



May 9, 2005

Jule L. Sigall

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

Re: Reply Comment Concerning Orphan Works (They Forgot About My Father)

Dear Mr. Sigall:

Having reviewed a substantial number of the initial comments, I came to only one conclusion: They forgot about my father.

It is not surprising, perhaps, because the Notice of Inquiry began with the suggestion that the inquiry focus on the effect upon prospective adopters of the orphaned works rather than on the authors of the orphaned works. That is, the Copyright Office also forgot about my father.

My father was a prolific author – an author of orphaned works. They forgot about him.

He authored works of visual art – pastels, silhouette cut-outs, drawings. His works of visual art were displayed about our house, some appeared in minor publications, and others displayed publicly. He never sought attribution or compensation for the reproduction or public display of his works of authorship, and they forgot about him.

My father was a poet. Although most of his verse was destined solely for my mother's heart, some of his verses reached wider audiences. When he died only a few months ago, only some of his verse has been discovered among his scant belongings, a few lines have been saved in attic boxes, some have been posted on the Internet, and many have been scattered about the world without a trace of desire for copyright control. All of them works that the authors of the initial comments forgot about.

My father was a composer. One of his musical compositions has been performed publicly in Spanish, but he died before ever hearing it performed in English. I know he never gave his permission for any public performance, but only because he would have thought it silly to do so. He would have considered it presumptuous to "give permission" or "license" a particular use, for such action would have suggested that his own pride of authorship should influence someone else's freedom to choose whether to reproduce it or to perform it publicly. All who knew him would have feared offending by making a request for permission.

None of my father's works are registered at the Copyright Office, none are being managed by powerful media companies, publishing houses, performance rights organizations or similar entities. None are being offered for sale or license. Yet, all of them are, as my father would have it, given to the world. No, they were not "dedicated to the public domain," or subjected to similar ritual. Rather, they were produced from his heart to the heart of the world. You see, my father knew so well his own roots that he was aware how entangled they are with those of others. He simply claimed no more pride in his own works than would a flower on the branch of one tree pride itself above the flower on a branch of the neighbor. His only pride would have been in what others made of his works.

How could they forget about my father?

My father authored prose. Oh, yes! What prose! Prose that was performed publicly only but once, and then left to find its way into the subconscious recesses of the audience's mind. Some listeners nodded their approval as they heard his words even as others nodded to sleep; you see, my father was a preacher.

My father's sermons were rarely reproduced for distribution, yet he would have been honored had anyone copied from them. His own father, a "circuit preacher" who rode from church to church in the Carolinas, inspired him. I have with me a worn leather binder containing the notes of many of my grandfather's sermons, spanning from 1917 to 1957. Few fill a single handwritten page. Some are only a Bible verse and a thought - perhaps not copyrightable. Others clearly are works of authorship in the Copyright Act's sense of the word, and should anyone dare to reproduce or perform them publicly, they could risk minimum statutory penalties far in excess of my grandfather's annual salary. Would my grandfather want his heirs to sue? I doubt it. Did my father make derivative works out of my grandfather's works? Probably. And in doing so, he honored his father.

Here I offer the totality of one of my grandfather's works, the notes for a sermon delivered at Ebenezer Baptist Church, October 21, 1917:

The Habitation of God

Ephesians 2:22

This habitation is built of Jew and Gentile - all the world.

It takes all the world to contain Him. It takes the spirit of unity to receive Him. If we exclude any part of the world we make ourselves too little to contain Him. If we seek the world we seek with God. If we serve the world we serve God and with God.

There you have it. I have reproduced, and offered for reproduction by others, the entirety of one of my grandfather's works, never before published beyond his handwritten notes back in 1917 when my own father was a toddler who had just turned three. As an heir (and there are many of us), I dare not grant my permission for others

to reproduce it because I feel it is not mine to give. The notion of “exclusive rights” in his works of authorship was alien to my grandfather. He would not have excluded any part of the world. His works of authorship, like those of my father, were intended to serve the world.

They forgot about my father and my grandfather.

Instead of thinking of orphans they thought of prospective adoptive parents. The comments focus on those seeking to incorporate select orphans into their own works; those wanting to adopt and adapt specific orphans. But what about my father? How can our copyright regime serve him, his lost orphan works, and his memory?

*He had the eyes of a painter,
the heart of a maker of songs
His words fell like rain
on the dry desert plain,
Precious and so quickly gone.*

Kate Wolf, “Eyes of a Painter.” Like the protagonist of the late Kate Wolk’s refrain, many of my father’s works were “so quickly gone” that his songs are not allowed to be sung, not because my father would not permit it, but because the singers, should they even find them, would dare not sing them, thanks to our copyright law – a law that presumes that my father’s heirs might sue them.

