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The Proposed Solution to the Orphan Works Problem: Safe Legal Adoption or Risky Foster Parenting?

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The Proposed Solution to the Orphan Works Problem: Safe Legal Adoption or Risky Foster Parenting?



Denise Troll Covey

Carnegie Mellon University Libraries

Coalition for Networked Information – April 2006

What's it all about, Alfie?

- U.S. Copyright Office Notice of Inquiry
 - Are orphan works “being needlessly removed from access & their dissemination inhibited”?
 - Are “inappropriate burdens” imposed on users?
 - Should something be done?

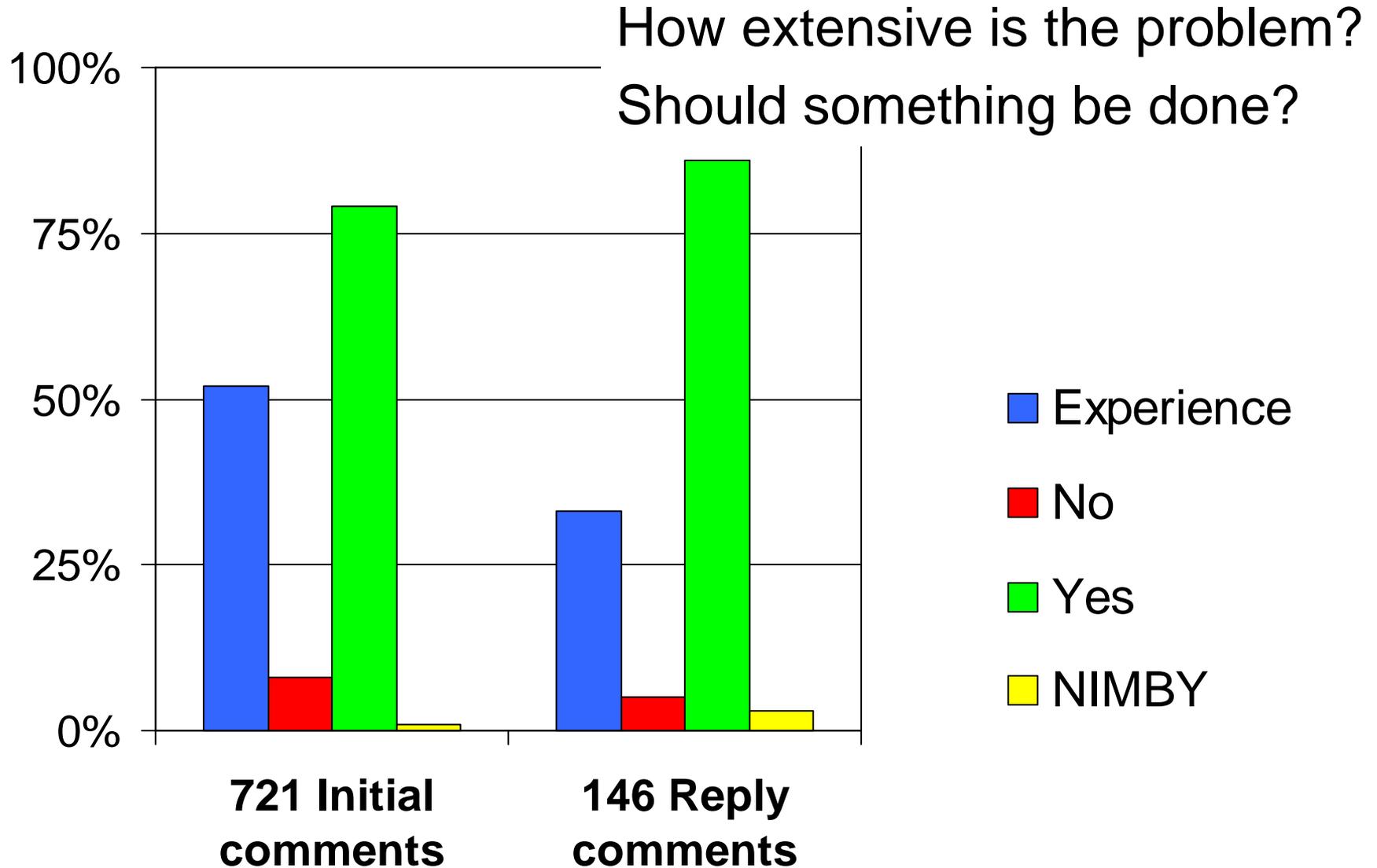
Posted to the Federal Register January 26, 2005

