



Science Fiction and Fantasy Writers of America, Inc. (SFWA)

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Reply Comments Concerning Orphan Works

TO: Karyn Temple Claggett,
Associate Register of Copyrights, and
Catherine Rowland,
Senior Counsel, Office of Policy and International Affairs
Copyright Office

*via electronic submission to
<http://www.copyright.gov/orphan/comment-submission/>*

RE: Notice of Inquiry (77 Fed. Reg. 64555, Oct. 22, 2012)

SFWA, Inc. respectfully submits the following reply comments concerning the Copyright Office's Notice of Inquiry.

Statement of Interest

SFWA is a membership organization of over 1,700 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published with other works. Of particular note, SFWA's membership includes a significant number of authors' estates, and has a long-standing record of advocating for the interests of authors' estates against those who would infringe on those estates' rights for their own profit.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this Inquiry.

I. Weight Given to Various Comments

When reviewing the submitted comments, the Copyright Office should place primary weight on the interests of the men and women who create protected expression. The interests and voices of the creators should be given substantially greater weight than the interests and opinions of transferees of copyrights and portions of copyright.¹

The views of transferees of copyright who have either licensed parts of a copyright – First English Language Serial Rights, for example – or obtained rights in a work as a work made for hire should not carry substantial weight with the Copyright Office. We include in this group of transferees publishing companies, film and television production companies, and organizations representing such transferees. However economically important those views may be, they are outside the scope of the Constitutional authority for copyright.

Similarly, the views of museums and libraries only represent the owners of copies of works. .

In cases where they have acquired copies of published works where the copyright is held by the creators – which represent the overwhelming majority of their collections – they neither hold copyrights themselves nor represent the interests of actual creators, and their views should be given substantially less weight than those of the real persons who are creators.

II. Responses to Comments Submitted by Individuals and Organizations

A. Comments Supporting a Rightsholder Registry

It is significant that nearly all of the creator groups who submitted comments to the Copyright Office mentioned that they are in favor of some variety of registry or directory of creators and their works

¹ The Constitution empowers Congress to grant copyright to authors. U.S. Const. Art. I, § 8, *cl.* 8. This grant of rights was considered sufficient by the Founders to encourage “promote the Progress of Science and the useful Arts.”

that should be used as part of a due diligence search for the creator and rightsholder of a potentially orphan work. They have also expressed a strong preference for a free, voluntary database of creator and rightsholder contact information.

Although SFWA believes that this directory of creators and works should initially concentrate on authors of textual works for the sake of simplicity, creators groups as diverse as the Digital Media Association² and the American Association of Independent Music³ are calling for such a registry in almost identical terms. Exceptions to this overwhelming agreement come primarily from visual artists' groups who feel that the paperwork necessary for an artist to register his or her many works would be onerous and, if there was a fee, unaffordable. Such objections should not stop development of a directory for textual works.

In its 2006 Final Report on Orphan Works⁴, the Copyright Office called the idea of a central registry of user certifications “premature” because of the difficulty of classifying non-textual works and the burden placed on users who wish to make available large collections of orphan works. We feel that the time is now ripe for such a registry, in part because high-capacity computers and storage systems have become much more affordable, and the Internet has become ubiquitous in a way that was hardly imaginable in 2005. We suggest that many of the pitfalls identified by the Copyright Office seven years ago could be addressed by limiting the registry to textual works, which are easy to classify, relatively easy to store, and eminently suited to keyword searches.

In the eight years since the Copyright Office last called for comments on orphan works, there has been little progress in the creation of such textual author registries. The Authors Guild mentions its “Authors Registry”⁵ in its comment, and speaks of the Registry’s utility in finding copyright owners owed overseas

² Comments of the Digital Media Association, Page 7.

³ Comments of the American Association of Independent Music, Page 3.

⁴ Report on Orphan Works: A Report of the Register of Copyrights, Library of Congress, U.S. Copyright Office, January 2006, page 113.

⁵ Comments of the Authors Guild, page 2.

photocopy royalties. Unfortunately, the Authors Registry, as implemented, is not a registry or directory as much as it is a clearinghouse for payments of royalties, and provides no direct way for a user to contact an author in its database. In addition, the Authors Registry provides no easy way for authors to update their contact information, or even to sign up through an automated form. While SFWA is a Participating Organization in the Authors Registry, there has been no contact between the two since SFWA joined in 1998, and the registry's contact information for SFWA members hasn't been updated since then. For these reasons, we do not feel the Authors Registry is a good model for a directory of works and creators.

