be maintained. The renewals could be required every ten years or so after the author's death. If it seems too severe to forbid the holder of an unrenewed copyright from bringing any actions for infringment, then instead of requiring renewal in order to maintain the ability to bring an action at all, the holder could be required to renew in order to maintain the right to gain any relief beyond the injunction. Or the relief available to the rightsholder upon a successful action could be reduced in stages the longer a right goes unrenewed. This will provide an incentive for rightsholders to maintain current information about their claims.

5. Provide for automatic termination of all assignments

In order to license a particular right or rights in the copyright bundle, a potential licensee must trace the holder of each right that he wishes to license. The various monopoly priviliges in the copyright bundle can be separately transferred ending up in the hands of multiple owners or adminnistrators. Termination of all assignments at intervals would re-consolidate the rights into a single bundle, owned by a single owner defined by statute. The present statute (17 U.S.C. 203) requires complex formalities in order for an author's heirs to terminate an assignment. The terminations should be made automatic, and the dates when they occur should be clearly defined in the statute, and easy to compute.

6. Define a good faith attempt to locate a rightsholder.

The statute should be amended to define a good-faith attempt to locate the holder of a particular right in the copyright bundle. Anyone who could document compliance with the conditions of a good-faith attempt to locate a rightsholder, and who failed to locate the true holder of the particular right (whether by making an erroneous identification or by failing to find any claimant at all) would be immune from suits for infringement of the right by any act done within a certain time after the completion of the search.

7. Define those works that are *public juris* with greater precision

The copyright statute should be amended to define a subset, at least, of works that are *publici juris* clearly enough that works in this subset can be identified easily. In this way the public's uncertainty concerning the copyright status of many works would be reduced, and members of the public would not expend effort on searching for the holders of rights that no longer existed. Such a provision would be worded approximately as follows:

> Copyright shall not subsist in any work distributed in copies to the public, in the United States or in any other country, on or before December 31st, 1922, regardless of whether such public distribution was with or without the consent of any author of any part thereof or any proprietor of any statutory or common law rights over any part therein.

This would remove some uncertainty concerning foreign works, the status of which has been clouded by the Ninth Circuit's, *Twin Books* ("Bambi") decision (83 F.3d 1162, 9th Cir. 1996). It would also reduce uncertainty concerning any lingering common law rights. The problem of lingering common-law rights is especially acute in contagious works, that is, works that are easily learned and so can be transmitted orally. Under present law, someone who wishes to reprint or record an air or lyric from *English Folks Songs from the Southern Appalachians*, by Olive Dame Campbell and Cecil J. Sharp, must do so under a cloud of uncertainty. This book was published in 1917 by G. P. Putnam's Sons. All validly-secured statutory copyrights to any of its contents expired no later than January 1st, 1993. However, the contents are songs, easily learned and also easily modified. Any particular version of any song in the book is a culmination of a long process of selection and variation. In theory, the originator of each such variation must authorize publication before that particular variation, or any variation derived from it, can be published. The informants from whom the editors collected the songs were not necessarily the originators of all the features, verbal and musical, of the songs they sang. In theory, someone might come forward at any time and claim that his grandfather was the author of this particular stanza or that particular musical phrase, that the collectors' informants learned the stanza or phrase from his grandfather, and that his grandfather never authorized the informants to give that stanza or phrase to the collectors. Hence the stanza or phrase remains legally "unpublished" and subject to the

rules for unpublished works, rather than to the rules for statutory copyright.

This is no mere hypothetical situation. A case of precisely this kind was argued in the 1930s, under the name *David Graves George v. Victor Talking Machine Company,* 17 USPQ 133 (D.N.J, 1933). The defendant had collected the song, "Wreck of the Old 97" from oral tradition and had taken some trouble to make sure it had found the author of the lyric. After defendant had begun selling phonograph records of a performance of the song, the plaintiff George brought suit stating the he was the author of the words to the song, rather than those whom the defendant claimed were their author. Though the defendant eventually prevailed, the litigation lasted many years. The present Copyright statute extinguishes all common law rights and replaces them with a statutory right, but this right expires only when seventy years have elapsed since the author's death. A case like *George v. Victor Talking Machine Company* could in theory arise even decades after the alleged author of a verbal or musical phrase had died. Such a charge would be hard to defend against, since many witnesses to the alleged author's life and deeds would be dead or aged. The "absolute public domain firewall" proposed here would create a kind of general estoppel to actions of this sort being initiated over anything that had appeared in any book issued anywhere in the world before a certain date. There would be no need for someone who wished to make commercial use of a song published in Campbell and Sharp either to trace every possible claimant to every musical and verbal phrase, or to wait until everyone who was above 1 year of age in 1916 (hence capable of being a link in the chain of cumulative authorship of the works published in Campbell and Sharp) has been dead for over 70 years.

8. Amend the law of trademark to prevent it from being used as a form of perpetual copyright

The rule in trademark law should be, "In the kingdom of the blind, no trademarks are." The law should apply to little beyond visual *marks* that are actually used in *trade*. But if it is too much to ask that the law reduce the scope of such concepts as "trade dress" and "dilution", it is nevertheless not too much to ask that the law's ability to impede the marketing of copyright-expired works be reduced. When a work is *publici juris,* anyone should be able to bring it to market without regard for any so-called "trademarks" in the names of fictional characters, or so-called "trademarks" in sounds or verbal formulas. The mere possibility of consumer confusion, or even actual confusion on the part of a few fools, should not be able to prevent the publication of a work from which copyright has expired, or the creation and publication of derivatives of it. Only the actual copying of a graphic *mark* , or some other clear-cut case of unfair or deceptive trade practices, should be able to prevent these uses of a work that is *publici juris*. Those who wish to rely on work's status as *publici juris* should be able to act almost as if trademark law did not exist. If any wish to create marketing enterprises centered on fictional characters, the burdens of trademark law should be chiefly on them: they should expend their own effort to distinguish their products by marking their editions and other merchandise unique graphical *marks,* and advertising to the public to look for those marks if they wish to have the "authorized" edition or "authorized" merchandise.