Initial comments due March 25 / Replies due May 9

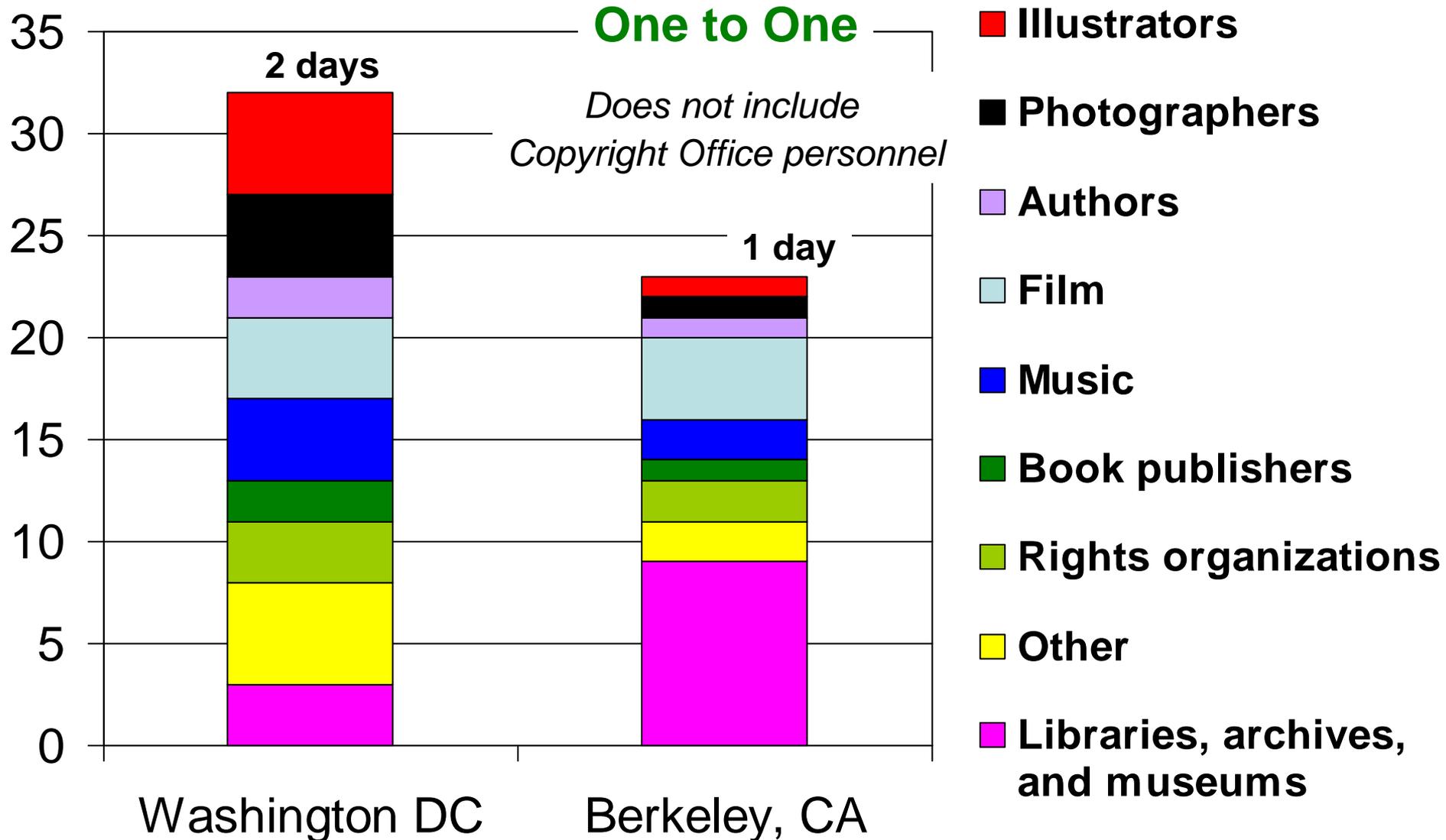
Public roundtables Jul–Aug / Additional meetings Oct–Dec

