**Steven C. Wheatley**
*Vice President*

**American Council of Learned Societies**
633 Third Avenue, New York, NY 10017-6795

March 25, 2005

Mr. Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building, Room-401
101 Independence Ave., S.E.
Washington, D.C. 20540

**ORPHAN WORKS NOTICE OF INQUIRY**

Dear Mr. Sigall:

On behalf of the American Council of Learned Societies (ACLS), I would like to thank the Copyright Office for inviting comments on this important issue.

ACLS is a private non-profit federation of 68 national scholarly organizations. Our Council was founded in 1919 to advance humanistic studies in all fields of learning in the humanities and social sciences, and to maintain and strengthen relations among national societies devoted to such studies. Our member societies include disciplinary societies in the humanities (in literature, history, art history, philosophy, and religion), in the social sciences (sociology, political science, geography, psychology and anthropology), societies devoted to the study of law, as well as many interdisciplinary societies in area studies and other domains. All together, our constituent societies have more than 300,000 individual members. Our constituent scholarly societies and their individual members are concerned about the orphan works problem as it affects all manner of works used in scholarship, research, and teaching across the broad range of fields we represent. These works of course include published texts, but also works of visual art, holographic manuscripts in archives, music, media and other materials. Since 1999, ACLS has developed and maintained its History E-Book Project, a digital collection of more than 1,000 new and previously published works of historical scholarship. The problem of orphan works has presented itself repeatedly in the development of that collection.

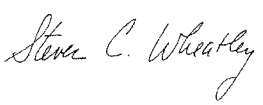
We write in support of, and fully endorse, the comments filed in this proceeding by the College Art Association, the National Humanities Alliance, and the proposal set out in the comments filed by the Glushko-Samuelson Intellectual Property Law Clinic in response to this Notice of Inquiry. This approach would set out a broad and flexible definition of an "orphan work." It correctly notes that an orphan work may be new or old. So long as the rights holder cannot be found after a good faith search, one that is reasonable in light of all the circumstances, the work is an "orphan" and can be used, subject only to very limited remedies should the copyright owner emerge.

We think it particularly important that this proposal does not limit the definition of orphan works to published materials. Unpublished works can have tremendous importance for scholars and there is no reason why they should not be made available for study, publication and dissemination to the American public. It would be unwise to predict what objects future scholars will wish to study. This proposal does not presuppose what those objects will be.

The proposal we are endorsing appropriately balances the rights of copyright owners and users. It would provide scholars, their institution, and their publishers greater certainty concerning their rights and responsibilities than might be available under the doctrine of fair use alone. Under this proposal the damages that a copyright owner could recover, if the use is ultimately determined to be infringing, would be capped appropriately. If the copyright owner of an orphan work comes forward, the use of the work could continue, though the owner would retain the right to negotiate for new uses of the work.

ACLS stands ready to assist the Copyright Office in this study or any further work in this area.

Sincerely,



Steven C. Wheatley

SCW/ssb

xc: Pauline Yu, President, ACLS
Susan Ball, Executive Director, College Art Association