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Rights, Registries and Remedies: An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works

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Rights, Registries, and Remedies: An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works

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Abstract: The U.S. Copyright Office received hundreds of responses to the Notice of Inquiry regarding orphan works. The responses report encounters with orphan works in all types of media, and many propose solutions to the problem, ranging from the creation of support services to eliminate or alleviate the problem to new legislation that would provide exemptions or accommodations that allow unauthorized use of copyrighted works under certain conditions. A quantitative look at the responses shows their general contours. A qualitative examination of the pros and cons of different positions taken on the many issues that must be addressed to solve the problem of orphan works reveals the trade-offs and implications of different actions to address the problem and the different perspectives and agendas of the respondents. Following these objective analyses of the responses, the paper argues for multiple approaches to solving the problem aimed at balance, certainty, practicality, and progress.

FRAMING THE PROBLEM

> A free culture supports and protects creators and innovators. It does this directly by granting intellectual property rights. But it does so indirectly by limiting the reach of those rights, to guarantee that follow-on creators and innovators remain as free as possible from the control of the past. A free culture is not a culture without property, just as a free market is not a market in which everything is free. The opposite of a free culture is a 'permission culture'—a culture in which creators get to create only with the permission of the powerful, or of creators from the past. *Lawrence Lessig,* Free Culture, *p. xiv*

> The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer. *Lawrence Lessig,* Free Culture, *p. 173*

In the analog world, roles in the supply chain of information—from creation through consumption—were more clearly delineated

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and rights more clearly constrained than they are in the digital world. The capabilities of digital technology challenge the practices and very definitions operative in the analog world. For example, "publication" in the analog world was more likely the result of a peer-review process that added value and assured the quality or authoritativeness of a work than currently occurs with many Web pages. Photocopying an entire book was not only illegal, but discouraged by the tedium, cost, and resulting hundreds of lower quality, loose-leaf pages. In the analog world, exercising the right of first sale was constrained by the physicality of the work, which also constrained the number of simultaneous users of the work. In contrast, copying a digital book occurs automatically upon viewing, and (unless constrained by technology) multiple identical, high quality copies can be created and distributed at the click of a button. Digital technology has changed or challenged the cultural practices of centuries, practices that turned on the physical rendering of intellectual property. It has yielded a paradigm shift in consumption, from purchased ownership to licensed access, and enabled a veritably unlimited number of simultaneous users of the same work at the same time. Digital technology has simplified and reduced the cost of all of the copyrights: reproduction, distribution, public display and performance, and the creation of derivative works. The ease with which these things can be done now has dramatically changed behavior and expectation. To paraphrase Lawrence Lessig, digital technology enables anyone with a computer to participate in building and cultivating culture. People using this power are changing the marketplace and these changes threaten content industries (Lessig 2004, 9). The upshot is vociferous debate among those who prefer to cling to the traditions of the analog world, to replicate and lock them down in the digital world at great expense, and those who prefer to adopt new policies and practices aligned with the capabilities and economics of the new technology.

The debate over the definition and scope of what should constitute an orphan work is discussed in this paper, but for the purpose of these introductory remarks, please allow the general understanding to be a work for which the copyright owner cannot be found—a diabolical problem in a permission culture. Orphan works no doubt existed before computers became popular consumer goods and before the invention of the Web. These technologies, however, have exacerbated the problem by increasing the demand for preservation and access to these works, especially as they are likely to be works of little commercial value but of great historical

value (*i.e.*, a treasure trove of knowledge about who we are, where we came from, and what we've done).

The issues surrounding orphan works are complex. The very topic puts a spotlight on the problems inherent in a permission culture, a culture created and sustained by a labyrinth of laws driven in large part by content industries that have "queered" (to use Lessig's word) the marketplace and fundamental cultural values. The orphan works problem highlights just how far we have wandered from the free culture of our roots. We live in a world where the two legal options that enable innovations built on the past—permission and fair use—are so fraught with problems, risks, and costs that they discourage rather than encourage preserving and cultivating culture. Acquiring permission is difficult if not impossible and prohibitively expensive in many instances. Relying on fair use is too risky, even for wealthy content industries. "Just at the time digital technology could unleash an extraordinary range of commercial and noncommercial creativity, the law burdens this creativity with insanely complex and vague rules and with the threat of obscenely severe penalties" (Lessig 2004, 19). The opportunities digital technology provides to stir democracy and creativity are obstructed "in a world in which creation requires permission and creativity must check with a lawyer" (Lessig 2004, 173).

The age, physical format, and ephemeral nature of many orphan works threaten their very existence. Our cultural and intellectual heritage in film, music, photographs, art, books, archival documents, etc. can be preserved by converting these works to digital format or at least replicating them in print. The law allows, under certain conditions, the preservation of copyrighted works, but a *preservation* copy is not a *use* copy. It is a locked-up copy, at least for the copyright term of the work. Preservation is not enough if the goals are marketing and cultivating culture. Broad access and use are essential to achieve these ends. Providing online access to orphan works would be a first step, a significant step, but access without a right to use would create a "read only" culture. To truly encourage the creation of new works and enhance or advance scholarship, research, education, and lifelong learning, people must be able to use and "tinker" with these works. The Internet, more specifically the Web, enables for the first time in history a new kind of teaching and learning that respects different styles. Digital technology provides an opportunity for us to overcome limitations inherent in our linear, left-brain, analog

world, and to encourage curiosity and creativity. Requiring permission from copyright owners who cannot be found threatens loss of our heritage and harms our ability to teach, learn, create, and compete in a global marketplace. Those who share this view believe the government should do something to address the problem of orphan works. The opposing camp argues that allowing unauthorized use of copyrighted work would encourage copyright infringement and destroy our economy by eliminating the incentive to create. The government should strengthen protections, punish pirates and other infringers, and ensure that copyright owners are appropriately compensated. Granted, this is a simplistic view of the terrain. As will be seen in this paper, there are positions in between these polar opposites. But let this suffice for an introduction to the problem space.

Concerns about whether current copyright law "imposes inappropriate burdens on users, including subsequent creators," of orphan works and whether these works "are being needlessly removed from public access and their dissemination inhibited" prompted Senators Orrin Hatch and Patrick Leahy to ask the Register of Copyrights to study the problem and report to the Senate Judiciary Committee by the end of the year (Notice of Inquiry 2005, 3). The result was the U.S. Copyright Office's Notice of Inquiry regarding orphan works, posted to the Federal Register January 26, 2005. The Notice requested initial comments from interested parties by March 25, and reply comments by May 9, 2005.

The Copyright Office received hundreds of responses to their Notice of Inquiry, each of which shared some experience or expressed some concern about the problem of orphan works or its solution. The responses run the gamut from uninformed (or misinformed) to well informed, from unintelligible rants to thoughtful analyses. They report painful experiences and heartfelt concerns from positions both for and against any action to address the orphan works problem. They reflect naiveté, arrogance, ignorance, ingenuity, acuity, altruism, and self-interest. Taken as a whole, the responses provide a diversity of perspectives on U.S. copyright law from a self-selected cross section of citizens and for-profit and non-profit organizations. Indeed they are a rich read.

The problem of orphan works raises serious questions about the proper balance of private interest and public good inherent in copyright law. The burning questions are whether unauthorized use of copyrighted works, for example, use without the copyright

owner's permission, should be allowed in circumstances and if so, what those circumstances might be. Should we and can we devise a designation of "orphan" works that both protects the rights of copyright owners and enables preservation, access, and use of orphaned cultural artifacts? Understanding the scope of the problem and the harm it causes is critical to finding an appropriate solution.

