

Statement of

The Honorable Orrin Hatch

United States Senator

Utah

April 6, 2006

Statement of Senator Orrin G. Hatch
Subcommittee on Intellectual Property,
U.S. Senate Judiciary Committee
"Orphan Works: Proposals for a Legislative Solution"

As most people interested in this hearing will already know, the term "orphan works" generally refers to copyrighted works for which the owner either is not known or cannot be found. With most forms of assets and physical property, an owner is typically easy to identify with reasonable efforts. For obvious reasons, identifying the owner of a copyrighted work is much more difficult in many cases, especially when information about the copyright holder is not publicly known or incorporated into the same end product that contains the work itself.

With very rare exceptions - many of which result in police intervention - whoever is living in a house or driving a car is either the property owner or someone with a personal or contractual relationship with the owner. The same is not true in the intangible world of copyrights, where the owner of an individual book, video tape, or photograph generally does not hold the copyright to the underlying text or content. Historically, copyright information has been included in the end product. For example, the copyright holder will frequently be listed in the movie credits, included album liner notes, or printed on the back of a photograph. However, with the advent of digital and internet distribution models for copyrighted works, it has become more difficult to attach such copyright information to the copyrighted work itself.

These problems have been exacerbated by two sets of changes in copyright law. First, because of the extension of the copyright terms, many works are protected by copyright for decades after the author has died and long after they cease to have any significant economic value. The second set of changes occurred as a result of our accession to the Berne Convention, which prohibits conditioning copyright protection on formalities such as registration or renewal. Because original works receive automatic copyright protection without the need for the owner to register the work, there is no centralized registry that can be used to identify copyright holders.

As a result of these difficulties, it appears that a significant number of works are protected by copyright without any reasonable or effective way for potential users to identify their owners. As a result, the public often loses ongoing access to - and use of - these works, without any corresponding benefit to the author. As the Copyright Office concluded in its recent report on the subject: such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

With respect to virtually every other type of property that receives legal recognition, there are either equitable doctrines or statutory provisions addressing this type of problem. In other areas of law, the rights of an owner are limited by things like adverse possession, salvage rights, found treasure doctrines, and abandonment theories. Many believe that a similar concept should be applied to copyright law, and the Copyright Office has recommended something along these lines. Under their proposal, a user who performed a good faith, reasonably diligent search for the owner prior to using a copyrighted work would - in most cases - have his or her damages liability limited to a reasonable royalty rate. In certain instances, equitable relief would also be limited.

I tend to believe that this type of approach would be beneficial to copyright law, and would allow artists, consumers, and academics the use of many works that have historical, cultural, and economic value. However, I suspect that we have a range of opinions on the Copyright Office proposal, so I look forward to hearing the opinions of our panel of expert witnesses.