

## COMMENT ON ORPHAN WORKS STUDY (70 FR 3739)

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The National Writers Union-UAW 1981 welcomes the Copyright Office study of orphan works. Freelance writers' ownership rights have long been ignored and abused. The lawsuit *NY Times v Tasini* and the related class action lawsuits, as well as similar lawsuits won by freelancers in recent years, indicate that this situation has led to freelancers losing considerable income. A major contributor to this abuse and loss of income is the difficulty of keeping track of rights owners when the owners are individuals and small businesses.

The union's view is that a registry and licensing agency (or agencies) are essential.

Remedies such as the Canadian Copyright Board are partial and insufficient. At best, they allow others to use a work. They do not insure that rights owners get the income that such use earns. While allowing others to use a work is a critical goal of copyright law, the law must also relieve the harm done to infringed rights owners and protect them against further harm. As the summary to the present study makes clear, current means of relieving the harm have largely failed. There seems no means of relieving that harm other than a registry and licensing agency.

It would be inappropriate of the Copyright Office to establish either of these functions.

While we sincerely applaud Congress and the Copyright Office for undertaking this study, we also note that the study would be unnecessary if the publishing industry had the same protections as the music and entertainment industries. In these industries, use and protection alike are facilitated by registries, licensing agencies, unions, and associations. Little such facilitation exists in the publishing industry, leading to problems such as the one presently under study. The latter industries provide a ready model for the publishing industry, one that, if it were adopted, would remove the

obstacles to lawful use that lay the foundation for such lawsuits as NY Times v Tasini.

## Specific Questions

### 1. Nature of the Problems Faced by Subsequent Creators and Users

Identification and communication with the current owner of the desired right is the key difficulty. The owner is often not the registered copyright holder, and there are often multiple owners of multiple rights to a single work. For instance, newspapers and magazines that obtain first serial rights to freelance writers' contributions will register the issue but not the individual works. A potential user only knows of the publication, and the publication will not know the name or location of the owner or owners of the works' remaining rights. Even if a freelancer registers the work separately, it is highly unlikely that s/he will re-register the work every time s/he changes address. However, s/he would maintain a current address with a registry/licensing agency that was paying her royalties for uses of the work.

### 2. Nature of "Orphan Works": Identification and Designation

Any passive system that allows use without actively contacting the rights owner and soliciting her agreement is inadequate. It will not protect the rights owner but will fool the intellectual property community and the broader public into believing that protection exists.

### 2 B. Formal Approach

A registry should be private. A registry can only work if it is policed, and, in this case, private policemen in the form of licensing agencies would be adequate (leaving aside the issue of widespread copying over the Internet, which even licensing agencies are challenged to address).

Likewise, elaborate systems of optional registration will confuse rights owners. In the union's experience, freelancers and publishers alike often assume that registration is unnecessary because copyright is automatic. Frankly, when the complicated system of additional protections, deadlines, statutory damages, and so on, that result from registration are explained to them, their eyes go blank. The present system is one that only a lawyer can like. Duplicating it with yet another complicated system would compound the problems that the system already fails to remedy.

### 3. Nature of "Orphan Works": Age

Adjusting requirements according to the age of a work is a needless complication that further interferes with understanding and compliance. KISS should be the watchword.

### 5. Effect of a Work Being Designated "Orphaned"

Official designation would be unnecessary in a system of registries and licensing agencies.