DEBEVOISE & PLIMPTON LLP

555 13th Street N.W.
Washington, D.C. 20004
Tel 202 383 8000
www.debevoise.com

Jeffrey P. Cunard
Partner

March 25, 2005

VIA E-MAIL

orphanworks@loc.gov

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

ORPHAN WORKS NOTICE OF INQUIRY

Dear Mr. Sigall:

On behalf of the College Art Association ("CAA") we are pleased to be able to submit these comments to the Copyright Office in response to the Notice of Inquiry ("Notice") on orphan works. CAA represents the broadest spectrum of academics and professionals working in the visual arts. Given their diversity of interests, their views on the orphan works problem are hardly uniform, ranging from the artist who is rightfully concerned about losing the rights to control his or her artwork, on the basis of it spuriously being deemed "orphaned," to the art historians, scholars, museums and publishers whose work has been inhibited significantly and severely by the difficulty in clearing rights to orphan works. Any solution that is crafted to address the orphan works "problem" must, in CAA's view, take proper and full account of the range of these legitimate views.

For years, CAA, its Committee on Intellectual Property and its members have discussed the issues raised by the inability to use orphan works with great vigor and intensity. Few, if any, intellectual property issues have been as central to the concerns of CAA and its thousands of members. Not surprisingly, therefore, CAA has welcomed the issuance of the Notice with tremendous enthusiasm and is exceptionally gratified by the opportunity to comment on the issues that the Notice raises.

To assist the Copyright Office, CAA has canvassed its membership to identify the nature and effect of the "orphan works" problem. The outpouring of responses from members and others – anecdotes and case studies – to this request has been unprecedented and demonstrates the signal importance of the issues raised by this Notice. Many of these comments will be highlighted or summarized here, in no small part to create an irrefutable record that the orphan works problems identified by the Notice are, indeed, very real, wide-ranging and deep. Simply put, the inability to identify and find copyright owners and to clear rights to works in copyright has repeatedly stymied scholarship, publication across the entire field of the arts, the exhibition and performance of artistic works and the creation of new copyrighted works – all, in CAA's view, in direct contravention of the fundamental purposes of the copyright law.

The experience of CAA's members and their desire to be able to make responsible use of orphaned works without in any way impairing the rights of legitimate copyright owners have formed the basis for the principles in these comments, including the proposed approach to a legislative solution. With respect to that approach, CAA has worked closely with other interested parties in crafting the proposal being submitted by the Copyright Clearance Initiative of the Glushko-Samuelson Intellectual Property Law Clinic of American University's Washington College of Law in response to the Notice (the "CCI Proposal"). CAA fully supports the CCI Proposal.

COLLEGE ART ASSOCIATION: ITS MISSION, ACTIVITIES AND PERSPECTIVES ON INTELLECTUAL PROPERTY

CAA is a non-profit membership organization representing more than 13,000 artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professionals who, by vocation or avocation, are concerned about and are committed to the practice of art, teaching and research about the visual arts and humanities. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA.[1]

CAA's bylaws and activities clarify the scope of its – and its members' – interest in intellectual property matters as they relate to the arts. First among the purposes set out in the CAA bylaws is:

> To encourage the highest standards of creativity, scholarship, connoisseurship, and teaching in the areas of studio art, the history and criticism of the visual arts and architecture, and exhibitions; and to further these objectives in institutions of

[1] More information about CAA and its mission, bylaws and activities can be found at http://www.collegeart.org.

higher learning and of public service such as colleges, universities, art schools, museums, and other art organizations.

Fundamentally, CAA members are educators. They teach the making of art and its place in history and society. The greatest majority teach in classroom settings or support those types of educational activities. Many members, however, undertake to educate the public through the development and exhibition of materials for presentation to museum visitors or through their own scholarship. As its bylaws state, CAA aims:

> To encourage and support those groups and activities, inside and outside of this Association, that set themselves the task of elevating the standards of teaching and curricula, of improving the materials of teaching, and of generally advancing the cause of learning in the arts at the secondary, undergraduate, and graduate levels.

Not surprisingly, these activities often require rights clearance from copyright owners.

That CAA has a seminal interest in making works of art and associated archival materials available to a broad audience is evident from another of its organizing purposes:

> To encourage curators, librarians, collectors, dealers, public officials, and all others entrusted with the custody of works of art or documents associated with works of art to make these available for study to scholars, artists, and students.

This interest is significantly impeded, of course, where those who are entrusted with the custody of works of art do not themselves possess, or know where to obtain, the rights needed to authorize use of such works in scholarship, publishing or further artistic creation.

CAA is an active publisher of arts-related periodicals, including two preeminent journals, *The Art Bulletin* and *Art Journal*. *The Art Bulletin* is the foremost journal for art historians in English. A quarterly, it was established in 1913 to publish original scholarly research in all areas of the history of art and architecture. *The Art Bulletin* currently publishes, on average, about 50 articles a year; since 1978, when the present Copyright Act came into effect, it has published a total of some 1,730 articles. On average, there are about 100 third-party images in each issue, or some 400 images for which rights need to be cleared each year.

Art Journal, published since 1941, is a quarterly devoted to 20th and 21st century art. It is one of the most vital, intellectually compelling and visually engaging periodicals in the field, featuring scholarly articles, conversations, portfolios, and other contributions by leading art historians, artists, curators and critics. It publishes approximately 50 such

contributions each year, with each issue containing about 80 third-party copyrighted works of visual or other art for which rights need to be cleared.

In addition to these two journals, since 1998 CAA has published *caa.reviews*, a Web-based publication devoted to the peer review of new books and exhibitions relevant to the fields of art, art history and architecture, with new reviews posted weekly. Until recently, CAA also published a series of monographs in the fine arts.

For each of these publications, CAA, acting as a responsible publisher, asks its contributors to clear all needed third-party rights, and assists them to do so. Rights clearance is therefore of tremendous interest and importance to CAA; it is becoming increasingly difficult as CAA periodicals now are made available in electronic formats, including, most recently on JSTOR, the online academic electronic publisher (www.jstor.org). All of this publishing activity is undertaken by a relatively small, overworked staff.

CAA also is privileged to have a broad range of some 65 "affiliated societies," which are groups of art professionals and other organizations whose goals are generally consonant with those of CAA. They include, for example, such diverse organizations as the Art Libraries Society of North America; the Association of Historians of American Art; the International Center of Medieval Art; the Historians of Islamic Art; the International Sculpture Center; the National Art Education Association; the Visual Resources Association; and the Women's Caucus for Art. Many of these groups are as interested as CAA in intellectual property issues as they affect scholarship, publishing and artistic creation. Although CAA does not speak for these societies, their memberships overlap to a significant degree with CAA's.[2] The Visual Resources Association, which has made a separate submission to the Copyright Office, fully endorses these comments.

CAA has a strong track record of significant accomplishments in the area of intellectual property – informing and educating its members and affiliates on trends in the law and best professional practices. CAA's Committee on Intellectual Property regularly sponsors and organizes conferences, town meetings, and workshops on copyright matters, and regularly publishes articles in the CAA newsletter as a means of informing the membership of current legislation and initiatives related to copyright, contracts, and licenses that affect their teaching, research, and art practices.

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[2] The affiliated societies range in size of membership from under 100 to over 40,000. A complete list of CAA's affiliated societies can be found at http://www.collegeart.org/caa/aboutcaa/affiliatedsocieties/03affsocietydirectory.pdf.

With its diverse membership, CAA approaches intellectual property issues carefully and with appreciation for the divergent views that are often taken. On the one hand, CAA supports strong intellectual property protection. CAA members are themselves copyright owners – artists, writers, publishers, museums and universities – who are absolutely committed to the principle that their intellectual property not be used illegally. CAA itself, as noted, is a significant publisher of important publications.

On the other hand, CAA members are major consumers of intellectual property, most substantially, works of visual art and literary works. In creating new artistic works in criticism and art historical scholarship, as well as education and publishing, CAA members use copyrighted works of third parties. Consistent with established professional practices, CAA believes that such users should seek permission, where the copyright law requires them to do so. If a work is in copyright, and the rightful copyright owner can be identified and found, and licenses the use of such work, then CAA believes that a user should – in the absence of fair use or other exceptions or limitations – use the work after having properly cleared the rights. In many cases, rights clearance is accomplished without undue burdens on the user or publisher, such as where rights clearing organizations have been established for authors and artists.

With respect to a large (and increasing) number of cases, however, the Notice has summarized the problem with accuracy and absolute precision: the user "seeks to incorporate an older work into a new work (e.g., old photos, footage or recordings) and is willing to seek permission, but is not able to identify or locate the copyright owner(s) in order to seek permission." In such circumstances, actions for infringement may indeed be unlikely. Furthermore, in many – perhaps most – of these circumstances, the work may be legitimately used under the doctrine of fair use.

CAA endorses the reasons set forth in the Notice as to why "fair use" is not always available to users in these situations. As the comments of CAA's members demonstrate, for a myriad of reasons, artists, authors and other users, as well as their publishers, exhibitors or other distributors, are unable to conclude that the proposed use is fair. Their inability to do so results from a host of factors. These include the absence of any (or knowledgeable) legal counsel, a basic unfamiliarity with the law or the manifest uncertainties as to whether the doctrine will apply, given that the fair use determination must be made on a case-by-case basis.

Furthermore, the comments of CAA members provide ample support for the Notice's suggestions as to why users may be unable to rely on fair use. That is, even where the artists and authors themselves may choose to invoke fair use, the so-called "gatekeepers" – university counsel or publishers, for example – take what might be viewed as an overly conservative approach to the copyright law. They are unwilling to assume any risk of unauthorized use, minimal though that risk might be, where rights have not been formally cleared. They fear suit by a copyright owner, should one emerge, and that they might have to spend money on mounting a defense, including one

predicated on the uncertain fair use defense. As a matter of expediency or efficiency, they may prefer to require copyright clearance even in cases where a strong fair use argument would apply. In other instances, gatekeepers obtain copyright indemnities from artists, authors and other users, shifting the risk of non-clearance to these individuals. As these individuals often have scant resources themselves, they in turn back off from reliance on fair use, with the consequent adverse effects on artistic creation, scholarship and the dissemination of new works to the public, all as further documented below.

