Mr. Jule Sigall
Associate Registrar for Policies & International Affairs
U. S. Copyright Office
Copyright GC/I&R
P. O. Box 70400
Southwest Station
Washington, D.C. 20024

Re: Response Comments on Orphaned Works

April 23, 2005

Dear Mr. Sigall,

Thank you for providing an opportunity to respond to the letter written by Mr. Jay D. Roth of the Directors Guild of America (DGA).

I worked in the film industry for approximately thirty-eight years, during which time I was involved in many aspects of filmmaking, including writing, producing, and directing. I will offer response comments on the DGA's proposal, and I will include an illustration drawn from my career.

Before doing that, I would like to suggest that the opinion of the Ninth Circuit Court of Appeals in *Effects Associates, Inc. v. Larry Cohen, Larco Productions, New World Pictures, et al* might have some relevance to the DGA request for licensing rights in Orphaned Films, and to the difficulty of researching the status of such works. The Court found that, in the absence of a written transfer of copyright, the production company and the initial distributor had only an implied non-exclusive license to use motion picture scenes commissioned by the producer. There are many feature films, television films, and commercials which incorporate commissioned scenes for which no written transfers of copyright were executed.

Because an implied non-exclusive license may not be transferred, complications might arise relative to the DGA licensing proposal and the orphaning of works in general.

To make the status of an incorporating work easier to determine, perhaps the application form for maintaining copyright could contain a cross-referenced section in which the copyright proprietor of a commissioned work could list the title of a work which incorporated the commissioned work by means of a non-exclusive license.

Now, on to my response comments.

NOT ALL FILMS FIT THE DGA MODEL

Not all films were, or are, made under DGA contract, and early DGA contracts did not have the earnings-sharing provisions mentioned by the DGA. I think it would be safe to say that the vast majority of all extant films do not fit the model described in the DGA letter.

DIRECTORS AND WRITERS WERE NOT THE SOLE CREATIVE AUTHORS OF ALL FILMS

The *producer* of a film—not the director—was the main creative force behind many films made by 'Hollywood' during the 1930s, 40s, 50s, 60s, and even later. With producer-created films, all the departments, including the writer(s), worked to support the producer's vision. Some of the best-loved films ever made were made in this way.

Was the director of a film able to make a significant, personal contribution under those conditions? Frequently. Was the director the author or prime creator of the film? Absolutely not... unless the director was also the producer.

GRANTING RIGHTS BASED ON A FALSE PREMISE WOULD BE INEQUITABLE

Granting directors and writers the exclusive right to grant or decline licenses for films that are classed as Orphaned Works—on the premise that only writers and directors are the creative authors of films—would prevent living producers from enjoying the licensing rights in those films for which the producer was the creative author.

THE VISUAL ARTISTS RIGHTS ACT OF 1990 EXCLUDES MOTION PICTURES

The DGA has referenced the moral protections offered by the Visual Artists Rights Act. Motion pictures are *excluded* by section 602 of the VARA.

THE UNEVENLY APPLIED MORAL RIGHT OF ATTRIBUTION

Despite the DGA's comments in support of the moral right of attribution, the DGA and the WGA have the contractual right to determine who will and who will not receive credits in the professions they represent. The DGA's contractual right also applies to those classes of director not represented in the DGA contract negotiations. Films often have more than one director and more than one writer. Very often those who do not receive a defining credit are responsible for creating work that is prominent in a film. Such work may even be a film's *raison d'être*.

While I support the right of any group to engage in lawful negotiations designed to produce contracts favorable to the members of that group, *contractual* rights should not be referenced when invoking *moral* rights. By stating that only *credited* writers and directors should be appointed to grant licenses of orphaned works, the DGA incorporates a *contract right* that is often at odds with the principle of the moral right of attribution.

From previous contacts with the Directors Guild, I have concluded that the DGA believes it is the organization best qualified to determine who qualifies as an artist (and thereby, who is, and who is not, entitled to the moral rights of an artist). I believe the DGA's policy is an example of precisely what the moral right of attribution was promulgated to prevent.

I find that evaluations of artistic merit are best left to the public and the judgment of history. The DGA's and the WGA's alteration of the historical record makes proper evaluation problematic.

Ironically, director John Frankenheimer was so incensed by the Writers Guild policies on screen credit that he pointed out, in a commentary track accompanying the laserdisc of the film *The Train*, that the credited writer did *not* write the screenplay Frankenheimer had used when directing that motion picture. Should someone who didn't write a film

be given the right to grant or reject licenses for that film simply because of an inaccurate attribution?

