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Comment on Orphan Works

To: Jule L. Sigall,
Associate Register for Policy and International Affairs
U.S. Copyright Office

Re: Notice of Inquiry, 70 F.R. 3739 (Jan. 26, 2005)

From: Thomas G. Field, Jr.
Professor of Law, Franklin Pierce Law Center

Date Feb. 7, 2005

Introduction

Testifying before a joint hearing of the House and Senate patent committees in 1906, the author known as Mark Twain, argued for a life-plus-fifty term. His primary point was 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. He speculated that about one in a thousand could outlast the current term and likened short terms as equivalent to limiting a woman to twenty-two children.

Similarly, when the United States was pressuring Japan to adopt copyright rather than a twenty-five year, sui generis protection for software, I speculated that little software would enjoy a shelf life exceeding eighteen months. Concerned about the need to bully an important ally, I asked Ralph Oman about advantages derived from a longer harm. Essentially begging the question, he said, "What's the harm?" I could then think of none, but I can now.

I welcome an opportunity to comment briefly.[1] My thesis is that terms of absolute exclusion exceeding the shelf life of particular works give no advantage to authors and publishers, and compulsory licenses are a fair means to increase public access.[2]

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1 *See* my Statement of Interest, *infra*.

2 Courts generally deny injunctions that seem unfair, but § 502 appears to offer less leeway than equivalents in, e.g., the trademark and patent laws.

Term Changes and Registration

I have no quarrel with Eldred v. Ashcroft, 537 U.S. 186 (2003); that the life-plus-seventy term survives rational-basis analysis does not mean that it is a good idea — especially for orphan works. Many, including dissenters in *Eldred,* bewail repeated term extensions, but few seem to have noticed that the term of more works was reduced than expanded under the 1976 Act.

Until § 301 went into effect in 1978, unpublished works enjoyed potentially perpetual protection.[3] Most could not be registered; thus, the older the works, the more difficult it was to clear title. Fair use notwithstanding, historical works with extensive quotations from private letters ran a risk of suit — the less flattering they might be to someone's ancestor, the larger the potential. Subsections 302(d) and (e) are helpful, but clearing title could be costly. Moreover, one must wonder about the constitutionality of provisions that terminate previously perpetual rights.

Although Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 34 (1939), found copyright to exist without "burdensome requirements," not until the United States joined the Berne Convention was it possible to enforce copyright in any work without registration. Yet, as evidenced by §§ 410(c) and 412, Berne permits the linking of proof of ownership and extraordinary remedies to formalities. It and the TRIPS convention also seem to permit compulsory licensing.

This offers many possibilities for increasing public availability of works that have uncertain ownership and dubious commercial value. Subsections 302(d) and (e) represent one possibility, but the durations seem unnecessarily long and the costs of obtaining proof seem too high to afford much relief. The infrequency with which the referenced Canadian scheme is used also counsels against imposing such burdens on prospective users.

If not already known, typical shelf lives of various kinds of works might be empirically determined. When the owners of commercially unavailable works older than that (plus, say, a ten-year hedge) cannot be readily located by searching electronic records of the Office (or other designated entities), injunctions should no longer be available. Lack of precise empirical

[3] Sometimes backed up with criminal sanctions; *see* N.H. Rev. Stat. Ann. §§ 352.1, 2 (1895) (still on the books, those provisions make it a misdemeanor to infringe copyright in unpublished works).

foundations, however, should not prevent selection and use of an initial default period such as the base 28-year term of the 1909 Act or the 35-year period in § 304(c).

Royalties

Study may also reveal additional instances in which the § 121 approach might be accepted (perhaps for other types of translations), but those seem rare. It is difficult to regard royalty-free licenses for existing works as other than running afoul of the Fifth Amendment and various conventions. Royalties are, therefore, assumed to be required in most circumstances.

Royalty formulae for application in discrete circumstances should be devised and used. That would avoid the overhead inherent in ad hoc judicial, arbitral and administrative adjudication. It should also minimize opportunities for escheat.

Determining set royalties for various works, under widely varying circumstances, could be difficult. Rates per word, for example, for authors likely to have orphaned works may already be standard. Calculations based on measures such as that, however, seem apt to exceed the point of diminishing returns.

Multimedia works aside perhaps, rates based on, e.g., content percentages and publishers' gross sales prices should minimize both overhead and risk of escheat. Were the rate 5%, a publisher selling a collection of ten, ten-page pieces for $30.00 would be liable for 15 cents per copy (10% of $30 times 5%) to each contributor, or $1.50 to all. A higher rate may be more reasonable, but it bears noting that publishers bear all the risk, and claimants will profit in circumstances where it is unlikely they would derive any income from the work.

Title

Successful works generate claims. The larger the success, the more claims are likely to compete. Publishers should not need to resolve competing claims, much less at their peril. If encouraging the submission of materials for the Library of Congress is a goal, the Copyright Office should keep ownership records, and they should be dispositive, not merely presumptive as under § 410(c) — after a suitable time.

The three-year period in § 507(b) seems ample for collecting back royalties and disputing ownership. When clear ownership records are unavailable, royalties should be held in escrow. Should another claimant appear within that time, disputes unresolved by negotiation might be addressed in arbitral or administrative adjudication.

Scofflaws

Criminal enforcement under § 506 may be difficult to obtain. Thus, substantial civil deterrents should also be provided as a hedge against publishers' underpaying royalties. Sanctions under §§ 504(c) and § 505 spring to mind and, in this instance at least, should be available regardless of ownership registration or its timing.

Fine Tuning

Compulsory licenses of the type described above must be legislatively based. A statute might, however, as under § 1201(a)(1)(C), authorize the Office to study, propose and subsequently modify them by regulation.

Statement of Interest

I speak for only myself, but I have dealt with topics addressed here from several perspectives. My most recent articles are *Judicial Review of Copyright Examination*, 44 IDEA 479 (2004) and *Copyright Protection for Perfumes*, 45 IDEA 19 (2004). *See also*, *Publishers' Rights and Wrongs in the Cyberage*, 39 IDEA 429 (1999).

Besides teaching and writing on copyright and administrative law, over the past 34 years I have also, for example:

- Spoken with frustrated archivists;
- Republished James Lardner's book, Fast Forward (with his cooperation);
- Served as Pierce Law's content webmaster, 1995-2004;
- Wrote and published a computer-assisted-instruction authoring program; and
- Wrote "Arbitration Exercises," long distributed by the Center for Computer Assisted Instruction.