

March 25, 2005

Via Electronic Submission

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

Re: Comment on Orphan Works Notice of Inquiry

Dear Mr. Sigall:

JSTOR, ARTstor Inc., and Ithaka Harbors, Inc. are pleased to submit the following statement in response to the notice of inquiry by the U.S. Copyright Office regarding orphan works.

JSTOR, ARTstor, and Ithaka are related, not-for-profit organizations¹ charged with utilizing digital technologies to facilitate access to and the preservation of important scholarly materials. In support of their shared mission, each organization is actively involved in constructing, operating, and making available digital repositories of scholarly and educational materials for noncommercial use within the academic or cultural communities. The reproduction and distribution of “orphan” works (that is, works for which the owners cannot be found) through these repositories – and any copyright exemption that addresses such works – has potentially significant implications for each of our organizations, and for the scholarly, educational and cultural communities that we serve. Accordingly, we respectfully submit our comments for the Copyright Office’s consideration.

Overview of JSTOR, ARTstor and Ithaka

JSTOR

Created in 1995, JSTOR, www.jstor.org, makes available a searchable, electronic archive of the full backrun of digitized versions of important scholarly journal literature, which it licenses from publishers and learned societies. In striving to fulfill its mission to provide greatly improved access to the back issues of important scholarly journals while at the same time ensuring the long-term preservation of these materials, JSTOR has adopted a

¹ ARTstor and Ithaka are “supporting organizations” of JSTOR under Section 509(a)(3) of the Internal Revenue Code. Accordingly, they operate in furtherance of JSTOR’s mission.

system-wide perspective, which takes into account the often conflicting needs of libraries, scholars, and publishers.

As permitted by rights holders and consistent with Section 201(c) of the U.S. Copyright Act and its not-for-profit status as an archive, JSTOR faithfully replicates in digital format the exact images of each page of entire journal back issues, beginning with volume one, issue one. JSTOR adds an “optical character recognition” component to enable the page images to be full-text searchable. Approaching its tenth anniversary, JSTOR now includes the full backruns of 464 journals from 291 publishers across 37 disciplines, including the humanities, sciences, and social sciences.

JSTOR has been widely adopted by the scholarly and educational community, transforming in many ways how scholarly research of journal literature is conducted. Its archive of nearly 17 million pages continues to grow as new journals in a variety of fields are added. Scholars and students at 2,386 non-profit institutions, including universities, libraries, secondary schools, foundations, and government agencies, in 87 countries currently participate in JSTOR.

ARTstor

ARTstor, www.artstor.org, was created in response to needs articulated by scholars, curators, teachers and students to have access to digital images for teaching and scholarship. Created in 2002, ARTstor makes available an expanding digital library of images of art works and related materials in art history and the humanities. ARTstor also provides software tools that facilitate the browsing, searching and active scholarly and classroom use of these materials, such as panning across images, comparing and contrasting multiple images simultaneously, grouping images together and saving such groups for study or lecture purposes, and zooming in on the details of works. As with JSTOR, ARTstor’s library is made available to non-profit organizations for solely noncommercial educational and scholarly purposes.

ARTstor’s primary collection goal is to continuously build a library of digital images that will have the depth, scale, breadth, and coherence to serve the pedagogical and scholarly needs of its users. Currently, the ARTstor library has approximately 300,000 images, arranged in pre-curated collections, with related cataloging. This number is expected to increase to approximately 500,000 in 2006. The existing collections reflect a commitment to provide both a core teaching resource that is broad enough to be reasonably comprehensive, and a varied set of more specialized collections that will appeal to scholars and students in a wide range of humanistic fields. The images largely consist of primary source materials, documenting artistic traditions across many times and cultures and embracing architecture, painting, sculpture, photography, design and decorative arts, as well as many other forms of visual culture. The collections are drawn from collaborations with museums, scholars, publishers, photoarchives, slide libraries, universities, academic libraries, and other institutions and individuals.

