
Resolution on Unlocking Access to Orphaned Works

Taking note of TACD resolutions on copyright adopted in July 2008¹ and in July 2009², TACD strongly urges US and EU authorities to overcome legal barriers to access to orphaned copyrighted works.

With copyright terms of life plus 70 years, and automatic copyright under national laws, there exist countless books, articles, pamphlets, letters, photographs, audio and visual recordings, software, architectural and other copyrighted works that are not being commercially exploited, and for which it is difficult or impossible to identify and or locate the owner of the copyright protecting the work. These works are largely inaccessible to the public, because copyright laws create large financial risks for acts of infringement associated with the copying, distribution and use of such works. Orphan works are potentially valuable to historians, documentary film makers, scholars, persons engaged in genealogical research, and artists. Solutions to the Orphan Works problem will require changes in copyright laws.

TACD points out that the lack of a legal solution that permits wide access to orphan works undermines the social credibility and legitimacy of international and national copyright law and its enforcement.

Among the measures that will expand access to orphan works are the following:

- Exceptions for uses of orphaned works.
- Limitations on damages for good faith infringement of orphaned works.
- Restrictions on the use of injunctions for new works that recast, transform, adapt or integrate an infringed orphaned work with a significant amount of original expression,
- Compulsory licensing of works
- Obligations to actively make protected works available, within the flexibility available under the WTO TRIPS Agreement

In considering mechanisms to expand access to orphaned copyrighted works, TACD notes that limitation on remedies for infringement are not subject to the “three-step” tests in the Berne Convention or the TRIPS that are applicable for certain exceptions to exclusive rights. For this reason, it is quite important to avoid creating new global norms on remedies for infringement that reduce the flexibility to expand access to orphaned copyrighted works.

1. TACD supports wide and accessible registration of copyrighted works to facilitate the identification of the owners of protected works.

¹ http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=34&Itemid=40

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2. TACD calls for flexible and economically sustainable proposals that promote and permit the massive public and private digitalization of our common historical cultural heritage. To prevent a digital "black hole of the 20th century".

3. TACD requests the creation of an exception in copyright law for Orphan Works that can give the cultural sector, public bodies and citizens as a whole, legal certainty when digitalizing historical material. TACD also recognizes the need for creating incentives for rightsholders to digitise their works independently, or in collaboration with the cultural sector or public authorities. TACD calls upon orphan works to be digitized both in private and public programs, like the EU project Europeana.

4. TACD believes that legally guaranteed digital preservation, and digital access to the content of "orphan works" for educational, scientific and research purposes, should be a pillar of International, European and US Copyright laws.

5. TACD supports the use of (i) copyright exceptions, (ii) limitations on remedies for infringement, or (iii) the issuance of non-exclusive compulsory licenses, in cases where reasonable efforts to locate a copyright owner have been unsuccessful.

6. TACD objects to IPR enforcement regimes, such as ACTA, or the enforcement measures proposed by the U.S. in the Trans Pacific Partnership Agreement, that would increase damages and mandate injunctions and other remedies for infringement of orphaned copyrighted works.

7. TACD calls for the establishment of flexible and fair EU and US regulations to address the rights, compensation and obligations when a work ceases to be an orphan work, taking into account the interests of the right holders and the persons who have invested in making the work available, and the public interest in expanding access to orphan works.

8. These recommendations also apply, *mutatis mutandis*, for related or neighboring rights.