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RE: Notice of Inquiry Concerning “Orphan Works”

Pursuant to the Notice of Inquiry published by the Copyright Office in the Federal Register of January 26, 2005 (p. 3739-3743), the Association of American Publishers, the Association of American University Presses, and the Software & Information Industry Association (hereinafter collectively referred to as “the Joint Commenters”) jointly submit these Comments on behalf of themselves and their members regarding the Copyright Office’s examination of “orphan works” issues.

Joint Commenters’ Statements of Interest

Association of American Publishers (“AAP”) – As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, many AAP members are active in the emerging market for e-books, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats. AAP has been on the public record as supporting the development of a solution to the problem of “orphan works” since it provided comments and testimony to that effect in the proceedings that resulted in the issuance of the Register of Copyright’s *Report on Copyright and Digital Distance Education* in May 1999.

Association of American University Presses (“AAUP”) – Each year, the 125 members of AAUP publish over 10,000 books and 750 journals. Just as scholars build on the achievements of their predecessors in order to develop new knowledge, the publication of

a scholar's new work often requires the incorporation of work done by others. As campus-based users and publishers of copyrighted works, AAUP's members would strongly benefit from a change in the copyright law that would facilitate the lawful use of such works in circumstances where permission for the use may be required but the copyright owner cannot be identified and located.

Software & Information Industry Association (“SIIA”) – As the principal trade association for the software and information industry, SIIA represents over 600 companies that develop and market software and electronic content for business, education, consumers, the Internet, and entertainment. Among SIIA members, it is primarily the information companies that are affected by the “orphan works” issue. Like the other Joint Commenters, these companies are both copyright owners and users (and successors-in-interest to users) of the copyrighted works of others, and are extremely interested in ensuring that any legislative approach to the “orphan works” issue will effectively balance the interests of copyright owners and users.

Introduction

The Joint Commenters commend the Copyright Office for initiating this inquiry into the issues raised by so-called “orphan works,” and welcome the opportunity to work with the Copyright Office in addressing those important issues.

As both copyright owners and users of the copyrighted works of others, the members of each of the Joint Commenters have an interest in supporting the wide dissemination and use of copyrighted works under established principles of copyright law. With their considerable experience in seeking permission for the use of discrete copyrighted works as parts of works of history and biography, textbooks and anthologies, and virtually all other genres of literary works that they publish, the members of each of the Joint Commenters understand the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining necessary permissions, and would welcome a change in the copyright law that helps to address those issues.

Having reflected on the “orphan works” issue from the perspective of both the user and the proprietor of copyrighted works, the Joint Commenters respectfully propose a solution that balances the interests of both parties, while constituting a modest "fine tuning" of current U.S. copyright law that is somewhat analogous to the current statutory treatment of “innocent infringement” in certain cases. Their proposal would not in any way affect the duration of copyright, the scope of copyright liability, or the applicability of “fair use” or other defenses against infringement. The “fair use” defense and other limitations or exceptions with respect to the rights of copyright owners would continue to apply to uses of copyrighted works, regardless of whether their owners can be identified and located. Moreover, the Joint Commenters’ proposal would not require the creation of any new government bureaucracies or tribunals, or impose any new prerequisites for registration or enforcement of copyright, and so would be unlikely to conflict with U.S. obligations under any international treaties or agreements on copyright.

