MARTIN
HUGG

ILLUSTRATION

March 17, 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

RE: Orphan Works Study (70 FR 3739)

Dear Register Sigall:

I respectfully petition the U.S. Copyright Office to maintain copyright protection of so-called orphaned works on all visual artistic works for the following reasons:

It is not valid to infer that a protected work of art has been abandoned simply because a potential user has difficulty identifying or locating an artist. Many works appear in print or on the internet as a result of unauthorized usage, and unsophisticated users may copy art from multiple sources. Also, as publishers adapt previously printed editions to the internet, artistic works may be separated from their original context without attribution. If a work of art is orphaned because of unlawful or feckless usage, its integrity will be irreparably compromised by stripping it of protection.

Automatic protection of visual artistic works is guaranteed without formalities. To strip past work of existing protections would bring copyright law into disrepute. Authors have been guaranteed protection under U.S. copyright law, the Berne Convention and other international copyright treaties. Because a searchable international registry of published visual artists does not presently exist for users to clear authors' rights, it would be unjust to penalize authors because new technology has given users a greater appetite for their work and easier access to exploit it.

Many published artistic works are independently copyrighted contributions to collective works. Even if a collective work is orphaned because a publication ceases or a publisher fails, an artist still retains the rights to his or her own individual contribution to the publication.

Authors' rights are exclusive. The public interest does not compel artists to publish their work, therefore the public cannot demand that orphaned work be available for free usage before copyright protection has expired.

Authors' rights are their incomes. The exclusive right to publish or not publish gives the artist the right to determine what compensation is due for usage. Most freelance artists and writers have no other source of income but their creative work and the accumulated value of that work is no different than the value that accrues to one's home. Therefore the copyright that protects creative work does not deprive the public of an "entitlement" any more than does the ordinary ownership of private property.

Creativity is not chilled by protecting orphaned works. The human imagination is not dependent on unlimited access to an unlimited body of other people's work to physically appropriate. Even with copyright protection intact, orphaned work can inspire and influence others.

Free speech is not restricted by protecting orphaned works. Since ideas and influence are not copyrightable, no one's free speech is restricted by placing legal limits on their appropriation of other people's tangible expressions of their own ideas.

Culture is not impoverished by protecting orphaned works. But without copyright protection, authors will lose one of their chief incentives to create.

Archival preservation is not hampered by copyright protections. Copyright law already permits the copying of work for archival preservation and does not necessitate giving anyone a broader privilege to copy and distribute work without the author's permission.

The internet has destabilized the environment in which creators must work. And as artistic works become available worldwide, there is an increased demand for content. But the opportunity this presents to artists for disseminating their work is currently menaced by the threat to authorship that comes with unauthorized usage by others. Artists, like other creators, are trying to meet the organizational, financial and legal challenges necessary to create licensing systems to let them compete with corporate content providers. But it takes time, investment, and creative organization to achieve these goals, and in the meantime, artists must still be able to protect their works. Removing protection from work that has fallen through the cracks of this system-in-flux will unfairly reward opportunists at the expense of creative individuals.

To strip orphaned works of their copyright protection in a time of flux would be to inflict permanent unprotected status on substantial bodies of work. This would penalize creators for lacking the resources, technology and ability to declare authorship at each instance of publication. A sweeping deprivation of copyright protection would foreclose the ability of future licensing systems to protect and distribute an artist's body of work in a way consistent with the intent of copyright protections.

To strip orphaned works of their protection would invite unjust exploitation. Commercial stockhouses, databases and print and web publishing industries could freely gather "orphaned" images for use by simply declaring authors hard to locate. The Copyright Clearance Center, which currently claims they cannot track usage or identify authorship, would see their continued failure to pay artists legitimized.

To strip orphaned works of their protection would threaten an author's integrity. I t's a

natural evolution for artists to create derivatives of their own work throughout their careers. To force an artist's "orphaned" work into the public domain for others to "remix" without consent is hostile to the centuries-old recognition of authors' rights. It would allow others to create a bastard body of derivative work to compete with the artist's self-created derivatives. This could injure both an artist's reputation and the value of his or her work.

The removal of copyright protection for orphaned work would reinforce the agenda of the "free culture" movement to subvert existing copyright protection for other work. The alternative copyright drafted by Creative Commons and being promoted as law in various countries includes a "Share Alike version" that "requires derivative users to adopt a similarly open license."

In the words of a proponent: " Widespread voluntary adoption of this [alternative] license will render measures like the extension of copyright irrelevant. . . The greater the volume of material with this kind of license that is out there, the greater the incentive to make use of it, even at the cost of forgoing commercial copyrights. Since most commercial culture depends ultimately on unpaid appropriation of older material, the effects will be cumulative, even viral." -- "Lessig on the Limits of Copyright"by John Quiggin 1/26/05 http://johnquiggin.com/index.php/archives/ 2005/01/26/lessig-on-the- limits-of-copyright/

Since it is not self-evident that "most commercial culture depends ultimately on unpaid appropriation of older material," we should be cautious about accepting this argument as a legal premise. If users of unprotected "orphaned" work could embed their "new derivative creations" with a "viral copyright," then standard copyright law could become as vulnerable to its unintended consequenses as computers to an internet worm.

The "Free Culture" argument is at odds with the principle of tangible expression, which is the only aspect of the creative process protected by copyright law. By arguing that creative work is only a "remix" of the work of others, the critics of copyright ignore the factors of experience, personal development and individual vision that are embodied in any author's tangible expression of an idea. The computer and internet, as well as photoshop, stock and royalty-free content have all made it possible for many people to become content providers by "sampling" the work of others. But the demands of this "new modality" for free and easy access to usable work should not induce lawmakers to legislate as if creativity can be adequately defined by the "remix" model. There is a difference between the alchemy of new creation and an assembly of "found work." Legal protections for this difference have been built up over centuries and once eroded, would be painful and costly to recover.

The internet has created a culture of appropriation, and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiary. But instant and unrestricted access to work should not be construed as a necessity just because technology has made it a possibility. That an artist's work now can be instantly transmitted around the world without the artist's permission or control does not justify a user's "right" to take the work. And if inability to trace a work to its author becomes the justification for creating such a "right," who and what will define the inability to trace

the work?

The "orphaned" works currently under consideration by the Copyright Office include the work of many artists now in the prime of their careers. To remove copyright protection from this work has the potential to undermine the important public policy behind copyright: To promote the creation and dissemination of culture by rewarding incentive. Rescinding guaranteed protection from copyrighted works will do more harm than good to the creative community and by extension, to the public good.

Please maintain copyright protection of so-called orphaned works on all visual artistic works.

Sincerely,

Martin Hugg

Member, Caney Fork Baptist Church
Member, Birmingham Arts Association
Member, Society of Children's Book Writers & Illustrators