Nothing could be clearer, therefore, than that being unable to clear rights and being unable (or fearing) to rely on fair use results in thwarting the legitimate uses of works that are protected by copyright but are hidden, unused, out of circulation or otherwise largely unavailable to the American public. In the words of the Notice, the "orphaning" of these works wreaks a fundamental harm to the public policy underlying copyright law – "To promote the dissemination of works by creating incentives for their creation and dissemination to the public."

Before turning to the specific questions raised by the Notice, CAA has four additional observations:

First, the "orphan works" problem has been enormously exacerbated by the restoration of foreign works as a result of Section 514 of the Uruguay Round Agreements Act, codified at 17 U.S.C. § 104A(a)(1). Literally, in one fell swoop, hundreds of thousands, if not millions, of works that were once in the public domain have been given the full protection of United States copyright. The vast majority of foreign works were never registered, so registrations and renewals cannot be found to identify the rights owners, particularly if they are not famous.[3] Nor, frequently, are there other means of finding the copyright owners, who are the heirs of long dead artists and authors in countries around the world. In the vast majority of cases, identifying, finding and

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[3] The complaint in the *Luck's Music Library* litigation, which challenges the constitutionality of copyright restoration, includes the fact that "numerous foreign works – including paintings by Picasso; drawings by M.C. Escher; novels by Joseph Conrad, George Orwell, J.R.R. Tolkien, H.G. Wells, and Virginia Woolf; and T.S. Eliot's *The Wasteland*" never satisfied copyright formalities, such as notice and registration previously required by American copyright law. *See* Brief for Appellants, Luck's Music Library, Inc. v. Ashcroft, No. 04-5240 (D.C. Cir., filed Nov. 23, 2004). How very likely it is that there are innumerable other, far less well-known works – published and potentially still protected by copyright not only in Western Europe but also in Central and Eastern Europe, Africa, Asia and Latin America – that were never registered in the United States and for which rights clearance (only recently required by U.S. copyright law) is now proving to be a significant hurdle.

clearing rights is realistically impossible. This restoration to the full protection of United States copyright law has largely occurred without any commensurate benefit to the American public because most of these works are not being disseminated unless the rights owner is identifiable and can be found (or unless the works are currently being exploited by the copyright owner or his or her licensee). Allowing users to make these orphan works available to the American public would effect a restoration of the proper copyright balance that should apply to this enormous class of works.

Second, as art historical scholarship has moved beyond famous or more traditional types of visual art – such as paintings and sculpture – the problems of clearing rights have become increasingly difficult for CAA members. In general, it may not be that difficult to identify the owners or licensors of rights in major 20th century paintings. The vast majority of the best-known works have ample identification on or accompanying them. In such cases, rights clearance can be sought directly from the artist, his or her heirs, or well-established rights organizations such as the Visual Arts and Galleries Association and the Artists Rights Society. In their artistic creations and scholarship, a number of CAA members are making use of works of other types of visual art, such as advertisements, catalogues, postcards, works with utilitarian aspects and photographs of such works. The difficulty of identifying and finding the owners of rights to these types of works is proving insuperable for many artists and scholars, and is forcing them to constrain or reorient their work and scholarship.

Third, photographs, as a class of works, present particular difficulties. Here, there is a significant difference between photographic works that are obvious works for hire or were created by identified photographers – such as Ansel Adams, Edward Weston, Henri Cartier-Bresson, Alfred Stieglitz or Diane Arbus – and many other types of photographic works. There is generally no great mystery about where to go to clear the rights to photographs by similarly well-known, self-identified photographers, to the extent that these works are published with copyright notices and credit lines. However, photographs taken not for artistic purposes, but simply to record and present information, often are produced anonymously. Such photographs frequently are published in books, or otherwise may be found in libraries and archives, without separate notices, credit lines or other identifying information. The underlying image – of a landscape, building or indeed of a sculpture – may not suffice to identify the owner of the copyright in an otherwise anonymous photograph. The larger work in which the photograph was published or the place in which it is found (such as an archive) often is equally lacking in identifying data. In such circumstances, as many CAA members can attest, rights clearance becomes virtually or actually impossible.

Fourth, CAA members generally do undertake reasonable efforts to identify and find rights owners to clear rights. Some CAA members and others are concerned that they would unfairly lose their copyright rights if a categorical exception for orphan works were established. In particular, two members have suggested that perhaps some

unscrupulous users might deem works as "orphan" for the sake of sheer expedience, after having performed a search for a rights owner that was essentially a sham (as opposed to merely unsuccessful or incompetent) or was other than in good faith. As one member put it, she would have "concerns" about how changing the status of orphaned works might "impact artists, particularly how due diligence for orphaned works would be defined." Or, as another said, the issue is problematic "as it has the possibility to open up copyright abuses with the abusers using this 'orphan' concept as an excuse for the abuse."

Where, however, in light of all the circumstances, a reasonable, good faith effort has been made to find and identify the copyright owner, and the would-be user has been unable to do so, then there is no abuse of the copyright owner's rights. In these situations, CAA believes that the balance in the copyright law should be struck in favor of allowing the use. In the words of one artist member of CAA who asserts his copyrights assiduously, "The idea of using orphan materials as a reference seems like something artists do often – I just object to the theft of materials when the artwork plainly says otherwise."

In summary, CAA is focused on crafting an approach to the use of orphan works that facilitates and encourages their use by diminishing the threat from a rightful copyright owner with respect to a use made *after* a user's good faith determination, in accordance with prevailing professional practices, that rights cannot be cleared notwithstanding what might have been his or her substantial efforts to do so. CAA is *not* suggesting that the special treatment for orphan works be in the form of a statutory safe harbor or sanctuary for users who would invoke it to justify their doing less than those practices ordinarily require. The remainder of CAA's comments elaborate on these observations.

NATURE OF THE PROBLEMS FACED BY SUBSEQUENT CREATORS OR OTHER USERS

CAA members have experienced substantial difficulties in obtaining rights or clearances in preexisting works. This is particularly so with artists, academics, scholars and publishers working with foreign works and all types of works that are less well-documented material than famous paintings or sculptures by well-known 20th century artists.

The range of situations where rights holders cannot be identified or located is enormous. In many circumstances, the works – such as photographs, postcards, letters or even conventional artworks – are found without any copyright-related information and are, essentially, anonymous. In such cases, if there is no other context for the work, there is no place to even begin a search for the copyright owner.

In other cases, there may be some copyright-related information accompanying the work, but the copyright owner is not identified. Efforts to find the copyright owner may have been made, but have proved futile. The trail simply runs cold.

The following examples have been culled from the great number of comments provided to CAA. These were selected for the purpose of illustrating the many types of situations in which works may be "orphaned."[4]

Types of Works and Users, and Difficulties Encountered in Identifying and Clearing Rights

Photographs

Photographs have been an especially problematic class of works for CAA members, including individual users, publishers, museums and scholarly institutions. The problem seems to be particularly marked where the photograph is of a building or of an artwork that is itself in the public domain.

- I needed *specific photos of architectural works* by an internationally known architectural firm. The living partner of the firm could not authorize use of photographs of the firm's own work (the buildings) because the *photographer was unlocatable.*[5]

- Bryn Mawr College had a large collection of lantern slides of *archeological sites and monuments, as well as artifacts.* Some of the photos were taken by scholars, some by commercial photographers employed by the College and others by unknown persons. . . . When the Center for the Study of Architecture undertook to put those images on the Web for scholarly use, *we were frustrated by an inability to use all the slides*. . . . Later, when museums and scholars asked to use the images, we were unable to grant permission. Particularly problematic are *photographs of archeological sites at earlier phases of excavations/examination and of monuments that have changed since earlier photos.*[6]

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4 Many of these comments have been paraphrased or minimally reworded for sense or, in some cases, to make the references less specific, where a certain degree of anonymity was desired. Italics have been added for emphasis. Reference here to individual parties and the institutions with which they are affiliated does not mean that such individuals or their institutions necessarily endorse these comments.

5 Leslie Humm Cormier, Department of Visual & Media Arts, Emerson College.

6 Harrison Eiteljorg, II, Director, Center for the Study of Architecture, Bryn Mawr, Pennsylvania.

- For use in an exhibition from the Malvina Hoffman papers, only one of three images an exhibition designer wished to use could be attributed; the remaining two photographs are pictured in Hoffman's published autobiography (1965) *but have no photo credits*. We have a negative for one of the images, but it remains *unclear who the photographer was*.[7]

- As a visual arts librarian, I receive roughly 12 inquiries a year from scholars who wish to *illustrate a publication with a picture that they have found in some publication in the library* where I work. The *images they want to use seldom have any copyright information* in the source publication. Often, however, they do have a photo credit; *photo acknowledgments are not claims of copyright*.[8]

- In *two major art history publications*, John Rewald's "The History of Impressionism" (Museum of Modern Art, New York, 1946) and John Canaday's "The Mainstreams of Modern Art" (Holt, Rinehard and Winston, New York, 1959), there are general copyright notices in the front of the books, *but no indication of who owns the copyrights in the many artworks illustrated in the books*. Although the books may list either the sources for the photographs of the artworks or where the artworks themselves may be found, *they tell us nothing about the proper pedigree of the copyright, either of the illustration or the artworks*.[9]

- I sought to publish a *photograph of an architectural rendering* that appeared in "Life" magazine in 1957. The image was credited to an individual in the magazine, but it was not clear if that person was the maker of the rendering, the photographer of the rendering or someone who had otherwise supplied the image for publication. *"Life" had no information on the individual*. . . . I work in modern architectural history. . . . Those that are the hardest to trace are *photographs of buildings which*

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7 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

8 Henry Pisciotta, Arts and Architecture Librarian & Assistant Head of the Arts and Humanities Library, University Libraries, The Pennsylvania State University.