Report dated January 2006

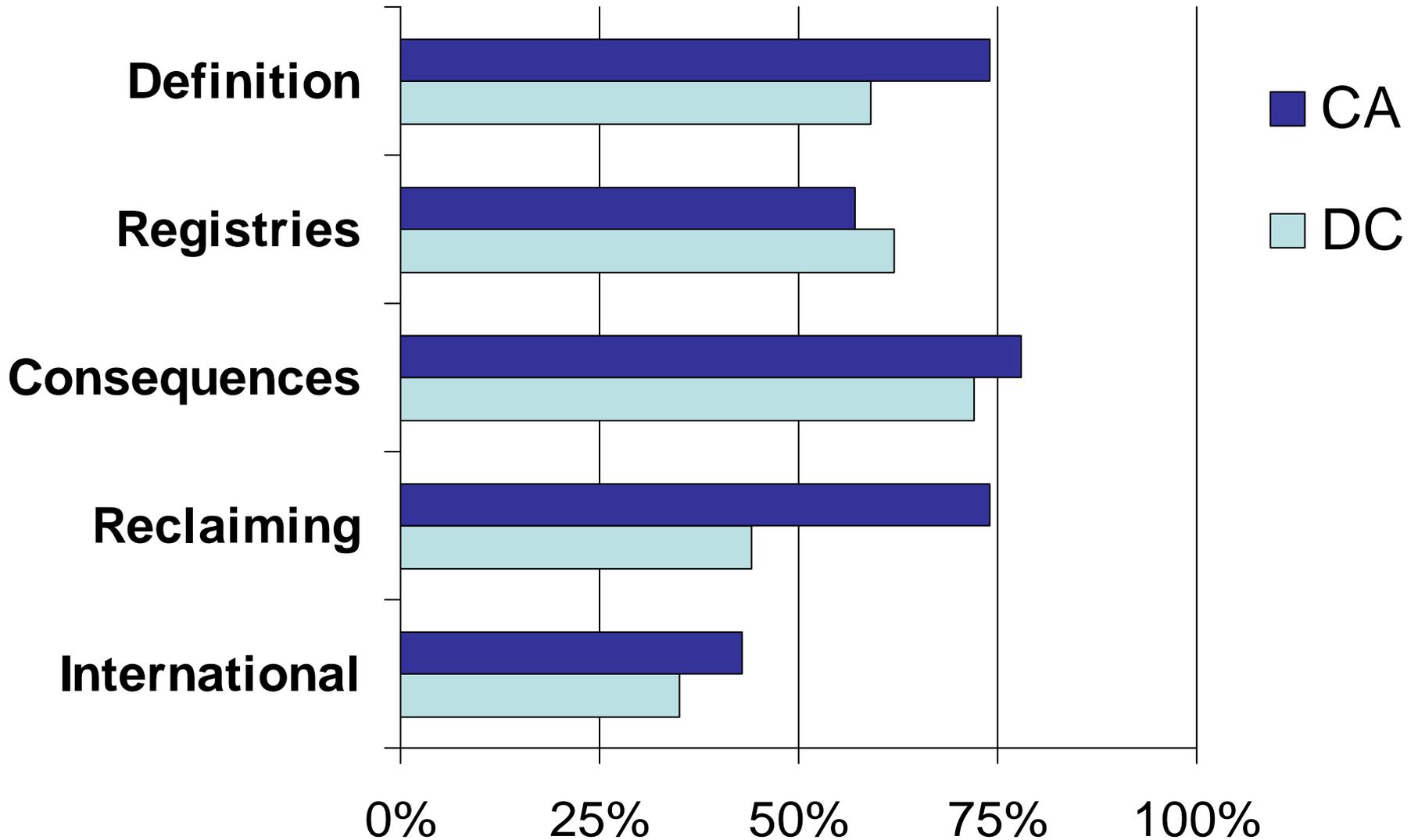
Contours of comments



Roundtable demographics



Roundtable participation



Reactions & interactions

Criteria of viable definition drive solution

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

Criteria of viable solution drive definition

- Categorical approaches
 - Default licensing (Creative Commons)
 - Exemptions for libraries, archives & museums

Definition 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”



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

Risky foster parenting



Definition 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?

