



Science Fiction and Fantasy Writers of America, Inc. (SFWA)

P.O. Box 3238

Enfield, CT 06083-3238

Reply Comments Concerning the Round Tables on Orphan Works and Mass Digitization

TO: Maria Pallante,
Register of Copyrights
via electronic submission, May 21, 2014, to
<http://www.copyright.gov/orphan/comment-submission/>

RE: FR Doc. 2014-02830. Notice of Inquiry, February 10, 2014
and issues raised during the public Round Tables held in
Washington, D.C., on March 10 and 11, 2014
Copyright Office Docket Number 2012-12
Extension of Deadline, 77 Fed. Reg. 18932

SFWA, Inc. respectfully submits the following comments.

Statement of Interest

SFWA is a membership organization of over 1,700 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published with other works. Of particular note, SFWA's membership includes a significant number of authors' estates, and has a long-standing record of advocating for the interests of authors' estates against those who would infringe on those estates' rights for their own profit.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this Inquiry.

I. Weight Given to Various Comments

As we said in our earlier comments, when reviewing the submitted comments, the Copyright Office should place primary weight on the interests of the men and women who create protected expression. The interests and voices of the creators should be given substantially greater weight than the interests and opinions of transferees of copyrights and portions of copyright.¹

The views of transferees of copyright who have either licensed parts of a copyright – First English Language Serial Rights, for example – or obtained rights in a work as a work made for hire should not carry substantial weight with the Copyright Office. We include in this group of transferees publishing companies, film and television production companies, and organizations representing such transferees. However economically important those views may be, they are outside the scope of the Constitutional authority for copyright.

Similarly, the views of museums and libraries only represent the owners of copies of works and not the interests of the creators of the works. In cases where they have acquired copies of published works where the copyright is held by the creators – which represent the overwhelming majority of their collections – they neither hold copyrights themselves nor represent the interests of actual creators, and their views should be given substantially less weight than those of the natural persons who are creators.

II. SFWA's controlling view

Above all other points, SFWA believes that control of copyrighted material must be vested in the creator and rightsholder. The copyright holder may decide to release a work into the public domain, to sell a specific license to the work, or to hold the material away from public view. The decision must rest with the holder of the copyright for the full term of the copyright.

¹ The Constitution empowers Congress to grant copyright to authors. U.S. Const. Art. I, § 8, *cl.* 8. This grant of rights was considered sufficient by the Founders to encourage “promote the Progress of Science and the useful Arts.”

III. Observations on the Round Tables

A. Participation in the Round Tables

There was far too little participation by working commercial writers. Publishers do not represent writers, and their interests. Especially when it comes to the status of out of print works and when works can be declared to be Orphan Works, the interests of writers and publishers are very different.

At the same time, there were so many different stakeholders present holding widely divergent interests that not enough time was devoted to any particular topic of concern and no consensus could be reached.

B. Facilitating the search for rightsholders

The Round Tables were not structured to give adequate attention to the ways in which the Copyright Office could itself facilitate the search for the rightsholders of potentially orphaned works, and attempts to direct the discussion to those topics were given short shrift.

The Copyright Office should hold another set of roundtables focusing on initiatives already within its purview that would ameliorate the situation that has caused the concern over orphan works, digitization and the need to optimize records — especially measures that do not require either legislation or formal rulemaking under the Administrative Procedures Act. The Copyright Office needs to give the highest priority to improved and expanded recordation of, and especially public access to, all rightsholders' copyright data . This should include accurate and updated contact information on rightsholders, all renewals and transfers of copyright (records of possible failures to renew copyright would, perhaps, be especially important), and all other information about copyrighted works that can be used to determine if a work is actually orphaned. None of these initiatives require any change in law, statutory or administrative; they require only ministerial acts.

C. Facilitating the search for rightsholders

The Copyright Office should cooperate and work closely with international organizations such as the Online Computer Library Center, Inc. (OCLC) and its WorldCat database and the International Standard Name Identifier database (ISNI) maintained by the ISNI International Agency to provide definitive, disambiguated information about authors and other rightsholders.

The Copyright Offices also should work directly with other offices within the Library of Congress to both use existing records and correct errors found in those records.

