Legally Speaking: Libraries Reverse Course on Need for Legislative Reform

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T
he U.S. Copyright Office in Washington, D.C., wants to know what legislative, regulatory, or other solutions are needed to resolve the problem of “orphan works” and mass digitization, and the library community has responded by saying “no, thank you.” A memorandum submitted by the Library Copyright Alliance (LCA) in mid-January unequivocally asserts that “libraries no longer need legislative reform in order to make appropriate uses of orphan works.”

Eight years ago, the LCA — which included the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries — wrote to the Copyright Office, asserting that “the Copyright Act must be amended to address the orphan work problem.” The LCA recommended in its March 2005 comments that Congress “limit the remedies when a user has engaged in a reasonable, but ultimately unsuccessful, search for the copyright owner.”

In its comments filed in 2013, the LCA explains that “significant changes in the copyright landscape over the past seven years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.” The changes include the following:


2. Court-ordered injunctions are less likely to be issued because of a 2006 U.S. Supreme Court decision holding that “irreparable injury” from an infringement of intellectual property can no longer be presumed by judges.

3. Mass digitization is more common, ranging from routine “caching” of Web pages by search engine companies to HathiTrust’s orphan works project.

As a result, the LCA concludes that the library community feels comfortable relying on fair use; however, LCA acknowledges that “other communities” may prefer greater certainty concerning what steps they would need to take to fall within a safe harbor.

If Congress does want to consider legislation, LCA “strongly urges” it to abandon the approach in the proposed legislation that passed the U.S. Senate in 2008 (and died in the House). According to the LCA, that bill — S. 2913 which was named the Shawn Bentley Orphan Works Act after a long-time Senate staff-member — had become “increasingly complex and convoluted” as it worked its way through Congress. Instead, the library group recommends “a simple one sentence amendment” to the Copyright Act that would grant courts the discretion to reduce or remit statutory damages in appropriate circumstances.

If Congress prefers to develop a more detailed piece of legislation, libraries would support an effort to amend the copyright laws only if it offered significant benefits over the status quo and included the following features (as outlined in an LCA statement issued in 2011):

• The non-commercial use (i.e., reproduction, distribution, public performance, public display, or preparation of a derivative work) by a nonprofit library or archives of a work when it possesses a copy of that work in its collection:
  — would not be subject to statutory damages;
  — would not be subject to actual damages if the use ceases when the library or archives receives an objection from the copyright owner of the work; and
  — would be subject to injunctive relief only to the extent that the use continues after the library or archives receives an objection from the copyright owner of the work.

• This limitation on remedies would apply to the employees of the library or archives, as well as to a consortium that includes the library or archives.

• Copyright owner objections would have no effect on a library’s rights under fair use.

My Prediction: Given the continually-changing legal and academic environment noted in the LCA’s report, it seems likely that the Copyright Office (and Congress) will take a wait-and-see attitude before jumping into an active effort to revise the copyright laws.