

May 4, 2005

Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington DC 20024

**Re: Reply comments on responses received to the Notice of Inquiry about Orphan Works,
Federal Register (January 26, 2005), Vol. 70, No. 16: 3739-3743.**

Dear Mr. Sigall,

Though I have not yet completed a detailed analysis of all of the responses to the Notice of Inquiry, I want to take the opportunity to comment on the responses I have studied – from libraries, archives, law schools, lawyers, teachers, scholars, related professional and non-profit organizations, and selected businesses like Google. I have discussed my preliminary findings with Carnegie Mellon University Libraries' governing council. Carnegie Mellon University Libraries has framed the following requirements for a solution to the orphaned works problem.

- **A clear, but broad, operational definition of “orphaned” works.** Many responses to the notice of inquiry describe serious problems in addition to locating the copyright owner that need to be addressed in the definition of orphaned works, for example, works for which neither copyright status nor ownership can be determined, and occasions where the copyright owner does not respond to multiple requests for permission. Many responses also provided compelling reasons for why the age or publication status of a work should *not* be factors in defining orphaned work.
- **A clear designation of what uses can be made of orphaned works.** Ideally, all uses should be allowed, including for-profit uses and the creation of derivative works. At minimum, non-profit uses for personal, scholarly, and educational purposes should be allowed, and an exemption for non-profit libraries, archives, and museums should be provided to not only enable, but encourage the digitization (preservation) and provision of online, open access to orphaned works.
- **A method by which copyright owners can assert their rights and reclaim works designated as “orphaned.”** Under no circumstances should works clearly protected by copyright be permanently stripped of that protection during their copyright term.
- **Clear guidelines that outline what constitutes a “good faith effort” to determine whether a work meets the criteria for orphan status.** We understand that guidelines will be somewhat ambiguous and vary for different media, but they must be sufficiently detailed to provide

potential users with some certainty that, if they follow the guidelines and a copyright owner later asserts that the work was not orphaned, they will have some protection in litigation. (See the requirement of limited legal remedies described below). Furthermore, the guidelines must also address the issue of “scale” raised in many of the responses from libraries and archives. The steps necessary to determine orphan status must not be too costly or labor intensive for individuals to conduct and they must be clear enough for a computer to implement and identify orphaned works. Requiring a laborious, case-by-case process or sanctioning a process that yields inconclusive results with no limitation of legal remedies will not solve the impediments to use and other problems associated with orphaned works.

- **Limited legal remedies for copyright owners who assert that their work was not orphaned after it has been (a) designated an orphan through a good faith effort and (b) used according to the laws that apply to the use of orphaned works.** If a “reasonable royalty” is to be paid for use of the work, the fee should be paid only after the copyright owner comes forward, and it should be capped so that potential users know what to expect should the copyright owner come forward. In addition, the exemption for non-profit libraries, archives, and museums that would allow the digitization and provision of online access to orphaned works should include a “take down” remedy for handling cases where copyright owners come forward to exercise their copyrights. If, however, a good faith effort was *not* put forth to justify the designation and use of an orphaned work, current legal remedies for copyright infringement should apply. The burden should be on the user to document his or her good faith efforts and on the copyright owner to prove that the effort was inadequate. As explained in many responses to the notice of inquiry, limiting legal remedies does not conflict with international treaties.
- **Legislation about orphaned works should not limit or otherwise alter “fair use” provisions in copyright law.**

In addition, it would be helpful if the Copyright Office would provide:

- Free, online access to all of their records that might help potential users determine copyright status and ownership
- A web-accessible, searchable database where copyright owners or their agents could provide current contact information and, whenever possible, a list of works to which they own the rights
- A web-accessible, searchable database where users could record their good faith efforts and designations of orphaned works – to avoid duplicated efforts

Sincerely,

Denise Troll Covey
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