

Testimony of

Mr. Thomas Rubin

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"Orphan Works: Proposals for a Legislative Solution"
Before the
Subcommittee on Intellectual Property
Committee on the Judiciary
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Chairman Hatch, Senator Leahy, Members of the Subcommittee, my name is Tom Rubin, and I am Associate General Counsel for Copyrights, Trademarks and Trade Secrets at Microsoft Corporation. Thank you for providing Microsoft the opportunity to testify regarding possible legislative solutions to the issue of "orphan works." We commend the Subcommittee for convening this hearing and thank Chairman Hatch and Senator Leahy for requesting the Copyright Office's detailed study and analysis.

Microsoft is the leading provider of software, services and solutions used by hundreds of millions of consumers and businesses worldwide. In this role, we are a creator of valuable copyrighted works - such as our Windows operating systems and Microsoft Office System - as well as a user of copyrighted works created by others. For example, our interactive encyclopedia Encarta and our online service MSN contain both original and third-party content. Although we have a policy of clearing rights to any third-party content that appears in our products, we occasionally have run into difficulties in locating copyright owners for works that we wish to include in these products.

Microsoft's interests in the orphan works issue thus coincide to a significant degree with those of both authors and users. Accordingly, we support a balanced solution to the orphan works problem, one that fully respects the exclusive rights of creators while advancing the public's interest in obtaining broad access to works consistent with those rights.

At the outset, we wish to make clear that we agree with the Copyright Office's characterization of an "orphan work." The Copyright Office uses the term to refer to the situation in which the owner of a copyrighted work cannot be located by someone who wishes to use the work in a manner that requires permission. A work is not an "orphan" if the copyright owner declines a request to use the work or insists on terms that the user views as unsatisfactory. While there are several possible approaches to the policy issues raised by orphan works, in our view, the legislative framework set out in the Copyright Office report is a promising start in achieving the right balance. As an initial matter, we believe that addressing the orphan works problem through a qualified limitation on remedies offers a reasonable approach for promoting the dissemination of orphan works while safeguarding the rights of copyright owners. Similar remedies-based approaches have been adopted in other areas of the Copyright Act to balance the competing interests of authors and users, for instance with respect to restored works (sect. 104A) and innocent infringement (sect. 504(c)(2)). That a remedies-based approach has proven over time to be fair in these contexts should provide some comfort that it could succeed here as well.

We believe a remedies-based approach is far preferable to one - such as a registration system or similar regime - that would impose formalities or other burdens on authors. The creation of new and untested formalities could have the counterproductive effect of inhibiting the dissemination of works and could impose enormous burdens on authors and the Copyright Office alike without necessarily creating corresponding benefits.

The remedies-based solution recommended by the Copyright Office is likewise preferable to a compulsory or other government-administered licensing or royalty system, which could become mired in bureaucratic overhead and might be vulnerable to challenge under the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) or other trade agreements. A compulsory licensing system would be a particularly inappropriate solution to the orphan works problem because, if the work is a true orphan, there will be no one to receive the compulsory license fee. If, by contrast, the work proves not to be an orphan, compensation to the copyright owner should match prevailing market-based royalty rates for the work.

We also agree with the Copyright Office that a use-based registration system, in which users would enjoy limited liability simply by filing a notice with the Copyright Office before using an orphan work, would be unfair to authors, inefficient, and difficult to implement. Such a system could impose significant burdens on all relevant parties, including: (i) on users - to list each purportedly orphan work prior to each covered use; (ii) on copyright owners - to monitor the system constantly for references to their own works; and (iii) on the Copyright Office - to develop and administer the filing system, a task that could prove particularly challenging with respect to photographs and other works that often are not accompanied by sufficient authorship or rights ownership information.

With respect to the specifics of the Copyright Office's proposed legislation, we support the use of a "good faith reasonableness" standard for evaluating whether a user has conducted a sufficiently diligent search to locate a work's owner prior to using the work. Given authors' exclusive rights to decide whether and how to make their works available to the public, it is vital that the proposed limitations on remedies be available only to users who have undertaken objectively reasonable and truly good-faith efforts to locate the work's owner. As this standard is applied and developed in practice, it will be important to ensure that it is interpreted to bar merely perfunctory or superficial searches from benefiting from the limitation on remedies. A robust application of this standard is particularly important in the case of photographs and other non-literary works, which are particularly vulnerable to infringing use simply because the identity of the copyright owner might not be apparent nor a written description of the work helpful in ascertaining its owner.

The nature of what qualifies as a sufficiently diligent search is likely to vary considerably depending on a variety of factors, including the type of work, its age, where it was found, the amount and nature of any copyright-related information found with the work, and the nature of the use of the work. Given these many factors, we appreciate the difficulty of establishing specific statutory criteria for what constitutes a "good faith, reasonably diligent search." At the same time, we consider it vital that the open-ended nature of this standard not weaken the ability of copyright owners, as a practical matter, to protect against misappropriation of their works. We therefore support the efforts of a number of stakeholders to explore, among other things, what might constitute a reasonably diligent search in various contexts.

In those cases where a copyright owner is entitled only to "reasonable compensation" for the use of her work, we support the notion that this amount should "represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced." In other words, courts awarding "reasonable compensation" under this section should always strive to impose damages equal to the amount that the parties would have agreed to in arms-length, market-based negotiations before the infringement began. A standard that resulted in copyright owners receiving below-market compensation or a standard that effectively resulted in the imposition of a statutory, non-market-based royalty rate would significantly deter copyright owners from enforcing their rights in court and thus would have the practical effect of restricting the exclusive rights of authors. Given its importance, clarifying the "reasonable compensation" standard in the legislative text in our view would be useful.

In closing, I'd like to emphasize the beneficial role that technology, in particular software, can play in helping address the orphan works problem. As the Copyright Office report observes, "any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance." A wide range of companies already offer low- or no-cost technologies that make it very easy for authors to embed rights management information into their digital works, and for users to locate and read this information. For our part, Microsoft works hard to ensure that our products and services maintain the integrity of such information as works are edited using various programs and distributed online. While these technologies provide a more limited solution for works that already are in circulation, greater reliance on them by authors in the future could help make the orphan works problem diminish over time. Furthermore, as search technologies continue to improve - an area in which Microsoft is devoting substantial resources - the ability of users to locate copyright owners should likewise improve, thereby decreasing the number of cases in which a work is incorrectly considered an orphan.

Thank you once again for inviting Microsoft to testify at today's hearing. We commend the Subcommittee for giving its attention to the orphan works issue, and we look forward to working with the Subcommittee as it shapes and advances legislation in this area.