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

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## Published In

Symposium on Free Culture and the Digital Library.

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# Rights, Registries & Remedies

An Analysis of Responses to the  
Copyright Office Notice of Inquiry  
Regarding *Orphan Works*

Denise Troll Covey

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Carnegie Mellon – October 2005

# Change

- Technology *has changed* the economics of how we can grow culture & create knowledge
  - Opportunity for unprecedented creativity
- Copyright law *should change* in a way that both respects © owners & leverages this opportunity
  - Law is complex, vague, & threatening
- 89 percent of librarians agree:  
**copyright is one of the major challenges to building the digital library**



# Copyright Office Notice of Inquiry

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- Study the problem of orphan works
  - Tentative definition: copyright owner can't be found
  - Does law impose “inappropriate burdens” on users?
  - Are orphan works “being needlessly removed from access & their dissemination inhibited”?

Notice of Inquiry posted to the Federal Register January 26  
Initial comments due March 25 – Reply comments due May 9  
Public hearings July – August  
Report due by the end of the year

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# Responses & Public Hearings

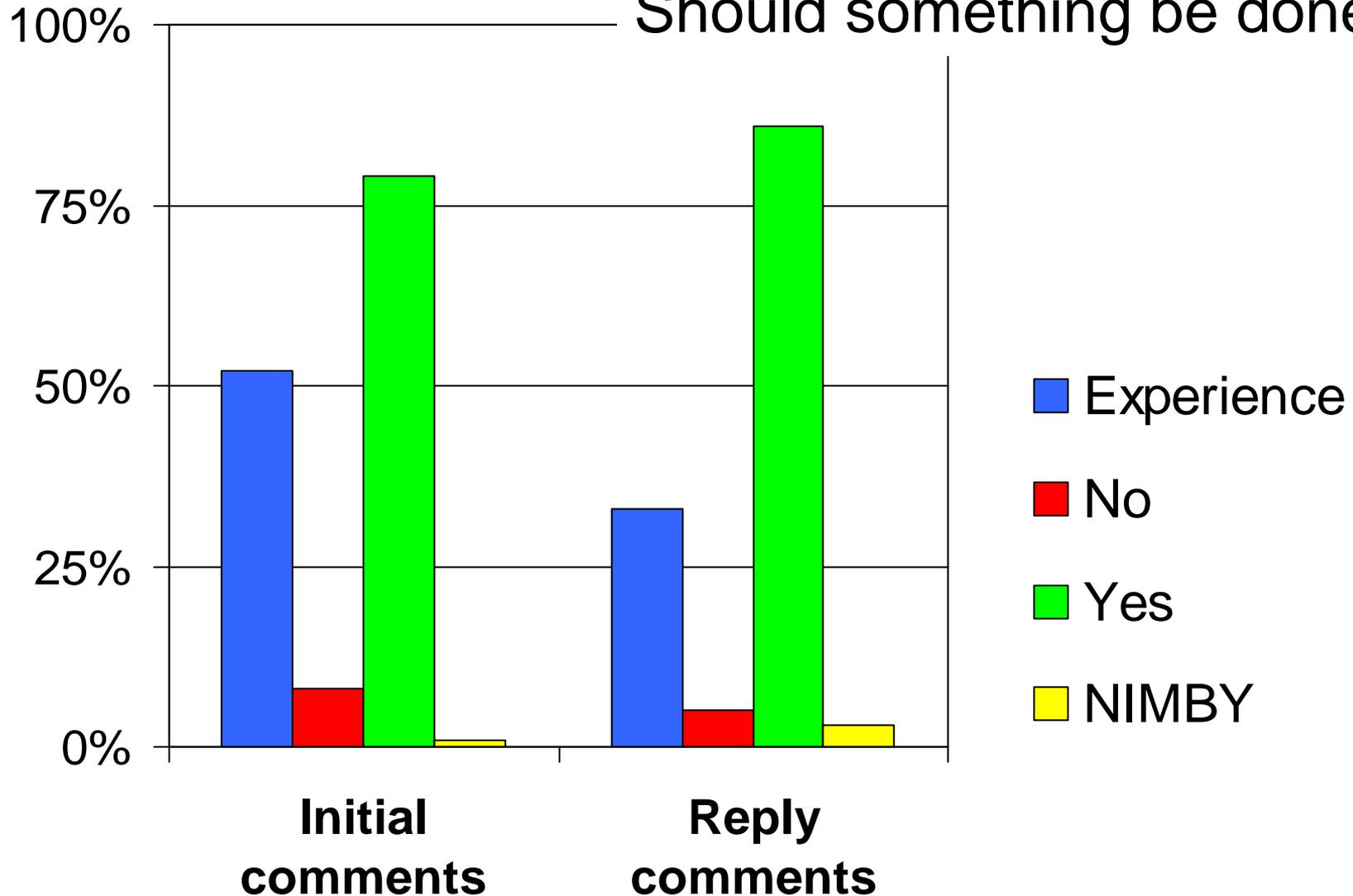
- 721 initial comments & 146 reply comments
- Public hearings
  - Washington DC (38) & Berkeley, CA (29)
  - Topics of discussion
    - Identity of orphan works & use of registries
    - Consequences of an orphan works designation
    - Reclaiming orphan works
    - International considerations