THE AGENDA AND APPROACH OF THIS PAPER

This paper provides a preliminary analysis and critique of the responses to the Copyright Office Notice of Inquiry, both the initial comments and the reply comments. The analysis includes a high level, quantitative look at all of the comments, and a qualitative, closer look at the objections to allowing unauthorized use of copyrighted works under any circumstances and the proposed solutions that would allow unauthorized use under certain circumstances. To the best of my ability, the analysis conveys an objective look at the responses, providing the pros and cons brought forth by the various respondents for each significant point under debate. Then taking a step back and looking at the debate through my personal lens as a professional librarian, as leader of the National Information Standards Organization (NISO) initiative on rights expression and management in the digital environment, and as a student of technologically driven cultural change, the paper provides my subjective, albeit preliminary, observations and recommendations for cutting a viable path through the maze. The work in this paper is preliminary in the sense that it has been constrained by the time available from the posting of the comments to the due date of this paper.

Unlike many of the reply comments to the Notice of Inquiry that dispensed with "outliers" and addressed what they claimed to be consensus in the initial comments, this paper acknowledges the outliers in the belief that the voices and opinions of a diverse citizenry should be heard in a deliberative democracy. Furthermore, absent a rigorous empirical study, there is no way to know if the outliers in these ad hoc comments represent the views of a significant segment of the population. Those who responded were self-selected, and it would be all too easy to dismiss as an outlier a view that was counter to our own or simply the view of a group less likely to self-select.

INITIAL OBSERVATIONS

To get a handle on the general contours of the comments, I devised a simple coding scheme. The results of this scheme do not accurately indicate the popularity or weight of positions for or against action to address the orphan works problem. Some comments were submitted by single individuals. Others were submitted by one or more organizations with thousands of members. Furthermore, all comments were not created equal, so to speak. Some are very well informed, others are not. Nevertheless, some way to grapple with the volume of responses was necessary as a starting point. To begin my task of trying to understand how the populace responded to the Notice of Inquiry, I analyzed both the initial comments and the reply comments using the following categories and definitions:

- Experience: The comment reported first- or second-hand encounters with problems related to orphan works.
- No: The comment explicitly stated an objection to any action that would allow use of copyrighted works without the copyright owner's permission.
- Yes: The comment explicitly or implicitly stated approval of or requested action to address the problem of orphan works. Comments that described experience as a matter of fact, without requesting help or indicating harm caused by orphan work, were not coded as "Yes." I took this conservative approach as a precautionary measure to prevent my personal position from coloring my coding.
- NIMBY ("Not In My Back Yard"): The comment explicitly stated approval of or requested action to address the problem of orphan works, but requested that their content be exempt from any orphan works designation because there is no or only a minor problem in their domain or because there are other compelling reasons that warrant their exemption.
- Solution: The comment proposed some action that could help to alleviate the problem of orphan works.

A rare few comments received neither a "Yes" nor a "No" code, for example, the comment that simply asked who owned the copyright on a vacation photograph taken by a random passerby. A few comments were coded "No" and "Solution" because they objected to allowing use of orphan works without permission, but proposed some action to eliminate or alleviate the problem.

Table 1 shows the results of this analysis. Few respondents submitted both an initial and a reply comment, and few objected to action that would allow unauthorized use of copyrighted work under any conditions. Very few approved action to address the problem everywhere but in their domain. The overwhelming majority approve of allowing unauthorized use in some circumstances. Many respondents shared personal experience with orphan works and proposed something about the solution to the problem. Not surprisingly, the reply comments focused more on the solution to the problem than the experience of the problem.

	No	**Yes**	**NIMBY**	**Experience**	**Solution**
Initial Comments	8%	79%	1%	52%	54%
Reply Comments	5%	86%	3%	33%	62%

Table 1. Rudimentary content analysis of initial comments and reply comments.

The many comments that reported experience with orphan works reveal the broad scope of the problem in terms of users, uses, and media. From personal to professional use of photographs, graphic art, software, film, books, radio and television broadcasts, any media you can think of, works for which the copyright owner cannot be found have created problems for academic researchers, teachers, students, journalists, documentary filmmakers, radio producers, photo shops, authors, publishers, record producers, hobbyists, scientists, engineers, libraries, archives, and museums. Though a few respondents claimed that there is no problem or only a minimal problem in their area and therefore their domain should be exempt from any legislation that would allow unauthorized use, experiences reported and in some cases data provided by other respondents belie these claims. All of the "NIMBY" respondents, though seeking exemption from an orphan works solution for their content, proposed solutions for the orphan works problem in other domains.

To enable me to target "Solution" responses that warranted focused study, I also analyzed the initial and reply comments using the following categories and definitions:

- Simple solution: The comment proposed one to three actions that could help to alleviate the problem of orphan works. I

also noted whether the recommended action was to remove copyright protection from orphan works (make them public domain) immediately or upon meeting certain conditions.

- Detailed solution: The comment proposed more than three actions or solution criteria that could help to alleviate the problem of orphan works.
- Solution analysis: The comment articulated advantages or disadvantages of different definitions of orphan works or approaches to the problem.

My operating assumption was that comments containing "Detailed solutions" and "Solution analysis" were likely to contain the points of merit in "Simple solutions." Note that these codes, like the previous ones, do not accurately indicate the popularity or weight of positions for or against action to address the orphan works problem. They simply provide a slightly more detailed view of the general contours of the comments.

The results of this analysis are shown in Table 2. Overall, most of the solution proposals were "Simple," though the percentage of "Detailed solutions" and comments containing "Solution analysis" increased in the reply comments. Among the initial comments, over a third recommended that orphan works become public domain immediately or conditionally; significantly fewer reply comments proposed the public domain as the solution. In conducting this analysis, I observed that proposals for the public domain came from individuals, not organizations, and were typically quite brief. Responses from organizations were longer, more detailed, and more analytic, which is not to say that no individuals proposed detailed solutions or provided analyses. More importantly, I observed that reply comments that made claims about consensus in the initial comments simply ignored all the proposals that orphan works become public domain. Granted, the solution adopted for the problem of orphan works is not likely to be the public domain, but it is misleading at best and at worst irresponsible to not even acknowledge that more comments proposed the public domain solution than any other solution. The many public domain proposals reveal something of interest if not significance about our citizenry, and overlooking or dismissing their comments entirely reveals something important about those who claim to build on consensus.

	Simple solutions			Detailed solutions	Solution analysis
	Public Domain	Conditional public domain	Other		
Initial comments	26%	10%	42%	22%	19%
Reply comments	4.5%	4.5%	54%	37%	38%

Table 2. Analysis of solution proposals.

