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By Electronic Submission

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Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington, DC 20540

Dear Mr. Sigall:

The Electronic Frontier Foundation ("EFF") respectfully submits these reply comments in response to the Copyright Office's Notice of Inquiry ("NOI") regarding orphan works ("OWs") dated January 21, 2005 and the Initial Comments submitted pursuant to that Notice on March 25, 2005.

Electronic Frontier Foundation (EFF) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. With over 10,000 members, EFF represents the interests of technology users in both court cases and the broader policy debates surrounding the application of law in the digital age. EFF opposes misguided legislation, initiates and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

I. Nature of The Problem and Solutions Proposed

As noted in the NOI, the issue of OWs has increasingly come to the attention of artists, writers, producers, distributors, librarians, archivists, and a whole host of content creators and users. From the initial comments submitted, there is no doubt that the inability to license OWs is a substantial and tangible barrier to achieving the full constitutional mandate of copyright, to "promote the Progress of Science." Thus, the only serious questions that remain from the NOI are how to address the scope and character of the solution to this problem.

A number of different answers to these questions were proposed in the Initial Comments. Many proposed solutions have merit and EFF encourages the Copyright Office and Congress to conduct a full exploration of them. Several of these solutions, however, have

components that present serious and troubling consequences. Each are noted below to help the Copyright Office recognize the pitfalls that might await it and its users if they were to be incorporated into the solution to the OW problem.

A. Escrow Accounts

A number of the proposals (e.g., Science Fiction and Fantasy Writers of America and The Harry Fox Agency ("HFA")) suggest that a possible solution to the orphan works problem would be the creation of an escrow account where OW users can deposit fees that will later be paid to copyright owners who come forth. This solution is both inefficient and ineffective. First, the primary purpose of addressing the OW problem is to further copyright's constitutional purpose by removing barriers to dissemination and creative use of works, not by imposing new barriers. Requiring that all users of any orphan work pay a significant fee to a non-copyright owner third party would impose such a burden and have a chilling effect on exactly the kind of activity (creation and dissemination of copyrighted works) that the copyright community is trying to solve here.

This is especially true in situations where, if the copyright owner had been available, little or no fee would have been charged for permission to use the work. This is a non-trivial possibility for many of the works at issue. For example, many works under a Creative Commons copyright license merely require attribution for commercial exploitation by others, not compensation. Requiring payment into an escrow account to use works where the copyright owners are interested solely in attribution would force an unnecessary and inefficient transfer of funds to an entity that has no interest in the transaction to begin with.

Second, there is no way to predict what the proper escrow amount would be for each work. Millions of works are potentially subject to orphan status, from software to movies to musical compositions to web site postings. To set a single escrow deposit amount for all of these diverse works would fail to recognize the individual investment, creativity, and circumstances involved in each. For example, a single web log ("blog") posting would rarely be worth a $1,000 escrow deposit while a full-length motion picture might be worth that, or more. Moreover, even if a single escrow figure were agreed upon for orphan works, this could come dangerously close to price fixing the value of all copyrighted orphan works, an outcome antithetical to the premise of a free market. It would be more efficient, equitable, and respectful to allow each copyright owner or her agent to individually address what compensation, if any, best suits use of their work after it has become orphaned.[1]

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[1] This is not to say that the same problem would arise in the context of a cap on potential damages in an infringement action by the copyright owner against the OW user. There, there would still be a range of possible payments, from nothing up to the cap. Thus, any compensation arrived at by the parties or the courts would still be subject to individualized factors and market forces.

Third, escrow accounts will cause needless and burdensome litigation between the copyright owners and the escrow administrators. As efforts like CARP and activities like those of ASCAP, BMI, and SESAC have demonstrated, collection, administration, and distribution of copyright payments can be highly contentious. EFF believes the goal of a viable OW solution should be to minimize the risk of litigation, not expand it. While some litigation between OW owners and OW users will be inevitable, introducing a third-party escrow system into the mix would actively contribute to additional conflicts and court actions.

Finally, as the Recording Industry Association of American's notes in its initial comment, none of the escrow proposals address the issue of administrative costs. Who pays for collection, accounting, and distribution fees? Who pays for litigation over proper use of the fees? The OW user? The OW copyright owner? EFF believes it would unfair to impose these costs on either party, especially since (in contrast to current PRO structures) neither has ever given permission for the third-party to undertake such a role.

B. Orphan Status Should Be Determined by the Difficulty of Ownership Identification, Not Type of Work At Issue

Numerous proposals attempt to draw distinctions between those works that should be subject to any proposed OW solution and those that should not. For example, HFA argues that musical composition works should categorically be exempt from any OW solution because many of those works are housed within HFA's online database. This approach, however, misses the connection between the problem and the solution, as outlined in the NOI. If we adopt a proper definition of orphan works, then no work will be improperly subject to an OW solution that doesn't suffer from the OW problem. For example, any musical composition in the HFA database would not be an orphan work per se because one can find the rightsholder in the database.[2] Therefore, none of the OW solutions would apply to it and HFA and its clients would have nothing to fear.[3] However, for musical compositions that do not appear in the HFA database and do qualify as orphans, an OW solution is appropriate. Categorical exemptions run the risk of being either over-inclusive or under-inclusive by their very approach.

C. There Should Be No Restrictions on Use of Orphan Works

The pursuit of creativity is at the heart of the Copyright Act. Thus, any orphan works solution should maximize the creative potential of those who legitimately qualify for OW use. If one imagines that, had the user been able to find the copyright owner, she would have been able to acquire (at some price) all of the various permissions she sought, then

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[2] This would also apply to any work registered with accurate contact information in the Copyright Office database. Any copyright owner who wishes to guarantee that her work is not orphaned can simply verify that the Office has her correct contact information.

[3] In fact, if anything, this would promote the business of organizations like HFA, ASCAP, BMI, and SESAC as they could market themselves as capable of preventing any work they administer from becoming an orphan.

there is no reason to restrict the uses she can enjoy because the work has been orphaned. This includes any of the exclusive rights set out in section 106 of the Copyright Act, as those are the rights that would have been subject to the hypothetical permission discussion with the missing copyright owner.

D. Contractual Obligations of a Copyright Owner Are Not Relevant to the Issue of Orphan Works

Two commentators, the Directors Guild of America ("DGA") and the Writers Guild of America ("WGA"), discuss the importance of respecting certain "creative rights" with regard to motion picture orphan works such as residual payments from the copyright holder of the motion picture to the writer or director. However, this discussion has nothing to do with orphan works. Rather, this is simply an issue of how the copyright holder chose to contractually compensate its employees or independent contractors. Use of a copyrighted work by a third-party, whether with permission or without, does not violate any of these so-called "rights" as they are not infringements of any copyright owned by the writer or director. Even mass infringement of a motion picture by commercial bootleggers would not give rise to any cause of action that the DGA or WGA members could pursue; therefore, use of an orphan work cannot implicate their rights either. If anything, the creation of an OW solution would give directors and writers additional incentive to help OW users find the copyright owner of the work in question to ensure payment on their contractual obligations.

Respectfully Submitted,

/s/ Jason Schultz

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