Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

March 25, 2005

VIA E-MAIL

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

Re: **Notice of Inquiry on Orphan Works**

Dear Mr. Sigall:

I am pleased to submit the attached comments of Microsoft Corporation in response to the Copyright Office's Notice of Inquiry on Orphan Works. Please feel free to contact me if you have any questions.

Very truly yours,

Thomas C. Rubin

Thomas C. Rubin
Associate General Counsel
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Attachment

Microsoft Corporation is an equal opportunity employer.

COMMENT OF MICROSOFT CORPORATION
In Response to Orphan Works Notice of Inquiry
70 Federal Register 3739 (Jan. 26, 2005)

Microsoft Corporation submits this comment in response to the Copyright Office's Notice of Inquiry on orphan works (70 Federal Register 3739 (Jan. 26, 2005)) (the "Notice"). Microsoft is the worldwide leader in software, services and solutions, and produces a wide variety of software platforms (such as Microsoft Windows and Xbox), applications (such as Microsoft Office, Encarta and games) and websites (such as MSN.com) used by hundreds of millions of consumers and businesses worldwide. These products contain a variety of both original and licensed content.

Microsoft has on occasion experienced the challenges presented by orphan works. When a work is orphaned, it is not available to content creators and is functionally unavailable to the public. Microsoft agrees with the Copyright Office that it is appropriate to assess whether current law, as applied to orphan works, strikes the proper balance between the societal interest in access and the important interests, including incentives to create and disseminate works, that underlie copyright protection. Microsoft submits this comment in furtherance of having the constitutionally grounded and historically respected balance of interests maintained.

Response to Specific Questions

A. Nature of the Problems Faced by Subsequent Creators and Users

As the Notice observes, orphan works may exist in a myriad of forms and may be found in many contexts. A photograph in the collection of a library, or a painting or sculpture discovered in a shop, may simply have no copyright-related information at all, whether as to authorship, source, or date of creation or publication. A manuscript found in an archive may have been authored by someone who has left no heirs or whose heirs cannot be found. An independent record label or publisher may have gone out of business, and efforts to determine to whom its copyright assets were distributed can hit a dead end. Efforts to identify and contact copyright owners based on the "last known address" may prove entirely futile, with letters unanswered or returned "addressee unknown, no forwarding address."

As the Notice recognizes, the number of legitimate potential uses of orphan works, and the range of potential users, are vast. Individual artists and authors, scholars, creators of complex multimedia works, documentary and commercial film makers and archivists may wish to use orphan works in their own creative works. Libraries interested in creating digital archives of works in their collection may find that some of their works are orphan works. Digital archives may store and display works that may themselves contain (or, over time, may themselves come to be) orphan works.

Each of these users would be serving a fundamental goal of copyright law by making an orphan work publicly available, but such users may well be deterred from

doing so by the difficulty or impossibility of obtaining rights clearance where the copyright owner is not known or cannot be located after a good faith, reasonable investigation.

In multiple respects, the bargain embodied within copyright policy and law is disrupted by the lack of a mechanism to enable use of orphan works:

- The user is, as a practical matter, unable to provide any economic reward – or, in many cases, even any credit – to the author or rights owner of the work.
- The user is deterred from making the work available to the public, notwithstanding that a principal goal of copyright law is to encourage the dissemination of copyrighted works to the public.
- The broader public is not able to benefit from creative derivative works that might otherwise be offered by the work's good faith user.

B. Nature of Orphan Works

1. Identification and Designation

As described above, a work may be orphaned in several circumstances, all of which lead to the same problem: the practical inability, using reasonable efforts, to find the copyright owner for the purpose of clearing rights to use the work. What characterizes an orphan work is the inability to clear rights because the rights owner cannot be identified and located, notwithstanding a user's reasonable good faith efforts to do so.[1]

For all the sound policy reasons cited by the Office in its Notice, we believe that further inquiry is warranted into whether in instances where a good faith user, after conducting a reasonable investigation, is unable to identify or locate the rights owners, the law should enable that user to proceed with using the work. The ability to search Copyright Office registrations and recordations of documents and the increasing availability of other rights ownership databases, publicly available registries, and Internet search tools should facilitate and make more reliable a true good faith search of relevant information. Other reasonable efforts, appropriate and customary in the field of use for the type of work in question, might be pursued as well.