The remainder of this paper explores the responses to the Notice of Inquiry in detail, beginning with respondents' answers to the Copyright Office's questions about the definition of an orphan work and the scope of the designation as these frame the objections and approaches to allowing unauthorized use of copyrighted works. The analysis focuses on the initial and reply comments coded as "No" and those coded as "Detailed solution" with "Solution analysis." The interaction of perceptions, priorities, assessments of value, awareness of relevant international treaties, and concerns about abuse, bureaucracy, control, risk, and cost, along with the respondent's presumptions about the purpose of copyright protection and allowable unauthorized use color the responses and make it difficult to present the debate in a linear fashion. The same arguments are brought forth again and again to address different issues and are sometimes used to make different points. In some cases, the definition of an orphan work shapes the proposed solution. In other cases, criteria for an acceptable solution shape the definition of an orphan work. For example, those primarily concerned about a solution that will scale to meet the needs of libraries, archives, and other cultural heritage institutions take a significantly different approach to defining an orphan work from those focused on individual use. I will do my best to walk you through the quagmire. Following an initial exploration of the defining criteria and scope, our path in broad strokes covers:

- Objections to allowing unauthorized use
- Copyright registries to avoid or alleviate the problem
- Categorical approaches to solving the problem
    - Default licensing
    - Safe harbor exemptions
    - Registry of orphan works
- Case-by-case approaches to solving the problem

  - Public domain
  - Compulsory licensing
  - Reasonable effort accommodation
- My recommendations and closing observations

Though the comments are posted on the Copyright Office website for public review, in the interest of objectivity and not biasing or influencing the reader's response, throughout this paper, the person or organization that submitted the comment is not named and—with rare exception—the frequency or popularity of the points made is not indicated. Instead, significant issues raised in the comments are briefly articulated and the pros and cons presented. Because the pros and cons often come from respondents with different priorities and perspectives, they do not always present a coherent whole.

DEFINING ORPHAN WORKS

Copyright Owner Cannot Be Found

Issue: Should an orphan work be defined as a work for which the copyright owner cannot be found?

Yes: "Unlocatable" copyright owners are the root of the orphan works problem and therefore should be the (or at least a) criteria for delineating what constitutes an orphan work. An agreed upon procedure for attempting to locate copyright owners is needed to substantiate the claim that a copyright owner is "unlocatable."

No: Copyright owners might be locatable by more skilled or diligent seekers. Copyright owners should not have their copyrights infringed due to the laziness or incompetence of potential users. Furthermore, copyright owners might choose to be unlocatable. They should not have their copyrights infringed or be assumed to have neglected or abandoned their work because of their choice.

Copyright Owner Cannot Be Identified

Issue: Should the definition of an orphan work include works for which the copyright owner cannot be identified?

Yes: The copyright owner of many copyrighted works is unknown because the work has no attribution. Clearly a potential user cannot locate an unknown entity.

No: Unscrupulous people often remove the attribution to plagiarize or steal the work.

Copyright Owner Does Not Respond

Issue: Sometimes diligent efforts to identify and locate the copyright owner yield no response. Should some number of successful contacts (*e.g.*, three successfully delivered letters requesting copyright permission) be criteria for designating an orphan work?

Yes: If the copyright owner is not sufficiently interested in his or her work to respond to a request for permission to use the work, then the work has been orphaned. In the interest of the public good, "no response" should be treated as "permission granted."

No: The copyright owner could choose not to respond or be unavailable or unable to respond when contacted due to illness, vacation, sabbatical, or other circumstances. Copyright owners should not have their copyrights infringed or be assumed to have neglected or abandoned their work because of their choices or circumstances. "The burden of having to be constantly available to those who may or may not really want to find the copyright holder is too much to put on copyright holders." In the interest of copyright protection, "no response" should be treated as "permission denied."

Discussion: Frequently the person or organization contacted is only the presumed copyright owner. Many comments detailed experiences where the presumed copyright owner responded only to say that the presumption was wrong. Sometimes multiple presumed copyright owners of the same work, contacted sequentially, responded that they did not own the copyright, sometimes referencing one another in a fruitless loop. According to legal counsel, no response from a presumed copyright owner could be "probative of the inability to find the owner." The problem is that in many cases there is no way to know definitively who owns the copyright because the records of the Copyright Office are incomplete, out of date, and inaccessible. Even if more often than not it would be reasonable to claim that a request is being sent to the presumed copyright owner, there is no way to know for sure whether the presumed copyright owner is indeed the copyright owner.

Age

Issue: Should the age of a work be considered in defining orphan work?

Yes: The age of a work is critical in categorical approaches to the orphan works problem. A categorical approach is necessary to provide certainty in designating orphan works. Without certainty, ambiguities will lead to self-censorship and gatekeeping and the problem will not be solved. (Categorical approaches are discussed later in this paper.)

No: The age of works likely to be orphans is often unknown. Excluding these works from acquiring orphan designation would prevent their preservation, access and use, and likely break up archival collections. Hinging the solution to the orphan works problem on the age of the work will introduce a new level of uncertainty. Any uncertainty in the definition will reduce the value of the solution and its impact on the problem. Furthermore, any setting of a minimum age to define an orphan work would necessarily be arbitrary. And if the designation of orphan works is restricted to older material, as is likely to be the case if age becomes part of the definition, more recent but ephemeral (endangered) materials on the Web will not be protected and preserved by the designation. The appropriate solution to the problem will apply to all works, regardless of age. The age of a work would be irrelevant if a "reasonable effort" accommodation or compulsory licensing were adopted to solve the orphan works problem. (The reasonable effort accommodation and compulsory licensing are discussed later in this paper.)

Publication Status

Issue: Should the publication status of a work be a consideration in defining orphan work?

Yes: Copyright holders have the moral right of first publication, privacy rights, and the non-economic right to withhold a work from the marketplace, all of which would be thwarted by allowing unpublished works to be designated orphans. A compulsory licensing approach to the orphan works problem could not be applied to unpublished work.

No: The publication status of works is often unknown. Excluding these works or works known not to have been published from acquiring orphan designation would prevent preservation and use of valuable cultural and intellectual heritage material, access to which is in the public interest. Hinging the solution to the orphan works problem on publication status will introduce a new level of uncertainty. Any uncertainty in the definition will reduce the value of the solution and its impact on the problem. The 1992

amendment to Title 17 §107 expanded fair use to unpublished works (though courts and cautious publishers still discourage such use), so likewise an orphan designation should be applicable to unpublished works. The right of the copyright owner to first publication focuses on commercial exploitation, which likely does not apply to the bulk of the heritage materials that will be salvaged under an orphan works regime. Furthermore, international treaties do not provide for or require a moral right of first publication. The purpose of copyright law is not to protect privacy. Privacy laws will protect privacy concerns despite any orphan works regime that would otherwise enable public access to these materials. The publication status of a work would be irrelevant if a "reasonable effort" accommodation were adopted to solve the orphan works problem. (The reasonable effort accommodation is discussed later in this paper.)

Print Status

Issue: Should the print status of a work be considered in defining orphan work? That is, if a work that had been commercially exploited (printed) is no longer commercially exploited (out of print), should this be a significant factor in designating an orphan work?

Yes: The primary purpose of copyright protection is the commercial exploitation of creative work. Works that are no longer being commercially exploited are likely to have been abandoned by the copyright owner. In a world where authors typically transfer exclusive rights to the publisher and the publisher ceases to disseminate the work, the rights may or may not revert to the author. In many cases authors would like to distribute their work, but either do not have the rights or the resources to do so. As libraries weed their collections, fewer and fewer copies of out-of-print books remain. As these books become worn and brittle, fewer and fewer copies circulate on interlibrary loan. Out-of-print materials are an endangered species in need of preservation. Access to these materials is in the public interest. Out-of-print materials are an easily identified corpus of works.

