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REPLY to Comment of

Bruce Funkhouser/Copyright Clearance Center
in Response to the Copyright Office's Notice of Inquiry
Concerning ORPHAN WORKS (70 FR 3739, 1/26/05)

My reply concerns the offer of Copyright Clearance Center, Inc. (CCC) to help administer orphan works policy. (<http://www.copyright.gov/orphan/comments/OW0691-CCC.pdf>)

Whoever does administer whatever registry or licensing activities may be necessary to implement orphan works policy should either be

(1) neutral as between the various interested persons and entities, or

(2) representative of all those parties.

The Copyright Office may qualify as the first; a consortium of major teaching universities might well qualify as the second (see my initial comment); but the CCC qualifies as neither.

The interested parties might be identified as "owners and users," but it is a little more complicated than that. Many users also create copyrightable works and are therefore owners;

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many owners can not create what they want without using works of past authors and are therefore users. Thus the more appropriate categories are:

- those who are predominantly OWNERS and who only rarely are in the position of users. This category includes publishers, authors who retain their own copyrights rather than assigning them to publishers, and companies whose employees create works-for-hire;

- those who are both OWNERS and USERS, and who routinely encounter the problems of BOTH roles equally,

- those who are predominantly USERS: they may be students and they may be authors who create copyrightable works but who only rarely seek direct monetary rewards from those works.

The general public is in the third category. Most publishers and many authors fit into the first. The few who might be in the second category usually identify more strongly with one of the other two. The most notable exceptions to this last point are the major research universities, which, within their walls, have publishers (the university presses), authors who do not make much use of other peoples' works (poets and fiction writers, and scholars whose research is in previously unexplored areas, whether natural science, history, sociology, etc.), authors who very strongly rely on the works of others (scholars whose research does build on the works of others, and professors who create course materials from a combination of existing works and their own creative endeavors in selecting and arranging those works), and of course students, who are predominantly users. If the universities identify with owners more strongly at certain times, it may be in part because the users are less well-organized and have smaller per capita

interests in any controversy (that is: students; the professors rarely involve themselves in the cost of course materials even though they are the creators of them).

The CCC could, but does not, represent both users and owners. It makes it easier for the users to pay the owners, but it does that whether or not the owners are entitled to any payment. It does not perform a fair use analysis for anyone. A neutral entity trusted by users and owners alike could include that in its services, but the CCC does not.

Tellingly, the phrase "fair use" is never mentioned in the CCC Comment, nor is there any reference to royalty-free licenses or to negotiations about royalties. But fair use is in the copyright statute and has been part of American copyright jurisprudence from very early on. Indeed, the Constitutional provision by which Congress can legislate copyright protection for authors suggests that there must be a fair use doctrine: copyright must not impede progress in science and useful arts. Fair use provides a significant path by which progress in scholarly fields and education can occur.

What Should the Governing Board of an
Organization that would Administer Orphan
Works Policy Look Like?

It is respectfully submitted that the governing board of any organization selected to administer orphan works policy should include people from all points on the owner/user spectrum.

Although the CCC in its initial comment states that it has "representatives on [its] Board of Directors not only from the

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author and publisher communities but from user communities as well," its current Board is very heavily on the side of owners. (Note: The CCC's website has no biographical information about most Board members. Most of the following information has been obtained via Google(TM). Please excuse any errors in misidentifying the board members with persons of the same name.)

Chairman: Jack Hoeft: Publisher. (Bantam Books)

Vice Chairman: Richard S. Rudi ck: Publisher (Wiley)

Joseph S. Alen: CCC employee since 1981.

Ina A. Brown-Woodson: Corporate Library (AT&T Labs)

Karen Hunter: Co-author of celebrity books.

Stanley N. Katz: Director, Princeton University Center for
Arts and Cultural Policy Studies

Nancy Lee: Canadian author?

Elizabeth St. J. Loker: Affiliation: Member, National
Council of Arts and Sciences at the Columbian College
of George Washington University, listed only as "AB
'69"

James Monaco: Film Industry: Writer, publisher and
producer

Eugenie E. Prime, Corporate Librarian (Hewlett Packard)

Ronald H. Schlosser, Publisher (Thomson Learning)

William Bruce Strachan, Publisher (Columbia Gazeteer
database)

Janice Hopkins Tanne, Science Writer and co-author

Sanford G. Thatcher, Publisher, Pennsylvania State
University Press

Where are the users?

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Of the librarians, none is from a school library, a university library or a public library.

Nobody on the Board represents the interests of K-12 educators.

Nobody on the Board represents the interests of students, whether K-12 or college or graduate.

Of the authors, none has won a major prize for non-fiction writing. None has written a major best-seller or famous play or movie or painted a famous picture.

Of the university persons, there is no member of the National Academy of Sciences. Nobody has won a Pulitzer.

Of the university-affiliated persons, one is director of a university press -- the owner side of university life, not the user side. The other is from Princeton. Princeton University Press was the named plaintiff in the fair use coursepack case against Michigan Document Service, and was among the litigants in the case settled last year concerning coursepacks used at the University of Texas at Austin. Someone from Princeton would not likely be the best choice to represent those of the education community's rights that may be adverse to copyright owners seeking a stream of income.

Of the university persons, none is an award-winning educator. (Mr. Katz' resume is quite impressive, but it does not include any teaching awards.) Someone whose originality in creating materials for teaching that go beyond published textbooks would have a useful perspective for these matters.

The governing board of any group administering orphan works policy should include people who represent all points on the owner-user spectrum.

Status as "Orphan" Is Irrelevant If a Use Is Fair

The problems of orphan works are much reduced when fair use analysis is done first and fairly. If the use of a work is fair, permission to use the work need not be sought. If no permission is necessary, then it follows that the owner need not be located.

The CCC is in the business of collecting money for owners. It has never been in the business of deciding whether those owners have an indisputable legal right to that money. Thus if it were in charge of orphan works, it would inevitably bill the taxpayers for effort to locate owners who are not entitled, under an intelligent analysis of fair use, to any royalties. That would not be in the interests of the public.

Respectfully submitted,

Roberta J. Morris