Remembering my father, I respectfully suggest the following:

First, urge Congress to reverse the presumption against my father. Copyright law currently rewards those who would restrict the use of their works to the fullest extent of the law with a presumption that indeed they have prohibited all copyrighted uses of their works other than those expressly licensed. They need do nothing. The law tells the whole world, on their behalf, “Warning, no copyrighted use is hereby licensed, unless you obtain express permission.” More generous authors, like my father, have their First Amendment rights burdened by unnecessary formalities in derogation of Article 5 of the Berne Convention. Authors like my father must take the additional steps of learning the law (my father probably never knew people could be sued for certain uses of his works), and then take measures to affirmatively rebut the presumption, such as by stating on the work itself that all uses, or all non-commercial uses, are permitted. Should they fail to engage in such formalities, the law decrees that prospective users should cower from using them for fear of an infringement lawsuit. The law imposes formalities that rob my father of the full enjoyment of his copyright.

Second, performance rights organizations should be obligated to publish, in publicly searchable form, precisely which works they are authorized to license for public performance, and by implication, to make clear that they are not authorized to license the public performance of my father’s works. You see, it has long been the case that the *in terrorem* effect of a mistake and the artificial maintenance of a virtual shell game concerning who is authorized to license which works serve to force public performers to obtain blanket licenses from ASCAP, BMI and SESAC with the expectation that doing

so buys insurance against inadvertently performing my father's works without a license. Acting in concert, these organizations profit by purporting to license all works, including my father's. The public is left unaware that none of these three blanket licenses cover any of my father's works, nor are any of them needed. The same is true for the licensing of reproductions – the Harry Fox Agency has nothing to sell, and no insurance to offer, when it comes to reproduction of my father's musical compositions.

There can be no doubt that someone who does not need the entire smorgasbord offered by a blanket license but only wishes to use one of my father's works will be placed at a disadvantage. They may pay the blanket licenses without reason, and, had they known to seek permission elsewhere, might have found it at a fraction of the cost. Even if my father's works were licensable by these collective licensing organizations, I would expect the uses to be so narrow that, should my father have desired a profit, it would have indeed been more handsome if the public databases of such organizations had been obligated to list the person authorized to license *à la carte*. Under the current regime, authors like my father subsidize the blanket licensing scheme that sells "insurance" against unlicensed performances but creates a shell game hiding my father's identity from prospective licensors who would seek him out individually.

Third, Congress should be urged to give the Copyright Office a properly funded mandate to create a free, publicly searchable database of all works, including information identifying the author, the date of expiration of copyright, which rights are being reserved and which licensed under what conditions, and most particularly identifying every author or entity authorized to license any particular use of the work. The database should be one to which any member of the public could add data, through a properly supervised process, enriching the wealth of works available. I and my siblings, for example, might want to notify the world that any work authored by my father is licensed for any non-commercial use, and that anyone seeking to profit from any copyrighted use of my father's works, or my grandfather's sermon notes, need only contact one of us for permission. Another author may want less than the full term of copyright protection, and wish to notify the Copyright Office, for inclusion in the database, that the work will enter the public domain after only 5 years, or immediately upon the author's death. Still another author may desire for the whole world to know that their promotional music video may be performed publicly anywhere by anyone at any time, at no cost. Prospective adopters or orphaned works might notify the Copyright Office, for publication to the world, that a particular work has been identified but not its author, or not the means of contacting the author, so that the database can be searched by those who may have information and authority over the work. How thrilled I would be to learn that someone has the sole copy of one of my father's works and wants to know who to contact for permission to reproduce and distribute it! I would, at once, ask for a copy and notify the Copyright Office to update the database reflecting what my siblings and I believe to be my father's wishes.

As things now stand, it is not the dry desert plain that evaporates the words of too many makers songs, the strokes of too many painters, the message of too many preachers or the verse of too many poets; rather, they simply get lost among the weeds

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of too many commercial works whose authors are given a competitive advantage through presumptions of lack of permission, on the one hand, coupled with presumptions of collective licensing authority, on the other. The risk of using a weed without a license is so great that it obscures the fruit of the carefully planted seed intended, by it's author, to be freely served up to the world's table.

Respectfully submitted in memory of my father, J. Frank Mitchell,

A handwritten signature in black ink that reads "J. T. Mitchell". The signature is written in a cursive style with a large, stylized initial "J" and "T".

John T. Mitchell