

VIA ELECTRONIC MAIL
mailto: orphanworks@loc.gov

May 9, 2005

Jule L. Sigall
Associate Register for Policy and International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 22024

Dear Mr. Sigall:

In response to the public comments submitted pursuant to the Notice of Inquiry published by the Federal Register of January 26, 2005 entitled “Orphan Works,” we hereby submit the following Reply Comment on behalf of a coalition of organizations whose work supports independent and documentary filmmakers. We thank the Copyright Office for the opportunity to respond to the initial comments submitted on the issue of orphan works. This reply represents the combined response of the submitters of Initial Comments OW0686 (International Documentary Association) and OW0663 (Various Independent Film Interests). Our combined coalition includes:

- **Association of Independent Video and Filmmakers (AIVF):** a non-profit membership organization with 5,000 members serving local and international film and videomakers—from documentarians and experimental artists, to makers of narrative features—by providing a variety of informational services and other resources (<http://www.aivf.org>).
- **Doculink:** an association of Los Angeles documentary filmmakers that meets regularly to review the projects and problems of local filmmakers (<http://www.doculink.org>).
- **Film Arts Foundation:** a non-profit membership service organization with 3,000 members providing comprehensive education, equipment, information, consultations, and exhibition opportunities to independent filmmakers (<http://www.filmarts.org>).
- **FIND (Film Independent)** (formerly IFP/Los Angeles): a non-profit membership organization that is home of the Spirit Awards and the Los Angeles Film Festival. It has over 6,500 members.
- **International Documentary Association:** a non-profit organization with over 2,500 members representing the interests of documentary filmmakers (<http://www.documentary.org>).
- **IFP (Independent Feature Project):** a not-for-profit membership organization designed to foster a more sustainable infrastructure that supports independent filmmaking and ensures that the public has the opportunity to see films that more accurately reflect the full diversity of the American culture. Headquartered in NYC, IFP has chapters in Austin, Chicago, Minneapolis/St. Paul, Santa Fe, and Seattle, and is part of an international network of organizations each supporting their own national filmmaking efforts (<http://www.ifp.org>).
- **National Alliance for Media Arts and Culture (NAMAC):** a non-profit association dedicated to the support and advocacy of independent film, video, audio, and online/multimedia arts (<http://www.namac.org>).
- **National Video Resources (NVR):** an organization that provides grants to filmmakers and creates educational programming using film and video (<http://www.nvr.org>).

The large volume of comments received by the Copyright Office in response to the Notice of Inquiry reveals a clear consensus that the issue with orphan works is a significant one that affects a broad range of parties—from librarians to scrapbookers to filmmakers. Although there were a few dissenters, the large majority of proposals noted that orphan works present a problem that should be solved. Moreover, while the comments have come from individuals and organizations whose interests run the gamut of intellectual property, many comments have coalesced around the following elements, which we support:

- a voluntary, searchable on-line listing to allow copyright owners to easily post contact information, thereby making certain their works are *per se* not orphaned;
- a strict limitation on liability for a “bona fide” user of the orphan works;
- a requirement that the user of an orphan work make “reasonable efforts” to find the copyright owner and post a description of those efforts on a list accessible to the public before taking advantage of the limitation on liability (or other proposed remedy);
- a categorical, generally applicable approach, rather than an *ex ante* “case-by-case” approach to determining what constitutes “reasonable efforts”;
- single use treatment of orphan works;
- benefits to the widest possible range of potential users;
- no recommendation of special treatment for unpublished works.