No: Works that are out of print now could be exploited later by the copyright owner. Designating these works as orphans and providing unauthorized public access to them could damage the future market for these works, and thus run afoul of international treaties by "unreasonably prejudicing the legitimate interests" of the copyright owner. Furthermore, the notion of print status is

becoming meaningless given print-on-demand services available in the digital environment.

Type of Work

Issue: Should an orphan works designation be applicable to all types of copyrighted work?

Yes: All types of copyrighted work can be orphaned. Providing special exemptions or treatment for certain classes of works is inappropriate and would extend the existence of the orphan works problem associated with these classes. Special treatment for certain classes of works is unjustified and discriminatory.

No: There is no serious orphan works problem in some areas and in some cases licensing and collection agencies already exist that can handle the minor problems.

Application and Duration

Issue: Should the orphan designation apply to the work that meets the defining criteria?

Yes: To be meaningful, the designation must apply to the work itself. Considerations of the identity and location of the copyright owner only make sense when applied to the work.

No: The designation should not apply to the work itself, but to a particular use made of the work, with each user having an independent duty to instantiate the definition prior to each use of a work.

Issue: Should an orphan designation endure in perpetuity?

Yes: Orphan designation should be an irrevocable status lasting for the remainder of the copyright term.

No: Orphan designation should endure only until the copyright owner comes forward to claim his or her work

SCOPE OF USERS AND USES OF ORPHAN WORKS

Issue: Should the solution to the orphan works problem apply to all users and uses of designated orphan works?

Yes: Limiting users or uses would unnecessarily complicate the situation and fail to address the full scope and implications of the problem of orphan works. It can be difficult to distinguish commercial from non-commercial use. Any uncertainty in the definition will reduce the value of the solution and its impact on

the problem. The solution must apply to all uses on the basis of the assumption that permission for all uses could have been negotiated (at some price) if the copyright owner had been found. Providing special exemptions or treatment for certain users or uses is inappropriate. The solution should be uniform and equitable. Special treatment for certain user groups is unjustified and discriminatory. The solution should apply to all users and uses with legitimate access to a non-infringing copy of the orphan work.

No: Different users or uses should be treated differently. For example, preservation is one thing, online dissemination is another. For-profit uses should be prohibited because they could damage the future market for these works and therefore run afoul of international treaties by "unreasonably prejudicing the legitimate interests" of the copyright owner. The solution should take into consideration that there is no or only a minimal orphan works problem in some areas. Furthermore, not all rights should be granted for all media. In some cases the right to use orphan works should be limited to the rights of reproduction and distribution. (Proposals for specific exemptions are discussed later in this paper.)

OBJECTIONS TO ALLOWING UNAUTHORIZED USE

A small percentage of the responses to the Notice of Inquiry objected to any action that would allow unauthorized use of copyrighted works. Most of the objections came from photographers and graphic artists. Reasons for objecting included:

- The Internet makes it easy to locate copyright owners. There is no orphaned art, only unscrupulous people who deliberately obscure signatures to pretend the creator is unknown. If publishers and the Copyright Clearance Center "took illustrators' copyrights seriously, there would be no orphaned art."
- The aim of copyright is to protect copyright owners. That protection should not depend on whether the copyright owner is locatable, available, or responsive. Allowing unauthorized use of copyrighted works would infringe the exclusive copyrights, including moral rights, of creators, take away their control of their work, and enable their work to be used to support organizations or causes to which they are opposed.
- Providing the incentive to create is more important than making life easier for users who do not have the time, skill, or resources to locate the copyright owner. Creativity and

innovation are the driving forces of a thriving economy. An orphan works regime would undermine the economy and threaten the livelihood of professional photographers and graphic illustrators.

- "The Internet has created a culture of appropriation, and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiary." Allowing unauthorized use of copyrighted works would encourage copyright infringement and favor corporate interests over individual creators. If potential users cannot locate copyright owners, they should use art created by copyright owners they can find or commission and pay for new art.
- Creativity is not chilled, free speech is not restricted, and culture is not endangered or impoverished by protecting orphan works. "The removal of copyright protection for orphaned work would reinforce the agenda of the 'free culture' movement to subvert existing copyright protection for other work." The free culture movement is "using subtle language and deception to trick the masses." Lawrence Lessig has convinced artists to give "their artwork away for free without them realizing the implications."

The plea in these objections is for laws to be strengthened to further protect the rights of copyright owners.

COPYRIGHT REGISTRIES TO AVOID OR ALLEVIATE THE PROBLEM

Some of those who objected to any unauthorized use of copyrighted work and some of those who approved of unauthorized use under certain conditions recommended a registry for current copyright owners to maintain up-to-date contact information. More aggressive respondents recommended not only the reinstitution of a copyright owner registry, but legislation to shorten the copyright term and to reinstitute the renewal requirement. Some respondents blamed the orphan works problem on current copyright laws and practices.

Issue: Should copyright registration be required?

Yes: Requiring the registration of current copyright ownership and contact information would enable potential users to locate copyright owners and negotiate permission to use their work. Works not registered could with certainty be designated orphans. If registration is not a prerequisite for acquiring or maintaining

copyright protection, it does not run afoul of international treaty obligations prohibiting formalities as a condition for "the enjoyment and exercise of copyright."

No: Copyright owners do not always know what copyrighted works they own. Requiring registration or renewal as a prerequisite to acquire or maintain full copyright protection would breach international treaty obligations prohibiting formalities as a condition for "the enjoyment and exercise of copyright." Requiring registration would "perversely encourage publishers to abandon works" because of the burden entailed in registration. Reinstating registration requirements "would lead creators to manipulate the nationality of their work to sidestep U.S. formalities." Periodic registration (renewal) would "diminish the market value of works."

Issue: Should copyright registration be voluntary?

Yes: Voluntary registration, without which the copyright owner nevertheless acquires and maintains full copyright protection, does not breach international treaty obligations, but provides users with an indication of works to be excluded from orphan designation. Voluntary registration would signal a copyright owner's intent to enforce copyrights on works not officially registered with the Copyright Office. Consulting such a voluntary registry would be a necessary, but not sufficient step in reasonable efforts to locate the copyright owner. Users could contribute information about their efforts to find copyright owners. Without filing formal proof of ownership or transfer documents such a registry would provide users with "precisely the information" on how to find rights owners and increase both the owner's ability to assert his or her rights and the user's ability to evaluate the risk of using a presumed orphan work.

No: Copyright owners do not always know what copyrighted works they own. If proof of ownership or transfer documents were not required, what prevents fraudulent claims of ownership? If registration were optional, how many copyright owners would register? Optional registration would only confuse copyright owners. "Freelancers and publishers alike often assume that registration is unnecessary because copyright is automatic. Frankly, when the complicated system of additional protections, deadlines, statutory damages, and so on, that result from registration are explained to them, their eyes go blank. The present system is one that only a lawyer could love. Duplicating it with

yet another complicated system would compound the problems that the system already fails to remedy."

CATEGORICAL APPROACHES

A categorical approach is an approach that provides certainty in designating orphan works and thus eliminates the risk in using orphan works. The rationale for supporting a categorical approach to solving the orphan works problem is that ambiguous definitions or criteria of "reasonableness" will go the same route as the "fair use" defense to copyright infringement: self-censorship by creators and gatekeeping by publishers. Ambiguity will yield to requiring permission because the risk of liability is too great.

