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May 9, 2005

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

Re: ***Google's Response to Notice of Inquiry Regarding Orphan Works***

Dear Mr. Sigall:

Google appreciates the opportunity to reply to the comments submitted in response to the Copyright Office's Notice of Inquiry regarding orphan works.

As illustrated by the volume and quality of the responses to the Notice, orphan works constitute an important problem that requires a thoughtful solution. We limit this reply to two significant issues raised by many of the comments.

1. Needed: An objective definition of what constitutes a "reasonable search"

The reinvigoration of orphan works requires that potential users and publishers have an effective means to assess – and, through reasonable efforts, minimize – legal risks associated with their use. For that reason, we believe that an objective definition of what constitutes a "reasonable search" is essential.

Many commentators have suggested that there should be instituted a "reasonable search" exception from, or limitation on, liability for copyright infringement.[1] Under these proposals, the unlicensed user of a work would be exempted from liability for infringement if he conducted a "reasonable search" and was (1) unable to determine the current holder of the copyright on the work at issue, or (2) unable to contact the current holder of the copyright on the work at issue because no contact information for the current holder was available.

We agree that a "reasonable search" exception should exist. At the same time, we understand the case for variability in the application of that exception across the vast and diverse body of orphan works: what constitutes a "reasonable search" for the holder of the copyright on an unpublished letter by a Civil War soldier may be different from a "reasonable search" for the holder of the copyright on a newspaper story published in a now-defunct newspaper in 1970. We also embrace the desirability of a "reasonable search" standard that can adapt to changing means of performing searches as well as future amendments to the law of copyright. However, without an objective "reasonable search" standard that provides definitive and reliable protection, little of the potential benefit of orphan works reform will be realized.

Absent an objective standard, a potential user or publisher of an orphan work can never, and will never, feel certain that her search will be deemed sufficiently "reasonable" by a court in the event of an infringement suit.[2] To avoid the expense of defending a suit over whether a search was "reasonable," potential users will avoid the very use of orphan works that the protection is designed to foster. The threat of expensive litigation against a potential user is particularly acute here, as a determination of whether a search was "reasonable" would invariably be a disputed issue of fact which could not be decided on summary judgment. *See* Federal Rule of Civil Procedure 56(c). In other words, any infringement suit where the accused infringer's defense was that he performed a "reasonable search" for the copyright holder would, barring settlement, go to trial.

Simply put, uncertainty breeds caution, and excessive uncertainty will generate excessive caution. If they are to make the investments that will enable the creative use of orphan works,

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[1] *See, e.g.*, Comment of the Association of American Publishers, Association of American University Presses, and the Software & Information Industry Association ("AAP Comment") at 3; Comment of Dwayne Buttler, Kenneth Crews, Dr. Fritz Dolak, Donna Ferullo and Carl Johnson at 4 and 7; Comment of Professional Photographers of America at 5; Comment of Public Knowledge at i and 4-6; and Comment of Society of American Archivists at 6.

[2] *See* Comment of Stanford University Libraries at 3 ("Any uncertainty within the copyright scheme results in libraries and archives acting cautiously thereby diminishing appropriate use of Orphan Works.").

libraries, archives, universities, museums, businesses and others must be able to develop reliable expectations about the risks inherent in the use of those works.

Creating an objective "reasonable search" standard also would benefit copyright holders. Copyright holders are no more interested in investing money in a losing lawsuit than are the users of orphan works. If alleged infringers have a straightforward means of demonstrating that a "reasonable search" was undertaken prior to the use of a copyrighted work, copyright holders will:

1. know precisely where, and how, they should publicize that they hold the copyright on a particular work to preclude parties from claiming the "reasonable search" defense; and

2. be able to demand proof of a "reasonable search" from alleged infringers who claim that their use was protected. With this information, the copyright holder can better assess its ability to win its lawsuit.

