

## **LIBRARY OF CONGRESS**

### **Copyright Office**

### **Orphan Works**

**AGENCY:** Copyright Office, Library of Congress

**ACTION:** Notice of Public Roundtables

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**SUMMARY:** The Copyright Office announces public roundtable discussions regarding “orphan works,” i.e., copyrighted works whose owners are difficult or even impossible to identify or locate. The Office seeks to address whether there are compelling concerns that merit a legislative, regulatory or other solution, and what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders. The Office solicited and received written comments on these issues pursuant to a Notice of Inquiry issued earlier this year. *See* Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005). The Office will now hold roundtable discussions to further address the issues raised and solutions proposed in the written comments.

**DATES:** The public roundtable will first be held in Washington, D.C. on Tuesday, July 26, 2005, from 9:00 a.m. to 5:00 p.m. E.D.T., and on Wednesday, July 27, 2005, from 9:00 a.m. to 5:00 p.m. E.D.T. An additional roundtable will be held in Berkeley, California on Tuesday, August 2, 2005, from 9:00 a.m. to 5:00 p.m. P.D.T. Requests to participate in the roundtables must be received by the Copyright Office by 5:00 p.m. E.D.T. on July 15, 2005.

**ADDRESSES:** The roundtable in Washington, D.C. will be held in the Russell Senate Office Building, Room 188, Washington, D.C. 20510, on July 26, 2005, and in the Rayburn House Office Building, Room 2237, Washington, D.C., 20515, on July 27, 2005. The public roundtable

in Berkeley, California will be held at the Boalt Hall School of Law, University of California – Berkeley, Berkeley, California 94720. Details on the precise location in Berkeley, California will be provided in advance of the meeting on the Copyright Office website, <http://www.copyright.gov>.

**FOR FURTHER INFORMATION CONTACT:** Oliver Metzger, Attorney-Advisor, Office of Policy & International Affairs, Email: [omet@loc.gov](mailto:omet@loc.gov); Telephone (202) 707-8350; Fax (202) 707-8366.

#### **SUPPLEMENTARY INFORMATION:**

##### **Procedure for Submitting Requests to Participate**

The roundtable discussions will be open to the public. However, persons wishing to participate in the discussions must submit a written request to the Copyright Office. The request to participate must include the following information: (1) the name of the person desiring to participate; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a one-page summary of the specific issues the participant (or his or her organization) wishes to address.

The one-page summary must also identify in which of the four general roundtable topic areas the person would most like to participate in order of preference, along with the corresponding date, time and location (see below for detail). Space and time constraints may require us to limit participation in one or more of the topic areas, and there is a chance that not all requests to participate will be granted. Identification of the desired topic areas in order of preference will help the Office to ensure that participants will be heard in the area(s) of interest most critical to them. In addition, any person requesting participation in the roundtable who did not file a written initial or reply comment must provide their statement of interest in this

proceeding in his or her one-page summary. The Office will notify each participant in advance of his or her designated topic area(s), and the corresponding time(s) and location(s).

Note also for those who wish to attend but not participate in the roundtables that space is limited. Seats will be available on a first-come, first-served basis. However, all discussions will be transcribed, and transcripts subsequently made available on the Copyright Office website.

Requests to participate may be submitted to the Office by e-mail (preferred), by commercial courier, or by hand delivery by a private party (submission by overnight service or regular mail will not be effective) as follows:

1. If by e-mail (preferred): Send to [orphanworks@loc.gov](mailto:orphanworks@loc.gov) a message containing the information required above. The one-page summary of issues may be included in the text of the message, or may be sent as a MIME attachment. If sent as a MIME attachment, the summary must be in a single file in either: (1) Adobe Portable Document File (PDF) format; (2) Microsoft Word 2000 or earlier; (3) WordPerfect 9.0 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.
2. If by commercial, non-government courier or messenger: Address to Jule L. Sigall, Associate Register for Policy & International Affairs, U.S. Copyright Office, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC 20559-6000, and deliver to the Congressional Courier Acceptance Site (CCAS), 2nd and D Streets, NE, Washington, DC between 8:30 a.m. and 4:00 p.m., a cover letter with the information required above, and include three copies of the one-page summary of issues. (Note: the Copyright Office will consider the date of receipt at CCAS as the date of receipt in the Copyright Office.)
3. If by hand delivery by a private party: Address to 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 20559-6000, and deliver to Room LM-401 of the James Madison Memorial Building, a cover letter with the information required above, and include three copies of the one-page summary of issues.

## **Background**

On January 26, 2005, the Copyright Office published a Notice of Inquiry in the Federal Register, 70 Fed. Reg. 3739 (Jan. 26, 2005), announcing its study of issues surrounding “orphan works,” *i.e.*, copyrighted works whose owners are difficult or even impossible to identify or locate. The study is a response to concerns that difficulty in identifying and/or locating copyright owners can create difficulties in obtaining permission for subsequent creators and users to use works in socially productive ways, such as by incorporating these works in new creative efforts, or by making them available to the public. Specifically the Office seeks to address whether the problems identified in the comments merit a solution, and what type of solution could effectively address these problems without conflicting with the legitimate interests of authors and right holders.

