

A Task for the New Congress: Orphan Works Legislation

By Katherine Hendricks

Hendricks & Lewis PLLC
901 Fifth Avenue, Suite 4100
Seattle, Washington 98164
(206) 624-1933

Copyright © 2009 Hendricks & Lewis PLLC. All Rights Reserved.

“Orphan works” are works whose owners are unknown or cannot be located. Filmmakers and others who wish to use old images, found film, writings, sound recordings and other material in their works are frequently prevented from doing so because they cannot identify and find the owners and are deterred by the prospects of infringement lawsuits.

To some extent, changes in copyright law over the last 30 years have exacerbated the difficulty of identifying copyright owners by relaxing their obligations to assert, manage and create public records of their rights. Before 1978, copyright protection was tied to affirmative acts and specific dates of publication, registration and renewal. The term of copyright was 28 years plus a 28 year renewal term. Now, protection is automatic, the term is the less easily discerned lifespan of the author plus 70 years, and there is no renewal registration requirement.

In 2008 legislators introduced Senate Bill 2913 and related House Bill 5885 to ease the orphan works problem. The proposed legislation offered a mechanism for a user to perform and document a good faith search for a copyright owner and to reduce the user’s financial exposure. Users would be required to attach an orphan symbol to the work’s use. If an owner surfaced, the user would be required to pay “reasonable compensation” or face full liability.

Despite the support of important constituents, including filmmakers, publishers, libraries, museums, universities and the Copyright Office, the legislation died in House committee and was not enacted in the 110th Congress.

Critics believe such legislation would deprive copyright owners of their rights, including injunctive relief, actual damages and statutory damages. But these remedies remain available if applicable, the copyright owner exists and comes forward and the owner and user are not able to agree on fair compensation. The majority of orphan works are not registered and thus, statutory damages would not be available in any event.

There are good reasons to enact orphan works legislation. Filmmakers must exclude important source material from films except as permitted by the fair use doctrine. Archives cannot make important images, footage and other material available to wider audiences. Sometimes projects are abandoned altogether when proponents cannot obtain licenses or releases for source material. These results are difficult to justify when the primary rationale is protecting a missing copyright owner who may not even exist.

Thus, orphan works legislation should and likely will emerge in the new Congress.

Katherine Hendricks is a partner at Hendricks & Lewis, a law firm that focuses on arts & entertainment, intellectual property, media and technology; additional information can be found at www.hllaw.com.