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VIA ELECTRONIC MAIL

orphanworks@loc.gov

Mr. Jule L. Sigall
Associate Register for Policy and International Affairs
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
101 Independence Avenue, S.E.
Washington, D.C. 20540

Dear Mr. Sigall,

Cabinet magazine, a non-profit arts and culture quarterly published in Brooklyn, NY (<http://www.cabinetmagazine.org>), is pleased to be able to respond to the orphan works proposals received and publicly posted by the Copyright Office.

Cabinet is a non-profit, scholarly publication, and the majority of its republications of copyrighted images fall within the doctrine of fair use. As fair use applies equally to orphaned and non-orphaned works, we are thus probably less hampered by the problems confronting would-be users of orphaned works than are many of those who responded to your initial request for comments. We have, however, had a number of experiences with authors and publishers who chose not to pursue research, or who have limited the scope of their work, out of concern that the copyright challenges surrounding orphan works would limit its future accessibility. Particularly in the non-profit and academic worlds, resources are inevitably scarce and legal uncertainty has a decidedly chilling effect.

Given our awareness of the limited resources available to many of those who responded to the Notice, we are struck by the time consuming and expensive (and frequently unreasonable) lengths to which legal uncertainty currently drives the prospective users of orphan works. In many cases, the most expensive searches appear to have been initiated when the works themselves provided few (or no) clues as to their publication and copyright histories. In our view, any reform should acknowledge that, as a practical matter, the “orphan” status of a work can only be defined by the practical difficulty and expense of establishing its current owner, a difficulty which often does not correlate with the work’s age, or with any other objective factor.

We thus believe that some sort of “reasonable efforts” analysis provides the best approach to solving this problem, and the proposals offered by the College Art Association and the Copyright Clearance Initiative seem most sensible to us. Limiting remedies available to a copyright owner with respect to a user who has engaged

in a reasonable efforts search appears to offer the flexibility necessary to protect the legitimate interests of copyright holders (including *Cabinet*) while recognizing that there is a substantial body of works whose copyright status is, as a practical matter, unknowable with reasonable efforts. For some works, a reasonable search should reveal the copyright owner, while for other works no search at all would be reasonable. These will be subjective judgments, and they will be best made by the users who desire to return otherwise orphaned works into public circulation.

Whatever approaches the Copyright Office ultimately chooses to pursue, we urge it to remember that prospective publishers of orphaned works frequently have very limited resources, and that many of these works would disappear completely but for the efforts of authors, academics and publishers who currently struggle in an environment of legal uncertainty. We thank you for focusing attention on this important issue.

Sincerely yours,

Sina Najafi
Editor-in-chief