Several photographers' and artists' groups point to the Picture Licensing Universal System (PLUS) Registry⁶. The PLUS Registry is extremely promising but is still in its beta testing stage with many functions yet to be implemented. SFWA maintains contact information for its members and the estates of deceased science fiction and fantasy authors, but this is a piecemeal approach in search of a more comprehensive solution. We agree with the National Writers Union comment that:

“This registry should be operated by the Copyright Office as a neutral body accountable to the due-process standards of the Administrative Procedure Act and less likely than a private registry to be captured by any particular sector of rightsholders, such as publishers and/or distributors, to the detriment of other sectors of rightsholders such as writers and other creators.”⁷

The following organizations provided specific comments supporting creation of a registry or directory of creators and rightsholders.

1. American Photographic Artists

“Aided by technological advances over the past four years, the PLUS Coalition has created the free, nonprofit

⁶ See <https://www.plusregistry.org>.

⁷ Comments of the National Writers Union, page 33.

PLUS Registry, an online resource developed for all communities engaged in creating, using, distributing or preserving images. The Plus Registry, www.PLUSregistry.org, enables the public to search its contents to find rights and descriptive information for any image, and to locate current contact information for creators, rightsholders, authorized licensors and other related parties.

It is designed as a global “hub” for image copyright information, connecting all registries so that a search of any one registry will search all registries connected to the hub. Importantly, the PLUS standards and PLUS Registry provide for both human readable and machine readable rights information, the latter allowing any connected system or application to read and write information to/from the Registry. This provides for fully multi-lingual rights information, together with automated digital asset management.

With increasingly potent search techniques and ever greater participation in the PLUS Registry, the robustness of searches promises to grow exponentially in the future and may serve to effectively eliminate the incidence of “kidnapped” orphans. The Registry also promises to minimize the number of “abandoned” orphans. The breadth of entities that have signed on to the PLUS Registry -- currently including entities from 92 countries -- portends a future in which a truly orphaned copyright work becomes a rarity.”⁸

2. American Society of Composers, Authors and Publishers and Broadcast Music, Inc.

“Musical works are not “orphaned” when users seek to make non-dramatic public performances due to the ready availability of licenses from the PROs and the extensive public databases they maintain. As previously expressed

⁸ Comments of American Photographic Artists, pages 4-5.

by ASCAP and BMI, with respect to the public performing right in musical works, the orphan works scenario should not be a problem because the PROs – BMI, ASCAP and SESAC – together represent the rights to in excess of 99% of copyrighted works registered with the Office (and many tens of thousands of works not yet registered). The significance of this is that a user seeking to license the public performing right in music can always obtain a license from the performing right organization whose repertoire includes that work.

It can be expected therefore that very few musical works will fall into the ‘orphaned’ category with respect to the public performing right.”⁹

3. American Society of Journalists and Authors

“Extended collective licensing as referenced in your call for comments seems to us a reasonable mechanism for the management of orphan works and payments, and a registry collectively representing rights holders in the form of multiple writers’ organizations could effectively negotiate for orphaned books and other text works on behalf of their absent rights holders.”¹⁰

4. American Society of Media Photographers

“Similarly, non-profit, voluntary registries of photographers, their contact information and their photographs are crucial to reducing and minimizing the numbers of photographs that might be considered orphan works.”¹¹

5. Association of Medical Illustrators

“The AMI supports the initiatives of the voluntary nonprofit PLUS (Picture Licensing Universal System). The

⁹ Comments of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc., page 3

¹⁰ Comments of the American Society of Journalists and Authors, page 2.

