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Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Re: Orphan Works Proceeding

The Home Recording Rights Coalition (HRRC) works on behalf of the makers and users of consumer electronics technology to preserve the right to use electronics products and equipment in reasonable and productive ways. As a representative of those who produce, sell, service, and use the implements through which audio and audiovisual works are rendered and stored, HRRC is concerned about the problem of orphan works — a problem that potentially impedes and impairs both the creation of new works and the distribution and archiving of old ones.

The Consumer Electronics Association (CEA) is the leading trade association for the consumer electronics and information technology industries. Its more than 2,000 members produce many or most of the professional and consumer electronics products necessary to create audio and audiovisual works, and to disseminate these creative works to consumers.

HRRC and CEA applaud the Copyright Office for its longtime attention to the orphan works issue, and for its serious and careful Notice of Inquiry. HRRC and CEA also believe that Senators Hatch and Leahy and Reps. Smith and Berman should be recognized for, and encouraged in, their interest and efforts on this subject.

HRRC and CEA support and endorse the March 24 submission of the Glushko-Samuelson Intellectual Property Law Clinic of American University's Washington College of Law. The Clinic's proposal would lower the risk of using, republishing, or adapting orphan works through a simple mechanism used for centuries in other areas of law. The proposal imposes no new burdens on copyright owners and is fully consistent with our treaty obligations. Best of all, it requires no new bureaucracy. The Clinic's proposal is for an intuitive use of time-honored principles.

As HRRC, CEA, and others have pointed out in a variety of policy, legal, and academic contexts, arguments seeking to equate real and personal property with intellectual property tend to obscure more than enlighten. For a limited purpose, however, an analogy may be appropriate: Even owners of land in "fee simple," who enjoy the strongest and most absolute form of ownership in our legal tradition, have long been subject to an "orphan" provision of their own: the rule of adverse possession. If a landowner abandons her property, and another party occupies and uses the land for a long period (usually 20 years), the landowner loses her rights to the property. Adverse possession encourages the productive use of land while remaining extremely solicitous of property owners' rights. To avoid losing her rights, all the landowner has to do is to appear and assert her ownership, anytime within the 20-year period.

Although a copyright, by contrast, is a limited right to exclude, created by statute, that covers many but not all uses of a work, the problem of orphan works can be usefully addressed by a rule *even more deferential to owners* than adverse possession. While adverse possession puts a burden on the landowner to identify adverse users, the Clinic's proposal requires the party wishing to use a work to conduct, as appropriate, a reasonable good faith search, given all of the circumstances, for the owner. These circumstances could include where the work was found, its age, its country of origin and other factors, potentially including the nature of the use and the user. The right of the owner (if found) to object lasts as long as her copyright, not a mere 20 years. Most importantly, the owner never forfeits her copyright.

From the potential user's perspective, the Clinic's proposal makes the risk of using an orphan work knowable and minimal. The combination of quantifiable risk and low potential damages suggests that most parties will self-insure against the risk that a rightful copyright owner might emerge. The proposed remedies are sufficiently modest that most authors and publishers will be able to quantify and bear the risk of loss should a copyright owner sue for infringement.

The more modest or fleeting the use to be made of the orphan work (to take extreme examples, think of a town historical society compiling an exhibit of uncaptioned photographs, or a musician or arranger using jazz themes from untraceable 1920's recordings), the less practical it is to conduct a time-consuming, resource-intensive search to find the copyright owner for permission. While, as the Clinic notes, fair use should and does cover examples such as these, even the remote possibility of statutory damages often chills and thus discourages many reasonable and productive uses of copyrighted works. Clearly, as other comments in this proceeding no doubt will illustrate, fair use can be unpredictable and is highly fact-specific; it does not alleviate the orphan works problem.

U.S. obligations under international copyright treaties will not be an obstacle to implementing the Clinic's proposal, or to any similar solution. The proposed use of orphan works by other parties, subject to reasonable compensation, does not conflict with the economic rights and interests of the copyright owner. The proposal imposes no

affirmative obligation on copyright owners in order to maintain their rights. By definition, asking the user to conduct a reasonable search for a copyright owner will give the reasonably accessible owner clear notice that someone intends to use their work, at which time the owner can object. In contrast to a statutory formality scheme, the owner must act only in the rare case where other parties wish to use the work. The owner is never required to act within a fixed period of time such as the 1909 Act's one-year renewal window.

Throughout the gradual accession of the United States to various copyright treaties, we have interpreted these treaties narrowly when necessary to address particular issues, and to maintain our national perspective on the purposes of copyright law. In this case, where the copyright owner, once identified and found, retains all rights to authorize a usage, there is no inconsistency with international treaty obligations

The Clinic's proposal is a simple, workable solution to an important problem. HRRC and CEA encourage the Copyright Office to endorse this proposal and to recommend it to the Congress as a model for future legislation.

Sincerely,

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