9 Christine Sundt, Visual Resources Curator, Architecture & Allied Arts Library, University of Oregon.

are in a library's or archive's collection, but for which the photographer is not known.[10]

- Several photographs [were] donated anonymously to the Institute of Texan Cultures. *I was unable to obtain permission from the owner*, so I was unable to get the images reprinted and use them. . . . Getting copyright permission for *images (drawings or photos) of historic structures* is often a problem for me.[11]

- We have many *old uncredited photos* in our oral history of conservation file. We have been collecting conservation history material since 1975; *people just give us their photo files, without any ownership or authorship information.*[12]

- I am publishing a book on [a famous architect]. I have full rights to his papers . . . . However, there are many *photographs of [his] work that are not marked or credited* in any way to a specific photographer . . . [t]he *author is truly unknowable.*[13]

- I found but could not reproduce a *photo of an early black architect from a yearbook of a major university*; the copyright to the yearbook photos was held by a publisher who may be out of business. The university denied [permission for] publication of the photo.[14]

- I wanted to publish an artwork by a 19th century artist. The [museum] has a *photograph but would not give me permission to publish it* since they did

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10 Joseph M. Siry, Professor of Art History, Department of Art and Art History, Wesleyan University.

11 Rachelle Starr, Ph.D. student in historic preservation.

12 Joyce Hill Stoner, Professor, Winterthur/University of Delaware Program in Art Conservation.

13 Jeffrey T. Tilman, Assistant Professor of Architecture, School of Architecture and Interior Design, College of Design, Architecture, Art and Planning, University of Cincinnati.

14 Leslie Humm Cormier, Department of Visual & Media Arts, Emerson College.

not own the painting. Nor did they (or would they) give me help on who the owner was.[15]

The problem appears to be rather acute with respect to foreign works (where the owner of the copyright in the photograph, if any, is apparently not in the United States):

- At the Hispanic Society of America, we have *thousands of photographs acquired from about 1900 to1940* from dealers all over the world. . . . The successor firms to these dealers cannot be located. . . . The obtaining of images of *Latin American works in particular is a constant problem.* In 2004, I sent letters to Argentina and Bolivia seeking information. In neither case was the original publisher still available. . . . *Images of architecture, especially buildings now destroyed*, have presented problems to other scholars.[16]

- The most important *works of ancient African art* belong to the National Commission for Museums and Monuments in Nigeria. Many of these works are housed at the National Museum in Lagos. You have to use *images of objects* that are owned by them. If you write to them, they simply *do not respond.*[17]

- Writing about [a 12th century Japanese drawing, which has been lost] becomes a problem. The *photograph [presumably Japanese] is reproduced in a Western book.* I have found no references to it in a Japanese publication or at the Japanese institution. *Reproducing Japanese works of art*, especially those that come from temples, is a problem, as getting copyright permission *is difficult.*[18]

- We have a *photograph of a drawing* attributed to the [17th century] artist Jusepe de Ribera in the Photo Study Collection. . . . The photograph did not appear in our database. When we located the *photograph, the verso*

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15 Wendy Katz, Associate Professor, Department of Art and Art History, University of Nebraska–Lincoln.

16 Marcus B. Burke, Curator, The Hispanic Society of America.

17 Eli Bentor, Associate Professor, Department of Art, Appalachian State University.

18 Anonymous.

was blank. We let [the user] know we *could not provide full permission* for use.[19]

- We have a *photograph of the [20th century] artist Hans Hoffmann* from a 20th century archive. Although the photo was credited, *we could not locate the photographer or current rights holder.*[20]

Works of Visual Art

- A user wanted slides of several *art objects published in rare periodicals from the 1960s and 1970s. . . .* She was having trouble locating those *artists who did not have gallery representation.* She decided not to publish any works of such artists.[21]

- Clearance was a "nightmare" in several cases of *sculptures and prints produced in the 1930s.* Efforts would lead nowhere.[22]

- *A cartoon* by a known artist appeared in "Ladies Home Journal" in 1955. The artist died in the early 1970s, but there was no obituary and he had a common surname. *None of the associations that handle rights have a record of him.*[23]

- I am a Boy Scout historian, author and publisher of books and CD-ROMS and have compiled, in digital format, a "*Guide to Boy Scout Postcards in the United States*" with over 100 images, whose ownerships have been untraceable (in addition to the hundreds that clearly belong to the Boy Scouts of America). Some have *attributions to photographers I have been unable to locate.* Some camp postcard images may have belonged to the *camps* (*now defunct*), the *Boy Scout Councils* (*no longer in existence*) or to

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19 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

20 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

21 Anonymous.

22 Dora Apel, Assistant Professor, W. Hawkins Ferry Chair in Modern and Contemporary Art, Department of Art and Art History, Wayne State University.

23 Amy Ogata, Associate Professor, Bard Graduate Center for Studies in the Decorative Arts, Design, and Culture.

unidentified photographers. Many have absolutely *no clue as to ownership*.[24]

- I have been working on an article on *American toys* and have had *numerous problems locating heirs* and establishing who is the copyright owner. *Mass-produced works present problems* because it cannot be determined *whether they are works for hire, or whether the rights were licensed* – if the original records or designer are not available or known.[25]

Other Anonymous Works

- In the 1980s, I helped to curate an art project that was a collection of over *500 works of art by Vietnam War veterans*. The collection traveled to many venues around the country between 1980 and about 1997. At each new location, veterans who had created art about their experiences brought additional works to the project. *These works were sometimes donated anonymously* . . . . We collected artworks made by American and Australian combat veterans, *some of whom* . . . *may have died*. I edited a book reproducing these works, and *some of the artists could not be found*. I would estimate that as many as *10% of the artworks in the collection lack either identification* or current contact information . . . .[26]

- I am an *artist* who seeks to incorporate *typical tourist postcards* into my work, but *could not reproduce those for which I could not find* the copyright holder.[27]

- *Postcard messages* offer a wealth of information about people, places and practices, yet most have no identifiable author. It is *virtually impossible to trace the sender of a postcard*. That person frequently signed the message "Love, Bessie." Even if she were still living, it would be *impossible to*

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24 Stanley H. Lipson, Professor of Mathematics and Computer Science, Department of Computer Science, Kean University.

25 Amy Ogata, Associate Professor, Bard Graduate Center for Studies in the Decorative Arts, Design, and Culture.

26 Eve Sinaiko, independent curator, New York.

27 Martin Gantman, independent artist, Los Angeles.

find her to ask for permission. I am using *hundreds of postcards* in my work and have looked at thousands in preparation of my manuscript.[28]

- I have been working on oral histories of restoration cleaning controversies in the 20th century regarding Old Master paintings. I had a graduate student or paid translator *translate one key article from German into English* for me about ten years ago. The *article had no indication who had translated it*. The Getty wanted to use the translation. We wrote to every possible former bilingual graduate student, but all said they hadn't done the translation.[29]

Musical Works and Sound Recordings

- I work with *music written during the silent film era*. Almost none of the music publishers still exist, though their catalogues were often sold to other companies. . . . *There are no websites, publications, or any other means of tracing ownership of these musical titles*. . . . The *vast quantity of silent film music has never been recorded*, so [the ASCAP] database is no good.[30]

- I recently published a book of *folk and children's songs* called "Snakes, Snails and C Major Scales" and was forced to omit several important songs. Because of *difficulty of locating copyrights, it no longer has an original Native American song, a Hanukkah song or a Spanish language song*.[31]

- As a sound artist, I *sample from an old record from a thrift store, or a cassette from somebody's discarded answering machine, or an old radio show from the 1940s*. The trails leading to the owners of the copyrights for these records are *long since overgrown*.[32]

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28 Emily Godbey, doctoral candidate in art history, Franke Institute for the Humanities Fellow, University of Chicago.

29 Joyce Hill Stoner, Professor, Winterthur/University of Delaware Program in Art Conservation.

30 Rodney Sauer, Director, Mont Alto Motion Picture Orchestra.

31 Kevin Cooper (comment separately submitted to Association of Research Libraries).

32 The Evolution Control Committee.

Motion Pictures

- One venue could not establish who *owns the rights to [a silent film]*, and we ended up showing the film *without clearing the rights* since they could not be found.[33]

- I am an amateur film historian. I attended what was to be a *public screening of a film [from 1924]* . . . . When the director called [a major distributor] to obtain permission, *they claimed they didn't own it so therefore could not give permission*. She was unwilling to show the film without the proper permissions, *so was forced to pull the film*.[34]

Foreign Works

- I am a scholar, and write many books on art, Bloomsbury and surrealism. I have tried for years to find w*ho owns the copyright to the work of Dorothy Bussy* (author of "Olivia"), sister of Lytton Strachey, and to the paintings of her husband Simon Bussy. I would like to be sure I can *publish her unpublished papers*.[35]

- I have taken *photographs of works by Haitian artists*, some in the artist's studio, some in galleries or local museums and some on the street, where many artists sell their work. *The works are often not signed or the signature is illegible*. . . . [P]ublication has been refused *since it was not possible to . . . trace the current ownership*. . . . Copyrights in Haiti are *practically irrelevant* . . . . I have encountered difficulties with *every project*.[36]

- *In World War II some works of art went missing and are presumed destroyed, so how do I get permission to reproduce these works [from photographs]?* Finding the right collection [where works are housed in Central and European collections] requires a great deal of effort. *Even*

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33 Rodney Sauer, Director, Mont Alto Motion Picture Orchestra.