Safe legal adoption

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



Categorical thresholds

- 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 exercise & enjoyment
 - Free use (exemption) or low-fee use (default license)

Register works & ownership

- Voluntary / mandatory = 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 = 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

Consequences

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

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

Contours

No change

Limited remedies

Public domain



One to One

What should be done?

146 Reply comments

90%

Nothing

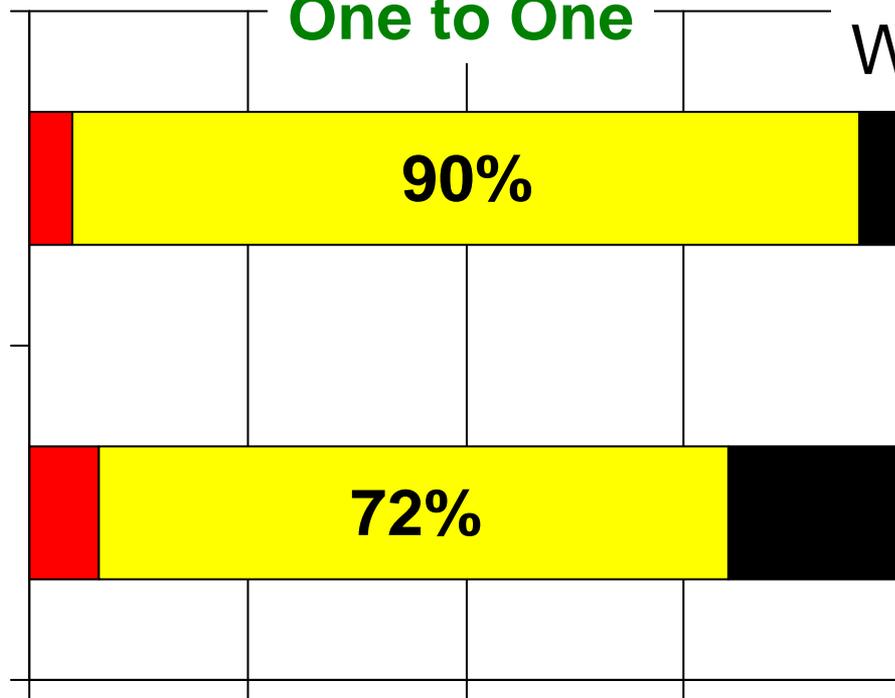
Limited remedies

Public domain

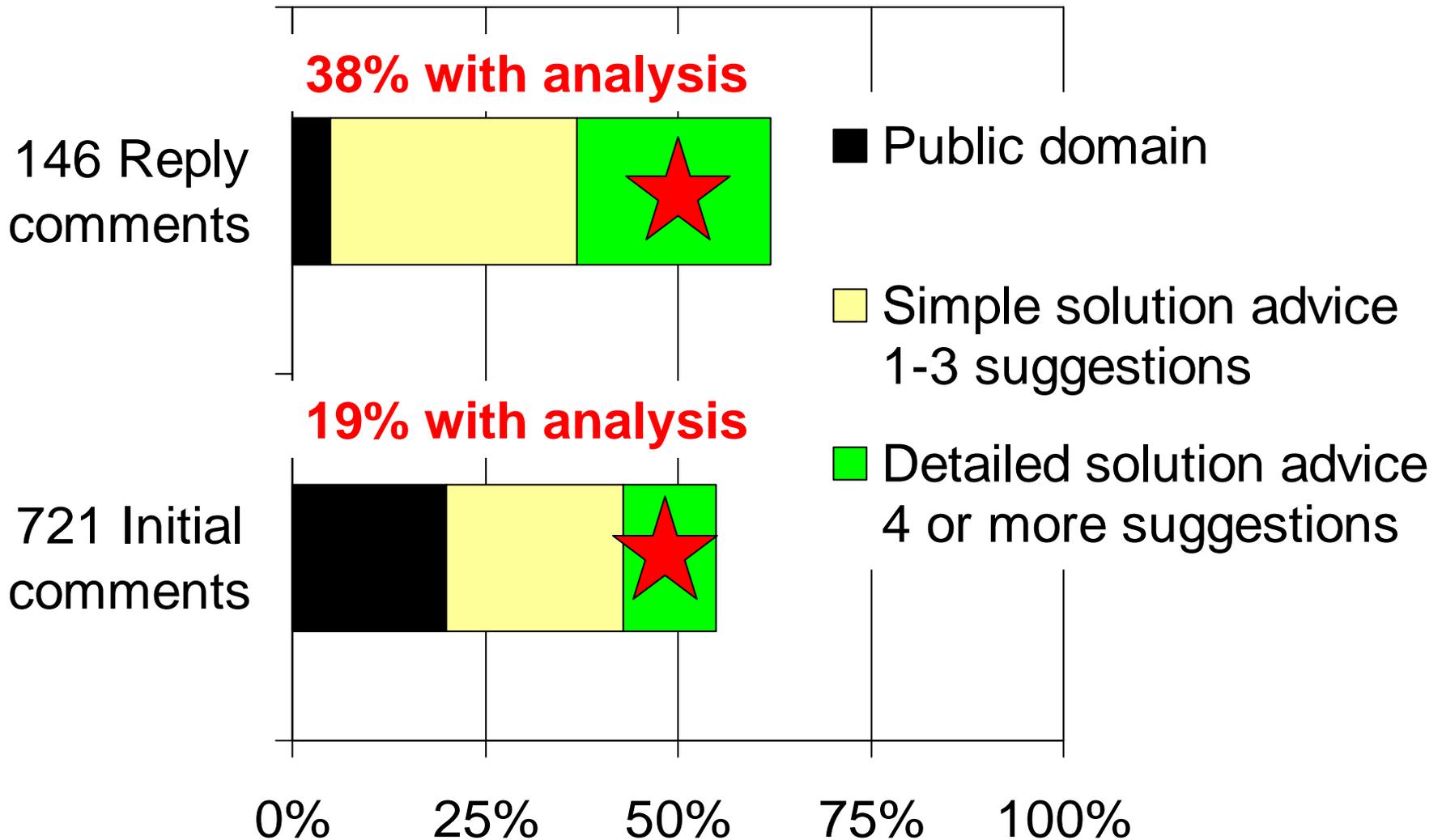
721 Initial comments

72%

0% 25% 50% 75% 100%



Comments with 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 be 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
 - Seemed to have the most support
 - Exemptions & default licensing are cheap & easy
 - Easiest to implement
 - Exemptions will solve some aspects of the problem & seemed to have some support
 - Default licensing could solve the entire problem, but seemed to have little support

Fundamental differences

- Purpose of copyright
 - Encourage creativity by compensating © owners
 - Encourage creativity & 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



Copyright Office analysis



- Half of the comments are out of scope
 - 33% to 40% of comments do not identify instances of not being able to locate the copyright owner
 - 10% (“another large portion”) identify situations that clearly are not orphan works (OW) situations
- Half are within scope
 - 25% to 50% identify what could be OW situations
 - 24% to 25% clearly present OW situations

Conclusions

- The orphan works problem is real
- The problem is difficult to quantify or describe
- Existing copyright law is inadequate
- Legislation is required



Recommended solution

- “Prior to the commencement of the infringement” each potential user must perform a “good faith, reasonably diligent search to locate the owner”
- If the search is unsuccessful, the user may use the work, giving attribution to the author & copyright owner (if possible & appropriate)
- If the owner comes forward & the user’s search is found to have been reasonable, then the remedies available to the owner are limited

Limited remedies

- Limited monetary relief
 - None if use is noncommercial & user ceases infringement “expeditiously upon notice”
 - Otherwise pay “reasonable compensation”
 - No attorney fees or statutory damages
- Limited injunctive relief
 - None if user created a derivative work
 - Otherwise full injunctive relief is available, “but the court must account for & accommodate” the user’s reliance interest in using the work