Default Licenses

The default license approach requires registration and renewal of published work for which copyright owners wish to retain the full copyright term and remedies for infringement provided by current copyright law. With the exception of software, online registration would be required within a 25-year period of publication. Software would be required to be registered within five years of publication. Renewal would be required 50 years into the copyright term. To facilitate use of registered works, copyright owners would be required to keep contact information up to date. Ideally the registry would include links to terms and conditions for licensing use of registered works.

Failure to register or renew would not remove copyright protection, but rather signal that the work is orphaned. A search of the registry would be sufficient to determine whether a work is an orphan. Orphan works could be used without permission for a nominal fee under a default license. No injunctions against use would be available under the default license. Copyright owners who do not register their work but later discover infringing uses may self-identify and claim the fees paid for use of their work.

A somewhat similar system is proposed for unpublished works. Registration is required within three years of the natural author's death (if unknown to be set at 75 years after the creation of the work) or within ten years of the creation of unpublished works by corporate authors. Registration would signal that copyright owners wish to retain the full copyright term and remedies for infringement provided by current copyright law. Failure to register would not remove copyright protection, but signal that the work is

orphaned. Use of unregistered, unpublished work would be contingent on the user:

- Confirming the date of the natural author's death (or the date of creation of the work if the death date is unknown) or the date of creation of the work of corporate authors.
- Confirming the expiration of the appropriate registration period (three years for natural authors, ten years for corporate authors).
- Posting a notice of intent to use for a period of six months in a centrally administered Web accessible database. The notice of intent provides copyright holders of unpublished work with an opportunity to reclaim their work prior to its use.

Pro: Default licensing provides an efficient, effective way to balance private interest and public good. It provides certainty for copyright owners and users. It avoids the ambiguity and unpredictability of the "reasonable effort" approach and the accompanying chilling effects of the threat of litigation. It gives users a way to know whether a work has been orphaned and when, and gives copyright owners the power to signal that they have not abandoned their works. It also gives copyright owners the option, at an appropriate point in the life of a work, to decide whether the work warrants the high-cost route of infringement damages, injunctions and customized licenses under current copyright law, or whether it is better served through a lower-cost system of default licensing. Since failure to register or renew a work does not affect the term of copyright protection or forfeit any rights, the requirement does not run afoul of international treaty obligations prohibiting the institution of formalities or interference with the enjoyment and exercise of copyright. Default licensing would promote the enjoyment and exercise of copyright by creating a lower-cost market for works unable to be marketed in the high-cost environment of current copyright law. The U.S. Copyright Office's data on registration and renewals, when these were required by copyright law, indicates that most works were abandoned within 25 years of publication, that most material of continuing commercial value was renewed, and that the un-renewed material, while of little if any commercial value, was of great value to scholars and other specialists. These findings suggest that most copyright owners would be pleased with a low-cost system of default licensing (Notice of Inquiry 2005)—the upshot being that registration would be required of only those copyright owners who wish to pursue infringement damages,

injunctions and customized licenses some designated number of years after publication or creation.

Con: The claim that copyright owners who fail to register are maintaining control and asserting their choice to have their work covered under a default licensing is problematic and likely a trap for the unwary. The default license approach requires knowing the author and date of publication or creation. These will probably be known for new works or relatively recent works, but not necessarily for older works.

Safe Harbor Exemptions

Exemption approaches would legislate safe harbors or exclude certain types of works or uses from the orphan works solution.

The safe harbor exemption for non-profit libraries, archives, and educational institutions would expand U.S.C. Title 17 §108 to enable the reproduction and dissemination of orphaned works. Driven by concerns about risk and scale, these institutions need a solution to the orphan works problem that is both low-cost and low-risk. Definitions of an orphan work that are ambiguous or cannot be applied cost-effectively—ideally by a computer—to identify large numbers of works will not solve the orphan works problem for this constituency. Cultural heritage institutions with missions to preserve and provide access to materials in the public interest have limited resources. Exorbitant transactional costs and the risks of uncertainty must be eliminated or greatly reduced.

The most detailed proposal for an expanded safe harbor recommended that it enable non-profit libraries, archives, and educational institutions to make and provide access to physical or digital copies of published written material for educational and scholarly purposes if the work was first published at least 30 years ago and is currently out of print and if the copyright owner has not registered the work to signal that it is to be excluded from orphan designation. Copyright owners that do not opt out of the exemption by registering their work could come forward later and require the institution to stop providing access to their work.

Pro: In the public interest, education and cultural heritage institutions should have a special exemption to encourage preservation, access and use of orphaned works. A legislated safe harbor for these institutions, for these works (published written materials that copyright owners have not signaled are to be excluded from orphan designation), and for these purposes

(reproduction and distribution for scholarly and educational use) would create an unrebuttable presumption of orphan work status and obviate the need for court intervention based on the nature of use and type of work. This approach is workable now. It avoids the unpredictability, costs and risks of the "reasonable effort" approach, and clearly identifies works that have not been abandoned. The registry requirement to avoid orphan works designation does not run afoul of international treaty obligations prohibiting the institution of formalities or interference with the enjoyment and exercise of copyright. An expanded exemption for non-profit libraries, archives, and educational institutions provides an efficient, effective way to support education and scholarship.

Con: The scope of the solution should address the scope of the problem. Limiting the solution to the orphan works problem to selected users, works, and purposes will not address the full scope of the problem. An appropriate solution to the problem will facilitate all creative users and uses. Special exemptions for educational and cultural heritage institutions should be prohibited because they could damage the future market for these works, which would breach international treaties by unreasonably prejudicing the legitimate interests of copyright owners. For example, complying with a take-down notice for an online copy of a work could be too late; multiple copies could have been made and distributed prior to the take down. Providing special exemptions or treatment for certain classes of works or user groups is inappropriate, unjustified and discriminatory. The solution to the problem should be uniform and equitable.

Registry of Orphan Works

A few comments proposed a registry of works designated or certified as orphans. Potential users could presumably consult this registry to find works available for unauthorized use. Who would identify and register these works or maintain this registry is unclear. The only detailed approach to the orphan works problem that explores anything that even resembles such a registry is the "reasonable effort" accommodation described later in this paper.

CASE-BY-CASE APPROACHES

Public Domain

Comments that proposed the public domain as a solution to the orphan works problem typically did not indicate how an orphan work was to be identified, though it appeared to be a matter of

"unlocatable" copyright owners. The comments did not elaborate how this solution would be implemented. No comments that analyzed proposed solutions explored the pros and cons of the public domain solution, perhaps because the advantages and disadvantages are clear. Removing copyright protection from orphan works would obviously enable use of many works without the hassle of acquiring permission. However, removing copyright protection from orphan works would breach international treaties and take away copyright owners' control of their work without remedy. The silence of other commentators speaks volumes about the lack of viability of the public domain solution.

Compulsory Licensing

Issue: The Copyright Office Notice of Inquiry mentions the Canadian approach to orphan works, which is compulsory licensing. Potential users apply to the government for a license and pay a fee, which is reserved for the copyright owner who might later resurface. For each application, the government or other administrative body conducts an inquiry to determine whether efforts to locate the copyright owner were sufficiently reasonable and to determine the appropriate licensing fee for a particular use of a particular work. Though not designed for orphaned works, U.S. copyright law currently legislates compulsory licensing of recorded music through private agencies.

Pro: Compulsory licensing has worked well for the music industry in the United States and seems to work for well for orphan works in other countries.