# Contours

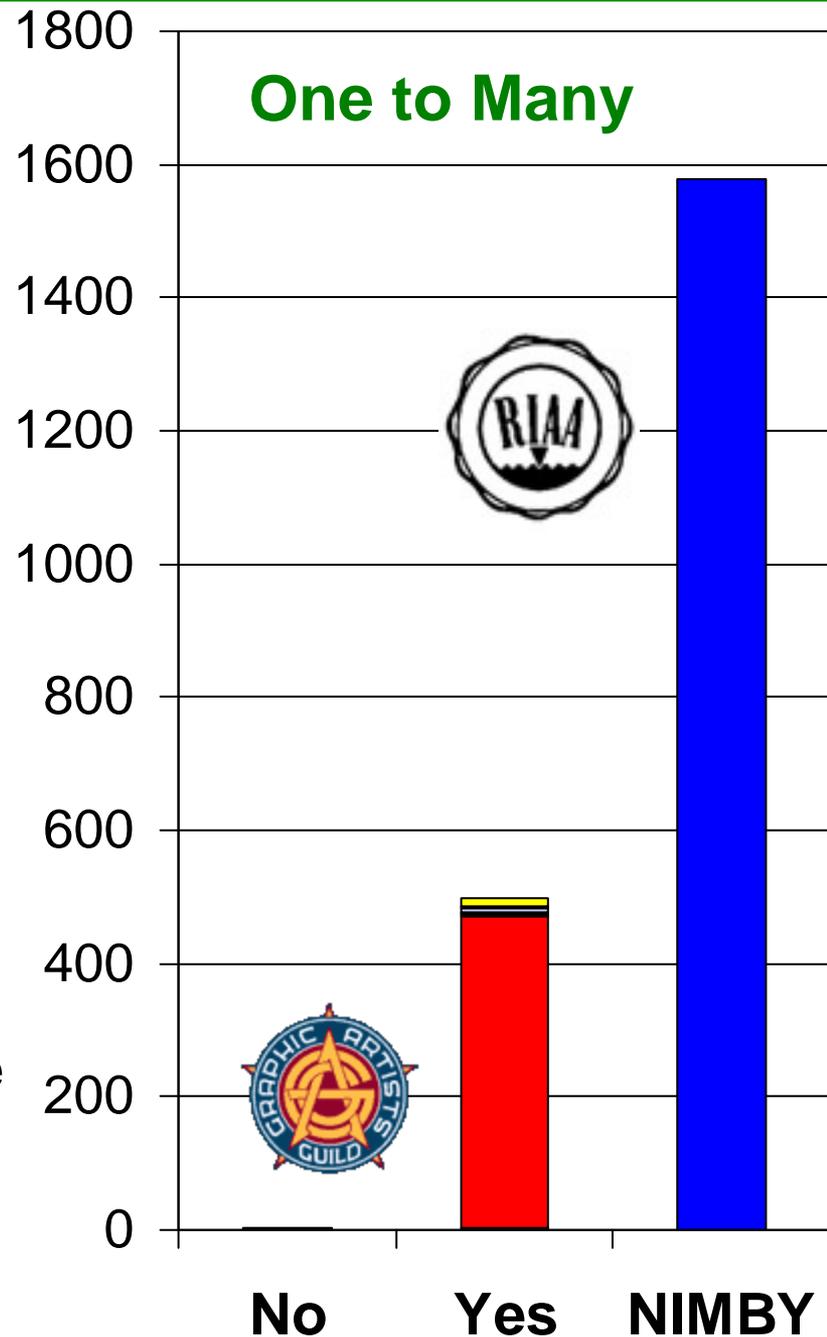
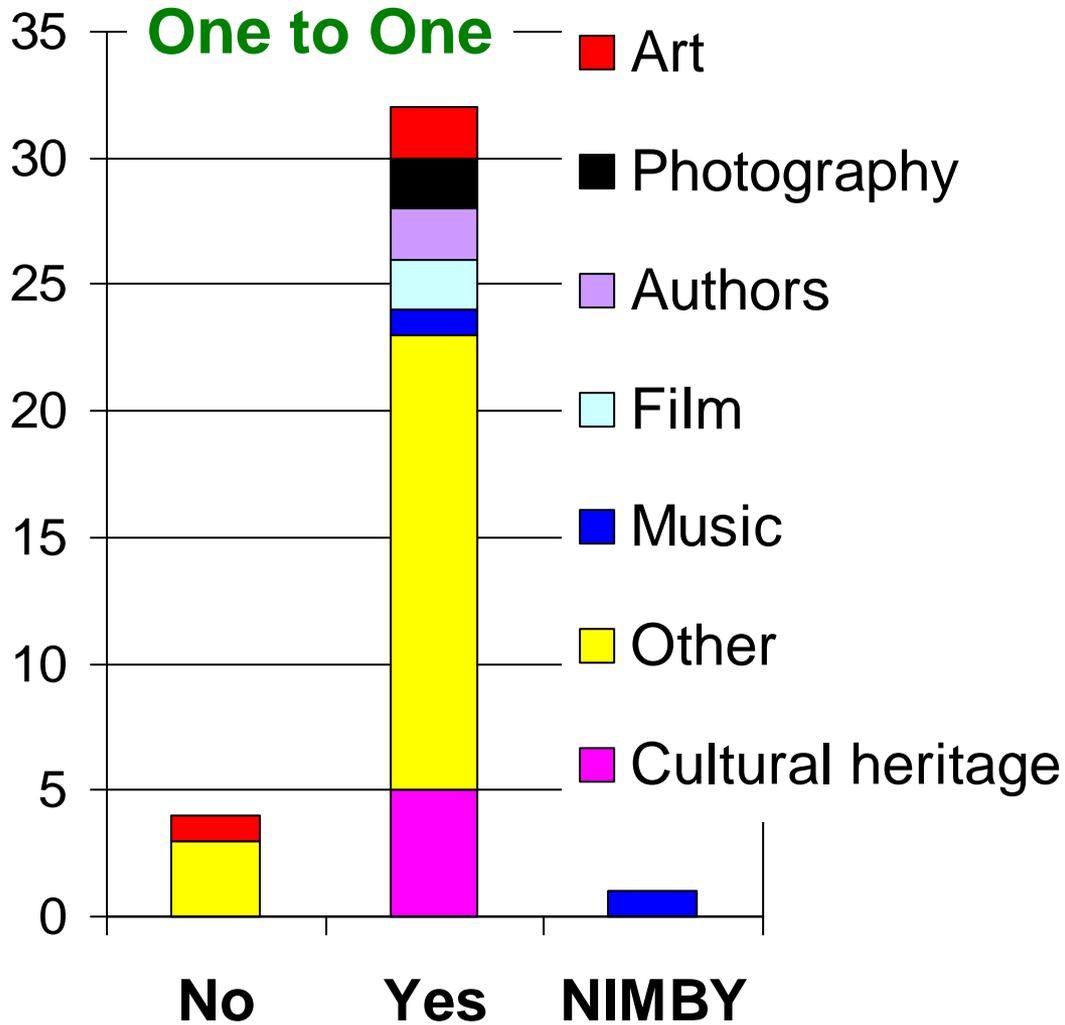
How extensive is the problem?

