Before the

COPYRIGHT OFFICE,
LIBRARY OF CONGRESS

Washington, DC

Orphan Works and Mass Digitization (FR Doc. 2012–25932; Copyright Office Docket Number 2012-12)	)))))))	**REPLY COMMENTS OF THE NATIONAL WRITERS UNION (UAW LOCAL 1981, AFL-CIO)**

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The National Writers Union (UAW Local 1981, AFL-CIO) welcomes the opportunity to submit these reply comments in response to the Notice of Inquiry by the U.S. Copyright Office, "Orphan Works and Mass Digitization," FR Doc. 2012-25932, Copyright Office Docket Number 2012-12, published at 77 *Federal Register* 64555-64561 (October 22, 2012), and the initial comments submitted to the Copyright Office by other individuals and organizations.[1]

In assessing and responding to the initial comments submitted to the Copyright Office[2], we begin by observing that most of the comments submitted on behalf of writers, other individual creators of copyrighted work, and organizations representing individual creators share serious concerns about the impact on individual creators of "orphan works" legislation, particularly in any form resembling the bills considered by Congress in 2006 and 2008. It's important for the Copyright Office and Congress to recognize that, as this record shows,"orphan works" proposals are being advanced primarily by those entities that seek to engage in activities that would constitute, or do constitute, infringement under current U.S. law and international treaties. Writers and creators are not part of any putative "consensus" in support of such laws.

In particular, the NWU endorses and commends to the attention of the Copyright Office and Congress the objections to "orphan works" legislation raised by Mr. Bruce A. Lehman[3]; the extensive submissions of the Illustrators Partnership of America regarding the potentially severe adverse economic impact of "orphan works" legislation on individual creators of works that would be at risk of being deemed "orphaned" despite being actively exploited[4]; and the analysis

1 These comments supplement initial comments submitted by the NWU on February 4, 2013, available at <http://www.copyright.gov/orphan/comments/noi_10222012/National-Writers-Union.pdf> and at <http://nwubook.org/NWU-orphan-works-4FEB2013.pdf>.
2 As listed at <http://www.copyright.gov/orphan/comments/noi_10222012/>.
3 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Lehman-Bruce.pdf>.
4 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Illustrators-Partnership-America.pdf>.

submitted by the Directors Guild of America, Inc. (DGA) and the Writers Guild of America, West Inc. (WGAW) of the meaning of, and the need to respect, the moral rights of creators which are guaranteed by the Berne Convention.[5]

We also note that several other organizations representing writers and creators in varied media and genres independently proposed variations on some of the specific recommendations made by the NWU in our initial comments.

Several commenters suggested, as did the NWU, that the Copyright Office establish and maintain a free, voluntary registry of rightsholder contact information, in which creators could enter and update our own listings. We suspect that such a project, if undertaken in the manner outlined in detail in the comments of the Science Fiction and Fantasy Writers of America, Inc. (SFWA)[6], would have near-universal support from working writers.

Several commenters also recommended, as did the NWU in our initial comments, that any legislation to authorize use of "orphan works" recognize the possibility of reversion of rights to the original creators, and provide for reversion of rights if third-party rightsholders no longer exist or cannot be located.[7] We believe that this could most easily be accomplished through

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5 Comments of the Directors Guild of America, Inc. (DGA), and the Writers Guild of America, West Inc. (WGAW), available at <http://www.copyright.gov/orphan/comments/noi_10222012/Directors-Guild-America-Inc.-(DGA)-Writers-Guild-America-West-Inc.pdf>.

6 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Science-Fiction-Fantasy-Writers-America-Inc.pdf>.

7 For example, "In that instance, the author should be treated in all respects as the owner of the orphan work, and all rights and obligations of the missing owner should inure to the author." Comments of the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), p.4, available at <http://www.copyright.gov/orphan/comments/noi_10222012/SAG-AFTRA.pdf>. Similarly, "Extant writers and directors should be given the right to grant non-exclusive licenses to use orphan motion pictures.... Like most creators, writers and directors want their work available to the public. As a result, a motion picture that has been orphaned because it has no value to a corporate copyright holder will still have value to the writer and director." Comments of the Directors Guild of America, Inc. (DGA), and the Writers Guild of America, West Inc. (WGAW), pp. 11-12, available at <http://www.copyright.gov/orphan/comments/noi_10222012/Directors-Guild-America-Inc.-(DGA)-Writers-Guild-America-West-Inc.pdf>.

reform of Section 203 of the Copyright Act (17 USC §203), and we urge the Copyright Office and Congress to take up such reform independent of any specific "orphan works" legislation.

