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## **Orphan Works Comments of FreeCulture.org**

### **Introduction**

FreeCulture.org is not-for-profit, non-partisan group of students and supporters. FreeCulture.org represents student groups at nine American colleges and universities, and students from over a dozen other schools across the United States and internationally. Our students are largely undergraduates, but also include graduate and professional students as well as high school students.

FreeCulture.org is concerned with the problem posed by orphan works in terms of barriers to new cultural creativity and advancement, to new economic endeavors and entrepreneurship, and to freedom of speech. FreeCulture.org's members, as students, deal daily with copyrighted material and the need to make subsequent or derivative use thereof. In educational situations, students may often rely on fair use doctrine in making subsequent uses. However, many of our members are creators outside the classroom, as musicians, authors of Web sites or Web logs (blogs), film or multimedia artists, etc. Such extracurricular activity often represents important educational or professional experience.

Outside the classroom, though, fair use is less likely to apply to subsequent uses, and more risky to rely upon. Students often have little experience in tracking down right holders to secure permissions, and little time or resources to do so. Therefore, copyrighted works whose owners are difficult to locate place an extraordinary burden on new creation for students; works whose owners are impossible to locate represent a bottomless pit from which our members cannot escape without putting themselves at an unacceptable level of legal risk.

### **Problem**

In response to the Copyright Office's question "whether there are compelling concerns raised by orphan works that merit a legislative, regulatory or other solution," we must answer resoundingly in the affirmative. FreeCulture.org appreciates this opportunity to communicate with the Copyright Office on behalf of our members in this regard.

### **Question 1: Nature of the Problems Faced by Subsequent Creators and Users**

FreeCulture.org has worked with the Electronic Frontier Foundation and Public Knowledge to

encourage students, members of the academic community, and the public to submit their experiences with the nature of the problems posed by orphan works to the Copyright Office. These stories have come from university librarians, digital archivists, fans of early computer and video games, literature aficionados, and individuals interested in professional reproduction of family photos. Their tales represent a failing of the current copyright system, and indicate the need for reform.

Attempting to extract general trends from these stories, the difficulties most often encountered in subsequent uses are in determining whether a work is covered by copyright, and if so, in locating the right holder to seek permission for use. The users most often encountering these difficulties appear to be individuals, largely for personal use, and non-profit organizations or educational institutions, largely for non-profit educational or archival use.

### **Questions 2-4: Nature of "Orphan Works"**

In general, "orphan works" should be defined as broadly and as flexibly as possible, while respecting right holders and allowing for the establishment of clear, effective, and simple rules for the subsequent use of abandoned works.

In response to the Copyright Office's inquiry, the final twenty years of a copyright term, as established by the Copyright Term Extension Act of 1998, are not acceptable as the only measure for eligibility as an orphan work, nor as a requirement for eligibility. Many of the stories encountered in our exploration of Question 1 involved works which were far from the final twenty years of their copyright term. Additionally, the burden of establishing the date of creation for undated works would be unacceptably high, particularly for students. Therefore, limiting the definition of "orphan works" to those works in the final twenty years of their term is inappropriate. However, it may be appropriate to allow the fact that a work is in the final twenty years of its term to be admitted as one piece of evidence that a work is orphaned, or to be considered as a factor for reduced liability in the good faith use of an orphan work.

### **Question 5: Effect of a Work Being Designated "Orphaned"**

In general, any system for the designation of orphan works should attend carefully to the balancing of protections for original creators with the possibility for wider distribution and use. For example, "orphaned" status should be revocable when right holders present themselves. Conversely, once a work has been established as orphaned, subsequent users should not be forced to re-prove that designation in the absence of new evidence to the contrary.

Specifically, a proposal to limit the liability for users of orphan works, such as that being developed at the Copyright Clearance Initiative of the Glushko-Samuelson Intellectual Property Law Clinic of American University's Washington College of Law, could be acceptable as one tool to achieve that balance, but it should not be the only one. To use the courts as the sole

solution to the problem of orphan works, even with statutory exemptions for "good faith" infringement, still requires subsequent users to put themselves at risk of having to bear the cost of defending themselves in litigation. For students -- as well as, we suspect, many individuals and non-profit or educational institutions -- that risk has a chilling effect on new creation. Therefore, an exemption for reduced liability is not acceptable as a stand-alone solution.

### **Question 6: International Implications**

The urgent need for a solution to the problem of orphan works behooves the Copyright Office and Congress to implement a solution as soon as possible. That may mean that an initial solution should skirt possible incompatibilities with international obligations. However, if the most effective solutions are found to be incompatible with international obligations, the importance of a national solution should be balanced with the possible need to reform international treaties.

### **Other General Criteria for Solutions**

In response to the Copyright Office's inquiry as to "what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders," FreeCulture.org further submits the following general criteria:

1. Any solution should balance the responsibilities of original creators with those of subsequent creators and users.
  - No solution should be implemented that imposes such a burden on original creators, or subsequent creators or users, that it inhibits progress.
  - No solution should be implemented that imposes an unfair burden on students, individuals, non-profit organizations, educational institutions, libraries, archives, or small business, either as original creators or as subsequent creators or users.
2. Any solution should provide clear rules for subsequent creators and users.
  - Any solution implemented should provide assistance for subsequent creators and users in locating right holders, and in determining the status of a work's copyright.
3. Any solution should provide clear rules for original creators.
  - Any solution implemented should provide clear rules for right holders on how to avoid having their work become orphaned, and incentives to do so.
4. Any solution must preserve fair use.
  - No solution should be implemented that reduces fair use rights or other statutory user's or consumer's rights.

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