The Notice further asks whether the good faith user should be required to file an "intent to use" notice, whether with the Copyright Office or some other entity. Rightful copyright owners of orphan works may be more likely to be drawn forth by the actual use

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[1] Such a situation must be distinguished from the case where a rights owner has been found or is known, but chooses not to authorize the use or chooses not to respond to requests. Such a work is not orphaned, but, instead, the rights owner is legitimately exercising the exclusive rights to exploit the work or to determine not to authorize its use.

of a work than by the existence of a formal filing. Accordingly, at this juncture, we do not believe that a mandatory filing system should be established. We suggest, however, that consideration should be given to whether there should be an incentive for good faith users to file such a notice.

2. Age

The orphan works problem is not one that is inevitably or invariably related to the age of the works or to the number of years remaining in their terms of protection. The age of a work is likely, however, to be relevant as to whether a good faith user's search for the copyright owner was reasonable.

3. Publication Status

Conducting a reasonable good faith search may vary as between a published and unpublished work. As noted above, substantial resources exist for searches of some published materials, including Copyright Office registrations, recordations, reference materials and inventories. While we are not prepared, at this early stage in the Office's inquiry, to suggest that unpublished works should in no instance be treated as "orphaned," we do acknowledge that efforts to determine the identity and locations of authors, heirs or other successors in interest for unpublished works may raise issues relating to privacy, publicity rights and other non-copyright interests that are not present with regard to works that have been published or otherwise commercially exploited.

C. Effect of a Work Being Designated as "Orphaned"

While Microsoft welcomes the Office's efforts to assess whether the balance between users and copyright owners' rights under the copyright law with respect to orphan works can be improved, we question whether the establishment of a statutory licensing framework or layer of governmental administration would be necessary or appropriate to achieve such balance. In our view, it is preferable to consider approaches that – consistent with U.S. copyright law and policy and international norms – avoid compulsory or other government-administered licensing or royalty collection systems to compensate uses of orphan works. If the work is a true orphan, there will be no one to receive the compulsory license fees. If the work proves not to be orphan, traditional approaches to marketplace exploitation should prevail.

Microsoft suggests the following areas warrant further public comment and consideration as the Copyright Office moves forward in its orphan works inquiry:

- Nature and Scope of a Reasonable, Good Faith Investigation. For the purpose of rights clearance, users of potential orphan works should be required to undertake reasonable, good faith investigations to identify and find the works' copyright owners. The nature of these investigations may vary, depending on the type of work, its age, where it was found, whether there was copyright-related information found with or accompanying the work, and whether affirmative efforts by the user (such as posting a notice or a copy of the work on a website or

making a voluntary filing of intent to use) are likely to result in meaningful leads. It is presumed that searches of Copyright Office registrations and recordations, use of Internet search tools, and use of other publicly available records would, where appropriate, be conducted. As these factors are likely to be variable, it might be difficult to establish specific statutory criteria for what would, in all circumstances, constitute a reasonable, good faith investigation. If the user conducts such an investigation and is not able to identify and find the copyright owner, then the user could reasonably conclude that the work is an orphan work.

- Emergence of the Rightful Owner. If a rightful copyright owner does emerge and make herself known to the world (such as through recordation or other means), then the work is no longer orphan. Careful consideration will have to be given to remedies and accommodations appropriate in circumstances in which a party has invested in the distribution or other dissemination or use of a work based on a good faith determination after reasonable investigation that the work is an orphan work.

- Appropriate Remedies. The Office should consider whether reduced remedies, perhaps modeled on the approaches of 17 U.S.C. § 104A (restored works) or 17 U.S.C. § 504(c)(2) (innocent infringement), might be appropriate in instances in which the user establishes that the orphan works defense is applicable.

D. International Implications

Microsoft recognizes that, in considering an approach to the challenges presented by orphan works, the Office and other policymakers must take care to recommend measures consistent with international obligations under the Berne Convention for the Protection of Literary and Artistic Works, the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), and various bilateral and regional IP and trade agreements. While these international obligations may limit policy choices, we do not believe that they preclude consideration of appropriate measures, *see, e.g.,* 17 U.S.C. § 104A.

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