ARTstor began making available the library collections to U.S. non-profit institutions in the higher educational community and museums in July 2004. Since its launch, over 350 non-profit institutions have started using ARTstor, including 52 large research universities, 195 liberal arts colleges and smaller universities, 77 community colleges, 23 independent art schools, and 7 museums. ARTstor is also exploring ways of providing images of art for teaching in the primary and secondary school context. Like JSTOR, ARTstor is intended to be a worldwide resource and will start making the library available in countries outside of the U.S. beginning later this year.

Ithaka

Ithaka, www.ithaka.org, was created with the mission to accelerate the efficient and productive uses of information technology for the benefit of the worldwide scholarly community. Ithaka pursues its mission through a variety of activities, including research, strategic services, and providing a variety of technological and administrative services for affiliated entities including JSTOR and ARTstor to increase their effectiveness, lower costs and allow them to focus their efforts on mission related activities. Ithaka is also incubating a number of promising projects with a goal of creating sustainable not-for-profit enterprises.

One of these initiatives, Aluka, is particularly instructive in considering the importance of the orphan works issue. Aluka is dedicated to creating an online archive of hard-to-locate scholarly resources from various regions of the world for non-profit, educational and scholarly use by the worldwide scholarly community. One of the initial content areas for Aluka is *Struggles for Freedom in Southern Africa*, which is intended to document the struggles against apartheid and colonialism in various countries in southern Africa through historical documents, periodicals, personal papers of important historical figures, oral histories, photographs, and other materials. Aluka works with national archives, political parties and other sources, and frequently encounters materials that have the potential to be of tremendous interest to scholars in Africa and worldwide, but – as we describe below – due to the nature of its mission, Aluka frequently encounters problems with orphan works.

The Value of Online Technologies to the Scholarly and Educational Community

The issues surrounding orphan works are important in the online context, in part because of the significant, transformative impact that digital technologies can have on scholarship and pedagogy.

Online search and browse capabilities and the availability of links between different resources mean that users can conduct research across collections in ways previously not possible. Additionally, multiple researchers can access content simultaneously, from multiple locations (such as dorm rooms or faculty offices), and at any time.

The use of digital technologies to further scholarship and pedagogy has also meant that works are accessible to those who previously had limited or no access. Researchers at

institutions with limited holdings, such as community colleges or small museums, are able to access resources previously available only to those institutions with large collections. Researchers with disabilities can conduct research independently through the use of assistive technologies that work with digital media. International scholars, teachers, and students can more easily participate in intellectual exchanges that were previously not possible.

Similarly, materials that were previously unavailable to most users – such as rare manuscripts and texts, deteriorating works of art, or materials held in storage – are now available to large numbers of students, teachers, and scholars, generating new opportunities for study and research. Collections of physical objects located in disparate parts of the world can be accessed relatively seamlessly and with little effort on the part of the curator, faculty member, or student. Additionally, digital technologies allow users to view works in ways previously not possible, such as the details of a ceiling fresco or the threads of a tapestry.

Digital media can also significantly aid in the preservation of scholarly materials. Researchers, curators, scholars and students no longer depend solely on a tangible, physical record, which is easily lost, damaged, or otherwise rendered inaccessible. Digital technologies permit the creation of multiple copies, reducing the risk that the only remaining record of works will be lost. When materials are distributed through centralized repositories, their integrity can be maintained efficiently and frequently more reliably. In the case of rare material, digitization can enable ongoing access over time without compromising the integrity or long-term preservation of the physical or artifactual copy.

Additionally, the digitization of materials presents an opportunity for significant cost savings within the educational and scholarly community. Rather than using expensive and limited shelf space to store periodicals, for example, digital technologies permit users at libraries, universities, colleges, and similar institutions to develop alternative and less expensive storage strategies.

The Impact of Orphan Works on Educational and Scholarly Efforts Such as JSTOR, ARTstor, and Ithaka, and on the Scholarly, Cultural and Educational Communities at Large

JSTOR, ARTstor and Ithaka take copyright – as well as the broader interests of both content owners and users – very seriously. Such considerations impact not only our ability to serve the educational, cultural, and scholarly communities well, but also our ability to obtain, on an ongoing basis, content from copyright owners and other content providers.

