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Library of Congress
U.S. Copyright Office
[Docket No. 2012-12]

Notice of Inquiry: Orphan Works and Mass Digitization – Reply Comments

Submitted via: www.copyright.gov/orphan/

I. Introduction

On behalf of the Directors Guild of America, Inc. (DGA) and the Writers Guild of America, West Inc. (WGAW), we are pleased to submit these reply comments regarding the Copyright Office's Notice of Inquiry (NOI). DGA represents 15,000 directors and members of the directorial team who create the feature films, television programs, commercials, documentaries, news and other motion picture productions that are this country's greatest cultural export. WGAW represents more than 8,000 professional writers of motion pictures, television, radio and Internet programming, including news and documentaries. Both DGA's and WGAW's mission is to protect the creative, economic and human rights of their members. As a result, the Guilds have participated in the orphan works debate since the Copyright Office first addressed the issue in 2005.

II. Writers and Directors are Rightholders who Must be Protected in any Orphan Works Reform

We noted in our original comments that writers and directors occupy a unique position in the debate over orphan works because they relate to the issue as both users and rightholders. Although they understand the entrepreneurial promise of orphan works reform in the digital age, they are also aware that such reform could threaten the economic, creative, moral and human rights they have in their works. These longstanding rights protect our members' ability to create, share, and benefit from the content they offer audiences around the world. Whatever interests others might have in utilizing their works, that interest does not and cannot trump the rights writers and directors have in their own creations.

Unfortunately, the majority of the comments filed in response to the NOI pay little attention to these creators who lie at the conceptual center of copyright law.¹ Instead, they focus almost exclusively on the rights of content users and copyright holders. In these reply comments, DGA and WGAW want to reiterate that writers and directors have a range of well-established rights that make them “rightholders” deserving of consideration and protection in any orphan works reform, even if they are not copyright holders.

Indeed, DGA and WGAW are concerned that some filings appear to incorrectly use the term “author” or “creator” to refer to copyright holders, rather than to the individuals who created the work. While we recognize the word “creator” is sometimes used broadly, simply holding a copyright does not qualify one as a creator. The individual writers and directors of audio-visual works, whose authorship is undeniably and indelibly evident in their works, are the authentic creators of motion pictures. Their rights and status as authors have long been recognized in countries with established moral rights protections, and are enshrined in international treaties such as the Berne Convention, to which the United States is a signatory.

We disagree with proposals by some commenters who used the NOI as an opportunity to undermine broader copyright laws and safeguards that protect writers and directors.² After all, the purpose of the current debate is not to provide “free” content to whoever wants it by “orphaning” more works. Rather, the purpose of orphan works reform is to ensure that more content is available to be easily licensed. Reducing copyright terms, reducing statutory damages or reinstating copyright formalities harm rightholders but do little to facilitate licensing.

We also disagree with those who appear opposed to any solution to the challenges presented by orphan works.³ DGA and WGAW believe these organizations have lost sight of the opportunity presented by orphan works reform. Done properly, orphan works reform should result in more license fees, not less, and at the same time spur creative output by providing greater certainty regarding the use of third-party content.

We are in agreement with commenters who understand, like DGA and WGAW, that orphan works reform can offer artists greater certainty regarding the licensing and use of third-party content.⁴ These commenters also recognize, like our Guilds, that orphan works reform creates unique risks for authors/creators, who have important economic and creative rights in their work. That is why these organizations have universally demanded a tailored, diligent search requirement and the ability to “de-orphan” a work if the author, director, writer, or copyright holder is later located. And that is exactly why our previous proposals regarding diligent search

¹ The only comments to expressly address the rights of authors were filed by DGA and WGAW, AFM, FMC and SAG-AFTRA.

² Such as the comments filed by EFF, PK, CCIA and others.

³ Such as the comments filed by organizations such as ARS and Author's Guild.

⁴ Such as the comments filed by ASCAP, AFM and IDA.

and non-exclusive licenses balanced the interests of all stakeholders: users, copyright holders, and authors/creators.

III. Additional Requirements for Orphan Works on an Occasional or Case-by-Case Basis

As raised in our initial comments to the Copyright Office’s most recent NOI regarding orphan works, the designation and use of orphan works must be tailored to specific industries. Our reply comments are specific to motion pictures.⁵ In the United States, writers and directors are typically employed by film and television studios on a “work for hire” basis; accordingly, under U.S. law they generally do not hold the copyright to the motion pictures they write or direct. However, writers and directors, as the authors and creators of motion pictures, are rightholders whose interests must be protected in addition to the copyright owner.

