

Sent by electronic mail to orphanworks@loc.gov

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, DC 20024

Subject: Reply Comments – Orphan Works Notice of Inquiry

Dear Mr. Sigall:

The J. Paul Getty Trust, The Metropolitan Museum of Art, The Solomon R. Guggenheim Foundation, and the Los Angeles County Museum of Art (LACMA) submitted Initial Comments (OWO610 and OWO644, respectively) to the Copyright Office in the Orphan Works matter, and now submit these Reply Comments. The Denver Art Museum, The Indianapolis Museum of Art, The Museum of Modern Art, the Spencer Museum of Art, the United States Holocaust Memorial Museum, and The Wolfsonian - Florida International University support our Initial Comments and these Reply Comments.

In reviewing the Initial Comments, we note that while there is a great deal of consensus on many aspects of Orphan Works (including the basic premise that they are a problem), there are some differences of opinion as to how best to address the problem. The most important of these differences is whether it is best to provide an outright exemption for those who use Orphan Works (which is what we propose) or merely the prospect of reduced damages. The second issue is how best to formulate the requirement that all users perform reasonable due diligence searches before declaring a work is orphaned. We wish to further address these two issues below. In addition, we wish to underscore the importance of including unpublished works in the definition of orphan works.

Safe-Harbor Exemption

In our Initial Comments, we proposed a five-year, safe-harbor period during which a user could use an Orphan Work, on a nonexclusive basis only, without payment of license fees or fear of a cease and desist demand.¹ We note that U.S. copyright law includes a number of exemptions that do not unduly prejudice the rights of copyright owners. We believe that an exemption for Orphan Works, as we've proposed it, would follow these precedents and would violate neither TRIPS nor the Berne Convention.

¹ Some of the others who suggested similar approaches were: the George Eastman House (OWO700), the Library of Congress (OWO630), and the UCLA Film and Television Archive (OWO638).

We believe that an orphan works solution will not go far enough unless it actually encourages uses of works that benefit the public. The solution must balance the rights of copyright owners to exercise their rights under Section 106, and the rights of users to recoup their investments in collecting, securing, preserving, and/or bringing the work to the public's attention. We note that these activities are the very mission of U.S. collecting institutions, from museums to archives to historical societies.

Art museums and others will find the specter of money damages, even minimal money damages such as the \$100 - \$500 suggested by some, to be too much. This is especially true when one considers the limited budgets museums have for publishing, educational activities, and website projects and the huge collections of orphan works in the vaults and storerooms of American museums. There are hundreds of thousands of orphan works that could be brought to the public's attention if institutions like ours were assured of an exemption from liability. As we stated in our Initial Comments, if the goal of an orphan works solution is to get important cultural material out of storage and available to the public, then a solution that includes money damages will not remove the deterrent that now exists and will not be effective. Even reduced damages, when multiplied by a fraction of an institution's orphan works, become prohibitively expensive very quickly.

The limited-term, safe-harbor exemption does not penalize copyright owners for being unidentifiable or unlocatable, nor will it violate international law. The safe-harbor proposal strikes a fair balance of interests that recognizes owners' rights and users' efforts. Furthermore, we believe that without a limited-term, safe-harbor exemption, capped damages will become a *de facto* payment. On the other hand, we believe that the safe-harbor exemption will help foster a positive working relationship between orphan work users and newly identified copyright owners, rather than create an atmosphere of conflict and litigation.

Reasonable Search Standards

Many submissions supported a reasonableness standard of due diligence for searching for copyright owners. The wide range of different uses and different users of orphan works, however, make it necessary to suggest a flexible due diligence standard; this standard should reflect reasonableness when taking into account the context and all of the circumstances. Specific industry practices should be considered and weighted with importance. A rigid checklist of things one must do is not the solution.

Unpublished Works

Unpublished works make up large parts of museum collections. This is especially true for unique works of fine art that may not be defined as "published" by the copyright law even though they have been offered for sale and exhibited on museum walls for many years. Often, it is a complicated research project to determine whether or not the work was published, and at the end of the research, a definitive answer may still be elusive. Moreover, it cannot be assumed that the authors of our orphan works did want them circulated. Indeed, the opposite is quite often the case. The authors entrusted them to us to do as we see best, but faulty paperwork (quite common

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in the case of early collections of letters and photographs, in particular) prevents us from taking risks. Therefore, we reiterate our position that all copyrighted works – published and unpublished – should be covered by the orphan works solution.

Signature Pages Follow.

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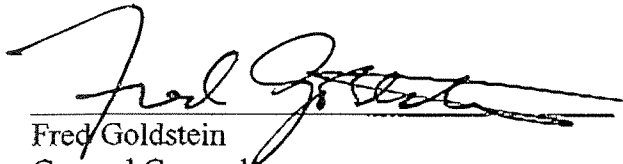
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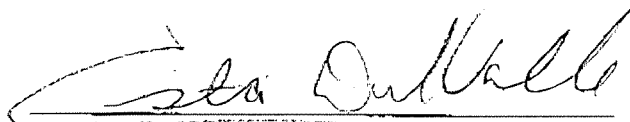
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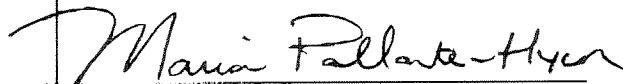
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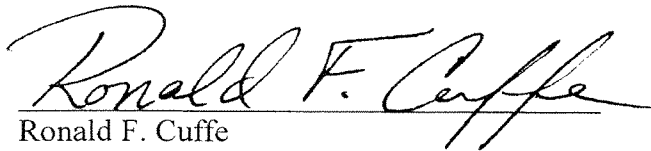
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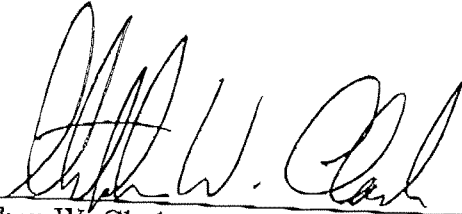


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