In approaching copyright clearance, our approach varies from organization to organization and depends on the works and context at issue (which often necessitates an analysis of a collection on a work by work basis). In some instances, we seek and are able to obtain permissions from the rights holders. In other instances, we rely on fair use

or other exceptions to copyright. In some instances, we have withheld content absent permissions. In all instances, we strive to “do the right thing” by balancing the interests and needs of our many constituents while recognizing the benefits – including those described above – of making such a work available for research and teaching and maintaining the integrity of that work for purposes of long-term preservation.²

Works that are orphaned – or suspected of being orphaned – are frequently encountered in collections of scholarly or archival materials. Many of the works in such collections lack basic information necessary for assessing whether a work is under copyright, including the name of the copyright owner(s), the date of the work, any publication or creation date, and the country of origin. Even where some of these facts are known, scholarly and archival collections often contain older works – potentially still under copyright – created by individual artists, authors, or photographers that are very difficult, and in many cases impossible, to locate.

Objects in certain media exacerbate these challenges. For example, art works and other primary scholarly materials traditionally have not contained by-lines identifying the artist, photographer, or author, as well as other copyright information. Similarly, letters, ephemera or other primary materials may have passed to unknown heirs or been bequeathed without publicly available records of such transactions. Also, it is often not possible to identify or locate the owners or successors to small, out-of-print, independent, and private press publications, such as journals, pamphlets, and booklets, which nonetheless would be important in advancing knowledge and building the scholarly record.

The orphan works problem is particularly challenging for those scholarly collections that are humanistic in nature; for example, those documenting historical periods, movements, or cultures. These collections draw materials from hundreds, if not thousands, of sources that often span centuries. Some of these works have either never been distributed, or were only published years ago, making it difficult to turn to a secondary source for such information. Attempting to identify and locate the copyright owners for works in these collections is frequently infeasible. Even in collections that are scientific in nature, orphan works are problematic, as the sciences often rely on photographs or other resources created by owners who are difficult to locate.

For example, one collection in ARTstor depicts American art and history dating from colonial times and selected by experts from their respective fields during the 1950s: it contains more than 1,000 images of architecture; offers more than 500 images of design and decorative arts; more than 300 graphic arts images; nearly 200 images of posters and other forms of “visual communication”; nearly 300 images of Native American art objects and artifacts; more than 1,200 paintings; nearly 100 photographs; more than 300 sculptures; as well as about 250 images related to costume and stage design. Another collection of 36,000 images documents the full spectrum of activities and experiences of

² We have engaged – and continue to engage – in significant efforts to reach out to copyright owners and owners of the physical objects to better understand and address their concerns. Additionally, we have implemented technological and other restrictions to protect copyright owners’ interests.

women in the Nineteenth and Twentieth centuries, including women's rights and suffrage, social reform, the labor movement, work and professions, family history, health and sexuality, culinary history, and gender issues. These images represent the work of both professional and amateur artistic and documentary photographers and include portraits of individuals and family groups, men, children, landscapes, houses and interiors, travel pictures, women at work, and political and social activities. These images were, until recently, all but inaccessible.

Aluka's Struggles for Freedom in Southern Africa encounters many of the same issues. Due to the nature of the political struggles it documents, the historical materials with which Aluka deals are frequently ephemeral, unpublished, anonymous and/or created by the authors in regions where even the rudimentary infrastructure and resources that are available in the U.S. for locating individual authors simply do not exist. Aluka thus frequently encounters orphan materials and faces the difficult choice of either risking liability that could endanger the project as a whole or excluding these materials due to copyright concerns, knowing full well that the authors were largely volunteers, activists, and other individuals who were motivated not by the incentives offered by copyright, but by an effort to secure their own and their people's liberation and basic human rights that would be advanced by having their struggle documented and available for educational purposes.