Most of the comments submitted to the Copyright Office by entities seeking statutory or judicial permission for activities that would constitute infringement under current U.S. law and international treaties repeat the same discredited fallacies which have dominated these entities' discourse on "orphan works" for many years. These comments continue to ignore the impact of schemes for (unauthorized) publication of "orphan works" and (unauthorized) mass digitization on working writers and other creators. Or they pretend that we don't exist, that our livelihoods won't be affected by these schemes, or that we aren't among the "stakeholders" who need to be part of the discussion.[8]

These failings are perhaps most apparent in the "best practices" for categorizing works (properly, "rights") as "orphaned" that have been cited and/or submitted by several commenters.

For example, the Society of American Archivists attached an "Orphan Works: Statement of Best Practices" as an appendix to its comments,[9] while the Berkeley Digital Library Copyright Project commented that, "In many cases, community-developed codes of best practices have further assured these users about the types of acceptable activities they should undertake with respect to mass digitization and orphan works. For orphan works in particular, community-driven efforts are underway to help libraries, archives, and other memory institutions understand how to

8 Author and attorney C.E. Petit has described this in his blog in colorful but unfortunately accurate terms: "[T]he absence of authors in the debates on copyright.... is unacceptable and inexcusable.... Indeed, there's an excellent argument that, under the current confused jurisprudential framework, virtually all of the proposed systems for dealing with orphan works constitute regulatory takings. The current debate over copyright, especially as it is on the 'net, uncomfortably resembles the partition of a colony by colonial powers without a voice at the table for the indigenous peoples (or at least not one drowned out by moneyed interests like the East India Company). It seems to me that we've made that mistake a few times before with unsatisfactory results. We really, really shouldn't be repeating it." Scrivener's Error, February 23, 2013, <http://scrivenerserror.blogspot.com/2013/02/D223x.html>.

9 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf>.

approach orphan works in their collections that they would like to use."[10] For its part, the Library Copyright Alliance (LCA) relies in significant part on the "*Code of Best Practices in Fair Use for Academic and Research Libraries*, developed by the Association of Research Libraries," for its conclusions about what constitutes "fair use".[11]

But by its own terms, the "Code of Best Practices" endorsed and cited by the LCA "represent[s] *the library community's current consensus* about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus *within the library community* about how those rights should apply."[12] [emphasis added]

Working writers are not included in this self-defined "library community". So far as we know, no writers who would seek to protect the rights to their work against being categorized as "orphaned", and no organizations representing such writers, were involved in developing any of these "codes" or "best practices". No such writers or organizations have been among the invited speakers at symposia organized by the Berkeley Digital Library Project, even though these events have been intended to demonstrate "consensus" on "orphan works" and copyright formalities, and have included and have been intended to influence the Register of Copyright and other staff of the Copyright Office.[13]

Those who wish to "use" written works in ways to which they do not have the rights (mainly by publishing those works on the World Wide Web) are free to advocate for legislation

10 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Berkeley-Digital-Library-Copyright-Project.pdf>, p. 2.
11 Available at http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf>.
12 Comments of the Library Copyright Alliance, note 11, *supra,* p. 4.
13 See the lists of speakers for symposia on "Orphan Works & Mass Digitization: Obstacles & Opportunities" (April 12-13, 2012), <http://www.law.berkeley.edu/orphanworks.htm> and "Reform(aliz)ing Copyright for the Internet Age" (April 18-19, 2013), <http://www.law.berkeley.edu/formalities.htm>.

to serve their interests by giving them impunity from sanctions for actions that would otherwise constitute copyright infringement.