An Example of How the Attribution Problem Has Affected This Director

After a special screening of a film on which I worked, a member of the audience asked if I had actually been present on location when the production was filmed. I replied that I had not only been present on location, I had been the *secondary director* of the film, both on location and in the studio; that my unit consisted of an entire camera crew, an assistant director, a script supervisor, a makeup and hair person, plus drivers and transportation vehicles. I directed extras, stunt actors, photo doubles of the principal cast; and, in some cases, the principal players themselves. Many of the scenes I directed were also created and designed by me during the scripting phase of the production. Some of the primary director's scenes were re-edited by me (at the producer's request) after the director had completed his assignment.

It was necessary for the audience member to ask his question because the directing credit agreed to in my deal memo with the production company was disallowed by the distributor, in accordance with DGA provisions.

When the DGA requires a credit to be removed or changed to a euphemism that does not define the creative or directorial aspect of the work done, the director of record usurps attribution that factually belongs to someone else. *What's moral about that*?

A POTENTIAL DANGER OF DIRECTOR-MANAGED LICENSES

When a would-be user of an orphaned work seeks a license to use only a scene or sequence not directed by the director of record, imagine the temptation for the director of record to reject the application, or to insist that some of *his* scenes also be included, or that the sequence be restored to the *director's* cut. Even if the director granted the license, suppose the licensee desired to give credit. How would the licensee determine who the creator of that scene or sequence *actually* was? Certainly not from the records of the DGA.

How could the *actual* writer(s) of a film be determined and credited?

EVEN BIGGER PROBLEMS

The aim of the proposed Public Domain Enhancement Act was to cause the copyright in Orphaned Works to terminate. Once copyright is terminated, no licenses are required or possible. If copyright is not terminated, only the copyright proprietor (or an exclusive licensee), may grant a sub-license. For Congress to comply with the DGA proposal, wouldn't the Federal Government first need to designate itself as the proprietor of the copyrights in Orphaned Works, then give directors and writers an exclusive license of copyright for films that meet the DGA criteria? I foresee legal challenges.

PAYMENTS IN PERPETUITY

The DGA has referenced its contractual right to receive payments "from all non-theatrical revenue from the picture in perpetuity," and has asked Congress to protect those rights in any legislation related to Orphaned Works. However, Supreme Court Justice Antonin Scalia, writing in *Daystar Corporation v. Twentieth Century Fox,* has stated that Congress may not create a species of perpetual patent or copyright.

ALTERATION OF THE ORIGINAL AUTHOR'S INTENT IS ONE OF THE REASONS FOR

THE EXISTENCE OF PUBLIC DOMAIN

Advancement of the arts—one goal of the Constitution—is often achieved by those who see a new way to use the work of authors who preceded them. However, the DGA states that; "a user should not have the right to make changes to a motion picture without the ability of the creators to prevent such action."

Why not? Directors and screenwriters have repeatedly used and changed *literary* works without the permission of the original authors.

CREATIVE WAYS TO EXTEND REVENUES AND ARTISTIC CONTROL

I agree with the DGA that directors and writers might be able to profit from revenues that would be too low to interest multi-national copyright proprietors, but the desire to continue to profit from Orphaned Works would seem to be only that—a *desire*, not a requirement. Of course, individual directors would presumably have the right to offer to buy a film from a disinterested copyright proprietor. The actor William Boyd did this years ago, and profited handsomely. If a director's work were orphaned, the director might acquire a public domain print. The director could then market a "Director Approved" video version featuring interesting director commentary and insights. If directors are as creative as the DGA claims, who better qualified to extract the economic value remaining in a Public Domain work? Free enterprise—the American way.

IN THE DGA'S FAVOR

Perhaps the law should provide a means to block a declaration of 'orphanage' when an interested party can show that a copyright proprietor exists, is in a financial position to honor contractual obligations, and is intentionally avoiding those obligations by choosing not to maintain the copyright.

THE RIGHT TO MANAGE

There is another issue not apparent from the DGA letter: According to a documentary film produced under the auspices of the DGA, the Federal Government initially denied directors permission to form a union, because they were *management*. After much effort, the directors succeeded in convincing the government that they were not management but were beleaguered *employees* in need of the protections offered by a union. Through the intervening years, the DGA has slowly increased its control of the filmmaking process through standard labor-contract negotiations. If the DGA were to negotiate the contractual right to *manage* the licensing of Orphaned Films, they might be moving toward the risk of decertification. Persuading Congress to create legislation granting the same right may seem an attractive to way avoid that possible risk.

I think it would be unfortunate if Congress granted to directors the rights they have requested—rights which could adversely affect the public's use and attribution of Orphaned Works.

Jim Danforth