Orphan Works

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Anyone interested in copyright should find the Copyright Office's Jan. 26, 2005 notice at 70 Fed.Reg. 3739 to be of interest. At the moment, it is also available under "hot topics" at http://www.copyright.gov/ .

That initiative in my view is overdue, but the Office notice seeks input on ways to address the limited availability of works that have uncertain ownership and dubious commercial value. It also briefly summarizes what is being done in Canada and the UK.

Many people have lobbied for longer copyright protection. For example, when testifying before a joint hearing of the House and Senate patent committees in 1906, Mark Twain, argued for a life-plus-fifty term. He pointed out that, of the 200,000 books published in what had become the United States since the Declaration of Independence, most had a shelf life of less than 10 years. Speculating that about one in a thousand books could outlast the then-current term, he likened it to limiting a woman to twenty-two children.

Dissenters in Eldred v. Ashcroft, 537 U.S. 186 (2003) took a different view. The majority did not hold that the life-plus-seventy term was a good idea, only that that and prior term extensions survive the rational basis test. The focus there and elsewhere has been repeated extensions of term, but few seem to have noticed that the term of more works was reduced than expanded under the 1976 Act.

Going into effect in 1978, 17 U.S.C. § 301 limits the terms of unpublished works that had previously enjoyed potentially perpetual protection — possibly backed up with criminal sanctions, as under N.H. Rev. Stat. Ann. §§ 352.1, 2 (1895). As mentioned in an earlier column, those preempted provisions nevertheless remain on the books.

Because most unpublished works could not be registered under the 1909 Act, it was difficult to impossible to clear title. Fair use notwithstanding, anyone producing historical works with extensive quotations from private letters ran a risk of suit. Now, assuming that provisions terminating rights previously perpetual and mostly

unregisterable are constitutional, § 302(d) & (e) can be used to eliminate such risks.

Various additional measures could be taken to increase the availability of works with uncertain ownership and dubious commercial value. A first step would be to choose a temporal benchmark for assuming that no one continues to be interested in those works. The base 28-year term under the 1909 Act might be a good place to start.

That no one appears to be interested does not mean that no one will be. The larger the success of a work incorporating an orphan work, the more likely a stranger will stake a claim. When uses exceed the bounds of fairness under § 107, publishers are subject to injunctions. That could force a negotiated royalty sufficiently large that others aware of it would be at least wary of falling into the same trap. Hence, compulsory licenses seem attractive, and I outline one such scheme below.

First, to minimize opportunities for escheat and to encourage productive uses of long-neglected works, discrete formulae can avoid the excessive overhead implicit in adjudication. To further simplify things, a rate based on only, e.g., content percentages and publishers' gross sales prices would be attractive.

Were the rate 5%, a publisher selling a collection of ten, ten-page pieces for $30.00 would face a maximum liability of $1.50 ($30 times 5%). A rate double that seems reasonable, but it should be kept in mind that the publisher took all the risk and claimants are profiting from work otherwise generating nothing.

Second, whatever the rate, publishers should not be obligated to resolve competing claims. Disputes could be eliminated were Copyright Office records dispositive as to ownership, not merely presumptive as under § 410(c). Challenges to those or other official records should be possible within three years (the § 507(b) statute of limitations) of an initial claim (or of the publication date). Should claims still open to challenge or unsupported by such records be made, payment could be put into escrow. To keep costs low, only disputes between claimants should be resolved (failing settlement) by judicial, arbitral or administrative adjudication.

Third, because criminal enforcement under § 506 may be difficult to obtain, the law should also provide substantial civil remedies. Those under §§ 504(c) (statutory damages) and § 505 (attorney fees and costs) are obvious means to deter publishers' making factual misrepresentations to royalty claimants — and, in this instance at least, such relief should be available regardless of registration or its timing.

Finally, I suggest, because § 502 (injunctions) seems to offer less leeway than equivalent provisions in, e.g., the trademark and patent laws, that compulsory licenses should be legislatively based. Whatever a basic scheme might prove to be, it seems both likely and useful for the Office, as under § 1201(a)(1)(C), to be authorized to study, propose and adopt or modify it by regulation.