

**NOTICE OF INQUIRY: ORPHAN WORKS;
Copyright Office, Library of Congress
70 Fed. Reg. 3,739 (2005)**

**REPLY COMMENT OF
THE ENTERTAINMENT SOFTWARE ASSOCIATION (ESA)**

May 9, 2005

In response to initial comments addressing orphan works issues involving video and computer games, the Entertainment Software Association (ESA) files this Reply Comment pursuant to the Notice of Inquiry at 70 Fed. Reg. 3,739 (2005). The ESA appreciates the opportunity to address this important issue and thanks the Copyright Office for its efforts to facilitate the legal use of entertainment software and other copyrighted works.

ESA does not believe legislative changes to accommodate a so-called “orphan works” problem, that would thereby affect copyright protection for entertainment software, are justified or advisable at this time. We believe that some commentators who argued for such changes in initial comments may be unaware of available resources to help them locate the owners of video and computer games. In this Reply Comment, we will describe some of these resources in the hope that we can assist the Copyright Office in developing orphan works due diligence search standards and assist gamers in locating entertainment software games and copyright owners.

The Entertainment Software Association is the United States association dedicated exclusively to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members account collectively for more than 90 percent of the \$7.3 billion in entertainment software sold in the United States in 2004, and billions more in export sales of U.S.-made entertainment software. It is from the perspective of serving the overwhelming majority of the industry that the ESA provides this guidance on locating entertainment software copyright owners.

THE INITIAL COMMENTS

Of the over 700 initial comments filed, 81 discussed software generally and 28 discussed entertainment software in particular. Unfortunately, none of these commentators described exactly what they had done in their attempts to identify or locate the owners of copyright in particular entertainment software titles. We hope that this Reply Comment will assist them in their searches. In addition, several commentators described issues involving copyrighted games embodied in degrading or obsolete media. These issues do not involve orphan works and are outside the scope of the Notice of Inquiry. Nevertheless, we hope that our description of the resources available for locating game copyright owners will also be of assistance to these commentators.

DEFINING ORPHAN WORKS

An essential starting point is to define just what orphan works are—and what they are not. As described by Register of Copyrights Peters in the Notice of Inquiry, orphan works are “copyrighted works whose owners are difficult or even impossible to locate.”¹ Thus, orphan works include games whose copyright owners cannot be identified or located after a reasonable search. However, by this definition orphan works do not include works on older or damaged media formats whose owners can be located. Likewise, orphan works do not include games where the owner can be located, but chooses not to distribute or license her work or respond to requests to use the work.

The ESA and its member companies are eager to assist game enthusiasts in their attempts to make legal use of entertainment software. Our member companies are also dedicated to preserving the history of video and computer games, the nation’s fastest growing form of entertainment. As noted above, none of the initial commentators described what resources they had used in their attempts to locate the copyright owner of a game in question, and their comments indicated that they may not be aware of the resources at their disposal for doing so. With that in mind, we offer the following resources available today that allow gamers to identify and contact copyright owners without requiring substantive changes to the law.

GAME COPYRIGHT INFORMATION RESOURCES

Orphan works are much less common for entertainment software than they are for many other types of works, as ours is a relatively youthful industry. The overwhelming majority of video and computer games have been published since 1978, and information on all copyrights registered since 1978 is available at the U.S. Copyright Office’s website, www.copyright.gov/records. ESA member companies are active users of the Copyright Office’s registration and recordation systems, and copyright information on many games can be found there. In addition to this valuable government resource, there are numerous private resources available to those seeking game copyright information.

Authentic versions of entertainment software are rarely—if ever—shipped without a copyright notice on the packaging and copyright information in the manual. This copyright information is also available for online and downloadable games, where it can be found in end-user licensing agreements and on the computer screen during the download process and when the game is started. The ESA’s website at www.theesa.com provides links to the sites of all ESA member companies. These ESA member companies—producing over 90 percent of the entertainment software sold in the United States—have the ability to provide information to those interested in the copyrights of their products.