¹¹ Comments of the American Society of Media Photographers, page 3.

problems of orphan works and indeed infringement would be greatly improved by industry-wide adoption of machine-readable metadata, standardized licensing language, and an up-to-date registry of artist's contact information.”¹²

6. Authors Guild

[Citing the success of the Authors Registry] “In 2009, for example, out of a sample of 1,000 authors of out-of-print books for which the Authors Registry had collected overseas photocopy royalties, the Registry located and paid more than 87%.”¹³

7. Copyright Alliance

“Thus, a cost effective, searchable and non-burdensome registration system which serves the needs of registrants and users of large volume/small value works at least as well as the current system serves to identify authors of low volume/high individual value works could begin to encourage greater and more accurate registration of works, as well as better searchability and thus reduce the incidence of orphan works.”¹⁴

8. Digital Media Association

“For all of these reasons, the creation of and/or recognition of a centralized, searchable database(s) deemed appropriate for the basis of a reasonable search is recommended.”¹⁵

9. Software & Information Industry Association

“Owner Identification and Location Database: A database that tracks the identification and location of copyright owners. The database would document changes in information regarding the identity and location of the

¹² Comments of the Association of Medical Illustrators, page 5.

¹³ Comments of the Authors Guild, page 2.

¹⁴ Comments of the Copyright Alliance, page 4.

¹⁵ Comments of the Digital Media Association, page 7.

copyright owner, such as name change due to marriage, divorce or otherwise, newly revealed attributions or authorship (e.g. , due to ownership originally being misattributed, anonymous or pseudonymous) and change in residence.”¹⁶

B. Comments of the Authors Guild Support of Payments for Use

The Authors Guild states that a requirement for a diligent search for the rightsholder is not sufficient in itself to help resolve the problem of Orphan Works:

Diligent searches may prove to be part of the solution, but such searches must be coupled with the payment of a reasonable license fee for the proposed use.¹⁷

We agree that such payments are vital, and urge creation of the escrow fund we have suggested.¹⁸

C. Comments of the National Writers Union

We concur with the Comments submitted by the National Writers Union. We especially support the NWU’s comments regarding creation of a registry of creators and rightsholders, with contact information,¹⁹ which echoes our recommendation for an Author Information Directory.²⁰

D. Comments of the Screen Actors Guild-American Federation of Television and Radio Artists (SAG—AFTRA)

We concur with the comments submitted by the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). We agree with the concerns stated in the first paragraph of page 3 of their Comments:

“The vast majority of SAG—AFTRA recording artists and audiovisual performers hold ongoing contractual

¹⁶ Comments of the Software & Information Industry Association, page 4

¹⁷ Comments of the Authors Guild, page 1.

¹⁸ Comments of Science Fiction and Fantasy Writers of America, page 10.

¹⁹ Comments of the National Writers Union, page 33.

²⁰ Comments of Science Fiction and Fantasy Writers of America, pages 4-9.

interests in the exploitation of copyrighted motion pictures and television programming as well as sound recordings and underlying musical compositions. The ongoing revenue stream from the lawful licensing and sales of sound recordings and audiovisual works is vital to the financial well-being of our members. These contractual interests are established through individual agreements and industry-wide union collective bargaining agreements. Many of the artists represented by SAG—AFTRA invest their entire lives in building their professional careers. While most may never be “famous,” the contractual rights and protections for their work, and the manner by which their works are exploited and used, hold a significant commercial and intrinsic value.”²¹

Especially with the growing importance of electronic editions of books and other written works, writers find themselves in the same situation.

E. Comments of the Directors-Guild-America-Inc.- (DGA)-Writers-Guild-America-West-Inc.

We agree in particular with the recommendation in Section III, D, of the comments from the Directors-Guild-America-Inc.-(DGA)-Writers-Guild-America-West-Inc., that any determinations that works are Orphan Works should be fully revocable should the rightsholder come forward.²²

Conclusion

As we said in our initial comments, SFWA believes that the problems raised by orphan works and works that are alleged to be orphan works must be resolved quickly. Far too many publishers and other users of works have simply declared works to be orphans and proceeded with various projects, without performing an

²¹ Comments of the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), Page 3.

²² Comments of the Directors-Guild-America-Inc.-(DGA)-Writers-Guild-America-West-Inc., Section III, Subsection D, Page 11.

adequate search for the owners of the rights in those works. The Copyright Office needs to use the rulemaking process to quickly define due diligence in searching for copyright holders and establish the AID or another system that will facilitate finding rightsholders.

Further, in reviewing the comments submitted in response to Notice of Inquiry, we urge the Copyright Office to place primary weight on the interests of the men and women who create works protected by copyright. The interests and voices of the creators should be given substantially greater weight than the interests and opinions of transferees of copyright.

Respectfully submitted for SFWA,

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