34 Greta de Groat, Electronic Media Cataloger, Stanford University Libraries.

35 Mary Ann Caws, Distinguished Professor, Graduate Center, City University of New York.

36 LeGrace Benson, Director, Arts of Haiti Research Project, Professor Emerita in Art History, State University of New York.

when works of art are housed in famous holdings and I write for permission I do not hear back.[37]

- Some of our most difficult inquiries come from patrons who ask for permission to *publish images of artworks and other graphics from art periodicals published in Europe in the 1930s*. These issues are not in the public domain, are rare, and *often have little if any useful publisher/photographer information.*[38]

- For the Vietnam War veterans project, the collection included *several watercolor sketches* created by anonymous North Vietnamese or Viet Cong artists, *who had been killed* and for whom rights could not therefore be cleared.[39]

Steps Taken to Locate Copyright Owners

From their responses, CAA members and other visual arts professionals appear to undertake appropriate steps to identify and locate copyright owners. Predictably, the nature of the search and the effort expended turn in large measure on the circumstances related to the work – its age, its source, where it was found and whether there is any identifying information associated with it. An anonymous photograph of an anonymous subject taken in Paris in the second quarter of the 20th century will require a different level of search (if any search is realistic) than a book published in the United States with a copyright notice ten years ago. A drawing found in a book published in China, where the publisher has gone out of business or is otherwise untraceable, demands a different type of search than that for a letter from a World War II veteran found in a municipal archive.

CAA is aware that critics of loosening the requirements with respect to the use of orphan works (including a few individuals who have written to CAA) are fearful that any change in the status quo will give users a license to be cavalier in their efforts to clear rights. CAA responds to these concerns by underscoring the importance of documenting the sometimes Herculean efforts undertaken – as a matter of routine professional practice – to clear rights before the user gives up and declares the search effort futile. In this

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37 Hilary Braysmith, Associate Professor of Art History, University of Southern Indiana.

38 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

39 Eve Sinaiko, independent curator, New York.

regard, CAA's own professional guidelines emphasize that users should start a search months or even years before the expected date of publication and must maintain scrupulous, permanent documentation of all correspondence and research on rights clearances and permissions. CAA notes, too, that these efforts can be inordinately time-consuming, that CAA members often experience significant frustration in their searches and that, in many circumstances, the searches end with the user renouncing use of salient materials.

The following examples illustrate the type and extent of these searches:

- Sometimes I've been told that "someone" now owns a photo but *I can't find out who it is*. For *publications produced since the mid-1960s*, I've tried to find owners through libraries, lists of holders of architectural records and letters of inquiry to scholars in pertinent fields. Even today, with the help of the Web, unless an institution lists its holdings somewhere on the Web, a person might search in vain and still *fail to discover the answer*. I have no idea how to find an owner of an *image that appeared in a now-defunct periodical published in 1945* if the photograph or drawing was not credited to anyone. *I'm an experienced researcher and can't do it*.[40]

- I have encountered many difficulties: *infirm and unresponsive heirs, no address*. I have had an archivist of the archive where the heir had placed the papers send a letter on my behalf, and without results. This has occurred for perhaps *30% of the works in my project*.[41]

- I am an independent scholar. It is hard to obtain permissions for *reproductions of an artist who is dead and whose relations are difficult to locate*. Early modern works are difficult since the *estate often passes on to parties unknown or unwilling to cooperate*. Finding *current addresses and contacts is a big problem*.[42]

- Finding a copyright owner, or even a possible copyright owner, could take *dozens of phone calls and emails*, which sometimes *still lead nowhere*. In

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40 Carol Herselle Krinsky, Professor, Department of Fine Arts, College of Arts and Sciences, New York University.

41 Amy Ogata, Associate Professor, Bard Graduate Center for Studies in the Decorative Arts, Design, and Culture.

42 Sandra Langer, independent scholar, New York.

other cases, after much searching, a copyright owner would be identified but my *unopened permission letter* would be returned by the post office. In another case, a copyright holder with whom I had been in contact for a previous project *moved and left no forwarding address* or phone number; *she could not be located* despite calls to former places of employment and Web searches.[43]

- I had problems tracing a *credited photograph of a fourteenth-century wall painting* printed in a small scholarly book from France. I could not find any address for the book's author, who was also the photographer. I wrote to a museum where I thought he had worked. They told me they would forward him a letter. *I wrote twice; I never heard back.* I ended up *traveling to France myself* to take photos of the same paintings.[44]

- I am an educator and book/journal publisher. Identifying and locating copyright holders is a daily problem that *persists for months*. In Europe, identifying and locating copyright holders *consumes more time than the research itself*. . . . Communicating with these numerous sources is never easy – sometimes *requiring requests to be made "in person."*[45]

- After *weeks of fruitless searching* (from Getty archives, to the Paris archives for Le Corbusier, to ARS [the Artists Rights Society], and so on), I was *unable to locate the copyright* for an uncredited photo essential to my article's argument. I was therefore unable to include the photo.[46]

- I had a frustrating attempt to reproduce an *uncredited photograph that appeared in a 1985 newspaper article* on immigration in the *San Diego Union*. The photographer could not be identified. The image was credited "File Photo." The newspaper's photo librarian and archivist concluded that the image could have been made by the *San Diego Union*

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43 Dora Apel, Assistant Professor, W. Hawkins Ferry Chair in Modern and Contemporary Art, Department of Art and Art History, Wayne State University.

44 Amanda Luyster, Assistant Professor of Art History, Minnesota State University, Mankato.

45 Anonymous.

46 Anonymous.

photographer or a wire service photographer. Either way, *without the ability to identify its creator*, the image could not be reproduced.[47]

- Several times in trying to produce public screenings of late-silent films, I had to make *a dozen long distance calls* to different sources trying to establish ownership. . . I found that *no one would admit to owning* the film.[48]

Many of the foregoing examples also highlight a related set of issues on which the Notice seeks comments: where the potential copyright owner may be identified, but does not respond to inquiries. The issues of identifying a copyright owner and of the owner's non-response are obviously interrelated because in many (and maybe most) situations the inquiry is being made both to identify and confirm the possible ownership of the copyright in the first place and, if ownership is claimed, to ask for permission to use the work.

For example, scholars' inquiries to museums, whether in Nigeria, Central or Eastern Europe, Asia or the United States, with respect to clearing rights in photographs of objects in their collections, may be unanswered. In these circumstances, the user may not be certain whether the owner of the copyright in the photograph is the museum or a third party. And if it is not the museum, then it would most often be impossible to find the actual copyright owner.

Similarly, with respect to trying to clear rights from heirs, it may not be clear which heirs, if any, inherited copyright rights. Or there may be a dispute among the heirs. Or, whether due to age or other reasons, they simply may not care about the inquiry from the would-be user.

Possible Copyright Owner/Information Source Goes Out of Business

In addition to the difficulty of tracking down heirs, where a rights holder might be identifiable, CAA members encounter especially frustrating circumstances when possible corporate owners of copyrights go out of business, leaving no obvious successor company nor any realistic means of identifying to whom ownership of the copyrights has

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[47] Dr. Andrew E. Hershberger, Assistant Professor of Contemporary Art History, School of Art, Bowling Green State University.

[48] Rodney Sauer, Director, Mont Alto Motion Picture Orchestra.

passed. This happens with respect to published and unpublished works, and both United States and foreign works. A few examples will suffice to illustrate this problem:

- I am interested in using *several photographs* from the Chicago Century of Progress Exhibition of *1933*. The photographers, Kaufmann & Fabry, *went defunct* some years ago, and rights were transferred to K&S Photographics, a Chicago photographic firm. The firm existed as recently as 2000, but has since gone defunct, and *no trace of the disposition of the firm's assets* has been able to be traced. The Architectural Foundation of Chicago used these images in 2004. The curator spent o*ver a year trying to locate* K&S or its successors – none could be found.[49]

- We have encountered publishers who are still in business, but who have merged or have been subsumed by an*other publisher that claims not to hold the copyright* on a particular published work. We have many photographs that are credited to commercial photographic firms that *we can no longer reach*. This is especially so in the case of *many European firms from the early to mid-20th century*.[50]

- Harvard University Art Museums Archives wishes to use a photo that has "News Events Photo Service" on the back. We are still trying to get in contact with this organization, if it exists. *I think this search may be a dead end*.[51]

- I have been attempting to get permission to use an *advertisement* for ColorLine partitions that was published in the *December 1959* issue of "Architectural Forum." Since *I cannot locate the company* and *cannot determine if it still exists*, I am not able to include the image in the version of my thesis that I will send to UMI Dissertations.[52]

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49 Jeffrey T. Tilman, Assistant Professor of Architecture, School of Architecture and Interior Design, College of Design, Architecture, Art and Planning, University of Cincinnati.

50 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

51 Jennifer Hughes, Rights and Licensing Coordinator, Visual Resources, Harvard University Art Museums.

52 Bobbye Tigerman, Lois F. McNeill Fellow and graduate student, Winterthur Program in Early American Culture.

- [I have had] difficulty in clearing rights for *trade catalogues by companies no longer in business*. . . . After much fruitless correspondence, I omitted the image from my article.[53]

- I study and teach 20th century United States history. I wanted to use an *undated image of a Washington Metro station*. In 2000, Harry Weese Associates allowed me to copy this slide. It is a historically important image, used by the architecture firm to present its work on the Metro. But Harry Weese Associates *no longer exists and veterans of the firm have no idea who originally took the picture*.[54]

- The old record might be a *short-run pressing from a company that went under decades ago*. Permission cannot be obtained because the owner simply cannot be found.[55]

- I authored a paper on *jazz album cover artwork*. I sought copyright but *many of the record companies had long since been out of business*.[56]

- A large group of *negatives, taken by living photographers as works made for hire*, were thrown away around the time of a corporate sale. Would there be any claim for copyright?[57]

Effect of Failure to Clear Rights and Problems in Relying on Fair Use

The record is unmistakable that the orphan works problem results in significant losses to artists, scholars, publishers and other users of works for which rights cannot be cleared. All classes of these would-be users may decide not to use an image that is an orphan work; they may decide to use other works that illustrate their points less powerfully; or they may decide that the rights clearance task is so daunting that they altogether abandon the entire artistic or scholarly project.

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53 Amy Ogata, Associate Professor, Bard Graduate Center for Studies in the Decorative Arts, Design, and Culture.