Con: A compulsory licensing system modeled on Canadian law would be bureaucratic, inefficient, slow, expensive, "draconian," and "inimical to the interest of both potential users and copyright owners." There are no standards for what constitutes a reasonable fee for different uses of different media. The outcome for users would be uncertain and the licensing fees could be inadequate from the copyright owners' perspective. Compulsory licensing could not apply to unpublished materials. Ambiguity regarding whether a use was fair or otherwise exempt would lead users to apply for a compulsory license for fear of liability under the licensing regime. Requiring navigation of a case-by-case adjudicatory system and up-front payment of licensing fees will seriously discourage if not prohibit use of orphan works. The cost would deter museums, archives, libraries and cultural heritage institutions from preserving and providing access to their materials. Requiring users to pay for

permissions that in many cases would be granted for free had the copyright owner been located is unfair. The money and time required of users is out of proportion to the scope of the problem given that many potential uses are personal or educational and non-commercial. Canada's experience with compulsory licensing of orphan works appears to be ineffective. The government has no right to claim ownership of copyrighted works and license rights to use them. Compulsory licensing could breach international treaties.

Reasonable Effort Accommodation

This approach recommends amending U.S. Title 17 to include a "reasonable effort" defense and predictable limits or remedies for infringement. The accommodation hinges on the definition of an orphaned work as one for which the copyright owner cannot be located and clearly places the burden on the user, at least initially. Implementing a reasonable effort accommodation would require the development of guidelines and boundaries for what potential users must do to qualify for the accommodation and agreement on acceptable remedies should the copyright owner later come forward to claim infringement.

Pro: The reasonable effort accommodation would reward users who were diligent in their efforts to locate and acquire permission from copyright owners by allowing their unauthorized use of copyrighted works and limiting their liability for infringement should the copyright owner later come forward. Copyright owners would retain control of their work and have recourse in cases of infringement.

Con: The reasonable effort accommodation disadvantages both copyright owners and potential users. It disadvantages copyright owners by providing no way for them to signal that their work is not orphaned. It disadvantages users by providing only a defense in litigation; it aims to limit, but not eliminate the user's liability and therefore necessarily retains some uncertainty. Establishing objective criteria for reasonableness is impossible. Disputes and litigation are bound to happen. If potential users are left with uncertainty as to whether their effort meets the criteria of reasonableness and the available remedies are onerous, the reasonable effort accommodation will suffer from the same self-censorship and gatekeeping practices that currently constrain exercise of fair use rights. The solution will not scale to accommodate the needs of libraries, archives, and museums to

cost-effectively identify large numbers of orphan works. In short, it will not solve the orphan works problem. Allowing unauthorized use based on "reasonable efforts" will only encourage laziness and offer an excuse for infringement.

The reasonable effort accommodation engages more thorny issues that the other proposed solutions, including the level of specificity and flexibility that can be provided and will be acceptable, whether users should document their reasonable efforts or use of a work under the orphan accommodation, whether and where users should post a notice of intent and how this would operate, whether subsequent users can "piggyback" on the reasonable efforts of prior users, and whether or at what point in disputes the burden shifts to the claimant who later comes forward to declare copyright ownership and infringement of the designated orphan work.

Specificity and Flexibility

Issue: What constitutes "reasonable effort?"

Some argue that "good faith" should be a defining characteristic, along with use of appropriate search tools and consideration of circumstances. Others believe the type of work, the nature of the proposed use, and the time, resources, and experience (expertise) of the user are essential criteria for assessing whether an effort is "reasonable." For example, in the interest of preservation and access, perhaps there should be a lower threshold for ephemeral online works that would otherwise be lost (given the shelf-life of Web pages) or for personal uses like the reproduction of family photographs. Some argue that the user's incompetence (lack of know-how or awareness of resources for locating copyright owners) is irrelevant and not an adequate defense for copyright infringement. Some prefer that a standard or test for "objective reasonableness" be established based on types of use and classes of works. Others want clearly delineated reasonable-effort practices that if followed would be recognized as reasonable per se, which would eliminate the possibility of litigation.

There does appear to be agreement on two points. First, Congress cannot prescribe safe harbor standards for what constitutes reasonable effort because what constitutes a reasonable search will vary with different media and over time. Second, guidelines and best practices developed by professional organizations could assist users in their search. These aids would need to be maintained and updated as new technologies and resources become available over time.

Documentation

Issue: Should users be required to document their efforts to locate copyright owners and to retain the documentation as evidence of their claim of reasonableness in case the copyright owner later comes forward to claim infringement?

Common sense would support documenting the search for a copyright owner if unauthorized use of orphan works is a defense for infringement based on a reasonable effort to acquire permission. Key issues are whether such documentation should be required, and if so, how long it must be retained and the user's liability if it is lost. Some argue that loss of documentation should not subject the user to full infringement liability. Other issues are whether the documentation should be filed (registered) or certified. These issues are explored further in the discussion of registries below.

Notice of Intent

Issue: Should users be required to post a "notice of intent" to use a work prior to using the work for which they could not locate the copyright owner through a reasonable effort?

Pro: Requiring the posting of a "notice of intent" to use a work is an essential and indispensable step in due diligence. Any inconvenience to the user is counter-balanced by bringing potential users and rights holders together and preventing works from being inappropriately designated orphans. A notice of intent would be a sign of good faith. A voluntary notice of intent would operate from the "false premise of symmetry between the situation of users and rights holders."

Con: Posting a notice of intent to use would be problematic in competitive contexts. Requiring a notice of intent prior to use would make planning difficult, delay preservation of and access to valuable resources, create the potential for illegitimate owners to corrupt the system, and add a step unlikely to connect potential users and rights owners. If copyright owners are required to check for notices of intent, does this run afoul of international treaties that prohibit formalities for copyright owners? If they are not required to check for notices of intent, how likely is it that they will check and what purpose would posting the notice serve other than to burden the user? Requiring formalities for potential users or copyright owners would be unfair and burdensome.

Issue: Where should notices of intent be posted and for how long prior to use of the work?

Those who support a notice of intent do not agree on how long a potential user must wait after posting the notice of intent before using the work. Suggestions include 90 days, six months, two years, and conducting a study to determine the appropriate time. There is also disagreement on where such a notice should be posted. Should a central database be created? If so, who should create and maintain it? How would it be funded? If notices should be advertised in major newspapers, as some suggest, in which newspapers and at what cost? High costs and long waiting periods will discourage preservation and use of orphan works.

Registries of Users and Uses of Orphan Works

Respondents in favor of a "reasonable effort" accommodation proposed different registries that resemble a notice of intent with the exception that no waiting period would be required. Proposals included:

- Users are required to file voluntary sworn statements containing their search details with the Copyright office and pay a processing fee. The Copyright Office certifies the statement, but does not issue a license. The sworn statement provides prima facie evidence of reasonable effort. The burden is then on the copyright owner—within the statute of limitations—to prove either that the user did not do the search described or that the search was not reasonable under the circumstances.
- Users are required to register their use of orphan works with a designated licensing agency that would provide certification of the use via a limited license and renewal process. This proposal somewhat resembles compulsory licensing, but with the significant difference that use is allowed under an accommodation that leaves users at risk of the remedies for copyright infringement.
- Users can voluntarily register their uses of orphan works, presumably to assist subsequent users—which leads to the issue of piggybacking.

