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In order to ensure that the constitutional goals of copyright law are not restricted by the logistical dilemma caused by unidentifiable copyright owners, the issues raised by “orphan works” warrant a regulatory solution. Orphan works call for an examination of the underlying purposes of copyright law in order to balance the interests of difficult-to-reach copyright owners and artists who are looking to incorporate a preexisting work into a new creation.

The undisputed purpose of copyright law is to promote and further the arts in order to benefit the public interest. Because many artists draw inspiration from and incorporate older works into new creations, the worry is that artists will be discouraged from utilizing orphan works for fear of the prohibitive costs of searching for the original owner and the potential litigation if an infringement results. This underutilization of orphan works will arguably hurt the public because dissemination of creative derivative works will be unnecessarily limited.

Copyright terms have been extended to what many deem an unreasonable length of time, so it is unsurprising that many copyright owners become difficult to locate over time. Moreover, the primary justification for such lengthy copyright terms is that the renewal period ensures a fair return on the investment for those that make expensive works possible. These sophisticated investors have a strong incentive to comply with all formalities to maintain copyright protection as long as possible in order to protect their investment, so it is unlikely that a policy that allows for greater use of orphan works will

create a disincentive for such copyright owners. Moreover, even if such copyright owners do fail to register the work or renew its registration after a significant length of time, in that case it is rational to assume that the copyright owner is no longer concerned with protecting their work and thus, the potential for harming the public interest by discouraging artistic creation will be lost.

However, a presumption that orphan works are in the public domain runs the risk of ignoring the rights of valid copyright owners. Furthermore, it is likely that the copyright owners that would be hurt in such a situation are the unsophisticated artists without the resources and know-how to effectively navigate the world of copyright law. Trampling on the legitimate rights of copyright owners poses an obvious risk of discouraging artistic creation.

Lastly, it is not necessarily correct to assume that having more works in the public domain inherently fosters greater creativity. Copyrighted works are not completely off-limits to other artists and can be used as a legitimate source of inspiration. In contrast, works in the public domain can be taken in their entirety and distributed for profit by people that had nothing to do with their creation. For obvious reasons, the potential for prematurely placing rightfully copyrighted works in the public domain thus runs the risk of discouraging artists from public dissemination of their works. It also encourages others to take advantage of works in the public domain rather than creating something original, thus potentially impeding creativity.

For these reasons, I think it makes sense to put the burden on those that are attempting to incorporate orphan works into new works as opposed to imposing a formal approach that mandates registration on the part of the original copyright owners. Placing

the burden on the original creators would unnecessarily disadvantage unsophisticated artists who are already at a disadvantage because they lack the knowledge and savvy of large corporate copyright owners. Likewise, a comprehensive compulsory license system seems to result in unwarranted fees that do nothing to further the goals of copyright law. It is unlikely that a copyright owner who has become unreachable will reemerge to claim their nominal license fee, so it is probable that such a system would be nothing more than a new source of funding for the Copyright Office.

Instead, a case-by-case approach best balances the interests outlined above. An artist seeking to utilize a so-called orphan work should be forced to make a reasonable inquiry to find the original copyright owner with the assistance of the Copyright Office. The guidelines that dictate the “reasonableness” of an inquiry would need to be fleshed out on an individual basis, keeping in mind the age of the orphan work in question, the likelihood of finding the author in the particular case, the costs of the search and other factors. If the search is conducted and the original copyright owner is not found, use of the orphan work should be allowed with one important caveat.

If the use of the original work results in a derivative work that attracts the attention of the original author, protest of the use by the valid copyright owner should work to estop the second artist from using the orphan work. However, in many cases estoppel would be inequitable because of the costs to the user of the orphan work, especially in light of the fact that the artist using the orphan work presumably took all necessary measures to search for the true owner and secure permission to use the work from the Copyright Office. In such situations, a compulsory license would be appropriate.

This case-by-case approach allows for flexibility according to the specific situation and is the best method to balance the conflicting interests involved in the use of orphan works.