Regardless of any variations from their initial proposals, the drafters of Initial Comment OW0663 (Various Independent Film Interests) and the drafter of Initial Comment OW0686 (International Documentary Association) support these elements and recommend that the Copyright Office integrate them into its solution to the orphan works problem. Together, these groups of independent and documentary filmmakers note the following:

I. Any solution to the orphan works problem should include a voluntary copyright claimant’s directory.

A number of the comments, including Initial Comment OW0646 (MPAA) and Initial Comment OW0675 (Orphan Film Symposium), recommend a voluntary on-line directory in which copyright owners may list works that they wish not to become orphaned. We continue to support creating such a directory. This will allow owners to have an easy means of making their works *per se* non-orphaned without having to go through the more elaborate process of the current fee-based formal registration system. A listing will allow potential users to have a direct and easy method to contact the owners of copyrighted works. A correct entry on such a claimant’s listing would turn any “reasonable efforts” search into an easy search, as any work listed is *per se* non-orphaned. Additionally, because this listing would be entirely voluntary, it would not be an affirmative burden on the copyright holder that might conflict with international intellectual property treaties such as the Berne Convention and TRIPS.

II. Any solution to the orphan works problem should incorporate a “reasonable efforts” search requirement.

A large number of comments recommend a reasonable efforts search as part of becoming a “qualified” user of an orphan work, regardless of whether the proposal is a limited liability, default license, or “safe harbor” model. Initial Comments recommending this requirement cover a broad range of commenter types, including Initial Comment OW0595 (Glushko-Samuelson IP Law Clinic of American University’s Washington School of Law), Initial Comment OW0629 (Public Knowledge), Initial Comment OW0630 (Library of Congress), Initial Comment OW0646 (MPAA), and Initial Comment OW0687 (RIAA). The majority of those who recommend reasonable efforts

also recommend a categorical rather than a case-by-case basis for determining what constitutes a proper “reasonable efforts” search, meaning that a user would undertake reasonable search efforts and would then be able to immediately start using the work without any *ex ante* approval of the efforts. We continue to support “reasonable efforts” requiring a statement that includes an affirmation of “good faith” or a signed affidavit that would go on record with the Copyright Office. This will create a meaningful record of the user’s search without the Office having to actually review each user’s search for reasonableness. This record of each user’s “reasonable efforts” could be made available in a searchable format. This would allow copyright owners of orphan works to have notice that their work is in use and will encourage them to place the work in the voluntary claimant’s directory to prevent future characterization of the work as an orphan. This would also allow potential users to be able to utilize previous search efforts when determining how to go about their own reasonable efforts search.

Filmmakers would also appreciate some non-binding guidance for reasonable efforts—perhaps in the form of Frequently Asked Questions, similar to the Copyright Office’s present information Web pages, or in the form suggested in Initial Comment OW0663 (Various Independent Film Interests). We do not, however, support any binding requirements or case-by-case determinations of reasonable efforts. If the Copyright Office were required to make a case-by-case determination of each user’s search efforts, the process would create a significant burden on the Copyright Office and would likely take an unacceptably long time for potential users, who are often working under serious time constraints.

III. A limited liability model is the best solution to the orphan works problem.

A majority of the comments recommend a limitation on liability for users of orphan works that have fulfilled some amount of reasonable efforts in trying to locate the owner of the copyright in the work. Various forms of a limited liability model with a low cap on damages are supported by a broad range of comments including Initial Comment OW0595 (Glushko-Samuelson IP Law Clinic of American University’s Washington School of Law), Initial Comment OW0629 (Public Knowledge), Initial Comment OW0630 (Library of Congress), Initial Comment OW0646 (MPAA), and Initial Comment OW0681 (Google). Moreover, a majority of the comments that recommend a specific dollar amount for the cap suggested an amount of \$500 or lower. We continue to recommend that the Copyright Office’s solution to the orphan works issue incorporate a limited liability scheme with a damages cap of no more than \$500, no injunctive relief, and no attorneys’ fees.

Once given legislative approval, the limited liability model does not require continuing administration by the Copyright Office and simply depends upon the current judicial system if there are conflicts over infringement. This is especially valuable for users who wish to either incorporate a large number of orphan works into a new work (such as documentary filmmakers) or collect and preserve a large number of works (such as librarians or archivists) because they would not have to pay any fees until challenged. Additionally, the limited liability model protects the interests of surfacing copyright holders by not entirely foreclosing any potential financial gain from their works.