Piggybacking on Prior User Efforts

Issue: Should potential users who want to use a work that a prior user's effort designated as an orphan be able to rely on the prior

user's "reasonable effort" and orphan designation? The point is moot if in the interim the copyright owner came forward to claim infringement of the work, in which case the orphan designation no longer applies—though how the new user is to know that the copyright owner came forward is another question. The point is also moot if the orphan works designation applies to a specific use of a work. If, however, the designation applies to the work itself and the copyright owner has not come forward, the answer is open to debate.

On the one hand, in the case where potential users want to use the same work and are often working against deadlines, it would seem unreasonable to require redundant efforts. On the other hand, piggybacking on prior user efforts presents many problems. For example, what if the prior user's efforts did not meet the criteria for reasonableness? What if someone later comes forward to claim copyright infringement? What if new technologies or resources in the interim have enabled locating the copyright owner? Having each new user be responsible for the reasonableness of his or her effort avoids these issues. Consulting prior user efforts, if available, might be a reasonable start, but it seems reasonable to have each new user decide whether this suffices or whether repeating these steps or taking additional steps is warranted.

Liability of the User of an Orphan Work

Issue: The reasonable effort accommodation requires remedies to handle cases when the copyright owner comes forward to claim infringement. Limiting remedies will enable potential users to manage the risk involved in using orphan works. Respondents who proposed the "reasonable effort" approach agree that remedies should be limited in cases where users have indeed exerted a reasonable effort in good faith to locate the copyright owner. Such users "qualify" for the reasonable effort accommodation. In cases where the effort was fraudulent or unreasonable, these users do not qualify for the accommodation and the full extent of the law should apply. Respondents disagree on whether the burden to prove reasonableness (qualification) remains the affirmative responsibility of the user, or whether the burden shifts to the copyright owner to prove unreasonableness (disqualification).

Pro: The remedies will limit only what copyright owners can do or recover in cases of infringement, not their exclusive copyrights. Limiting the remedies available to copyright owners is consistent

with international treaties and gives copyright owners some recourse in cases of infringement.

Con: While it is likely that legislative determinations of remedies for infringement do not impinge on the copyright owner's "exercise and enjoyment of copyright," it is less clear whether remedies that create de facto compulsory licenses for unauthorized use of orphan works would be compatible with international treaties. Who decides what users qualify and what remedies should be available?

The range of proposals for limited remedies runs the gamut from no forfeiture of any rights or remedies to complete immunity. Between these two end points, some would eliminate all statutory damages, criminal damages, and attorney fees. Others argue for a "reasonable royalty." Others argue for a cap on monetary damages. Still others for injunctive relief or a portion of the profits from any commercial use. Those who propose complete immunity typically would prohibit commercial use of orphan works. Detailed analyses in the responses focused on the options of capping monetary damages, requiring payment of a reasonable royalty, and depositing money in an escrow account.

Capping monetary damages

Pro: Setting a cap is not price fixing because the payment would be within the range up to the cap. Having a set fee eliminates the problem of having to value different uses of different types of works on a case-by-case basis.

Con: Certain uses of certain types of works have greater market value than others, so setting a cap on all types of uses and works would be unfair. Furthermore, what cap would be appropriate, based on what criteria? On the one hand, the cap must be low enough not to discourage use. On the other hand, the cap must be high enough to provide an incentive for users to really try to locate the copyright owner and to make it worthwhile for a copyright owner to pursue cases of copyright infringement. A cap of a few hundred dollars would be so low that copyright owners would not likely pursue judicial redress for copyright infringement, which in turn would encourage users to exert less than reasonable efforts to locate the copyright owner or to refuse to pay the cap.

Requiring a reasonable royalty

Pro: Requiring a reasonably royalty most closely resembles the market dynamic that would have been operative had the copyright

owner been located in the first place. Reasonable royalty fees can be predicted "within a reasonable range set by actual market practices." If the user and copyright owner cannot agree on a reasonable royalty, the fee could be set by the court. Reasonable royalties should not discourage use because it is unlikely that the copyright owner of a truly orphaned work will come forward or file a law suit. The uncertainty of users should not be minimized at the expense of copyright owners' rights. Use of an orphaned work could effectively preclude copyright owners from making profitable use of their work in the future.

Con: How is a user to know what a reasonable royalty might be for different uses of different media? Uncertainty will discourage use and fail to solve the problem of orphan works.

Depositing money in an escrow account

Pro: Users can reclaim certainty by depositing into an escrow account a sum they believe in good faith constitutes a reasonable royalty fee.

Con: How is a user to know what a reasonable royalty might be for different uses of different media? Fees paid upfront in case copyright owners come forward later are likely not to end up in the pockets of copyright owners. Paying into an escrow account would be inefficient, ineffective, and involve third parties who have no interest in the transaction. It would require payment when in many cases the owner would grant permission with little or no fee. The music industry provides sufficient evidence of litigation between copyright owners and escrow administrators. Who would administer and pay to administer the escrow account? Who would pay for litigation? Any setting of the escrow amount would be arbitrary price fixing. Escrow entails bureaucracy and imposes an unnecessary tax that would be a hindrance to use of orphan works.

Ongoing and New Uses of Mistakenly Designated Orphan Works

Issue: If a copyright owner comes forward to claim infringement, consensus appears to be that new uses of the mistakenly designated orphan work require permission from the now locatable copyright owner, but what happens to the new work a user created using the mistakenly designated orphan work before the copyright owner came forward?

There is some support for "ongoing uses" of new works created by qualified users of mistakenly designated orphan works, which

would allow the new works to continue unhindered in perpetuity or at least through some safe harbor period. "Successors-in-interest" (those who subsequently license or use the new work) would also have ongoing use without the approval of the copyright owner of the mistakenly designated orphan work. A different approach recommends an injunction against future sales of mistakenly designed orphan work, but no monetary damages for past use. If a mistakenly designated orphan work has been used in a derivative work such that the orphan work cannot be separated from the new work, there should be no injunctive relief going forward, but if it can be separated, then a reasonable license fee should be set for continued use.

Pro: If ongoing use of new works created with mistakenly designated orphan works is prohibited, many uses will be discouraged and the orphan works problem will not be solved.

Con: In the absence of payment of a license fee agreeable to the copyright owner, ongoing use might constitute a compulsory license that could breach international treaties.

RECOMMENDATIONS AND OBSERVATIONS

Needless to say, the orphan works problem is profoundly complex. Clearly much is at stake and there are many stakeholders. Just as clearly, digital technology is implicated in the problem and its solution. Table 3 is an attempt to apply criteria for an acceptable solution articulated in the responses to the Notice of Inquiry to the proposed solutions. No proposal strikes me as a perfect match or conspicuous winner. Ideally, all of the cells in the Table for a given solution would be "Yes." Part of the problem in applying the criteria is that many of the proposed solutions have more questions asked than answered. The Table also masks significant differences in the scope of application of the proposals.

The criteria reveal significant concerns about balance, certainty, and containing costs. The solution will require compromise and burden, the question is who gives and who endures. Under the current copyright regime, the balance is clearly tipped in favor of copyright owners, users are bewildered and threatened, and millions of valuable works apparently orphaned are not used. We need a practical solution and we need it now, a solution that is reasonable for creators, gatekeepers, and users of all stripes. Copyright owners are concerned primarily about compensation and loss of control. Users are concerned about costs, risks, preservation, access, and the right to use. Disenfranchised

creators, forced to transfer exclusive rights to publishers that no longer see a viable market for their work, are concerned about dissemination of their work. What can we make of this soup of concerns?