Should something be done?

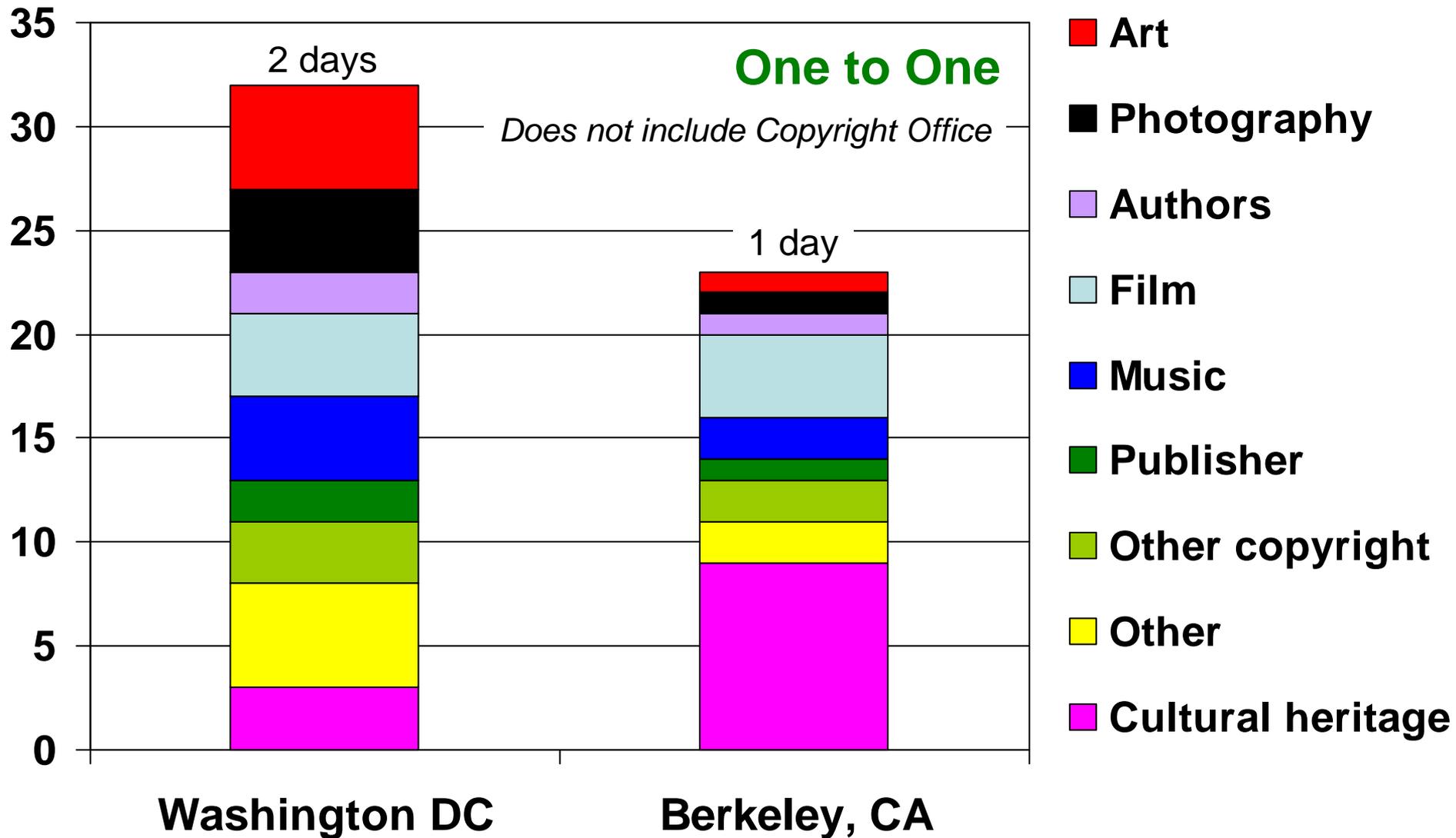


# Random Sample Initial Comments

## Demographics



# Public Hearing Demographics



# Reactions & Interactions

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## Criteria of viable definition drive solution

- Case-by-case approaches
  - Compulsory licensing
  - Reasonable effort accommodation

## Criteria of viable solution drive definition

- Categorical approaches
    - Default licensing (Creative Commons)
    - Exemptions for cultural heritage
-

# Identity of Orphan Works

Case-by-case

Hybrids

Categorical

- © owner cannot be identified
- © owner cannot be found
- © owner does not respond
- © owner uncertain of ownership
  - Grants or denies permission anyway

“Overloading the boat?”

