

ORPHAN WORKS

On behalf of the International Documentary Association (“IDA”), the following proposal is submitted to the United States Copyright Office in response to its request for proposals concerning Orphan Works.

The **IDA** has over 2500 members in 50 countries around the world, supporting the documentary film community. This proposal is written from the perspective of documentary filmmakers but has applicability across the broad range of materials protected by copyright under U.S. law. It has been endorsed by **IFP/Los Angeles**, an organization of nearly 6000 members supporting independent filmmakers and by the founders of **Doculink**, an unincorporated association of Los Angeles documentary filmmakers that meets regularly to review the projects and problems of local filmmakers.

It is rare for a documentary film not to use a film clip, photograph or piece of music that is protected by copyright. Enormous effort and money have to be budgeted for searching for the owners, negotiating a deal with the owners, working out a written agreement to reflect the deal and paying the owners. Sometimes a deal is made for a limited time or limited rights. When the time runs out or wider exploitation is possible, the filmmaker must relocate the rights holder, go through a second negotiation and make a second payment (e.g. Eye on the Prize.)

The problem of Orphan Works (that is, works protected by copyright but the copyright owners can not be found after a reasonable effort to do so) is especially acute for the maker of documentary films. To summarize the reaction of documentary filmmakers polled for this proposal, searching for the rightful owner of material “is the bane of our existence.” It is “exhausting,” “frustrating” and “creates constant pressure.” It is “the one thing I hate about making documentary films.” Nearly every day, some filmmaker, somewhere has to “compromise” their film or “take on a really scary risk” that “most distributors will not allow anyway.” In short, the problem of Orphan Works forces filmmakers into an untenable Hobson’s choice – either substitute a second choice because you can’t find the owner of a work that you would like to use or take on a risk that is potentially devastating to the film and the finances of the filmmaker.

The IDA proposes a system that is user-friendly, ultimately self-supporting, and considerate of the rights of the owners of copyright and of domestic and international copyright law. It reduces the number of Orphan Works right from the start by providing a directory of claimants to provide a simple way of avoiding being declared an Orphan Work. This directory will also serve as a wonderful tool for those seeking permission. The IDA proposal also provides that when reasonable efforts do not turn up the copyright holder, the work in question will receive an Orphan Works designation and a compulsory license for Orphan Works will issue to anyone wanting to make use of the Orphan work as long as they remain orphaned. This insulates the user from litigation.

DIRECTORY OF CLAIMANTS

At the present time, there is no place to go to obtain current contact information for entities claiming ownership of the copyright or some interest in it. Each filmmaker must start the search anew. There are professional searchers who build up some contact information, which makes their job somewhat easier if a future client asks them to find that particular claimant in the future, but that is haphazard at best.

IDA proposes that the Copyright Office immediately establish a Directory of Claimants as a service to the creative community. The listing would be a simple, free, voluntary listing by the claimants of their name and address and of the work in which they are claiming an interest. They would also set forth the specific rights for which they claim, as various aspects of the copyright are often held by different claimants. The Directory of Claimants would be like a phone book, accessible by the name of the work, the name of the author of the work and by the registration number so that it is user-friendly. It would not require legislative action. Any work that is accurately listed on such a directory could not be considered an Orphan Work, because the identity of the claimant would be readily available.

Note that such a directory does not constitute a prohibited formality to copyright ownership under the Berne Convention. This is merely a directory that someone could use to find the copyright claimant. It is a service both to copyright claimants and those wishing to license copyright protected works.

The copyright office would advertise this directory to all organizations representing the owners of copyright such as the three organizations sponsoring this proposal. It would also be advertised throughout the intellectual property community, to institutions such as libraries, archives and museums and to the general public. Submission of false information for listing in the Directory of Claimants would carry penalties similar to the penalty of submitting false information to any other government entity. Presumably, it would be a crime. If the Copyright Office does not desire to create and maintain the Directory or feels that it does not have the resources to do so, it could designate a private organization to perform this function.

REASONABLE EFFORTS

What constitutes reasonable efforts may differ for different categories of creative works. This proposal is submitted on behalf of filmmakers. Each filmmaker is a potential licensor of footage to another filmmaker and a potential licensee of footage from another filmmaker of footage for use in one of their projects. It is essential that the requisite Reasonable Efforts be perceived as fair for both sides of the equation.

The existence of a Directory of Claimants, as described above, is a big first step in the direction of mutual fairness. If a claimant is listed in the Directory of Claimants, the work for which they are the claimant cannot be an Orphan Work by definition. Beyond that, Reasonable Efforts would include such things as checking other copyright records and attempting to locate the claimant through telephone directories, both online and traditional and, for corporate entities,

the appropriate state authorities, such as the Secretary of State in California. A guideline should be issued listing these steps with a great deal of specificity. Such a guideline would amount to a clear “how-to” guide to finding people. It would not change much for the different kinds of works, but each kind of work has its own unique sources of information that should be checked by someone making a serious effort to find the claimant.

Reasonable Efforts will evolve from year-to-year. The arrival of various on-line search tools has changed the ease and speed with which people can be located. It is anticipated that it will continue to change. Therefore a tool that could be easily updated as practices in the field change would seem optimal. This would suggest something other than a legislative solution.

REQUESTING ORPHAN WORK DESIGNATION

Once a filmmaker has made Reasonable Efforts to find the claimant of copyright in a work that the filmmaker would like to use, the filmmaker would fill out a simple pre-printed affidavit verifying the steps that have been taken. That affidavit would also request that the work in question be designated an Orphan Work. Assuming that the affidavit is complete and signed and establishes that a Reasonable Effort has been made, the work would be designated as an Orphan Work.

If the guidelines are sufficiently detailed, it would be a fast and simple process to approve the request. Since permissions for use are often obtained near the end of the filmmaking process, it is essential that this step not be unduly time-consuming.

COMPULSORY LISENCE FOR ORPHAN WORKS

Once a work is designated an Orphan Work, it can be licensed under a Compulsory License by the applicant and anyone else who wants to license it. It would also be put on a list of Orphan Works maintained by the Copyright Office. If a work is on the list of Orphan Works, subsequent applicants will not have to repeat the drudgery of searching for a claimant. They merely send in the compulsory license fee with a simple form setting forth the use they are making of the protected work and they can use the item without fear of being sued.

The Compulsory Licenses Fee could be set by Congress as in the case of a Compulsory Mechanical License for music to be recorded or by a commission as in the case of remote Transmission License fees for cable systems or by the Library of Congress. No matter how the rates are established, wide input should be obtained prior to their being set.

The Compulsory License fee would be paid into a trust fund where it would remain for a period of time, say three years. If the owner came forward and established their rightful position as the claimant who should have been paid, the claimant will be paid the Compulsory License fee. Presumably, the claimant would also immediately list him, her, or itself on the Directory of Claimants and would be back in control of the licensing process. If no one came forward during the three year period, the money would be transferred over to the general operating account of the Copyright Office, so that the system would eventually become supported by user fees. These fees would supply some or all of the money necessary to sustain the system of Orphan Works.