Solution criteria	Public domain	Compulsory license	Default license	Safe harbor exemption	Reason-able effort accom-modation
Does it avoid harming copyright owners?	no	no	maybe	maybe	maybe
Does it lower risk to users?	yes	yes	yes	yes	maybe
Does it avoid unnecessary costs?	maybe	no	yes	yes	maybe
Does it avoid unnecessary bureaucracy?	maybe	no	yes	yes	maybe
Does it comply with international treaties?	no	maybe	yes	yes	maybe

Table 3. Solution Criteria

I believe solving the problem requires multiple solutions. We already have a copyright regime wherein one size does not fit all. There is no good reason to make that a requirement now.

I support the expanded exemption of U.S. Title 17 §108. This exemption, as proposed, is workable now with minimal effort. Current copyright law already grants exemptions and safe harbors for certain communities of interest and classes of works. It is not uniform and equitable now and those arguing for uniformity and equity in addressing orphan works do not make a case for reviewing and revising the entire multitude of copyright laws to make them uniform and equitable across the board. Their argument is disingenuous and defensive, prompted by fear of the capabilities of digital technology. An operational definition that can scale to identify large numbers of published written works at low cost is required to meet the urgent needs of libraries, archives, and educational institutions. In conjunction with a take-down option for copyright owners who fail to register their intent to exercise the full scope of copyright protection, expanding this exemption will encourage preservation and use of materials of

little commercial but great historical value. Allowing non-profit use of these works for scholarly and educational purposes is in the public interest. Those who argue against this exemption are likely those who would have outlawed the photocopier and used book stores. When a book goes out of print "it can be sold in used books stores without the copyright owner getting anything and stored in libraries, where many get to read the book, also for free. Used book stores and libraries are thus the second life of a book. That second life is extremely important to the spread and stability of culture" (Lessig 2004, 113). For the net generation, a work does not exist if it can't be found online. Even those who prefer to use materials in print prefer to find them online. Digital libraries are essential to meet these needs, essential to democracy and the cultivation of culture in today's world. Libraries are prepared to fund the digitization of these materials and provide equitable access to them. Their copyright owners, who see no market for these works, are not. They should not be allowed to deny access to them.

I acknowledge that expanding Title 17 §108 does not address the full scope of the orphan works problem. It's a first step and a small step at that, but it would have a powerful impact on researching, teaching, and lifelong learning. Nevertheless, further steps are urgently required to address all users, all uses, and all orphan works. For the reasons noted in the respective sections of this paper, I strongly disapprove of making orphan works public domain and I disapprove of compulsory licensing schemes. I am not optimistic that the many issues swarming around the "reasonable effort" accommodation can be settled to the satisfaction of all interested parties or settled in a timeframe likely to enable salvaging valuable endangered works or to facilitate access and use in my lifetime. If working through the myriad issues inherent in a reasonable effort accommodation does not prove too expensive, unwieldy, or controversial to manage, such that the whole effort fizzles out like the attempt in 1994 to establish fair use guidelines for digital works, I predict that the power and self-interest of big media lobbies will push through the reasonable effort accommodation with the remedy of reasonable royalties, the uncertainty of which could yield the same results as the "fair use" defense (i.e., self-censorship and gatekeeping). Frankly, the whole notion of granting a legal right that is nothing more than a defense in litigation strikes me as nothing more than a taunt of the citizenry and a trap for the unwary. The reasonable effort accommodation is so fraught with problems that I hope it

collapses under its own weight. The burden it would place on users will do nothing to restore balance in our copyright system. The reasonable effort accommodation will likely do nothing of real value for copyright owners. It will not end or address the issue of piracy of commercially viable works. What it might do is make content industries reassess the value of a work on the spur of the moment and invent a "reasonable royalty" presumably designed to resemble actual market practice—but no actual market practice existed for this work prior to its use under the reasonable effort accommodation. The situation is analogous to the child who shows no interest in his toys until the neighbor kid starts playing with them, the difference being that the reasonable effort accommodation would make the neighbor kid guilty under the law. The group likely to benefit most from a reasonable effort accommodation is lawyers. Such a solution is not practical, preferable, or affordable.

I am most intrigued by the default licensing approach to solving the problem of orphan works. It is elegant in its simplicity, outward and forward looking in its thrust, commendable in reducing harm, burdens, and costs. I fully support but am not optimistic that default licensing will be adopted. I do believe that the time has come for radical change if we want to continue to have a free culture—not free as in free beer, but free as in not unnecessarily fettered by the past. But I sadly suspect that the default licensing proposal is ahead of its time. Significantly more grass roots work needs to be done. No comments with "Solution analysis" seriously considered the default licensing proposal, just as they dismissed the public domain as the solution to the orphan works problem. Those who objected to any action that would allow unauthorized use of copyrighted works attacked the free culture movement, though their comments reveal that they do not understand it.[1]

In my opinion, the ideal solution will not be framed to address the fears or protect the self-interests of content industries. Such a frame would only further burden users and cripple technological innovation. Instead the frame should harness the potential of the technology to create a future aligned with, but not controlled by, our past. Medieval monks controlled manuscript technology, censored what was copied, and were put out of business by print technology, which re-defined and democratized literacy itself. No one argues that this was a bad thing. Imagine our world today if the medieval Church had managed to lock-down or control the

printing press. Likely there would be many fewer readers and books, and Latin would probably have been the language of scholarship until Vatican II. Today those who rule in the analog world of print are at risk of losing their control in the digital realm. So be it. What we gain will far exceed what we lose. The default licensing proposal illumines and models a path that would both compensate copyright owners and encourage tinkering, creativity, and progress by embracing technology. What is needed is an easy, affordable process for registering all types of works. Granted, this will be a significant challenge with some media, but it is not an impossible task. Representative creators and professional associations could collaborate to prepare requirement specifications designed to meet the needs of each community of interest.

What's at stake is "Not *whether* creative property should be protected, but how. Not *whether* we will enforce the rights the law gives to creative-property owners, but what the particular mix of rights ought to be. Not *whether* artists should be paid, but whether institutions designed to assure that artists get paid need also control how culture develops" (Lessig 2004, 120). Once understood, what is there to legitimately resist in the default license proposal? It requires no unwieldy bureaucracy or exorbitant costs, entails no significant risks or sacrifices, and avoids creating jobs for lawyers. Furthermore, it exposes and leverages the mistaken assumption that the current copyright regime is in the best interest of all copyright owners and all copyrighted works throughout their copyright term. If all copyright owners approved of the current regime there would be no open source software, no open access movement, and no Yahoo! service to search only materials with Creative Commons licenses. There is a ground swell afoot that demonstrates strong dissatisfaction with current copyright law and practice. The problem is clearly bigger than orphan works. Nevertheless Congress should be commended for requesting an investigation and the Copyright Office commended for their public call for comments. I can't help hoping that this investigation opened Pandora's Box.

ENDNOTES

1. Those who objected to any action to address the orphan works problem appear to be disenfranchised by the current copyright system. They are understandably frightened and angry. These communities, photographers and graphic illustrators, deserve special

attention in the inquiry into orphan works. The sheer number of photographs taken by a professional photographer and understandable practice of putting attribution information on the back of the work, where it is inconspicuous if not inaccessible, seems to me to warrant special handling in copyright law. The Copyright Clearance Office's payment of copyright royalties to primary copyright holders at the expense of third-party interests warrants investigation and redress.

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