54 Zachary Schrag, Assistant Professor, Department of History and Art History, George Mason University.

55 The Evolution Control Committee.

56 Anonymous.

57 Randall Gabrielan, author.

The ultimate loser, of course, is the American public. Americans are deprived of access to these orphan works, either on their own or in the context of new artistic and scholarly works. With respect to the creation of new works, this outcome seems to CAA to contravene the fundamental purpose of the copyright law, which is to create incentives to create. Instead, in these circumstances, the copyright law has precisely the opposite effect: it grants decades-long exclusive rights to unknown, hidden, and uninterested copyright owners who are not themselves making the orphan works available to the American public – nor, indeed, exploiting them commercially. In this regard, CAA respectfully submits, the copyright bargain is being kept in name only.

The Notice identifies a relationship between the orphan works problem and fair use. Perhaps, with respect to many or even most of the examples identified above, a copyright specialist – a practitioner or a law school professor – might ultimately conclude upon review of all the relevant facts and circumstances that the fair use doctrine could legitimately be invoked by the would-be user. In that case, it might be asked, why worry about the need to treat orphan works as a special case, when section 107 already provides some protection for the user of such works?

To be sure, fair use may and probably will be available in many circumstances where use is to be made of an orphan work. If fair use is appropriately invoked as the justification for use of an orphan work and a copyright owner thereafter emerges and sues for infringement, the defendant ought to prevail; then the question will simply never arise as to whether the limitation on remedies proposed here for suits involving orphan works is applicable. Accordingly, in these comments, CAA is by no means suggesting that the proposal to limit remedies for such suits should supplant legitimate reliance on fair use as a defense.

Indeed, as the Notice indicates, some users, usually those who are more sophisticated or more willing to "self-insure," are relying on fair use. But the evidence collected by CAA suggests that frequently a lack of understanding about the metes and bounds of fair use, a lack of access to the legal resources necessary to determine whether a use is fair, the uncertainties of the application of the fair use doctrine and the imperative of many (non-profit and/or marginally profitable) art publishers to eliminate the risk of an infringement suit entirely, make fair use a less than complete or satisfactory solution to the orphan works problem. In these all-too-common circumstances, the imperative of greater certainty with respect to the outer bounds of liability for use of an orphan work (against the possibility that a fair use defense might fail) is a principal impetus for the present proposal.

The following examples illustrate the effect of the orphan works problem on creation and scholarship and, relatedly, the interplay between that problem and the fair use doctrine. Note that these are "orphan work" situations, and not circumstances where permission has been refused outright by the copyright owner, or the copyright owner has

been identified and refuses access, or where the user is unwilling to pay the license fees requested by the rightful copyright owner:

- In its amicus brief in *Eldred v. Ashcroft*, CAA describes the example of "Who Built America?," a pathbreaking, award-winning CD-ROM series containing many primary sources from the Depression Era for high school and college students. *Its authors had immense difficulties tracking down copyright owners.* Whether because they could not find the copyright owners (or, in other cases, due to license fees) *the authors substituted federal government works and other public domain works* for their preferred choices.[58]

- I could not find the rights holders and *there are no substitute works*. So, *two articles* that I spent years researching *remain manuscripts*. *Publishers were not willing to rely on fair use.*[59]

- I have had to *change the entire subject of a research project* because I was unable to secure drawing rights. I had to start over, using different plantations. *This changed the scope of my project and the point I was trying to prove.* [The] university is very strict about what constitutes fair use; *it is unwilling to rely on fair use* for almost anything.[60]

- Due to uncertainties in the copyright law, *I have not relied on fair use* and therefore have *not been able to include images* already published in articles and books.[61]

- *Publisher was unwilling to rely on fair use.*[62]

- My guess it that the *publisher will ask for substitutions* for the anonymous photos I plan on using.[63]

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58 Brief of Amici College Art Ass'n, et al. at 7, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

59 Hilary Braysmith, Associate Professor of Art History, University of Southern Indiana.

60 Rachelle Starr, Ph.D. student in historic preservation.

61 Bobbye Tigerman, Lois F. McNeill Fellow and graduate student, Winterthur Program in Early American Culture.

62 Anonymous.

- As an artist, I did rely on fair use, but an *exhibit or publication did not occur* because of the other party's unwillingness to take such a risk. As a result of failure to find rights owners (for postcards), *I discontinued these kinds of projects.*[64]

- Where, out of a larger body of work, certain artworks lacked identification or current contact information, the *book published only a selection of the collection*, choosing as far as possible *only the works for which we had a signed permission form.*[65]

- For an international book of folk and children's songs, the *omission of songs* results in a book that resembles the multicultural music education of the past with an *imbalance of songs* from mostly white, European cultures and superficial songs written about cultures but not by the cultures themselves.[66]

- In one case, *we ended up tailoring the text* to the available photographic rights. To say the least, *this compromised the scholarship*. . . . I have *dropped one illustration* from my 1998 publication.[67]

- I had to *omit a photograph* I wanted to use; the photographer was located in England but my letters to him were returned.[68]

- I have *used other (inferior) illustrations*. In a few cases, I choose no image at all. *I've relied on descriptions instead*. . . . It means I don't use

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63 Jeffrey T. Tilman, Assistant Professor of Architecture, School of Architecture and Interior Design, College of Design, Architecture, Art and Planning, University of Cincinnati.

64 Martin Gantman, independent artist, Los Angeles.

65 Eve Sinaiko, independent curator, New York.

66 Kevin Cooper (comment separately submitted to Association of Research Libraries).

67 Marcus B. Burke, Curator, The Hispanic Society of America.

68 Amanda Luyster, Assistant Professor of Art History, Minnesota State University, Mankato.

the image. I'm too nervous about being *sued out of the blue by an owner who suddenly appears.*[69]

- When I published my first article on Romaine Brooks, I had to shift to a *verbal description without benefit of visual backup* because we could not locate the relative who owned the copyright.[70]

- Absolute failure occurs once per project. I have *indeed switched works.* I have *had to make revisions or substitutions* to accommodate the fact that certain objects were too difficult to obtain rights for.[71]

- I did not pursue the photographs. I modified these projects. This caused *real detriments to my publications. I omitted most visuals. I went on to another project* because these copyright problems have led to dead ends.[72]

- For an essay published in a peer-reviewed MIT Press journal, I was unable to include a *photo* and my *article was weakened immeasurably.*[73]

- I wanted to donate a large picture collection (300,000) but *I was forced to abandon my donation* because I did not have the time to find each one of the copyright holders.[74]

- For silent film music, since I am often unable to trace the ownership of these titles, I am *forced to restrict my music to the years prior to 1923,* which are in the public domain. . . . In trying to produce screenings, I have *had to abandon one title* and fall back to more standard films.[75]

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69 Carol Herselle Krinsky, Professor, Department of Fine Arts, College of Arts and Sciences, New York University.

70 Sandra Langer, independent scholar, New York.

71 Wendy Katz, Associate Professor, Department of Art and Art History, University of Nebraska–Lincoln.

72 Leslie Humm Cormier, Department of Visual & Media Arts, Emerson College.

73 Anonymous.

74 Alan Singer, artist, Professor, School of Art, Rochester Institute of Technology.

75 Rodney Sauer, Director, Mont Alto Motion Picture Orchestra.

- We have *no way of locating the negative or the rights holder*. We suggest that a patron select another image from the photo archive where the rights issues are clear (public domain or known rights holder). With respect to a clipping from a 1929 Hotel Drouot auction sales catalogue depicting an early Netherlandish painting, *we suggested that the patron use a different image* of the same painting for which the rights issues were clear.[76]

- In putting images of archeological site excavations on the Web, *we did not use any image* that seemed possibly under copyright. *We did not rely on fair use.*[77]

- The difficulty in clearing copyrights prevents me from using material and *undermines the quality of my classes.*[78]

- From a scholar of Chinese art: In the case of publication of books, I or my publishers would *hesitate to rely on fair use*. The result is that the *work discussed and others may not be illustrated* at all.[79]

- From a photographer of works of Haitian artists: I am willing to *rely on fair use* but *publishers have been reluctant.*[80]

NATURE OF "ORPHAN WORKS": IDENTIFICATION AND DESIGNATION

As the preceding examples illustrate, a work can be "orphaned" as a result of many different circumstances. CAA believes that the determination of "orphaning" should be made on a case-by-case basis, in light of the facts, by the would-be user of the work. CAA urges adoption, therefore, of the core element in the CCI Proposal: that an orphan work is a work for which the copyright owner cannot be located after a

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76 Tracey Schuster, Head, Special Collections and Visual Resources Reference Research Library, Getty Research Institute.

77 Harrison Eiteljorg, II, Director, Center for the Study of Architecture, Bryn Mawr, Pennsylvania.

78 Lucy Bowditch, Associate Professor of Art History, The College of Saint Rose.

79 Cesar Guillen Nuñez, art historian, Research Fellow, Macau Ricci Institute, Macau, China.

80 LeGrace Benson, Director, Arts of Haiti Research Project, Professor Emerita in Art History, State University of New York.

"reasonable efforts search," which is a search that is made in good faith and is reasonable, in light of all the circumstances.

A work may be orphaned because there is no information relating to authorship or copyright information in or surrounding the work. Literally, there may be no clue as to where to start a search. It will, realistically, not be possible to clear rights in works that are utterly anonymous, or in a photograph or drawing found in an archive of unknown persons or unknown places, or even of a known work where there is no credit or copyright information associated with the image.

A work also may be orphaned where there is some limited surrounding or contextual information, but none about the work's rights holder. As the examples suggest, uncredited photographs may be found in a published book or newspaper, or may have been used to present the work of an architectural firm. In many circumstances, the publisher or user has no record of the identity of the photographer. Absent any information about the work, it may be equally difficult to search for copyright registrations (especially if the work is foreign) or other databases for the photographer.

Finally, a work may have some rights-related information that a would-be user is able to pursue. After exercising good faith efforts to conduct a reasonable search, the trail may run cold or, in the words of one contributor, be thoroughly overgrown. Heirs are not to be found. Corporate successors are unknown. Letters are returned unopened. Database searches prove fruitless. Associations and libraries are dead-ends. The work has been orphaned.

