

PROTECT YOUR ARTISTIC WORKS FROM BECOMING ORPHANS

© Lisa Shaftel, National Advocacy Committee Chairperson
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The last few years have spurred many discussions about the situation of orphan works, from the Glushko-Samuelson Intellectual Property Law Clinic's 2002 "Copyright Clearance Initiative," to the 2004 *Kahle vs. Ashcroft* case, to the Congressionally directed study by the US Copyright Office presently underway in 2005.

As an artist and an advocate for artists, all that I have learned about this issue has educated me that there are some steps that we can take as creators of intellectual property to help prevent our works from becoming "orphaned" in the future.

The US Copyright Office defines "orphan works" as "copyrighted works whose owners are difficult or even impossible to locate." In other words, a work that is still protected within its term of copyright, but the copyright owner cannot be contacted for a variety of reasons by a user who seeks permission to use the work.

As I've discussed in my White Paper about "Orphan Works," I define two categories copyright owners:

#1 Works created by individual living authors who still own their copyright, or are deceased and their copyright has passed to their heirs, and is unlocatable either because they have not kept their contact information current with the US Copyright Office, their name is not on their work, or they never registered their work at all. These copyright owners are simply unlocatable.

#2 Works created under a Work-For-Hire agreement (or where the author's rights were bought out in full), where a business or corporation owned the copyright, and that business or corporation is defunct and its assets- including intellectual property rights- were not sold or assigned to anyone else. In this circumstance, these works are truly orphaned in that no one owns the copyright although the term of copyright has not expired, and therefore these works are not in public domain.

Updates in US Copyright Law have brought us to the current terms of "life of the author plus 70 years;" that additional 70 years is basically an automatic renewal to ensure that the creator's heirs will retain legal control of the work and be able to benefit financially from it as part of the creator's estate. Although there's no foolproof, ironclad way to insure that your work won't become orphaned before the end of its term, there are some very easy things you can do to create records of yourself and your work.

First, register your works with the US Copyright Office. Update your address with the Copyright Office when you move (they have a form for that). If you move and then subsequently register a new work, the Copyright Office will automatically update your most current address without the need to file their change of address form. Now, I know that we don't register all of our work, especially the works that haven't been published. So,

Second, be sure to put your name and date of creation somewhere on all your works legibly. If your works exist in digital format, include your contact information in the file properties, and make hard copy prints (any size is fine) with your contact information and date on them and keep them together in a sturdy archival file folder.

Third, keep copies of your copyright registrations with hard copy prints of the works. The idea is to keep all the records together in an obvious place.

Fourth, tell your heir(s)- the person or people you will name in your will or living trust- about your works and show them where your paper files are. Even better, make them copies to keep. Give them contact information for the Copyright Office and inform them that in the event of your death that they must notify the Copyright Office in writing that the rights to your work have passed to them. Your heir may be your partner, children, parent, sibling, or anyone else of your choosing.

Fifth, write a will or living trust. You should do this anyway. You need to clearly state in this document to whom you transfer all or specifically some of your copyrights to upon your death. If you die without a will [intestate], or you haven't specified to whom your copyrights will be transferred, or transferred ownership of your copyrights into a trust, the "ownership of the copyrights will become fragmented when transferred to more than one legatee under the artist's will. (...) Intestate distribution laws seem to favor multiple beneficiaries."

"Fragmentation of copyright ownership creates very serious administrative problems because it results in fragmentation of control. In the United States, each joint owner of the copyright can, without the consent of the other co-owner or co-owners, exploit the work herself or grant a nonexclusive license to others. This can result in chaotic exploitation of the copyrights."

"Moreover, in most foreign countries, a license is not valid unless it is granted by all of the joint owners. This difference between U.S. law and foreign law makes it more important to avoid fragmentation of control when international exploitation of the artistic work is to be undertaken. Even more significant, however, is that for most important transactions it is necessary to grant exclusive rights in the copyrights. A grant of exclusive rights requires the action of all the co-owners and must be in writing." [*Art Law Handbook*, Roy S. Kaufman, Editor, © 2000 by Aspen Law & Business, a division of Aspen Publishers, Inc.]

If you simply assign your copyrights in a lump to your children (more than one child), the ownership of specific copyrights will be splintered by a probate attorney or court upon your death. You can prevent this by assigning the transfer of your copyrights to a trust collectively owned by your children, so that they will equally share all your copyrights. Or, you can create a legal entity such as a corporation or LLC owned by your children, and assign your copyrights as "works made for hire" to that entity. The duration of the copyright will then become either 95 years from publication or 120 years from creation, rather than the shorter term of the life of the artist plus 70 years. This is the one situation in which the work for hire designation can be used to the artist's favor! An attorney or certified public accountant can give you more extensive information about death and taxes.

And **sixth**, try to include a reversion of rights clause in your all-rights and work for hire contracts. This is a contractual statement that specifies that all rights to your

work will revert back to you, or your designated heirs; after a specific length of time; upon a specific date; or upon the dissolution, bankruptcy, or sale of the client's company. Convey to your clients who insist on all rights to your work or a work for hire agreement that the time may come when your work is no longer needed by them or will no longer have any financial value to them, or will be lost should their business shut down, and that you would like the rights to your work to revert back to your or your heirs when that time comes. Another good reason to always use a written contract! Be sure that your chosen heirs have hard copies of this agreement, and you have told them about it. You might also send a letter and copy of that agreement to the Copyright Office to keep with the registration of the work.

Benjamin Franklin, one of America's greatest inventors, said, "In this world nothing is certain but death and taxes." Many artists do not achieve success, in terms of fame and money, until they are elderly or have passed away. Copyright law provides for an artist's heirs to rightfully profit from that success. There is no way to guarantee that your work will not become orphaned in the future. But we can be proactive to protect our works as much as possible.