In addition to the need to protect writer and director rightholders, the right to use orphan work motion pictures on an occasional or case-by-case basis must include the following key elements; (1) a good faith, reasonably diligent search for all rightholders including writer and director authors of motion pictures; (2) attribution to the author and copyright owner(s); (3) reasonable compensation should rightholders of orphan motion pictures emerge after a diligent search is completed; and (4) injunctive relief granted to writers and directors of orphaned motion pictures for future use. Several commenters including the Independent Film and Television Alliance (IFTA), the Independent Documentary Association, et al. and the Copyright Alliance offered similar suggestions on a process that makes possible the use of orphan works while protecting copyright owners and rightholders.

Good Faith, Reasonably Diligent Search

A good faith, reasonably diligent search must be conducted and documented before a copyrighted work can be designated as orphaned and used without the permission of its rightholders. Development of clear guidelines about when a search must take place, what sources must be utilized, as well as certification and process monitoring by the Copyright Office or other third party will allow users to access orphan works while protecting rightholders. Such action is necessary to prevent any potential abuse.

As noted in our initial comments, any user of a potentially orphaned motion picture should be required to search for the credited writers and directors. Writers and directors of motion pictures have a number of well-established economic and creative rights established by collective bargaining agreements and specific contractual arrangements entered into with the

⁵ Motion picture refers to an audio-visual work such as a theatrical film, television program or other video material.

copyright holder. If the copyright holder cannot be located but the credited writer or director of the motion picture is locatable, a user of an orphan work should be required to contact the writer and director rightholders. In this instance, the writer and director rightholders should be given the right to grant or deny use of the work.

The law specifying what constitutes a reasonably diligent search must also establish the required databases where potential users must search for authors. In the case of motion pictures, potential users should be required to search the Copyright Office website, the Internet Movie Database (IMDB) and other similar websites offering authorship information. Requirements to research specific websites should be developed in consultation with industry rightholders. In addition, searches for the writer and director authors of motion pictures could utilize DGA and WGAW operated databases developed as a result of the “Transfer Legislation” included in the Digital Millennium Copyright Act. These databases, available on our respective websites, were created to facilitate the assumption of obligations of our respective collective bargaining agreements in the case of a transfer of copyright ownership of a motion picture.⁶ A potential orphan work user could consult these databases to determine if a motion picture was covered by a DGA or WGAW agreement. If the motion picture is covered by either the DGA or WGAW, the user could contact each Guild for information about the writer and director rightholders.

To ensure that a reasonably diligent search is conducted, DGA and WGAW believe that both certification of such a process as well as ongoing compliance monitoring should be part of any orphan works reform. These measures are necessary to protect rightholders. Compliance monitoring and search process certification could be conducted by the Copyright Office or other neutral third party.

Attribution of Authors

If in the diligent search process rightholders of motion pictures, including the writer and director, are identified but cannot be located, the user of the orphan work should provide attribution of the authors. Because many motion pictures identify rightholders within the work itself, attribution is a reasonable minimum standard for orphan works.

Reasonable Compensation

If a rightholder emerges after a diligent search is performed, the rightholder should be entitled to reasonable compensation for the user’s exploitation of the copyrighted work. Such a requirement would protect rightholders while allowing good faith users of orphan works the ability to use such works without the fear of statutory damages should a rightholder emerge later.

⁶ DGA database available at <http://www.dga.org/Employers/SignatoryDatabase.aspx>, WGAW database available at <http://www.wga.org/coveredprojects/default.aspx>

If a writer or director author of an orphaned motion picture emerges after a diligent search has been performed, reasonable compensation can be determined using the residual formulas established in the DGA’s and WGAW’s collective bargaining agreements. Both Guilds have industry standard formulas for compensation for reuse of motion pictures in various markets.

Injunctive Relief

It is also important that rightholders who emerge after a diligent search, including writers and directors, be allowed to prevent any further use of the work. We agree with the IFTA that rightholders who emerge after a certified diligent search has been conducted may not be entitled to attorney’s fees, statutory damages or injunctive relief for prior use, but any future use should require authorization of the rightholder.

If it is determined that an orphan work user has not completed a diligent search, as certified by the Copyright Office or other third party, then rightholders should be entitled to seek the full remedies for copyright infringement under the law.⁷

IV. Conclusion

In conclusion, if the Copyright Office recommends a legislative or regulatory initiative to deal with orphan works, it should ensure that proposal protects the economic, creative, moral and human rights of motion picture writers and directors. We believe the proposals recommended in these and our original comments protect those rights while still promoting the potential benefits of orphan works reform. We welcome any additional questions or issues the Copyright Office might want to raise. Thank you again for the opportunity to comment on an issue of such importance to our members.

Respectfully submitted,

/s/

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⁷ 17 U.S.C. § 504(c)(2) (2006).