Given the myriad possible circumstances that can lead to orphaning a work, including the many types of works, CAA does not believe that there should be any fixed set of statutory or regulatory criteria that can be used to determine whether or when a copyright owner cannot be identified or found. The determination that a work has been orphaned may turn on the subject matter of the work, whether it is a foreign or United States work, its age, where it was found or the many other criteria that are used today in trying to determine whether rights can be cleared and, if so, how best to do so.

Typically, a good faith search may well include consulting Copyright Office records, publicly available databases and more specialized sources such as court records, archives, libraries and corporate offices. Obviously, the type and extent of the good faith effort needed to seek permission to reproduce a painting or text published in the late 20th century in the United States will be vastly different from the rights clearance required to reproduce a photograph taken in Africa or Asia of an archeological site or painting, or to photograph an Indonesian batik painting or an African stone sculpture.

The Notice raises two issues of formal processes relating to orphan work identification: 1) whether the user should be required to file an intent to use form and 2)

whether copyright owners should be required to register or make some filing to maintain their copyrights and to assist in locating copyright owners.

As to the first suggestion – requiring a user to file a notice of intent to use – CAA believes that such a notice is unnecessary, wasteful and would hinder the types of uses of orphan works that the copyright law should be encouraging. For works that are truly orphaned, what is the practical or real benefit of filing a notice with the Copyright Office or elsewhere? There are likely to be hundreds of thousands or millions of orphan works, using the standard articulated above. Copyright owners who are not exploiting their rights and who, in most cases, may well not even know of their ownership (or care), are unlikely to check for such notices or review postings on a website. Furthermore, for many types of uses, very large numbers (dozens or even thousands) of individual works are involved, making the filing of a notice a burdensome process without any obvious purpose. In addition, to the extent that the would-be user would be required to wait to make use of the work for some statutory period of time, that in itself might constitute an undue bar to the dissemination of works as well as a practical impediment to meeting publishing or exhibition deadlines.

CAA is not persuaded at this time that there is any meaningful benefit to requiring potential users to post notices with the Copyright Office or other organizations of their intent to use. That having been said, if a user wishes to post a notice of potential use on a website as part of a reasonable efforts search, then, of course, he or she should be free and even encouraged to do so. Perhaps, over time, private parties will develop such websites and it will be accepted professional practice to post notices of works that are provisionally deemed by the user to have been orphaned as part of a reasonable efforts search. In the meantime, however, CAA sees no reason to require that intent to use filings be made with the Copyright Office or elsewhere.

Second, CAA does not believe that registration should be a requirement of maintaining copyrights. CAA's view, in this respect, is driven in part by its belief, as set out below, that a work can become an orphan at any point during the term of protection, that it can be enormously difficult to determine the precise (or even approximate) age of a work, that unpublished as well as published works may be orphan works and that no additional hurdles to protecting copyrighted materials should be established.[81]

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[81] In particular, CAA notes that a proposal along the lines of H.R. 2601, 108th Cong., 1st Sess. (2003), would represent a woefully inadequate response to the orphan works problem for most of its members. H.R. 2601 would leave unaddressed orphan works in the following categories: foreign works, pre-1978 United States works that are not published, United States works where the very fact (or date) of publication is unknown and, finally, the countless orphan works created in the last 50 years.

Of course, if copyright owners wished to make it easier for users to identify and find them, CAA would strongly encourage them to do so. Indeed, professional practices and academic integrity provide a substantial impetus for CAA members to find and properly credit authors and copyright owners.[82] As the examples above highlight, CAA members expend significant efforts in finding copyright owners. The failure to find a copyright owner and to clear rights can have a direct and dramatic adverse effect on artistic creation and scholarship. Accordingly, CAA would support copyright owners' use of whatever means might be available, on an optional basis, to publicize their ownership of works.

From the copyright owners' perspective, making their ownership of works known widely would sharply limit and maybe eliminate altogether the possibility that a work would be deemed orphan, and avoid the consequences of such a designation. That, in and of itself, might give a few copyright owners the incentive to make known their ownership of particular works. Given the nature of orphan works, however, CAA does not believe that such a scheme could realistically be used or be very useful for the overwhelming majority of such works.

CAA's opposition to a mandatory system of copyright owner registration arises out of its belief that even works created rather recently can be orphaned (in the sense that no owner can be identified and found for rights clearance purposes). But establishing a mandatory registration system for all works, without a minimum period after creation during which such registration need not be made, would largely duplicate the existing registration system and, furthermore, might not meet U.S. international treaty obligations. As the Notice implicitly suggests, such a system would indeed "tread too closely to the copyright registration system."

NATURE OF "ORPHAN WORKS": AGE

CAA very strongly believes that age should *not* be the triggering point for determining whether a work qualifies as an orphan work and is subject to the proposed

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[82] CAA's Code of Ethics for art historians for crediting sources provides as follows: "It is a maxim of scholarship that authors should be scrupulous in crediting sources, not only for ideas and textual material but also photographs and suggestions as to the location of documentation. Comments made by other art historians on the mounts of drawings, on the backs of photographs, recorded in museum dossiers or reported orally when relevant to one's research should be cited. The contributions of students to a teacher who publishes must also be acknowledged. Failure to do so establishes disrespect not only for the instructor in question but also to the profession." *See* "A Code of Ethics for Art Historians" (1995), available at http://www.collegeart.org/caa/ethics/art_hist_ethics.html.

special treatment described below. Orphan works are works for which the copyright owner cannot be identified and found with a reasonable efforts search. There is no ineluctable connection between a work's age and whether its owner can be traced. Thus, it makes no sense to adopt a test that is based on age – whether the criteria are tied to an arbitrary time period (e.g., 35 years from date of creation), the time from the publication date (e.g., 50 years thereafter) or some number of years (e.g., 20) before the expiry of the normal term of copyright.

Certainly, it may be hard to trace copyright ownership for older works. Nevertheless, equal, though different, difficulties may present themselves with respect to more recently created works. There are innumerable examples of newer works that are truly orphan. A few are cited above: a painting or drawing made by Americans or Vietnamese during the Vietnam War; a photo of a mid or late 20th century building by an architecture firm that has gone out of business; a design or trade catalogue from the 1960s; a photo from a rare, foreign periodical from the 1960s and 1970s; and a recently made slide of an object in the collection of a museum in Asia, China or Latin America, where the museum does not know who took (or owns the copyright in) the photo and, in any event, cannot or does not respond to reasonable inquiries. In the digital age, indeed, works created in just the last few years also could be orphaned in analogous circumstances, such as a website of a dot.com business that has been liquidated, where the website was created by a design firm that has dissolved.

A further practical problem with establishing a trigger for orphan works status based on age is that it may not be possible to determine when the term of copyright protection began if, as is often the case, there is no date associated with the work. Or, as the Notice points out, it may be impossible to determine whether a work is in its last 20 years of protection, if the author (and therefore her or his life span) is unknown or if the date of death is unknown. Establishing an age-based test for orphan works treatment would, at least for certain works, result in compelling the would-be user to undertake investigatory efforts as to the publication status or the life and death of an author that might well prove futile.[83]

Although CAA would not be in favor of any age-based test for determining whether a work is orphan, CAA recognizes that the age of a work, like other factors, is

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[83] The approach used in the United Kingdom is rather more focused on whether the copyright in a work can reasonably be thought to have expired. Of course, in that circumstance, the question is whether the work is or is not in the public domain; if it is, then it may freely be used without regard to whether there was reasonable inquiry as to its copyright status. In this regard, the U.K. approach is somewhat analogous to section 302(e), with its entitlement to a presumption that the term of copyright has expired in certain circumstances.

undoubtedly relevant for the type and extent of a reasonable efforts search that may be undertaken. For newer works, more sources may be available and it may be reasonable to expect that more sources would be searched to try to determine authorship and ownership. For older works, however, a would-be user might conclude in some cases that less should or needs to be done because, pragmatically speaking, less can usefully be done to identify and find the owner of a copyright.

NATURE OF "ORPHAN WORKS": PUBLICATION STATUS

There are no reasons to distinguish between a published and an unpublished work. Both can be orphan works. Copyright protection does not, today, turn on whether a work was published or not. Regardless of whether a work is published or not, it is equally subject to the full protection of copyright law upon fixation, including all of its exceptions and limitations.[84] Indeed, as the Copyright Office well knows, Congress acted in 1992 to correct the tendency of courts to make a distinction between published and unpublished works when it applied the fair use doctrine. Now to resurrect a distinction that the 1976 Copyright Act has largely obliterated (at least with respect to post-1978 works) makes no sense because the copyright bargain – with respect to creating incentives to create works, for the purpose of dissemination to the public – is the same for unpublished and published works.

Precluding unpublished works from being considered eligible for potential treatment as orphan works could well deprive the American public of access to a gargantuan class of important material that is fully protected by copyright: artwork never distributed by artists, but retained in their private collections; letters, photographs and postcards found in archives; motion pictures that were only performed, but not distributed in copies; architectural photos or drawings conveyed to contractors or customers and shown, but not distributed, publicly; and privately made sound recordings.[85] Conversely, the harm to copyright owners of allowing unpublished works to be classified, in

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[84] Copyright law and copyright lawyers do not, at least for post-1978 works, generally regard the concept of publication as particularly meaningful – except with respect to the enhanced remedies that might be available for works registered within three months of their publication or the effect of the omission or inclusion of copyright notices on published works.