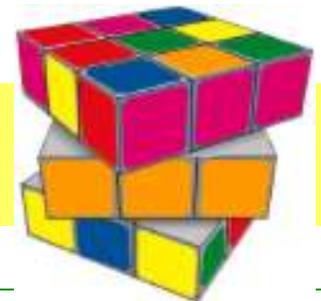


# Assumptions

- If © owner cannot be found or does not respond
  - Can we assume owner abandoned the work?
    - Yes
    - No – might want to be found
      - User might not have conducted a sufficient search
    - No – might choose not to be found or to respond
      - Is this a legitimate exercise of © ?
  - Can we assume owner wants to be paid for use?
    - Yes – compensation is the purpose of ©
    - No – permission is often given for free

# Case-by-Case Reasonable Effort

- Does reasonableness vary based on
  - Type of use? Amount of work used?
  - Type, publication status, or age of work?
  - User's skill & resources?
- Difficulty of developing sector guidelines
- Uncertain defense of infringement
  - Level of risk contingent on remedies
  - Self-censorship & gatekeeping
- Cost & risk prohibitive for large projects



# Identity of Orphan Works

Case-by-case

Hybrids

Categorical

- Meet certain threshold requirements = orphan
  - Age of work?
  - Print status?
  - Non-profit use only?
  - Registration to opt out?

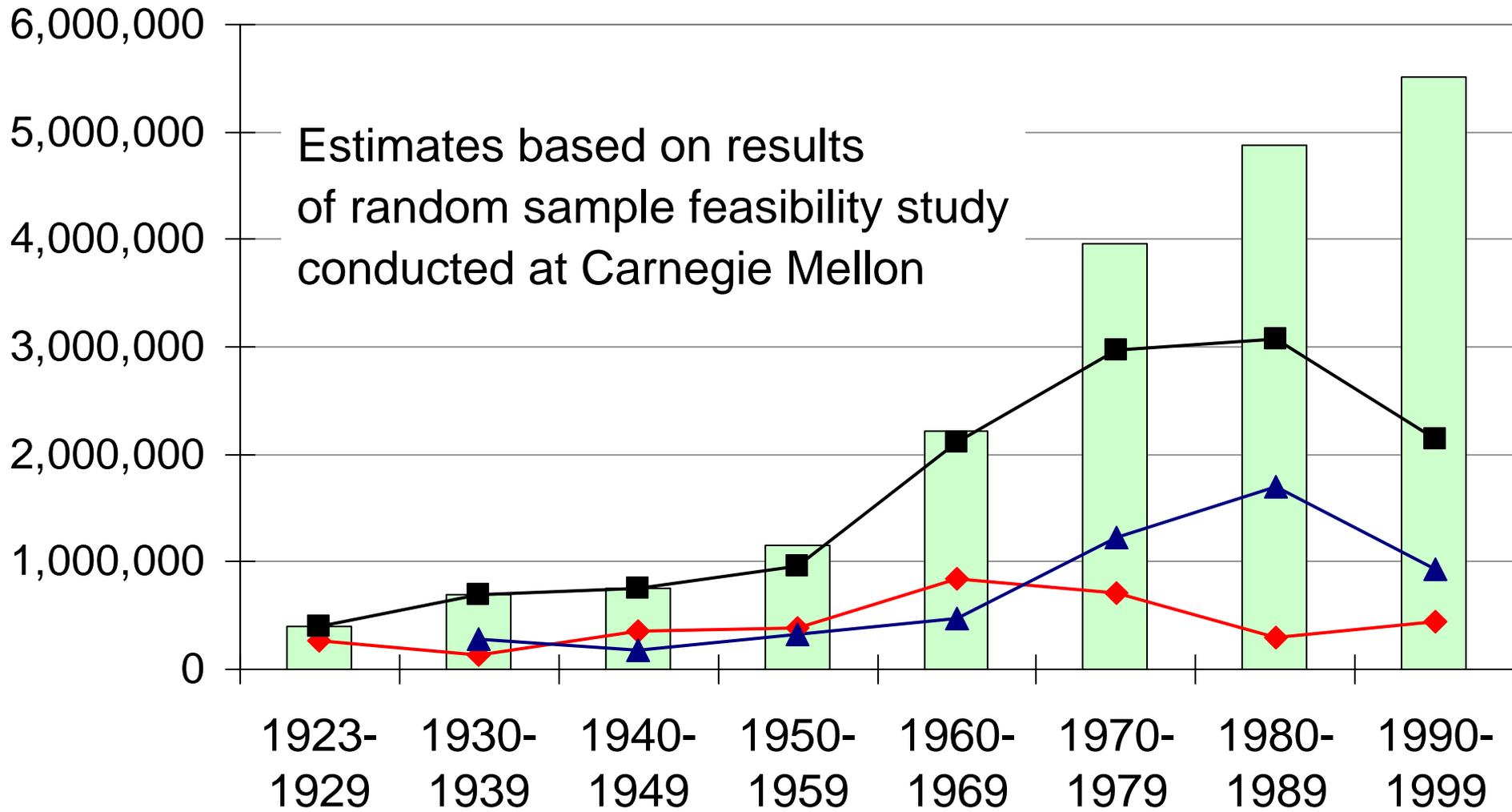
“Don’t embroider the existing situation.  
Do something to benefit the citizenry.”



