

Thomas A. White

Friday, March 25th, 2005

Jule L. Sigall, Associate Register for Policy & International Affairs
U. S. Copyright Office
Washington DC
orphanworks@loc.gov

Re: Comment on 70 Fed. Reg. 3739 (January 26, 2005) Notice of Inquiry/Orphan Works

Dear Mr. Sigall:

The following sets forth my opinions and recommendations.

1. Background. The U. S. copyright industries collectively represent our country's leading economic, technological and cultural exports, the strengthening of which is vital to maintaining our balance of trade with other nations, our leadership position in GATT and the WTO, and the general health of our domestic economy as a whole. Notwithstanding that it is in our national interest to increase the protection and enforcement of copyright, most of the copyright industries continue to be heavily damaged, if not decimated, by the unauthorized use, misappropriation and infringement of copyrighted works on a massive scale throughout the world.

In the midst of this external onslaught, the property rights of authors and copyright proprietors are being internally assaulted on an unprecedented level by individuals and so-called charitable organizations funded by computer and consumer electronics companies who are vigorously pursuing appellate court decisions and legislative amendments to legally appropriate the commercial value of copyrighted works for the purpose of inducing consumers to buy those companies' products and services. This group disingenuously uses the First Amendment and self-serving claims of the "public's rights" to advance its goals through the wholesale erosion of copyright protections.

As one example of the adverse impacts on copyright by the pressure of these external and internal forces, the record industry has acquiesced, almost in desperation, to the adoption of the current "99 cent" economic model for the digital downloading of a sound recording and underlying song, which undervalues both, undermines the economic stability of the record industry, the interests of the works' creators, and occurs after decades of voluntary suppression of normal consumer price increases relative to inflation.

2. Unsupported Assumptions. The Register's Notice of Inquiry implies that Orphan Works is a significant problem, but offers no support for such conclusion, either statistically or qualitatively. In fact, it appears that there is only anecdotal information within the Copyright Office on this subject, since no review, survey or needs assessment has been conducted, and there has been no WIPO level inquiry (except for the Canadian and UK examples cited).

The Register has relied instead on (a) the apparent complaints of some small book publishers seeking to obtaining permission to prepare derivative works that they cannot find the owner(s) of some copyrighted works; and (b) the theory that the public interest must necessarily be prejudiced by any work which is presumed, rightly or wrongly, to be an Orphan Work.

The readers of the Notice of Inquiry are not informed as to the effort or methodology, if any, which was used by the small book publishers and any others alleged to be thwarted by Orphan Works. For example, we do not know if any professional copyright clearance or "rights and permissions" companies were engaged, if a copyright search through Thomson & Thomson or the Copyright Office was initiated, whether any probate or UCC research was conducted, or whether they even bothered to look up a name in a phone book.

The issues of "successorship" due to the sale, gifting, acquisition, death of individuals, probating and/or distribution of decedent estates by will or trust, and the dissolution of companies are universal to the disposition of all forms of property, both real and personal. In these instances it would be unthinkable to a reasonable person for the successors-in-interest or beneficiaries to be forced to chose between perpetual self-identification and the risk of forfeiture, in whole or in part, of their assets. Yet, this seems to be the direction which the Register favors when she states:

"If no one claims the copyright in a work, it appears likely that the public benefit of having access to the work would outweigh whatever copyright interest there might be."

The Register overlooks the fact that the issuance of a Certificate of Copyright registration by her office is itself pursuant to an express written claim, and that no further updating or contact is required for the work to subsist in its registered form with all benefits fully intact. It therefore cannot be reasonably said that a "claim" of copyright has been abandoned for any work which has been registered and has not entered the public domain.

In any case, there is no reason why a claimant or their successors-in-interest of copyrights should be treated less favorably than the owners of real or personal property.

3. Possible Remedies. The Copyright Office has always had the capability to list contact information within its COHD and COHM databases. It also has the capability to extend the scope of its registration and recorded documents to include works created or registered from the commencement of the Copyright Act of 1909. In the Notice of Inquiry, there was no mention of the CO's existing Address File index card system of records which was specifically designed for contact updating by copyright claimants and others. This system of records should be automated and made available through www.copyright.gov along with a listing of works for which the

current copyright claimant's whereabouts are presumed to be unknown.

I recommend that all of the foregoing CO capabilities be implemented. If they are, I believe they would resolve virtually all of the alleged problems associated with Orphan Works.

Thank you for your consideration.

Sincerely,

Thomas A. White

[submitted by e-mail without original signature]