[85] That Section 77 of the 1997 Copyright Act in Canada only applies to published works should not be deemed particularly relevant to whether the American public has access to orphan works. Canadian copyright law may treat unpublished works specially in order to safeguard perceived interests in protecting authors' personal privacy; under U.S. law, however, privacy rights are protected under separate legal regimes, as described below.

appropriate circumstances, as orphan works would not seem to be significant where the copyright owners can neither be identified nor found.[86]

Furthermore, determining when a work has been published is far from easy in many circumstances. This is particularly the case for works found, often without much context, in libraries or archives. As noted, however, because of the specifics of the definition of "publication" in the Copyright Act, even works that one would think might have been published – such as motion pictures exhibited publicly – might still be unpublished because copies of them were not distributed to the public. The Copyright Office itself recognizes that "The concept of 'publication' is very technical. . . ."[87] Determining whether a work has been published turns on ascertaining facts that may be entirely exogenous to the work itself, searching in U.S. or foreign sources. To require a user to find these facts to verify that a work was published erects yet an additional barrier to an otherwise appropriate use of an orphan work. In addition, having found the facts (if they can be found), the user might then need to consult a legal expert to apply the "very technical" concept of publication to determine whether the work was, in fact, published for purposes of U.S. copyright law.

In an analogous context, the Notice expressly recognizes that the difficulties of determining whether a use is "fair" can impede the availability of section 107. CAA submits that precisely the same considerations – uncertainties and the possible need to resort to lawyers for advice – should counsel strongly against establishing a sharp division between published and unpublished works, and then choosing to afford potential orphan works status only to the former, but not the latter.

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[86] In this regard, allowing unpublished works to be eligible for orphan work treatment does not threaten the "commercially valuable" right of first publication for the copyright owner, as articulated in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 417 U.S. 539 (1985). That decision focused on circumstances where a work was soon-to-be published, *id.* at 554, and where the user's "intended purpose" was to supplant the "copyright holder's commercially valuable right of first publication." *Id.* at 562. Those circumstances simply are not present where a reasonable efforts search turns up no indication of the ownership of any rights, let alone that the work might be on the verge of being published in a national news magazine. President Ford's memoirs were as far from being orphaned as is conceivable: "The Nation" magazine was all too aware that President Ford was the author of the unpublished manuscript, that Harper & Row and The Readers Digest owned the book rights and that it would be scooping "Time" magazine's prepublication rights.

[87] "How to Investigate the Copyright Status of a Work," Circular 22, Copyright Office, available at http://www.copyright.gov/circs/circ22.html (page 10 of 15).

Finally, the Notice implicitly suggests that there may perhaps be reasons to treat unpublished works specially. Those reasons are not logically based in copyright law and copyright policy because copyright law today does not distinguish in any fundamental sense between the rights in unpublished and published works. An individual may, however, have privacy, publicity and non-copyright-related interests in maintaining the status of a work as unpublished. These interests are separate from copyright.[88] They are grounded in other legal regimes which, notwithstanding a copyright use, would still be available to any person who is entitled to invoke them.

In short, a would-be user would, without regard to whether an unpublished work is orphan or not, still have to comply with all other applicable laws.[89] It is not being suggested here that treatment of a work as orphan for purposes of the copyright law would create any sort of safe harbor from state law or foreign law claims that are independent of copyright. Accordingly, in terms of any proposal that would enhance the American public's access to orphan works, there is no justification for according second-class status to unpublished works.

EFFECT OF A WORK BEING DESIGNATED "ORPHANED"

Finally, with respect to the effects of designating a work as "orphaned," CAA fully supports the CCI Proposal. From CAA's perspective, the following elements are central to the proposal.

Reasonable Efforts Search

Users would determine whether a work is orphaned based on a reasonable efforts search, as defined above. Determinations with respect to a reasonable efforts search would be made on a case-by-case basis, in light of all the circumstances.

As noted above, whether to conduct a search in the first place, and the type of search, will vary depending on a host of factors. It may be that guidance should be provided by associations such as CAA as to what would constitute a reasonable efforts search. CAA already promulgates many guidelines for professional practices. In the ordinary course, however, it would be expected that searches might be made of Copyright

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88 The Library of Congress itself recognizes that privacy and publicity rights are "separate and distinct" from copyright interests. *See* Legal Notices, Privacy and Publicity Rights, Library of Congress, available at http://www.loc.gov/homepage/legal.html.

89 *See id.* (explaining that users remain responsible for determining whether their proposed uses implicate privacy and publicity rights, apart from copyright).

Office records and other public databases, archives, rights clearance organizations, or image banks, as well as Web searches and more focused research, depending on the source, age and subject matter of the work. Given CAA's strong preference for a flexible process, CAA does not believe that there should be fixed statutory factors setting out the criteria for what would qualify as a reasonable efforts search.

Preservation of Documentation

After having undertaken a reasonable efforts search, a user should maintain appropriate documentation describing his or her efforts, or explaining why it would not have been reasonable to further pursue a particular avenue of search. Users essentially would self-certify that a work has been orphaned.

CAA, as a publisher, would expect to request that users – authors of contributions to scholarly journals, for example – be able to produce evidence of such documentation upon request. Authors might be asked to declare or certify to publishers that, where they had been unable to clear rights, they had undertaken a reasonable efforts search to find the copyright owner.

As noted above, CAA understands that some copyright owners may be skeptical that all users will proceed in good faith in deeming a work orphaned. For this reason, the requirement that documentary materials be maintained is important, to guard against the possibility that the orphan works provision will be invoked after sham searches. In instances where the user's work will be published or displayed, the publisher or venue of exhibition itself will have an interest in being persuaded that the search has met the reasonable efforts standard. In addition, such documentation may be made available to subsequent users.

Identification of Orphan Work Status and Subsequent Users

A user should identify, in accordance with appropriate professional standards, that a work is orphaned. Reputable professionals currently credit third-party sources and identify rights holders or others who have provided access to a work (e.g., a museum supplying a slide or digital image of a painting in the public domain). It would be expected that they would do the same in identifying the status of a work as one where the copyright owner cannot be found; perhaps they might indicate that the use is being made pursuant to a particular statutory provision.

Identification of a work as orphaned is important in two respects. First, it enhances the public's knowledge with respect to the ownership of a copyright. Second, it transparently indicates the circumstances under which the user is making use of the work.

Subsequent would-be users of an orphan work may well find that work reproduced in the first user's publication or other work. As part of a reasonable efforts

search, it would be expected that such subsequent users contact the first user with respect to the search that had been made at the time of such first use. Subsequent users should also have to make their own determinations as to whether the work is still orphaned, based on their own reasonable efforts investigation (which presumably would include contacting the first user, if he or she is found). It may be, however, that sufficient time has elapsed since the first use, or that the subsequent user has access to different and improved search technologies, or that he or she has new or other leads to finding the copyright owner; thus, in such instances, it would not be reasonable for the subsequent user to do no more than merely rely on the first user's search.

Orphaned Work: A Matter of Proof

What, then, ought to be the consequences of designating a work as orphaned, should a rightful copyright owner emerge? CAA does not believe that such a designation should cut off the rights of such a copyright owner. The CCI Proposal offers a nuanced approach that properly balances all rights in light of the purposes of U.S. copyright law.

A rightful copyright owner should not be prevented from suing an author or publisher who makes use of an orphan work for copyright infringement in federal court. A copyright owner should be required, as today, to register the work before suing (for United States works) and should be required to demonstrate its ownership.[90] Importantly, however, if the owner succeeds in proving infringement, then the remedies available should be limited, as set out below.

In such a suit, any defendant could offer proof of a reasonable efforts search to limit the remedies available to the plaintiff, if the plaintiff succeeds in proving infringement. The plaintiff then could attempt to prove that the defendant's search was not reasonable, in light of all the circumstances.

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[90] Although the orphan work at issue might, in fact, have been registered previously for purposes of section 411(a), that is unlikely to be the usual case. Ordinarily, a reasonable efforts search should have uncovered the registration, which then may mean that the work was not an orphan. Registration of a work does not, however, preclude the possibility that the work has been orphaned. It is difficult, for example, to search for certain types of works, such as uncredited, anonymous photographs, which may have been published in a publication whose registration covered its whole content. Even where a user has been able to associate the work with a copyright registration, the work may still be an orphan because the trail of copyright clearance has run cold, where, for example, the registrant has gone out of business or cannot otherwise be traced.

Any type of defendant could argue that its use was of an orphan work, including an individual, a publisher, a website, library, archive or, indeed, any other user, whether a not-for-profit entity or not, and without regard to whether the use was non-commercial or commercial. There is no reason to assume that libraries or archives or other non-profit institutions should have a privileged status in disseminating orphan works available to the American public. The difference between not-for-profit publishers and smaller (or even larger) for-profit publishers may not be great. Indeed, a larger, commercial enterprise, whether a book publisher, record label or major motion picture company, is likely to have even greater resources to present the orphan work by itself or in a new, altogether different context. Such legitimate uses should be encouraged, not thwarted by having a statutory provision that creates artificial distinctions between types of users that only result in inhibiting the creative reuse of orphan works.

If the plaintiff proves that the defendant's use infringed and, further, successfully carries its burden of demonstrating that the defendant's assertion that the work was orphaned was, in fact, pretextual – that is, that the defendant's so-called reasonable efforts search really was a sham – then the full range of remedies would be available to the plaintiff. In defending the infringement action, the defendant would still be fully entitled to invoke all affirmative defenses that might otherwise be available, including fair use or the expiry of the statute of limitations, for example.

Remedies Available to the Plaintiff for Defendant's Use of an Orphan Work

A central element of the CCI Proposal is that the plaintiff's remedies are limited if the defendant has made an infringing use of an "orphan work." That a work has been orphaned would not, by itself, operate to create any exceptions or limitations to the exclusive rights of the copyright owner.

Limiting remedies is appropriate because if, to the contrary, a plaintiff can pursue and obtain all of the remedies for use of an orphan work that are otherwise available under the Copyright Act, the threat posed by such an infringement action will dissuade all use of such works. Skittish defendants or those to whom legal counsel is not readily available – including gatekeeper publishers, artists, smaller non-profit organizations, universities and many others – would, absent the promise of limited remedies, be far less willing to rely on the status of a work as orphan.

CAA notes that other legal approaches, proposed by the museum commenting parties (whose interests are very similar to and are allied with the CAA), would cap or curtail altogether the exposure of a user of orphan works if the use falls under a safe harbor. These include crafting statutory exceptions or limitations to a rights owner's ability to sue for infringement of an orphan work for some period of time. CAA welcomes those proposals and believes that they, too, merit serious consideration.