# Exemptions & Default Licensing

- **Threshold requirements are contentious**
  - Age or print status of work?
    - Difficult to determine
  - Non-profit use only?
    - Basis for disallowing for-profit use
  - Registration to opt out of orphan works regime?
    - Burden on © owner
    - International issue of formalities
  - © owner loses control & adequate compensation
    - International issue of full enjoyment & exercise
    - Free use or low-fee use

- Books published in English in the United States (WorldCat)
- Books for which copyright owner cannot be found
- Books for which copyright owner does not respond
- Books out-of-print



# Orphan Designation Questions

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- To what does an orphan designation apply?
    - The work – exemptions & default licensing
    - The use – reasonable effort accommodation
  - How long does an orphan designation endure?
    - Until the © owner steps up or claims infringement
    - In perpetuity
  - What use does an orphan designation enable?
    - A particular use by a particular user
    - Any use by any user
    - Other
-

# Register Works & Ownership

- Voluntary / mandatory = international issue of formalities
- Consequences of **NOT** registering
  - Incentive for user to check registry
    - Default licensing = orphan
    - Reasonable effort = keep looking
  - Incentive for © owner to register
    - Limited remedies = *currently not working*
- Burden on © owner
- Benefit preservation, access, & use

# Register Searches & Uses

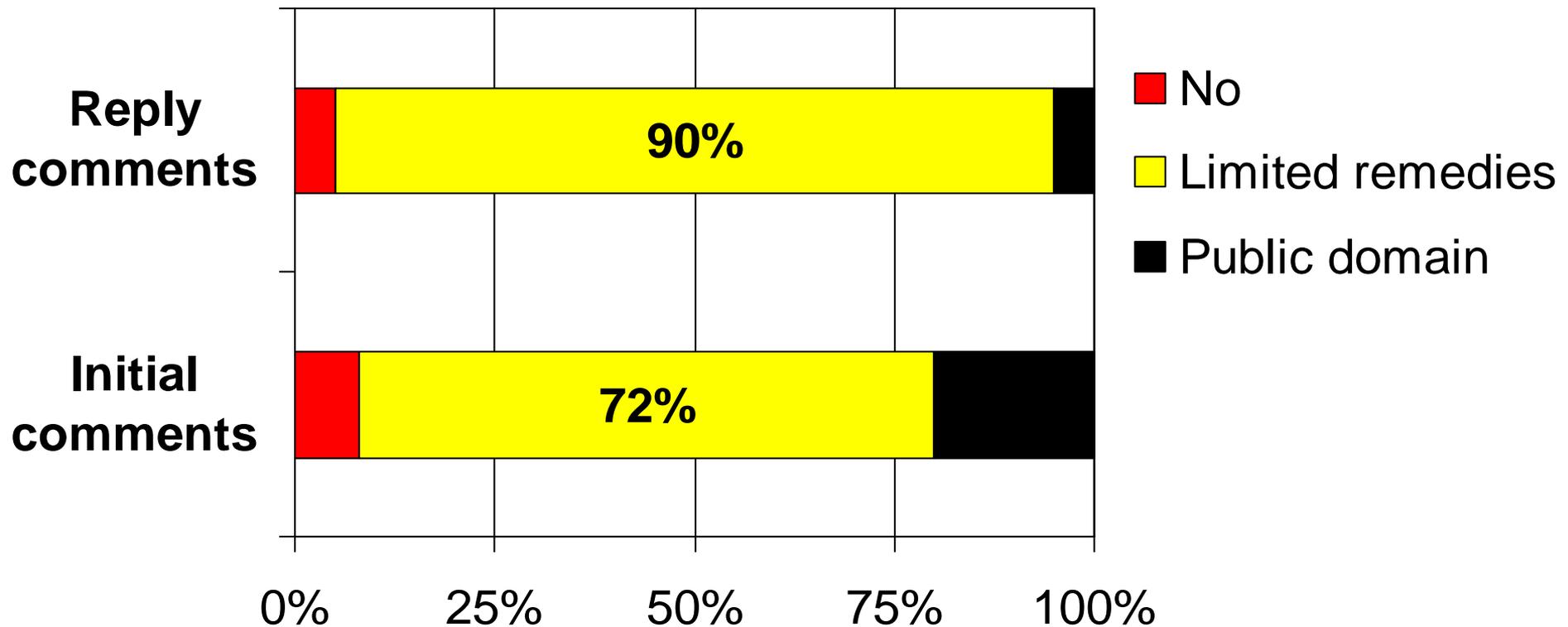
- Voluntary / mandatory
- Accuracy, scope, & ease of use / piggybacking
- Consequences of registering
  - Incentive for user to register
    - Reasonable effort approach = helpful in litigation
  - Incentive for © owner to check registry
    - Find users & deny or grant permission (compensation)
- Burden on user & © owner
- No benefit for preservation, access, & use