The definition of the "reasonable search" required to qualify one's use of an orphan work as protected should consist of two parts:

1. a clearly-defined set of practices codified or otherwise recognized as reasonable *per se*; and

2. general guidelines regarding other types of searches that might be deemed reasonable under certain circumstances.

Only where a user failed to conduct a "reasonable *per se*" search would the question of reasonableness remain a litigable issue.

The universe of searches considered "reasonable *per se*" for a given work will depend on the work's type, age, publication status, and perhaps other factors; more than one type of search may be "reasonable *per se*" for a given work. However, one type of search should be considered "reasonable *per se*" for all works registered with the Copyright Office: the centralized and automatically searchable database of works registered with the Copyright Office we proposed in our comment would provide a straightforward means to perform a "reasonable *per se*" search. Such a database would be "scalable," allowing the storage of a large amount of information and permitting fast automated searches of a large number of works.[3] For published books, an automated author and title query of the database that returned no records should be codified as a "reasonable *per se*" search. Comment should be sought from those who routinely perform searches for copyright ownership as to other practices that should be deemed "reasonable *per se*."

[3] *See* Comment of Sidney Verba of Harvard University Library at 4 ("[T]he solution should scale – that is, one should be able to apply it cost-effectively to large numbers of works."); AAP Comment at 4-5 regarding the benefits of a database of copyright holders; Comment of Michigan State University at 2 ("Timeliness is particularly important for educational uses. Identifying orphan works on a case-by-case basis could be extremely slow and labor intensive, even with clear guidelines.")

As we noted in our comment, and as others have noted as well, a searchable, centralized database would afford other benefits to copyright holders and potential users of copyrighted works alike. Such a database could be a centralized location at which:

- holders of copyrights could provide notations regarding licensing (including, for example, a statement that the holder will not license the work) or a link to licensing and payment terms that would enable an interested party to secure a license to the work through the Internet, thereby facilitating compensated use and greatly reducing the transaction costs of licensing a work;

- creators of unpublished works could post information about themselves and their works, allowing the copyright owner to be contacted and the work to be published under terms favorable to that copyright holder; and

- those searching for copyright holders could, on a work- or holder-specific basis, share the results of unsuccessful searches, including leads towards finding copyright holders or affidavits documenting "reasonable *per se*" searches that were unable to locate the holder (potentially prompting that copyright holder to come forward).

For all of these reasons, Google strongly supports the creation of a centralized, searchable database, the search of which would qualify as "reasonable *per se*" and afford users of orphan works unambiguous protection from infringement claims.

2. Any orphan works protection should apply to for-profit as well as non-profit entities

We reiterate our strong belief that any solution to the problem of orphan works should apply to for-profit as well as non-profit entities.

Though most commentators did not address this issue, a few comments can be read to imply that orphan works protection should extend only to non-profit or non-commercial entities. We believe there is no justification for such a distinction. If the Copyright Office concludes that the creative use of orphan works is a public good, maximizing their dissemination should be a priority. Both non-profit entities (such as libraries, universities, and non-commercial archives) and for-profit entities (such as Google and Google Print, book publishers, and film producers) have a role to play in reinvigorating orphan works through their use and dissemination. Google Print is but one example of a service by a commercial entity that effectively advances the broader policy objective of enabling public access to out-of-copyright and orphaned works.

"[T]hat 'Progress of Science and useful Arts' cannot occur unless authors and inventors are privileged to build upon earlier progress and earlier invention – has long been a virtually unchallenged premise in all branches of the law of intellectual property." *Lotus Development Corp. v. Paperback Software Inter.*, 740 F.Supp. 37, 77 (D. Mass. 1990). Permitting for-profit entities to use orphan works is essential to the meaningful realization of this progress. Confining the ability to "build upon earlier progress and earlier invention" to those lacking any commercial motive would

retard the progress of science and useful arts and needlessly constrain the central benefit of orphan works reform: the increased use and dissemination of works abandoned by their copyright owners.