D. Mass digitization and diligent searches for rightsholders and their heirs

Mass digitization is and will remain incompatible with the interests of rightsholders unless it includes a diligent search for rightsholders so that works are not inaccurately designated as orphans. At the same time, the topic of mass digitization is separate from that of Orphan Works and should not have been included in these roundtables. The Copyright Office should be involved in the definition of diligent search for rightsholders, and was sidetracked by stakeholders for whom diligent search would be administratively inconvenient.

We believe that the Copyright Office should hold additional roundtables specifically devoted to what it can do to define and enhance diligent search for rightsholders to address the concern that findable rightsholders will be declared orphans on the basis of insufficient effort.

IV. Responses to Comments Submitted by Individuals and Organizations

We concur with many of the comments made during the Round Tables by Ann F. Hoffman for the National Writers Union. We especially agree that it is more important to develop a registry of creators and rightsholders, with contact information, which echoes

our recommendation for an Author Information Directory.² Ms. Hoffman noted that at this time there are no comprehensive and easily used directories or registries in place. Further, she notes that in many cases works have been designated as orphans when an easy search with existing databases would have found the rightsholders.³

It is, as she noted, important to not put the burden of demonstrating that a work is not an orphan on the rightsholder. The burden should be placed on the person or organization wishing to use a work to conduct a diligent search for the rightsholder.⁴ Indeed, existing copyright law already does so; any designation of a work as an orphan is an *exception* — an affirmative defense to infringement of the rights established and allocated by the Copyright Act.

As we note above, the Copyright Office should digitize its records quickly and work with the Library of Congress's own collection and with the WorldCat and ISNI databases and their sponsoring organizations and with other organizations to accomplish this goal. We do not consider libraries our enemies and believe they can and will help with this effort.

Conclusion

SFWA believes that the problems raised by orphan works and works that are alleged to be orphan works must be resolved quickly.

Organizations are using the argument that works are orphans as a lever to justify mass digitization of works and the abrogation of creators' control of their copyrights without performing an adequate search for the owners of the rights in those works. The Copyright Office is in the unique position to counter such arguments and ameliorate any damage to rightsholders that would result from them. Control of copyrighted material must be vested in the

² Initial Comments of Science Fiction and Fantasy Writers of America, pages 4-9.

³ Copyright Office Transcript of March 10, 2014 Round Table, at various places.

⁴ Copyright Office Transcript of March 11, 2014 Round Table, pages 65-66.

creators and rightsholders.

The Copyright Office needs to quickly digitize and make easily searchable all copyright records, linking original registrations with any renewals. We recommend creation of the Author Information Directory (AID) we proposed in our initial comments. The purpose of the digitized records and Directory would be to make finding authors easier. For the initial creation of the Directory, the Copyright Office could draw upon the Library of Congress Name Authority File (NAF), WorldCat, and ISNI. It then needs to use the rulemaking process to quickly define due diligence in searching for copyright holders, and formally establish the AID or another system that will facilitate finding rightsholders.

Further, in reviewing the comments submitted in response to Notice of Inquiry, we urge the Copyright Office to place primary weight on the interests of the men and women who create works protected by copyright. The interests and voices of the creators should be given substantially greater weight than the interests and opinions of transferees of copyright.

Respectfully submitted for SFWA,

James W. Fiscus, Chairman,
SFWA Orphan Works Committee
Author, SFWA Western Regional Director

Cat Rambo, Author.
Vice President Elect, SFWA

Michael Capobianco, Author,
Past President, SFWA ;

Elizabeth Moon, Author,
Past Vice-President, SFWA ;

Lynne M. Thomas, Author,
Curator of Rare Books and Special Collections at
Northern Illinois University;

Advisors to the Committee:

Jerry Pournelle, PhD, Author and Editor,
Past President, SFWA

Andrew Burt, PhD, Author and Editor,
Past Vice-President, SFWA ;

Bud Webster, Author,
Liaison, SFWA Estates Project;

Gordon Van Gelder, Editor and Publisher,
The Magazine of Fantasy & Science Fiction

Eric Flint, Author and Editor;

C.E. Petit, JD, Author and Editor,
Director of Licensing & Enforcement
Avicenna Development Corporation;

Charlie Stross, Author.