Fundamentally, CAA believes that defendants who succeed in establishing that their use was based on a reasonable efforts search ought to be regarded as truly innocent infringers. For that reason, only a modest financial remedy should be available against such defendants. Capping the monetary remedy at the lesser of actual damages or $100 per work will remove the disincentives to use works for which a good faith determination has been made as to their orphan status.

Where groups of works are involved – in a single publication or posting of archival materials to a website – the cap should be actual damages or $500. In this regard, groups of works should be regarded as including works by a single author or by multiple authors; the essential element here is that the works are treated by the user as a unit. Such would be the case, for example, for an archive of photographs, letters or other documentation (by one or several authors) donated to a museum by a donor that the museum publishes in book form or posts on a website. Absent a meaningful cap on remedies, there will remain lingering, possibly substantial disincentives to make productive use of very large numbers of discrete copyrighted orphan works (e.g., photographs of works in the public domain, postcards, letters or illustrations from a catalogue).

CAA offers its proposal – $100/$500 caps on damages – for consideration by the Copyright Office. CAA urges, however, that whatever approaches ultimately are adopted to address the problem of orphan works, the guiding principle must be that the remedies, if any, that are made available to a successful plaintiff cannot be set so high (either individually or in the aggregate) as to establish a practical or economic hurdle to a legitimate user's use of such works.

In any event, no injunctive relief should be available to the plaintiff against the user of an orphan work. Nor should the plaintiff be able to obtain statutory damages or attorney's fees, even assuming timely registration in the case of United States works.

CAA has considered whether successful plaintiffs in an action against the user of an orphan work might, instead of the monetary remedies suggested above, be able to obtain a "reasonable royalty." CAA is not in favor of allowing successful plaintiffs to recover a reasonable royalty against users of orphan works, principally because a reasonable royalty will be an amount that, by definition, is indeterminate at the time of the use. Particularly with respect to an orphan work that, presumably, is not being exploited currently and for which there may well be few comparable licenses, it is far from certain how a "reasonable" royalty would be established. That very indeterminacy would operate as a disincentive to use orphan works because would-be users would not know to what extent their exposure to risk is limited. Further, a statutory provision that could propel parties into contested litigation on the question of what is a reasonable royalty would defeat the whole purpose of the present exercise: crafting an approach that makes orphan works available for use on a more certain footing.

In this regard, CAA has considered the general approach and the specifics of the Canadian approach to what Canadian law calls "unlocatable works."[91] Briefly, as the Notice points out, the Copyright Board can issue licenses, with reasonable royalties, for such works. CAA believes that the Canadian approach is not an appropriate model for the United States for several reasons.[92]

- The Canadian Copyright Board is a governmental body that has the central role in administering the unlocatable works scheme. The Board's origins are in overseeing the royalties charged by Canadian copyright collectives. In turn, those collectives, which grow out of an earlier French tradition, are very much a part of the Canadian copyright system. The United States has some collecting societies for particular rights and types of works, but they are not as pervasive in this country as they are in Canada. Importantly, the United States has no government body that has been established to play such an active part in setting copyright royalties. Consistent with the free market, private sector orientation of U.S. copyright law, the United States should not establish such a body or involve any non-judicial bodies in establishing the remedies for copyright infringement.

- Section 77 of the Canadian Copyright Act, which grants the Board the exclusive jurisdiction to issue licenses for published unlocatable works, is related to the collective administration model in the sense that a user might have the incentive to resort to the section 77 process where the copyright owner cannot be located through the collectives. The Board, in that case, may, upon application, assume the responsibility for fixing the royalty rate.

- The Board's work with respect to establishing licenses for unlocatable works has proven to be resource intensive, yet without real predictability or transparency for a potential license seeker. The Board makes case-by-

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91 Copyright Act, R.S.C. 1985, c. C-42, s.77. CAA is grateful to Agnes Li, a clinical program student at the Berkman Center for Internet & Society at Harvard Law School, for her research into both the history of s.77 and the operation of the Canadian Copyright Board in administering the scheme, and for her contributions to the following discussion.

92 Several of the points that follow with respect to the operation in practice of the Canadian scheme were developed based on a telephone interview with Mario Bouchard, General Counsel of the Canadian Copyright Board, by Ms. Li and the undersigned.

case determinations on what constitute "reasonable efforts" by the would-be licensee to locate the rights holder. The Board may ask the would-be licensee to conduct additional searches. The dialogue between the Board and the would-be licensee can be iterative and time-consuming, and may create disincentives to make use of unlocatable works.

- To determine the royalty rate for the license, the Board will look to multiple sources, including the market rate, an established price, if any, by the copyright owner for comparable works and the rate established by the collective society. The would-be licensee has no certainty as to whether its license application will be approved and on what terms it might be approved.

- Frequently, applications not meeting the statute's "reasonable efforts" requirement are simply withdrawn. There may be multiple reasons for such withdrawals, from the user finding that it is unable to meet the "reasonable efforts" requirement, to the Board's view that no license is required because the proposed use is de minimis or falls within the "fair dealing" exception of Canadian copyright law.

- Since the Board began undertaking this activity with respect to unlocatable works, only 150 applications have been considered, with a somewhat smaller number of licenses having been granted. It is thought that the very small number of applications may be due to a lack of awareness by would-be users. In addition, it may be that Canadian users simply go ahead and use unlocatable works without a license, on the assumption that if the copyright owner does eventually emerge, then it will be possible to negotiate a resolution of the matter at that time. In this regard, it also has been suggested that the threat of copyright litigation in Canada may be diminished, when compared with the United States, due to a somewhat less litigious tradition. The possibility that a copyright owner might emerge to claim an interest in an unlocatable work, therefore, seems to be less of a disincentive to use such a work in Canada than it has been in the United States.

In short, in the United States, a more certain and predictable scheme, along the general lines of the proposal outlined here, seems a better fit for our copyright tradition and more likely to further the purposes of our copyright law.

<u>If a Copyright Owner Surfaces: Subsequent Uses and Subsequent Users</u>

CAA also has considered the consequences of a copyright owner of a work making known its presence and ownership of rights to someone who had determined that the work had been orphaned. Aside from the owner being able to sue for infringement in

the circumstances described above, both the owner and the first user, as well as subsequent users, should have some obligations.

First, CAA proposes that the original user be free to continue to make the same use of the work as before, without increasing the remedies available to the rightful owner. The user may continue to distribute copies of a book or phonorecords, in existing or new editions or pressings, or maintain images on a website.

Second, the original user must credit, where possible, the rights owner. Doing so might mean updating the credit line on a website or in a new edition of a book, in circumstances where credits would otherwise normally be amended.

Third, the original user must obtain permission for new uses, such as making a movie from a book that contains an orphan work photograph. "New" uses are uses that would constitute new infringing acts. Revising an article into a book would also be a new use; thus, if the copyright owner surfaced as a result of the publication of the article, the user could not rely on the orphan works remedies provision of the copyright law in authoring and publishing the book without obtaining the permission of the rights holder.

Fourth, subsequent users, as noted, ordinarily are expected to contact the first user with respect to the rights status of an orphan work. If they do so, then the first user should inform the subsequent users about any post-publication assertions of copyright ownership by parties who were unknown at the time of the first user's search. As such a work is no longer orphaned, the subsequent user must then, as is typically the case, determine whether and how to clear rights from the copyright owner; failing to do so could expose the subsequent user to an action for copyright infringement where the full panoply of remedies is available to the successful plaintiff. Thus, just as a work may become orphaned, it may also lose its orphan status as a consequence of having been used – a good result for the copyright owner, subsequent users, and the American public.

Fifth, the rightful owner must take some affirmative action to make known its claim to own rights in a work that is otherwise credited as orphan. Otherwise, a subsequent user will remain unaware of the identity of the copyright owner and might reasonably conclude that the work is still an orphan. Assuming that a subsequent user has undertaken a reasonable efforts search (including contacting the original user), and still has not found the copyright owner, the rights holder, in pursuing that user, may only recover the limited remedies described above.

INTERNATIONAL IMPLICATIONS

Finally, with respect to the international implications of the proposal set out here, CAA agrees with the views expressed in the CCI Proposal. The proposal creates no new formalities to the exercise of the exclusive rights of the copyright owner. Importantly, the remedies-based approach should not to be regarded as creating any new exceptions to

or limitations on copyright owners' exclusive rights. The proposal does not operate like a compulsory license, which curtails the exclusive rights of the copyright owner and establishes the terms and conditions of usage for all eligible users, without regard to a known copyright owner's assertions of such rights.

Instead, the CCI Proposal simply modifies the remedies available to a copyright owner who emerges to assert his or her rights over an orphan work. Even if the three-part test of Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property were applicable (and the CCI Proposal notes that the test might well not be applicable where only remedies are limited), the proposed approach satisfies that standard. Orphan works are indeed "special cases" where a work is not being exploited, and, therefore, it cannot be said that limiting the remedies available to a successful plaintiff conflicts with the "normal exploitation of the work" or "unreasonably prejudices" the "legitimate interests of the rights holder. Providing only limited remedies to the plaintiff in these circumstances no more runs afoul of the international obligations of the United States than does section 504(c)(2), which allows courts to reduce statutory damages for innocent infringement to $200.

The rights holder is permitted to prove in an infringement action that a reasonable efforts search would have found the rightful owner of the rights, in which case all remedies are available. Moreover, the rights holder, having surfaced and made itself known (whether by bringing suit or otherwise), loses none of its exclusive rights against new uses by the original user or against any subsequent users.

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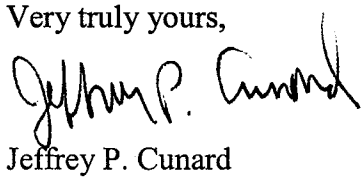
For the foregoing reasons, CAA supports the CCI Proposal and is prepared to assist the Copyright Office with respect to its important study or in the development of any further proposals relating to orphan works.

Very truly yours,



Jeffrey P. Cunard
Counsel
College Art Association