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March 6, 2013

Hon. Maria Pallante
Register of Copyrights
United States Copyright Office
101 Independence Avenue S.E.
Washington, DC 20559

Re: Reply Comments Submitted Pursuant to Notice of Inquiry Regarding “Orphan Works and Mass Digitization,” 77 Fed. Reg. 64,555 (Oct. 22, 2012), due March 6, 2013

Dear Register Pallante:

Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments to the U.S. Copyright Office in response to the above-referenced Notice of Inquiry regarding “Orphan Works and Mass Digitization.” We have reviewed the comments submitted on February 4, 2013, and provide this statement to reply to some of the comments.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO’s membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

IPO continues to support, in principle, the general framework proposed in prior draft legislation such as The Orphan Works Act of 2008 (S. 2913). Such legislation would promote the productive and beneficial use of orphan works by limiting monetary damages and equitable relief where a potential user, prior to use, performs a reasonably diligent search to locate the copyright owner of such works. Orphan works legislation must strike a proper balance between the public interest in promoting the use of works whose ownership cannot be ascertained, and the interest of owners who may be entitled to reasonable compensation once they identify themselves after use of their works has been made.

IPO believes that any proposed legislative scheme must fairly balance these competing interests, including with respect to the following issues:

Reasonable Compensation Standard

The financial liability of an infringer who performed and documented a reasonably diligent search but failed to locate the copyright owner should be limited to reasonable compensation. However, if the statutory definition of “reasonable compensation” is too indefinite, users of orphan works will not be able to determine with sufficient certainty the extent of potential liability and the purpose of the legislation to promote responsible

use of orphan works will be thwarted. Reasonable compensation should therefore take into account the standard fees that are charged in the industry for similar works.

Differences in Industries; What Constitutes a “Reasonably Diligent” Search?

IPO notes that the comments reflect varying issues with the prior legislation as they pertain to different industries impacted by copyright. For example, the music industry clearly already has a very adequate set of compulsory licenses and system of distributing royalties and locating rights owners, some of which is statutory or required by various court ordered consent decrees, whereas the visual arts are only now starting to develop systems that may in the future assist with adequately identifying rights holders. In its comments submitted in 2008 concerning the then-pending legislation, IPO urged that the definition of “reasonably diligent search” be clear and have sufficient “teeth” so that it did not become a mere search of Copyright Office records; on the other hand, IPO felt it should be balanced and clear so that potential users could know exactly what was required before taking a risk in using orphan works in their products. That concern remains relevant today, and that differences by artistic discipline may need to be considered in defining what is a “reasonably diligent search” is evident. In order for legislation to succeed, readily accessible search tools must be made available that meet certain basic standards of thoroughness.

Derivative Works

Proposed legislation may provide certain protections to a user who creates a derivative work from an orphan work, where the user is unable to locate a copyright owner after performing a reasonably diligent search. In such cases, the derivative work creator has relied on the orphan status of the original copyrighted work, and although the subsequent creator should pay reasonable compensation to the copyright owner, the statutory scheme could allow some continued exploitation of the derivative work. However, legislation should not alter the rights copyright law grants to an owner with respect to derivative works.

Under current section 106, the preparation of derivative works is an exclusive right held by a copyright owner. Section 103(a) states that “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.” Proposed legislation must balance the copyright owner’s exclusive rights with the subsequent creator’s potential reliance interest in having invested resources to create a derivative work based on what appeared to be an orphaned work, without abrogating the right of the copyright owner to control derivative works.

Mass Digitization

That articulating rules for the treatment of orphan works is a complicated issue is evident from the initial comments that were submitted. Any future legislative solution to deal with “mass digitization” projects will require balancing the public interest with respect for the rights copyright law grants to an owner. The lack of a specific proposal makes it difficult for a widely diversified organization such as IPO to arrive at a fully

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informed point of view. We look forward to the opportunity to comment if possible solutions are proposed in the future.

We appreciate the opportunity to comment in this matter. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "R.F. PHILLIPS". The letters are stylized and connected, with a period at the end.

Richard F. Phillips
President