



March 25, 2005

Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building
101 Independence Ave., SE.
Washington, D.C., 20540

Re: Orphan Works Notice of Inquiry

Dear Mr. Sigall:

NetCoalition is pleased to submit these comments in response to the Copyright Office's Notice of Inquiry concerning "orphan works." NetCoalition serves as the public policy voice for the world's most innovative Internet companies, ranging from Internet portal sites to search engines, ISPs and commerce sites, on the key legislative and administrative proposals affecting the online world. NetCoalition is at the forefront on matters affecting online liability, privacy, data protection, and other issues that impact the Web. Our members include Bloomberg, CNET, Google, and Yahoo!, as well as a number of smaller state and local ISP associations.

In its Notice of Inquiry, the Copyright Office has identified a significant issue that requires expeditious resolution. The vast majority of copyrighted works have little or no economic value soon after their creation or publication. Nonetheless, these works may possess significant cultural, educational, or historical value. Authors of such works typically are willing to permit others to reproduce, distribute, perform, or display their works at no charge because the authors still benefit in tangible and intangible ways from these uses. While the authors obviously would like to receive compensation for the use of their works, most authors would prefer uncompensated use over no use whatsoever; authors rarely want their creations to be ignored and forgotten.

Because the Internet dramatically reduces the cost of global distribution, it provides an unprecedented opportunity for the broad dissemination of this category of works of low economic but high social value. A photograph stored in an archive in Los Angeles can be scanned into a digital file and posted on a website from which it can be accessed for no cost by students in Taiwan, Tajikistan, and Tanzania.

Libraries and archives across the country are interested in digitizing their collections to make them publicly accessible over the Internet. If it is clear that the

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copyright term for a particular work has not expired, and the owner of the copyright can be identified and located, then the archive as a general matter should not make the full text of the work publicly accessible over the Internet without seeking the owner's permission. But for many works, it is not clear whether the term has expired, or the owner cannot readily be identified or located.

Under current law, the archive might be liable for copyright infringement if it were to upload the entire orphan work onto the Internet and the rightful owner subsequently objected. Although the owner probably suffered no actual damage because the work had no economic value, he or she still might be able to recover statutory damages. And although most authors would be pleased that their long neglected works were receiving any attention, an archive's potential exposure could be significant if it were to upload thousands of orphan works.

In the face of this potential exposure, the archive may well decide not to make the orphan works available on the Internet. This represents a significant loss to the public, which will be denied access to socially valuable information. Keeping this wealth of material off the Internet also harms members of NetCoalition, which benefit as more users seek more information on the Internet. Additionally, it represents a loss to most of the authors of these works, whose creations will continue to remain hidden from public sight. At the same time, keeping the works warehoused in the archive does not preserve any income stream for the owners, because orphan works rarely, if ever, generate any revenue.

Accordingly, NetCoalition strongly supports the amendment of the Copyright Act to eliminate the barriers it places on the dissemination of orphan works. A statutory framework for orphan works should be simple so as to avoid unnecessary transaction costs. It should apply to all categories of works in order to maximize the benefit to society. It should not place onerous burdens on owners to preserve their copyrights. It should contain safeguards to prevent abuse prejudicial to copyright owners. And it should contain a mechanism for providing limited compensation to owners who object to the unauthorized publication of their works. The proposal formulated by the Glushko-Samuelson Intellectual Property Law Clinic of American University's Washington College of Law is one possible approach that meets all these criteria. We urge the Copyright Office to consider it carefully.

We support the Copyright Office in its effort to find a solution to the orphan works problem. Please let us know if we can be of assistance as this matter progresses.

Sincerely,

/s/

Markham Erickson, Esq.
General Counsel