# Contours of Consequences

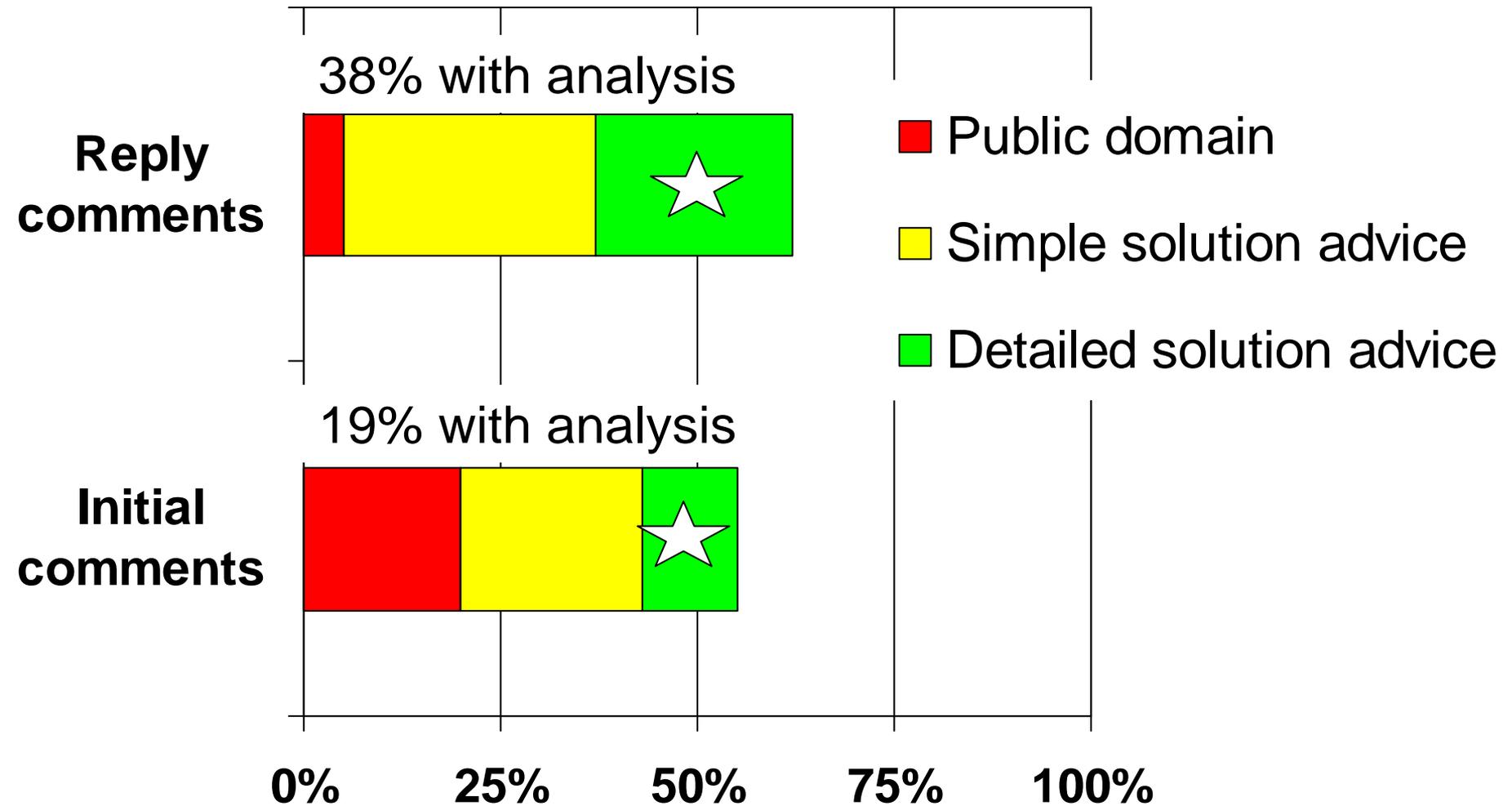
No change

Limited remedies

Public domain



# Comments on Solutions



# Reclaiming: How Limit Remedies?

- Different remedies for different users & uses?
  - Take-down option for non-profit online access?
  - No injunctions for other users & uses?
- Compensating the © owner
  - Issues with reasonable effort approach
    - Who proves unreasonableness?
    - No attorney fees? No statutory damages?
    - Cap? Reasonable royalty? Who determines fee? How?
    - How budget for large projects?
  - Issues with default license approach
    - Default fee could be too low – *incentive to register?*



# To be fair, the solution must

- Provide incentive to recognize the value of using or making orphan works available
- Provide incentive for © owners to become locatable
- Recognize that users have rights & invest time & money in pursuing permission & using works
- Recognize that © owners can appreciate use & free ride on users' creation of markets



# To succeed, the solution must

- Be cheap & easy
  - Reasonable effort is expensive & hard
    - Most difficult to implement
    - Least likely to solve the problem
    - Seems to have the most support
  - Exemptions & default licensing are cheap & easy
    - Easiest to implement
    - Exemptions will solve some aspects of the problem & seem to have some support
    - Default licensing could solve the entire problem, but seems to have little support

# Assumptions

- All © owners want to negotiate permission & to be paid for each use of their work
- Current © term & permission practice are appropriate for all © works

✓ **Permission is often given for free**

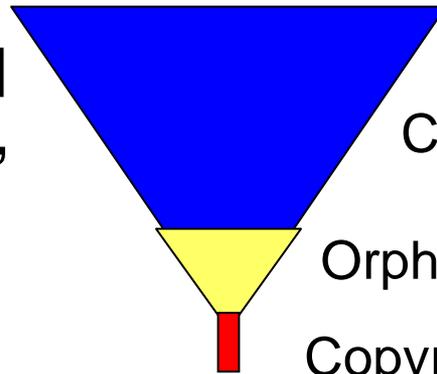


✓ **Increasing use of Creative Commons licenses**

- ✓ September 29, 2004 – Use of CC licensing has increased by 50% every fiscal quarter for the past year. (> 4 million sites)
- ✓ Summer 2005 – 53 million CC licenses & Yahoo CC search

# Thank you!

“Upside down pyramid  
on a funnel”



Copyrighted works

Orphan works used

Copyright owners surface



“If many chickens come home to roost,  
the solution was poorly designed.”



# Additional slides

Issues from comments & public hearings

Discussion demographics from public hearings  
(percentage of participants engaged in conversation)