The challenges that JSTOR, ARTstor, and Ithaka face with respect to orphan works, and their potential effects, are mirrored in the scholarly, cultural, and educational communities that our organizations seek to serve:

Given that the creators of orphan works cannot be located, the reality is that the scholarly, cultural and educational communities will often refrain from using these materials, preventing the potential advancement of research and intellectual and cultural exchange, and creating gaps in the scholarly or archival record. Conversely, a system that encouraged the use of orphan works would not only greatly enrich the basic materials available for scholarship and learning, but would also – in part through the use of digital technologies – foster new forms of collaboration and academic endeavor.

Likewise, a system that permitted the educational, cultural and scholarly communities to rely on the ongoing accessibility of orphan works without fear that they would be suddenly withdrawn would significantly advance scholarship, cultural exchange and learning. Users in these communities could include them in teaching or scholarly materials without fear that there would be unanticipated gaps. Scholars, teachers, curators, and students could share them with others, encouraging dialogue and advancing knowledge. And individuals and institutions could keep fewer copies, permitting the community to reduce preservation costs.

Conclusion

Our primary purpose in writing this comment has been to describe how orphan works impact the scholarly, cultural, and educational communities – particularly in the online

context. While we have not proposed specific solutions, we do want to note some outcomes that would be particularly helpful from our perspective, and to suggest why some remedies might be problematic:

- We believe any new exemption that reduces the current burdens of due diligence – particularly, though not exclusively, in the educational and scholarly context – would be highly desirable. We also recommend that any due diligence requirement be context dependent, and not overly prescriptive (which may have the unintended effect of increasing transactional costs or stifling uses). Any such requirement should take into consideration the nature of the use, the medium in which an underlying work is expressed, the availability of efficient mechanisms for conducting such due diligence, and the practices developed by relevant industry standards.
- Given the importance of maintaining and providing ongoing access to an archival record in the scholarly and educational context – and of allowing teachers, curators, and students to access online materials without fear that such works will be suddenly unavailable – we support the idea of a reasonable safe harbor during which such content could continue to be made available on a non-exclusive basis should a work lose its “orphan” status.
- We agree with those commentators who have recommended that orphan works treatment apply to newer and unpublished works, since the problems described in this statement are not confined to older and published works.
- We believe that any exemption established with respect to orphan works should expressly not limit or alter other exceptions to copyright – particularly those on which the educational, cultural, and scholarly communities also rely – such as fair use or classroom exceptions.
- We concur with those commentators who have discouraged the creation of a compulsory license or a centralized agency that would establish license fees, for the reasons articulated by many other commentators. We believe the practical problems inherent in the application of such regimes outweigh their potential value. We also believe that an exemption that permits a court to set a license fee for the use of works *after* such uses have been made could inadvertently stifle scholarship and educational use given the uncertainty surrounding such fees and their cumulative magnitude.

* * * * *

In sum, digital technologies have significant potential to advance scholarship and education: they facilitate access to important scholarly and cultural materials, transform the ways in which scholarly materials are studied and researched, and preserve materials that could otherwise be lost to academic, cultural, and scholarly institutions, and the individuals they serve, as well as the community at large. Orphan works can impact

these advances in important ways. Should a system develop that encourages the use of orphan works, we believe the attendant benefits would be consistent with the original constitutional impetus for copyright, and would greatly enrich scholarship as well as cultural and educational endeavors.

We appreciate the Copyright Office's attention to the challenges posed by orphan works, and its willingness to assess and seek potential solutions to such challenges. Please do not hesitate to contact us should you have further questions or if we can be of assistance.

Sincerely,

Michael Spinella
Executive Director
JSTOR

James Shulman
Executive Director
ARTstor Inc.

Kevin M. Guthrie
President
Ithaca Harbors, Inc.

For questions or further assistance, please contact:

Nancy Kopans
General Counsel and Secretary
JSTOR
149 Fifth Avenue
8th Floor
New York, NY 10010

Gretchen Wagner
General Counsel and Secretary
ARTstor Inc.
151 East 61st Street
New York, NY 10021

Barnaby Gibson
General Counsel, Secretary and Treasurer
Ithaca Harbors, Inc.
151 East 61st Street
New York, NY 10021