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The Stanford University Libraries

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Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington DC 20540

Re: Stanford University Reply to Orphan Works Comments

Dear Mr. Sigall:

Stanford submits this reply after reviewing many of the 700 + comments put forward in response to Congress' Notice of Inquiry regarding orphan works. The truths that can be gleaned from all of the reviewed comments are first that the orphan works issue is compelling across many disciplines and second the fear of a copyright misstep hinders the "Progress of Science and Useful Arts" – the Constitutional purpose of the copyright law in our country (see U.S. Const., Art. I, Sec. 8, Cl. 8). To quote from our colleagues at the J. Paul Getty Trust, the Metropolitan Museum of Art and The Solomon R. Guggenheim Foundation: "Orphan works are a frustration and a risk for our institutions. None of us can easily afford the costs of defending a copyright infringement claim, on the one hand, or the costs of handcuffing an important scholarly project, on the other hand." It is imperative for Congress to act and to act in a manner that will provide useful access to works through clear guidance and without fear of unwieldy copyright litigation.¹

Through this reply Stanford would like to briefly state two points:

First, Stanford's articulation of a proposed amendment to section 108(h) of the Copyright Act to provide for an ALOW category of works to be used by libraries and archives is an effective and inexpensive solution to a subset of the overall orphan works issue. Under Stanford's proposal archives and libraries would be able to reproduce, distribute and digitize works 28 years and older that are no longer subject to

¹ See Comments of Susan Kornfield & Jack Bernard, March 24, 2005, "We have counseled clients on copyright risk management and copyright strategy, and have litigated copyright cases. Copyright law is difficult subject matter and outcomes almost impossible to predict."

commercial exploitation without fear of litigation.² In his comments, Sidney Verba, Director of Harvard University Library, discussed extensively the benefits of digitizing library collections and sharing them with the world through the Internet. The accessibility to extensive library collections is limited by geography, but in time and through digitization efforts and a relatively simple amendment such as we suggest, much of the world's texts held in large library collections could be extended in digital format beyond the physical walls of libraries. Access to the contents of those collections could stimulate students, teachers, and adult learners as well as researchers who are presently hindered in their creative work by access to carefully amassed collections in large research libraries.³ Currently, copyright law limits digitization efforts of orphan works – works that have only theoretical commercial value, but that do have content useful in the promotion of the sciences and arts. The ALOW amendment would significantly expand the number of works available for digitization, and thus significantly expand U.S. citizens' access in order to search and use meaningful content, without adversely affecting the theoretical value of such texts.

Second, Stanford would like to state clearly that its proposal, which is limited to archive and library use of orphan works, is offered as a step toward achieving a global solution to orphan works questions. Without hesitation, Stanford favors a solution to the orphan works issues that will apply to all uses of content in all forms of media whether now known or created in the future for all purposes, whether commercial or non-profit. In particular, Stanford supports the comments and recommendations proffered by Susan Kornfield and Jack Bernard as well as the comments of Lawrence Lessig *et al.* on behalf of Save the Music and Creative Commons. Stanford's proposal is not made in lieu of a solution, but one that might lead in part to such a solution. Our narrow resolution for archives and libraries is succinct, narrowly tailored and can be acted upon immediately by Congress while it undertakes consideration of more extensive suggested amendments to the orphan works issue for commercial and other non-academic use.

Conclusion

Stanford ends this letter in the same way it concluded its original comments: Congress needs to take appropriate steps to restore balance and certainty so that teachers, students, and researchers are able to make non-commercial use of orphan works. Those steps will make us better able to advance ourselves as a nation. While Congress and the copyright community will undoubtedly need some time to fashion a broad orphan works solution, Congress should act quickly to enact the ALOW proposal – or a similar narrow solution – to bring about immediate positive change and expand the academic use of orphan works consistent with the underlying Constitutional purposes of our copyright laws.

Yours truly,



²Please note that Stanford's proposal, among other things, provides objective guidelines as to what constitutes a diligent search that can be tested by third parties. In contrast, other proposals involve complex structures and processes that include subjective elements that impose further litigation risk without easily resolving uncertainty.

³Stanford supports the notion expressed by our colleagues at Carnegie Mellon that the scope of persons who can make use of orphaned works be broad enough reasonably to facilitate research. See Comments of Denise Troll Covey, 22 March 2005.