The original Notice of Inquiry invited the public to submit written comments. Initial Comments were first submitted to the Office during a 60-day period following issuance of the Notice of Inquiry. Reply Comments were then submitted during an additional 45-day period. The Office received approximately 850 unique comments during these periods, all of which have been posted on the Copyright Office website (<http://www.copyright.gov/orphan>).

The Copyright Office has reviewed the Initial and Reply Comments and seeks further information and discussion on several issues raised by the Notice and this study. To help guide

the discussion, the following Provisional Agenda will be followed in both the Washington, DC and Berkeley, CA roundtables:

Topic 1: Identification of Orphan Works

Washington, DC: Tuesday, July 26, morning session

Berkeley, CA: Tuesday, August 2, morning session

The Notice of Inquiry invited comments on how the term “orphan work” should be defined, or how orphan works might be designated. It suggested two general approaches: (1) an “ad hoc” or case-by-case approach, setting forth basic parameters of what might constitute a sufficient search under the circumstances; and (2) a formal approach incorporating a registry or registries in various forms and with various effects. The Notice of Inquiry also invited comment on other threshold issues, such as whether certain works should be categorically excluded from designation as “orphan works” because of age, publication status, etc. While many comments addressed these issues in detail, the Copyright Office seeks further discussion on the following issues within this general area of concern:

- a. The “due diligence”/“reasonable efforts” search approach and standard.
- b. The role of registries of copyright ownership information and/or uses of purported orphan works.
- c. Inclusion or exclusion of unpublished works.
- d. Other threshold requirements, such as age of works, types of works, types of users, types of uses.

Topic 2: Consequences of an “Orphan Works” Designation

Washington, DC: Tuesday, July 26, afternoon session

Berkeley, CA: Tuesday, August 2, afternoon session

Assuming that a work is identified or designated as an orphan work, a wide range of legal consequences may potentially result. The Notice of Inquiry summarized some of these consequences, while others were suggested and addressed in the written comments. These consequences vary in nature and degree, from limitations on the remedies available to a reappearing owner, to the payment of a mandatory fee by the user in a variety of forms, to a statutory exemption explicitly authorizing various uses, to termination of all rights in the work through entry into the public domain. The Copyright Office seeks further information on the following issues within this topic area:

- a. The “limitations on remedies” approach.
- b. The exemption and public domain approaches.
- c. Payment of fees or escrow by the user.
- d. Other conditions/obligations on the user (e.g. time limits, notice, registration).
- e. Reliance (or “piggybacking”) on previous searches by subsequent users.

### Topic 3: Reclaiming Orphan Works

Washington, DC: Wednesday, July 27, morning session

Berkeley, CA: Tuesday, August 2, afternoon session

Once a work has been designated an orphan work, resulting in any of a number of potential legal consequences, a formerly unidentified or missing copyright owner may reappear and attempt to assert rights in the work. This assertion of rights might occur during any number of stages in the process of exploiting of the work, and after a user may have incurred costs in reliance on the continuing unavailability of the original owner. The assertion of rights may also occur in a variety of forms, from informal communication between the original owner and user, to formal litigation over rights in the work. The Copyright Office seeks further discussion of the

following issues within this topic area:

- a. The consequences of owner reappearance for uses in the process of being prepared for exploitation (whether derivative uses or other uses in preparation), and for ongoing exploitations.
- b. The burden of proof in litigation, on issues such as the reasonableness of a user's search.
- c. Statutory damages and attorneys fees.
- d. Rights in derivative works based on an orphan work.

#### Topic 4: International Issues

Washington, DC: Wednesday, July 27, afternoon session

Berkeley, CA: Tuesday, August 2, afternoon session

The Notice of Inquiry specifically asked how any proposed solution to orphan works problems might be reconciled with existing international obligations regarding copyright. These obligations include the prohibition against formalities in the Berne Convention, as well as limitations on the nature of exceptions imposed by the TRIPS Agreement. Several comments addressed these questions specifically, but also raised other concerns when the international dimensions of orphan works problems are considered. The Copyright Office seeks further information on the following issues within this topic area:

- a. Compliance of various alternatives with the Berne Convention prohibition against formalities.
- b. Compliance of various alternatives with TRIPS/Berne "three-step" test for limitations or exceptions.
- c. Exclusion of foreign works from the orphan work definition.

- d. Gathering information on experience in other countries with orphan works issues.

The roundtable might also take up other issues not encompassed by the above agenda if time permits.

**Dated: July 7, 2005**

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Marybeth Peters,  
Register of Copyrights.