But what is essential for the Copyright Office and Congress to understand is that these statements of "best practices" and this so-called "consensus" reflect only what infringers and would-be infringers believe to be "best" for themselves. They do not reflect a consensus among all stakeholders, or any sort of "multi-stakeholder" process. These commenters do not include working writers who want to protect our copyrights in their self-defined "library community", and they have spurned our requests to participate in their "standard-setting" processes. The fatal gaps in their understanding of our business models and the likely adverse impact on us of their proposals, as discussed in our initial comments, are thus entirely self-inflicted on their part.

These self-serving, one-sided, and entirely unrealistic "codes" and this artificially-created "consensus" are, in fact, among the reasons why we question the competence or commitment of would-be "users" of works potentially deemed "orphaned" to define "standards" in anything other than a self-serving manner. This is why the Administrative Procedure Act properly requires that the substantive and procedural criteria used to determine rightsholdings, including such matters as the definition of "diligent search" if that is to be made determinative of rights, must be specified either by Congress or in regulations promulgated by an agency such as the Copyright Office. Would-be infringers cannot be allowed to define for themselves the extent of their impunity or of the expropriation and transfer to themselves of others' rights.

The consequences of development of "standards" by groups that omit a significant category of stakeholders are perhaps most obvious in the European Union "Accessible Registries of Rights Information and Orphan Works" (ARROW) project mentioned by several commenters.

Because ARROW was designed and developed by a consortium of government agencies, libraries, print publishers, and collective licensing organizations, it relies on an aggregation of information from the types of records kept by (surprise!) government agencies, libraries, print publishers, and collective licensing organizations.[14] Most of these databases focus on records of past print publication, and contain little or no information about digital publication or digital rightsholdings. Some of these, such as library catalogs, consist entirely of *publication* records and contain no information at all about *current holdings of rights* to reproduction in any medium.

Rights to electronic reproduction for most older works were never assigned by authors to print publishers. Electronic rights to many newer works reverted to the authors when the works went out of print in the original paper editions. Writers who hold the electronic rights to their own work are under no obligation to tell (former) publishers of out-of-print paper editions about their new e-book or Web versions of the work. Publishers have no right to know, no reason to expect to know, and in fact have no idea how many of their out-of-print backlist titles have been reissued in digital (e-book or Web) form by the authors of those works. Print publication records provide no legitimate basis for a determination of whether a work is published or unpublished, or whether a work (and not just a specific edition) is "out of print" or "out of commerce".

An original handwritten letter or typed manuscript may have been deposited in an archive, but the author or her heirs may have retained a photocopy of it. They are under no obligation to notify the archive if, as is increasingly common, they publish it on a personal, family, genealogical, community, or other Web site. This can happen years after the deposit of the original in the archive. No evidence internal to the archival copy provides a sufficient basis for a determination that the work is unpublished or is not being commercially exploited.

14 See <http://www.arrow-net.eu/partners>.

ARROW includes few records of self-publication or self-exploitation. Crucially, ARROW includes no database in which a creator can list her own self-published and/or self-exploited work, such as the content of her Web site, without jumping through hoops to qualify herself to participate as a "publisher", or licensing her work through some reproduction rights organization even if she would prefer to manage and/or exploit her rights to own work herself.

Although the majority of all recently published written work has been published on the Internet, not on paper, ARROW includes no database of records of Web publication. (Unsurprisingly, since no such database exists.) As a result, there is no record of most recently published work in any of the databases accessed by ARROW. The vast majority of recently published, in-copyright work would be erroneously deemed "orphaned" based on an automated ARROW search, regardless of how much revenue it is generating for the holders of Web publication rights.

The ARROW project exemplifies the fallacy of "Garbage in, garbage out." To avoid a sweeping expropriation of creators' rights, it's crucial for the U.S. Copyright Office and Congress not to replicate the European Union's misguided reliance on such a system.

Many of the initial comments submitted to the Copyright Office in the current inquiry concern photographs and other graphic work. It's important for the Copyright Office and Congress to recognize that many of the concerns and objections raised by freelance photographers apply equally to freelance writers. This is especially true for writers whose income is derived from licensing or exploitation of a large body of discrete works, as is increasingly typical of writers of smaller and more "granular" Web content elements which are routinely licensed, sub-licensed, syndicated,h and dynamically compiled into Web pages.

Consider what might be required of such an author who is already making her best efforts to exploit her portfolio of writing, and does not want any rights to it to be deemed "orphaned".