Some commentators indicated that missing owners and so-called “forever-lost” games were growing problems. We do not believe this to be true. In the last several years, so-called “classic games” have actually increased in availability. Vintage video

¹ Notice of Inquiry, Orphan Works, 70 Fed. Reg. 3,739, 3,739 (2005).

and computer games have seen their popularity increase substantially, resulting in re-releases of many classic games. For instance, ESA member Atari has released the *Atari Flashback*, a video game console loaded with 20 classic games, as well as a collection of 80 classic games sold in one package for the personal computer. ESA member Nintendo has released the *Classic NES Series*, featuring some of its popular vintage games, and ESA member Namco Hometek has released its *Namco Museum*, which includes some of its classic games, including *Pac-Man*. Also, the ESA has hosted the *Classic Gaming Expo*, operated by an organization dedicated to the preservation and play of vintage games.

In addition, even for games that have not been re-released, copyright ownership information is also available. As classic gaming has become more popular, the resources available for locating the copyright owners of older games have expanded as well. Countless websites are devoted to classic gaming and many provide information on locating vintage games and their copyright owners. For instance, the *Digital Press Video Game Database* provides information (including publisher data) on over 35,000 classic games. In addition to game-related resources, standard online information sites can assist users as well. As a relatively youthful industry, the history of entertainment software—including the copyright owners of various games—can be found at online business resources, such as *Hoover's* and informational and legal sources such as *Westlaw* and *LexisNexis*, not to mention the various search engines and search features of major media sites. Between the online resources of the Copyright Office, the information available from ESA member companies, the classic gaming resources available online, and the various general search engines and media sites, copyright information on virtually any mass-produced game is available with the click of a mouse.

INCORRECT ASSUMPTIONS ABOUT SOFTWARE LIFESPAN

Two commentators² stated incorrectly that software has a shorter commercial lifespan than other works, and should thus receive disparate treatment under an orphan works regime. This assumption is incorrect when applied to entertainment software. As noted above, classic video and computer games are enjoying renewed popularity more than two decades after their original releases. Thus, one commentator's assertion that a copyright term of five years for video games would be appropriate, besides falling far outside the scope of this proceeding, is based on a false assumption.³ This same false assumption dictates the policy recommendations of the other commentator on this topic, which advocates a shorter registration deadline for computer software.⁴ Rather than focusing on a return to formalities that U.S. law left behind years ago in order to meet international legal standards, a better public policy would be to provide guidance and resources that would help would-be users identify and contact the owners of the works they wish to use.

² See OW0409 and OW0643.

³ See OW0409 at 3.

⁴ See OW0643 at 16.

POLICY IMPLICATIONS

Based on the record compiled to date, the ESA believes that it would be inappropriate to make changes to copyright in order to address orphan works issues arising with respect to entertainment software. Effective copyright protection should not depend on compliance with formalities—especially those that discriminate against software as a category of work. The present day realities, including the popularity of vintage games, illustrate that entertainment software should not receive a shorter period of protection than that afforded to other works, nor should its protection be weakened or reduced under an orphan works regime on a discriminatory basis.

If, however, the Copyright Office were to consider a legislative remedy, we do not believe that the age of a work should become a legislative bright-line test used to delineate orphan from non-orphan works. Instead, the focus should remain on the actual difficulty of identifying and locating copyright owners, which is the only way that a work becomes an orphan. Best practices and due diligence standards to assist would-be users in identifying and locating the owners of works would be the most constructive response because it would help to reduce the population of orphan works. In addition, any orphan works legislation that may be considered should be capable of distinguishing between the different uses that people may wish to make of works deemed to be orphaned—again militating against any bright-line test for delineating orphan from non-orphan works.

CONCLUSION

The relative youth and tremendous popularity of entertainment software makes finding information about its copyright owners something that can be accomplished without undue difficulty. With ever-expanding Internet resources to obtain information on copyright owners and the lack of a demonstrated orphan works problem for entertainment software, the ESA does not believe that legislative action is warranted at this time. However, providing guidance and resources to assist in a search for owners of possibly orphaned works would help potential users of copyrighted works as well as protect the interest of copyright owners. If the Copyright Office does decide to take steps to improve the ability of potential users to identify and locate copyright owners, the ESA would like to participate. We would also appreciate the opportunity to provide input into and to comment upon any legislative or regulatory proposal that may emerge from this proceeding. Once again, on behalf of its member companies, the ESA thanks the Copyright Office for its efforts on this issue as well as the entertainment software enthusiasts who took the time to file initial comments on their experiences with our industry's products.