Under a limited liability model with a clear and strict cap, potential users can meaningfully assess the financial risks of using orphaned works rather than being discouraged by fear of unlimited and unknown liability from incorporating orphaned works into new creative endeavors. The limited liability model will keep artistic expression from being chilled by financial uncertainty and provide the public with broader exposure to valuable works from our cultural background.

IV. Unpublished works should not receive special treatment under any solution to the orphan works problem.

Only a small minority of Initial Comments included a recommendation that unpublished works receive different treatment than published works. Instead, a wide variety of different groups and individuals—from libraries and archives, to artists and filmmaker groups—have recognized that some of the most culturally important works are unpublished and that it is vital that these works be allowed to be utilized, both by being exposed to the public in their original forms and by incorporation into new, valuable works. General copyright law recognizes the importance of these works by providing them with copyright in a similar manner to published works. Orphan work status should be conferred in a similar fashion. However, any remedies under other laws intended to protect privacy or other rights will, of course, be left undisturbed by this approach.

V. Orphan status should only be conferred for a single work and a single user at a time.

Many of the comments recommend that works should be considered to be orphans for one use, which would include any and all rights a user must ordinarily exercise in order to realize a creative work as they have envisioned it, regardless of which rights under 17 U.S.C. §106 this implicates. This recommendation is supported by comments representing a range of organizations including Initial Comment OW0595 (Glushko-Samuelson IP Law Clinic of American University's Washington School of Law), Initial Comment OW0610 (Getty Trust, Metropolitan Museum of Art, Guggenheim Foundation), and Initial Comment OW0646 (MPAA). This approach allows a surfacing owner to prevent a work from being classified as an orphan in the future by listing it in the directory of claimants but allows the new user to continue to use the work freely. This approach recognizes that an owner may surface after an orphan work is used publicly or that an owner may become more accessible between searches, and balances the needs of potential users without foreclosing any future financial benefit for a surfacing owner. Additionally, by allowing copyright owners to reclaim their right to receive future financial gains from their work, this approach should not be in conflict with international intellectual property treaties.

VI. Any solution to the orphan works problem should benefit as wide a range of users as possible.

The majority of comments support proposals that benefit a wide range of users rather than a select group. While some particular groups clearly have specific needs in terms of orphan works that might be addressed by a limited fix, we recommend that the Copyright Office implement a solution that applies to the widest group of users, if not all users. The wide range of comments strongly indicates that there are many different kinds of users who are troubled by orphan works. By choosing to implement a broad reaching solution that is not limited to benefiting a small segment of those users, the Copyright Office can provide clarity to the wide landscape of potential users and encourage the broadest use of these important cultural items.

VII. Conclusion

While we have drafted our response to reflect specifically the interests of filmmakers, we applaud the wide variety of individuals and groups that have weighed in on the orphan works issue and the many thoughtful contributions proposing a wide range of solutions that would benefit a broad cross-section of users. We thank the Copyright Office for engaging this important issue and for providing us with the opportunity to respond. We would welcome the opportunity to participate in hearings, if they are held. If there is any additional information or clarification we can provide, please do not hesitate to contact us.

Respectfully submitted,

Jennifer M. Urban

Director

and

Christine Kawasaki

Jill Rubin

Clinical Interns

USC School of Law Intellectual Property Clinic

On behalf of

Association of Independent Video and Filmmakers (AIVF)

Film Arts Foundation

IFP (Independent Feature Project)

National Alliance for Media Arts and Culture (NAMAC)

National Video Resources (NVR)

And

Michael Donaldson, Esq.

DONALDSON & HART

On behalf of

Doculink

FIND (Film Independent) (formerly IFP/Los Angeles)

International Documentary Association

Contact information:

Jennifer M. Urban

Director, Intellectual Property Clinic

The Law School, Rm 410

University of Southern California

Los Angeles, CA 90089-0071

Tel: 213-740-1538

Fax: 213-740-5502

e-mail: jurban@law.usc.edu

Michael Donaldson, Esq.

DONALDSON & HART

9220 Sunset Boulevard, Ste 224

Los Angeles, CA 90069-3501

Tel: 310-273-8394

Fax: 310-273-5370

e-mail: mcd@donaldsonhart.com