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May 9, 2005

Jule L. Sigall,
Associate Register for Policy & International Affairs
U.S. Copyright Office
Via orphanworks@loc.gov

Re: Notice of Inquiry concerning "Orphan Works"
70 Fed. Reg. 3739-43 (January 26, 2005)

Dear Mr. Sigall:

I submit these reply comments in connection with the Copyright Office Notice of Inquiry concerning "Orphan Works," dated January 26, 2005.

The comments submitted to the Copyright Office in the initial round, taken as a whole, amply demonstrate that there are important issues to be addressed in connection with orphan works. They do not, however, indicate a clear solution, and I believe important work needs to be done in gathering evidence before a fair solution can be crafted.

I continue to be concerned that any initiative that is undertaken maintain a balance between the rights of copyright owners and the privileges of users. How we define "orphan works" is critical to that balance. I believe that "orphan work" status should be determined on an ad hoc basis, and should be contingent upon a bona fide effort to identify and locate the copyright owner to secure permission to use the work. But any response to this problem should be multi-faceted: the Copyright Office should not only seek to make available "true" orphan works, but should also try to minimize the number of orphan works by developing resources so that a bona fide effort to identify and locate a copyright owner is more likely to be fruitful.

Designating "Orphan Works"

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There were a number of reasons cited in the comments for the inability to obtain permissions to use works. These included:¹

- (1) copyright owner could not be identified
- (2) copyright owner, though identified, could not be located
- (3) copyright owner did not respond to inquiries

There are many reasons why one may not be able to identify or locate a copyright owner. For example, there may be no name associated with the work (e.g., a work posted online without permission and without identifying information); ownership of rights may be unclear (e.g., where the existence or scope of a contract or work for hire relationship is ambiguous), or rights may have been transferred by contract or by operation of law in such a way that it is virtually impossible to trace the copyright owner; the putative user may be unaware of available resources for identifying or locating copyright owners; or there may be a lack of cooperation/assistance from a third party with knowledge. Moreover, there may be many reasons why a copyright owner does not respond to inquiries, including for example, health or family circumstances, unwillingness to license, or a misidentification, i.e., the person isn't the copyright owner.

Ideally, unsuccessful bona fide inquiries would yield a group of works whose owners either are entirely unaware of their rights,² or who have no desire to preclude others from exploiting them. The exploitation of *those* works – through enhanced distribution and new creative uses of works – would indeed benefit the public interest. Of course, no definition of a “bona fide inquiry” could possibly ensure that only those works are included in the “orphan works” category. Some copyrighted works whose owners are aware of their copyright rights will be inevitably be designated orphans due to error, lack of cooperation from third parties, etc.

My concern, however, is that some of the proposals for a “reasonable inquiry” standard apparently envision a relatively low threshold, emphasizing easy and convenient use, and would be applicable to any work, regardless of age or publication status. As the standard of inquiry required diminishes, the risk of mistaken “orphan” designation increases.

The impact on the copyright owner of such a mistaken designation depends largely on what rights he/she has to terminate uses made in the belief that the work was an orphan, and what relief for past use is available. To the extent uses may continue – even with some form of compensation – they impose, in effect, a compulsory license on the work. Thus, it is important to give careful attention to the scope of the required inquiry and to the works that are eligible for orphan works designation: the broader the permitted use, the broader and more far reaching the compulsory license. This is problematic on two levels: (1) it is simply unfair to strip copyright

¹ There was another group of works cited in the comments – those for which the copyright owner denied permission – but I do not believe these are embraced within this inquiry and will not address them here.

² E.g., descendants of a soldier who made (unsigned) sketches of the battlefield in WWI.

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owners of the exclusive rights granted by law, based on a casual, unsuccessful inquiry, especially where there is considerable potential for error, lack of cooperation, or even wrongdoing (as in the example of a work placed online) by third parties; and (2) it risks violating U.S. obligations under the Berne Convention and other international treaties, for the reasons explained in the comments submitted by Professors Goldstein and Ginsburg.

Further Fact-Finding

Numerous comments submitted to the Copyright Office reported unavailing attempts to locate copyright owners to seek permissions, but provided little detail on the scope of these searches. Moreover, it would be helpful to develop further information on the *effect* of fruitless searches. Many users have been forthcoming about experiences that deterred use. Further exploration of circumstances in which users made a risk-assessment and decided to proceed – and what the consequences of those decisions have been – would also be helpful. Such information would assist the Copyright Office in assessing the scope of the orphan works problem and possible solutions.

Conclusion

I reiterate my recommendation that the Copyright Office pursue a multi-faceted approach to the orphan works problem, e.g., (1) improve sources of information available to users seeking to identify and locate copyright owners, including digitizing pre-1978 Copyright Office records, and possibly create a database of relevant information (e.g., mergers, sales of assets, etc.) concerning publishers, motion picture studios, record companies and other licensees of copyright rights; (2) provide education and guidance as to avenues available for finding copyright owners; and, if warranted by the evidence, and (3) formulate limited legislative relief to reduce the risk for those who have made a bona fide effort to locate the author of a copyrighted work, without success.

Sincerely,

June M. Besek