Imagine, for example, that she earns some portion of her living by writing one-paragraph, untitled, unsigned product reviews, or hotel reviews for travel Web sites.

Suppose that a statute is enacted such that – as Google continues to advocate[15] – certain rights to any work, any edition or copy of which does not contain specific "opt-out" code or is not listed in a specified set of databases or registries, will be deemed "orphaned".

What will be required of this writer to avoid having Google acquire the right to distribute copies of her work, for free or for Google's profit, in competition with copies she has authorized?

First, she will have to compile not just a complete list of all her works but a complete list of the URLs of each page on which any of them has ever been published. This is, in all likelihood, a hopeless task, for several reasons. Many licensing agreements for Web content permit sublicensing to other Web sites without notice to the original creator. So it is normal for the creator not to know, and to have no right to know, all of the Web sites on which her work has legitimately appeared. Scripts and dynamically-generated Web pages mean that the same content element may be, or may have been, displayed at an almost unlimited number of URLs. For example, even on a single Web site with a single domain name the same content element may have been displayed in different ways in response to myriad slightly differently worded search queries contained in different fully-formed URLs. In another common case, a content item posted to a social network may have been displayed in different contexts as part of the unique timelines viewed by hundreds, thousands, or more of "friends" or "followers".

15 See comments at <http://www.copyright.gov/orphan/comments/noi_10222012/Google-Inc.pdf>.

Second, she will have to add each of her works to some yet-to-be-created (private) registry, and embed sufficient information in each copy of any of her works (including each copy of any collective work, such as a dynamically created Web page, that contains any element of her work) to allow that content element to be matched to the registry entry.

We don't know exactly what this would entail, since no such registry yet exists. Fees for registration with the Copyright Office are currently prohibitive for work of this sort.

Metadata are routinely stripped from photographs published on the Web, but at least there are standards for embedding of attribution metadata in digital photographs. There are no such standards for metadata in HTML – the most common format for digital distribution of text.

In their comments, Public Knowledge and the Electronic Frontier Foundation note – truthfully but disingenuously -- that it is "easily" possible to embed author metadata in Microsoft Office or PDF files.[16] But the overwhelming majority of published digital text is distributed as HTML, not in Microsoft Office or PDF format. There is no HTML standard for specifying who holds which rights to which portions of a typical multi-rightsholder HTML file.

For the time being, the only "standard" way to indicate a desire that a Web page not be re-published without permission (which legally should be presumed, and should not require a digital "no stealing" sign) is through a "no-archive" or "no-cache" header or "robots.txt" file, each of which operates on an entire Web page rather than on an individual content element.

Even assuming some such standard were to be created, and extended to individual components of a Web page, our hypothetical author would still face the problem that, except in the case of self-publication, she who holds the copyright rarely controls the HTML.

16 Available at <http://www.copyright.gov/orphan/comments/noi_10222012/Public-Knowledge-and-Electronic-Frontier-Foundation.pdf>, p. 9.

In theory, a freelance writer might be able to negotiate a contractual commitment from a licensee that her work only be displayed on Web pages containing specific hidden HTML code such as an attribution or "no-archive" or "no-cache" tag, or subject to a "robots.txt" exclusion.

In practice, the disparity in bargaining power between individual Web content creators and large Web publishers makes it extraordinarily unlikely than any but the most successful Web authors would be able to negotiate such a commitment from any major Web publisher.

And even if an author obtained such a commitment, it would likely be unenforceable. Web publishers already routinely exceed the scope of their licenses from writers, such as by continuing to distribute content from their Web sites after time-limited licenses have expired.

Digital content of this sort is prohibitively expensive and difficult to register with the Copyright Office, so attorneys' fees and statutory damages are typically unavailable to writers of Web content. As a result, and as we have noted in this and other ongoing inquiries by the Copyright Office and the office of the Intellectual Property Enforcement Coordinator, civil litigation in federal court is out of reach of most writers. And as we have also noted before, the Department of Justice typically ignores complaints of criminal copyright infringement by publishers, as long as they hold or once held any sort of license for any use of the work at issue.