# Fundamental Differences

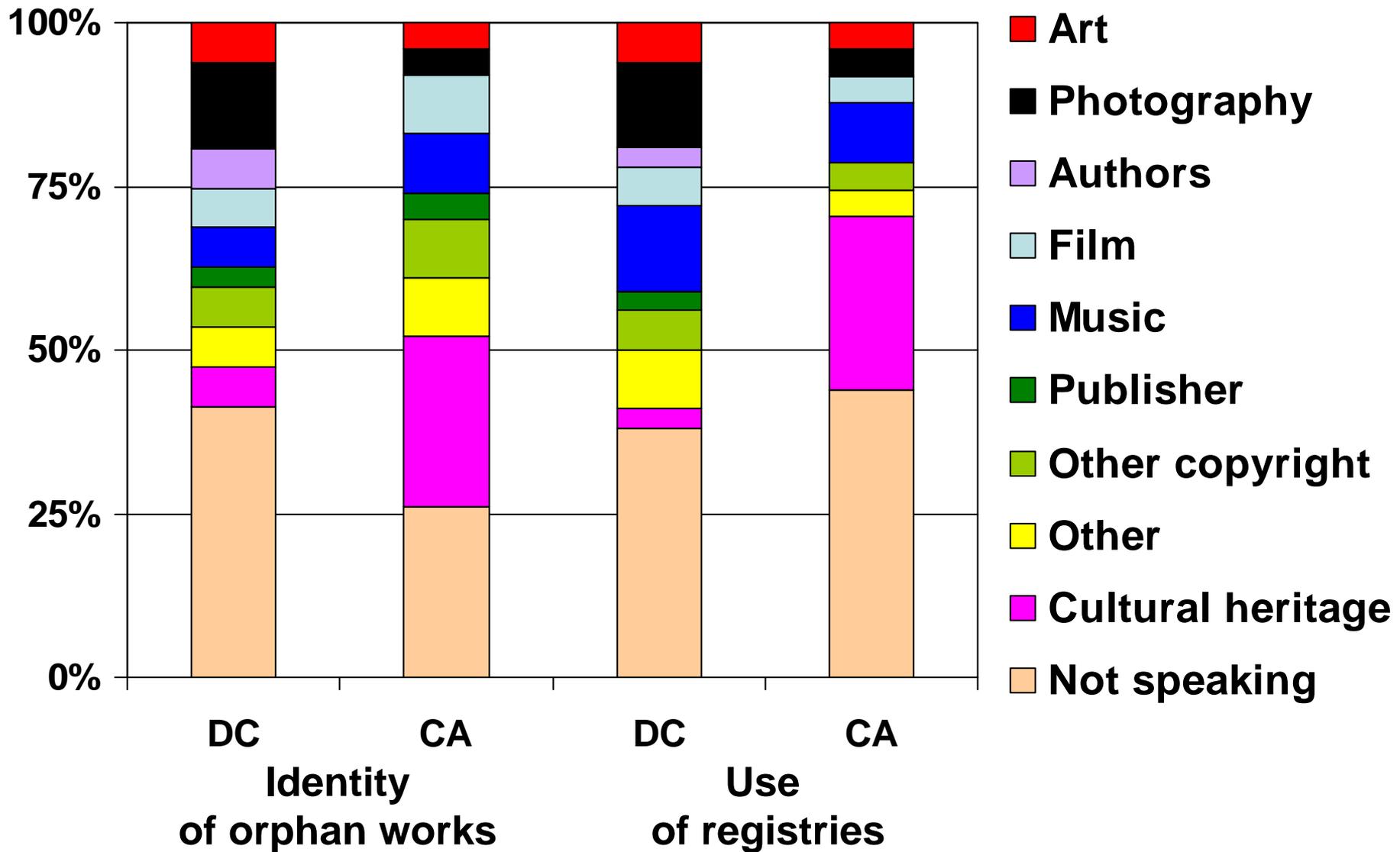
- Purpose of copyright
  - Encourage creation by compensating © owners
  - Encourage creation & use
- Policy goal for orphan works
  - Enable preservation, access, & use
    - At least non-profit cultural custodianship & personal use
  - Help users locate © owners & ask permission
    - Short of that, approximate reasonable bargain
  - Enable © owners to signal what they want
  - Restore balance



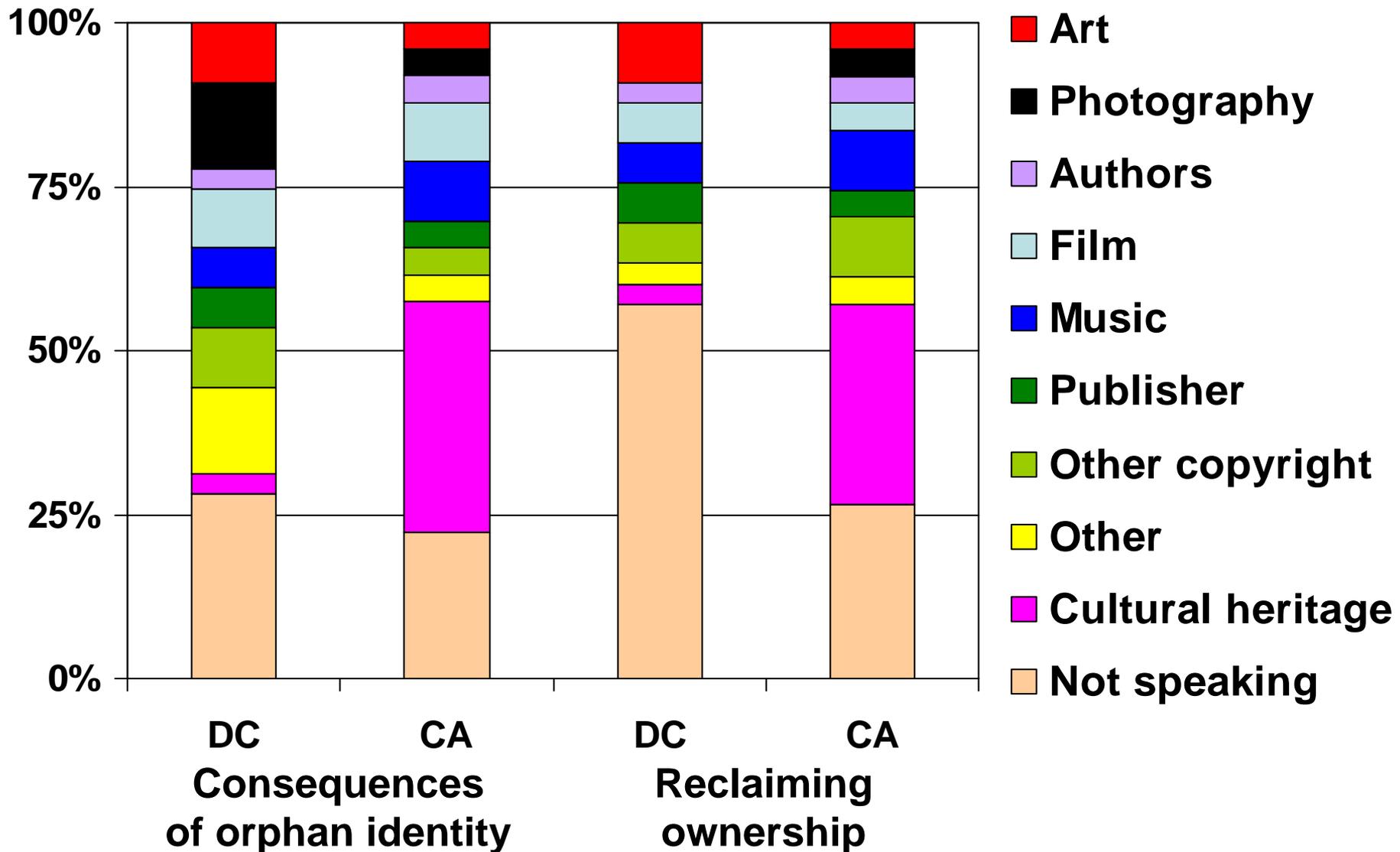
# What Can or Must the User Do?

