

By Email Only:
orphanworks@loc.gov

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U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
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Re: "Orphan Works"

This submission is in response to the request of the Copyright Office for comments on "orphan works." It is based upon the following framework and assumptions:

1. The rights of copyright owners "are limited in nature and must ultimately serve the public good. . . . Private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The ultimate aim is . . . to stimulate artistic creativity for the general public good. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts.'" *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).
2. It is in the interests of authors, copyright owners, and the public that orphan works are preserved, made accessible to the public, and used.
3. The current framework of the U. S. Copyright Act, 17 U.S.C. § 101 *et seq.* embodies procedures that will allow for a proper balance of the many interests involved in making orphan works accessible.
4. These interests include enrichment of the public through access to information, ideas, and expression, notice, good faith, risk management, and an opportunity for authors and copyright owners to become involved in the dissemination of their works.
5. Users of works cannot rely on the doctrine of fair use, as embodied in § 107 of the Copyright Act, because litigation is too expensive and the outcome of any case is too unpredictable.

The undersigned individuals are authors of copyrightable works, have taught copyright law to graduate students in law, business, public policy, information studies, and library science. We have counseled clients on copyright risk management and copyright strategy, and have litigated copyright cases. Copyright law is difficult subject matter and outcomes almost impossible to predict. Accordingly, we believe that the issue of orphan works should be addressed through an amendment to the U.S. Copyright Act so as to provide clarity and direction to the public, the courts, authors, copyright owners, and users.

We believe a good orphan works proposal can help the U.S. Copyright Act achieve its constitutional objectives of “promoting broad public availability of literature, music, and the other arts” and must reflect a sensitive balancing of interests of those who create, disseminate, preserve, and use copyrightable works.

We refer to the orphan works that have been the subject of efforts of third parties to preserve, enable access to, disseminate, or commercialize them as “fostered works.”

We believe that an orphan works solution should¹:

1. Apply to works whose author(s) or whose current copyright owner(s) are not known or, if known, cannot be located with reasonable efforts (“orphan works”).²
2. Not apply to works currently in print.
3. Apply to published and unpublished works.
4. Apply to all works (literary works, films, photographs, musical compositions, sound recordings, *etc.*).
5. Be media neutral (as echoed in 17 U.S.C. § 102 “in all media now known or later developed”).
6. Be available to any user of an orphan work, whether for profit, not for profit, or private.
7. Give special incentives for libraries and archives to preserve orphan works.
8. Provide mechanisms within the U.S. Copyright Office:
 - For persons who have fostered works (or who intend to foster works) to give notice of their activity.
 - For deposit of fostered works in accordance with procedures substantially similar to the current deposit requirements of the U.S. Copyright Act.
 - For assisting in the resolution of ownership of copyright if multiple claimants come forward to claim ownership.

¹ At the end of this outline of objectives, the authors of this proposal provide additional suggestions as to how these objectives could be achieved within the current structure of the U.S. Copyright Act.

² Our definition of “orphan works” includes those works whose authors and/or copyright owners are unknown, in addition to the definition that appears in the Copyright Office Notice of Inquiry (“copyrighted works whose owners are difficult or even impossible to locate”).

9. Eliminate the fear of litigation for those who foster a work in good faith.
10. Eliminate awards of attorneys' fees, statutory damages, and actual damages, for those who foster a work in good faith.
11. Provide examples of conduct constituting good faith in the efforts to locate an author or copyright owner of a work believed to be an orphan work.
12. Provide examples of conduct constituting good faith in the efforts in the fostering of an orphan work.
13. Require that a person claiming to be the owner of copyright in a fostered work to prove such ownership by "clear and convincing" evidence where there are multiple claimants of copyright in the fostered work.
14. Adopt a new type of copyright notice of copies of fostered works that are disseminated that will advise third parties that the work is a fostered work and the name of the entity who has fostered the work, for example "[F] XYZ University."
15. Be in addition to, and specifically not limit the rights under, §§ 107 - 122 of the U.S. Copyright Act.
16. Provide a mechanism by which a lawful copyright owner, once identified, can regain certain control over the future publication or dissemination of a fostered work.
17. Recognize that those who preserve, archive, study, research, teach from, report on, comment upon, build upon, adapt, and publicly disseminate fostered works in good faith enrich our society by "promoting broad public availability of literature, music, and the other arts."
18. Recognize that many of those who foster works will invest financial, intellectual, and strategic resources in doing so.

The undersigned have provided legal guidance on copyright matters to literally thousands of individuals. Although generalizations are not applicable to every circumstance, we have found that for those works no longer in print, authors are thrilled to have their works made accessible to new audiences. For those works whose authors are unknown or who cannot be found through reasonable efforts, the balance of interests weighs in favor of enabling access, preservation, and use.

Additional Specifications of the Proposal for Orphan Works Legislation

1. The U.S. Copyright Office database is accessible worldwide and is free. We propose that the Copyright Office have a mechanism that allows a person who has fostered a work, or who intend to foster a work, to complete a simple form (a description of

the work it believes to be an orphan work and contact information for the fostering organization) with an attachment in a format providing some portion of the orphan work (text for literary works, file formats designed to enable access to sound or images). Anyone can access the orphan works database and a person who is the true copyright owner can contact the fostering entity.

2. Use of this mechanism by a fostering entity is presumptively good faith. Other examples of presumptive good faith would include (a) reliance upon a written opinion of copyright counsel, and/or (b) maintaining records of searches of or communications to at least three (3) sources who may have information about the copyright owner (if any) or author, such as the U.S. Copyright Office, publisher, writers' guilds or other such organizations, author's family, heirs, trustee, or attorney, and/or (c) review of industry publications of works in print or works commercially available. These examples are not exhaustive and a court may consider all evidence of good faith and reasonableness.
3. Persons who have demonstrated that they are the true owner of copyright in a fostered work shall have the right to seek an injunction against commercial use of the work, and the right to seek an injunction against certain not for profit uses. The request for injunctive relief shall be considered by a U.S. district court in accordance with the applicable standards for injunctive relief, including proof by the copyright owner that it cannot be made whole with a reasonable compulsory license.
4. Article 5 of the U.S. Copyright Act would be amended to make injunctive relief the only relief available to a copyright owner of a work that has been fostered in good faith. The injunctive relief would not apply to copies maintained or created by libraries and archives.³ The injunctive relief would be prospective only, as to future exercise of the rights under § 106, and shall not apply until the fostering organization has recouped all costs associated with its fostering activities.
5. Just as the U.S. Copyright Act provides special protections for "reliance parties" in § 104A, those who foster works can receive similar protections as "foster works reliance parties," including opportunities to continue using derivative works of fostered works, subject to a reasonable compulsory license.

³ The U.S. Supreme Court has noted that not-for-profit uses of works that have no current functioning market can advance the goals of copyright law:

"[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

6. There will be no personal liability for damages of any kind, or for fees or expenses of any kind, for individuals acting in good faith with respect to fostered works or those in privity with them.

Respectfully submitted⁴:

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