Even if a sympathetic Web publisher voluntarily added the newly-specified metadata tags to all newly-distributed digital copies of Web pages containing elements of our hypothetical author's work, she would still have the problem of previously-distributed Web pages. Many of the former publishers of those Web sites are likely out of business. But copies of those Web pages are likely retained by Google, Microsoft Bing, the Internet Archive, and so on. There's no way for our hypothetical author retroactively to add metadata to those "cached" copies.

The rights to some (probably most) of our hypothetical author's work will inevitably be subject to being deemed "orphaned", despite her best efforts, as described above, to proclaim her rightsholdings and her desire to retain her rights.

Third and consequently, she will find it necessary (if she doesn't want to forfeit the rights to this work) to carry out her own ongoing periodic policing of all of the places around the world (who knows where in the cloud Web content may have been served from or to) where works, rights to which have been deemed "orphaned", are inventoried.

In each case of such a work, she will have to follow up – according to the idiosyncratic policies and procedures of the particular registry, in whatever language it operates – to document her rights claim to the particular work, to terminate the unauthorized use, and to establish (an arduous process, in the absence of statutory damages) and "claim" the revenues she has lost.

Since most of these systems have yet to be established, we can't yet say exactly how much of a burden they would impose on writers. But we can make some initial estimates:

Because of the domination by U.S.-based companies of the worldwide Web hosting industry, vast numbers of writers around the world publish their work on servers in the U.S.

Very conservatively, suppose that 50 million writers around the world have published some in-copyright work in the U.S. which they are trying to exploit commercially.

Suppose that for each of these writers, attempting to catalog all of her work, tracking down all of the places and editions where it has been published (including an exhaustive list of the URLs at which any of it has appeared), registering all of those editions, and adding attribution and other required metadata to future editions and copies requires one week (40

hours) of work at an average wage of $10 per hour (barely more than President Obama's proposed minimum wage).

That would mean $20 billion dollars worth of writers' labor – not counting any of the operational costs, registration fees, etc. – as part of the startup costs of the scheme.

On an ongoing basis, suppose conservatively that each of those 50 million writers spends one hour every 90 days checking for editions or copies of her works, rights to which have been deemed orphaned. At the same $10/hour average valuation of writers' time, that would mean $2 billion per year worth of writers' time, in perpetuity, to maintain the "orphan works" scheme.

These estimates are obviously rough, but we believe they are conservative. The one-time burden imposed on writers by the enactment of "orphan works" law would be measured at least in tens of billions of dollars, and the ongoing burden at least in billions of dollars per year.

For some writers, these costs would tip the balance of profitability of trying to make a living from writing. For those writers who tried to carry on, these costs – billions of dollars worth every year – would be borne in time directly deducted from creative activity.

These estimates don't include fees or operational expenses, and they don't include the unrecoverable revenues that creators (and other rightsholders) would lose through diversion of readers from authorized copies to copies made available through the "orphan works" scheme.

What's particularly outrageous about the imposition of these costs is that all of them would be borne by those who are supposed to be the beneficiaries of copyright law: creators.[17]

17 Copyright exists to secure rights to authors, not to third parties. Any benefit of copyright for publishers or other intermediaries is purely incidental, and should be taken as evidence of friction and inefficiency in the creativity-promoting system of copyright, not of its success. This is among the reasons why publishers and intermediaries should not be taken as proxies for the interests of creators in discussions of copyright law and policy. See also C.E. Petit, "Cost Allocation and Copyright Orphans", August 2006, <http://ssrn.com/abstract=921610>.

And not just any creators. In the ultimate injustice, all of these costs would be borne by a specific sub-group of creators: those who are already exploiting their portfolios of copyrights in the manner they think best serves their interests, and who are not seeking to sell or offer new licenses to their work in some different manner. In other words, those writers who would get *no* benefit from an "orphan works" scheme. *All* of the costs imposed on authors would be costs of purely defensive activity required to try to protect existing rights and revenue streams.

We again urge the Copyright Office and Congress to abandon this misguided attack on writers' rights, and take up real copyright reforms that will benefit both writers and readers.

We continue to look forward to the opportunity to participate in future hearings or workshops on these issues, and to work with the Copyright Office and Congress to enact the reforms to Section 203 of the Copyright Act proposed in our initial comments.

Respectfully submitted,

_____/s/_____

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