- Register search, use, or intent to use?
  - Burden & loss of competitive advantage
- Disclose use of orphan work?
  - Invite false claims of © ownership
- Attribute © ownership?
  - Accuracy (often only presumption of ownership)
- Pay prior to use? Who determines fee? How?
  - Unfair for real orphan & public domain works
  - Could be cheaper than reasonable search
  - Permission often given for free
  - Does not scale for large projects

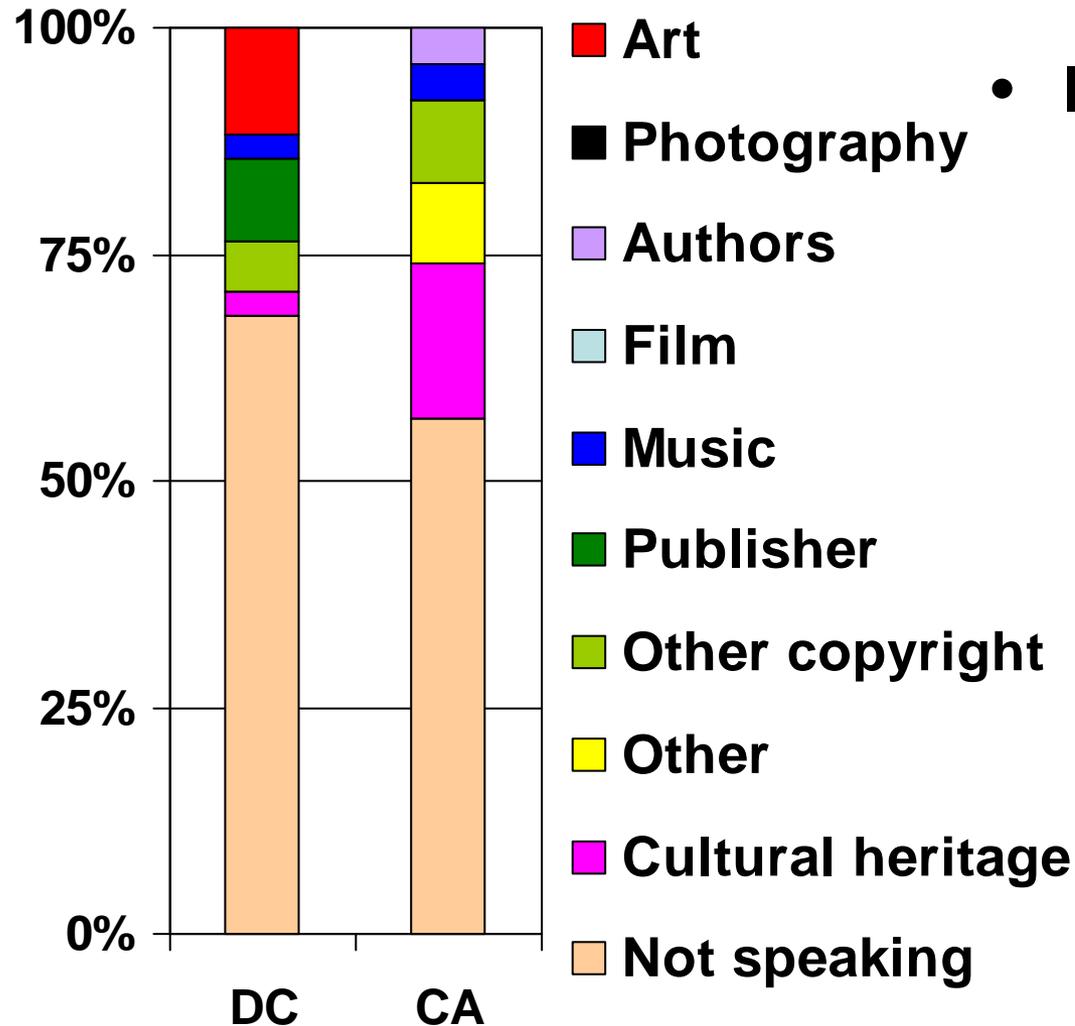
# Discussion Demographics



# Discussion Demographics



# Discussion Demographics



- **International issues**
  - Compliance
    - Formalities
    - Enjoyment & exercise of ©
  - Solution must apply to foreign works
    - Ownership often unknown
    - Global relationships
  - Economic / moral views
  - Market practice can differ from law
  - U.S. law applies only in the U.S.