Administrative provisions

- Limited remedies terminate after ten years to “allow” examination
 - Whether & how the provision is working
 - Whether changes are needed
- OW legislation does not affect other legal rights & limitations



Rejected

- Owner or user registries – burden © owners
- Users posting intent to use
- Users disclosing use under OW regime
- Requiring users to pay prior to use



Bottom line

- Reasonable effort by every user for every use
- Different remedies for different users & uses
- Onus on user to prove reasonableness
 - If reasonable, stop or pay for past & future use
 - If not reasonable, full infringement penalties apply
- Limited remedies not available after ten years

Risky foster parenting

Commend Copyright Office

- Process & sequence of events
- No attorney fees & statutory damages
- No injunctive relief for derivative works
- Take-down option for noncommercial use
- Enabling, under certain conditions, all types of uses of all types of works by all types of users

Concern #1:
Ambiguity

What is a “reasonable” search?

- Copyright Office report
 - Notes “significant disagreement” on “reasonableness”
 - Explains that what is reasonable should vary, e.g., based on scope of audience of intended use
 - Identifies relevant factors (pp. 9–10)
 - Encourages industries & associations to define or guide & users to assume risk

What is “reasonable” compensation?

- Copyright Office report
 - What the user would have paid had permission been negotiated prior to infringing use
- User could have created a market for the work

How respond to uncertainty?

- Copyright Office report claims no deterrent
 - If the user conducted a reasonable search, it is unlikely that the © owner will come forward
 - Limited monetary remedies & injunctive relief reduce the risk to the user



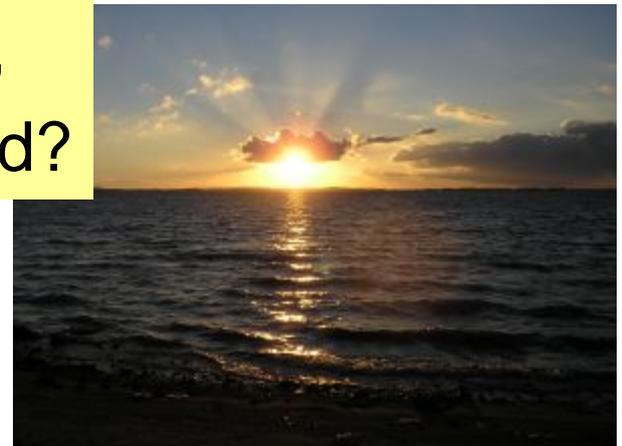
Or will OW legislation go the route of fair use?

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

What happens at sunset?

- Copyright Office report
 - Does not address what happens at or after sunset to users & uses begun prior to sunset
 - No statute of limitations on infringement claims

How will potential users, owners, associations & industries respond?



Concern #2:
Begging the question
(tipping the balance)

Assumes central point is proven

- Copyright Office report
 - “...we have refrained from offering a categorical definition...& have invited...definitions,” but ...
 - “Requiring a search for the owner seems to flow naturally from the NOI’s definition of orphan work (‘the copyright owners are **difficult or even impossible to locate**’).”

See pp. 34 & 71

Conflicting definitions

- Copyright Office report
 - The term must “mean what it implies: that the ‘parent’ of the work is **unknown or *unavailable*.**”
 - © owners are “**difficult or even impossible to *locate*.**”

See pp. 34 & 71

“To locate” versus “to be available”

- **Locate – onus is on the user**
 - To determine or specify the position or limits of
 - To find by searching, examining, or experimenting
 - To place at a certain location; to station or situate
- **Available – onus is on © owner**
 - Present & ready for use; at hand; accessible
 - Capable of being gotten; obtainable
 - Qualified & willing to be of service or assistance



Scope of © owner rights

- Copyright Office report
 - The “fundamental principles of ©” include “the right to ignore permission requests” (p. 9)
- Questions
 - How does ignoring users’ requests serve © owners’ legally valid interests & the public good?
 - How does this jibe with “the ‘parent’ of the work is unknown or **unavailable**”?

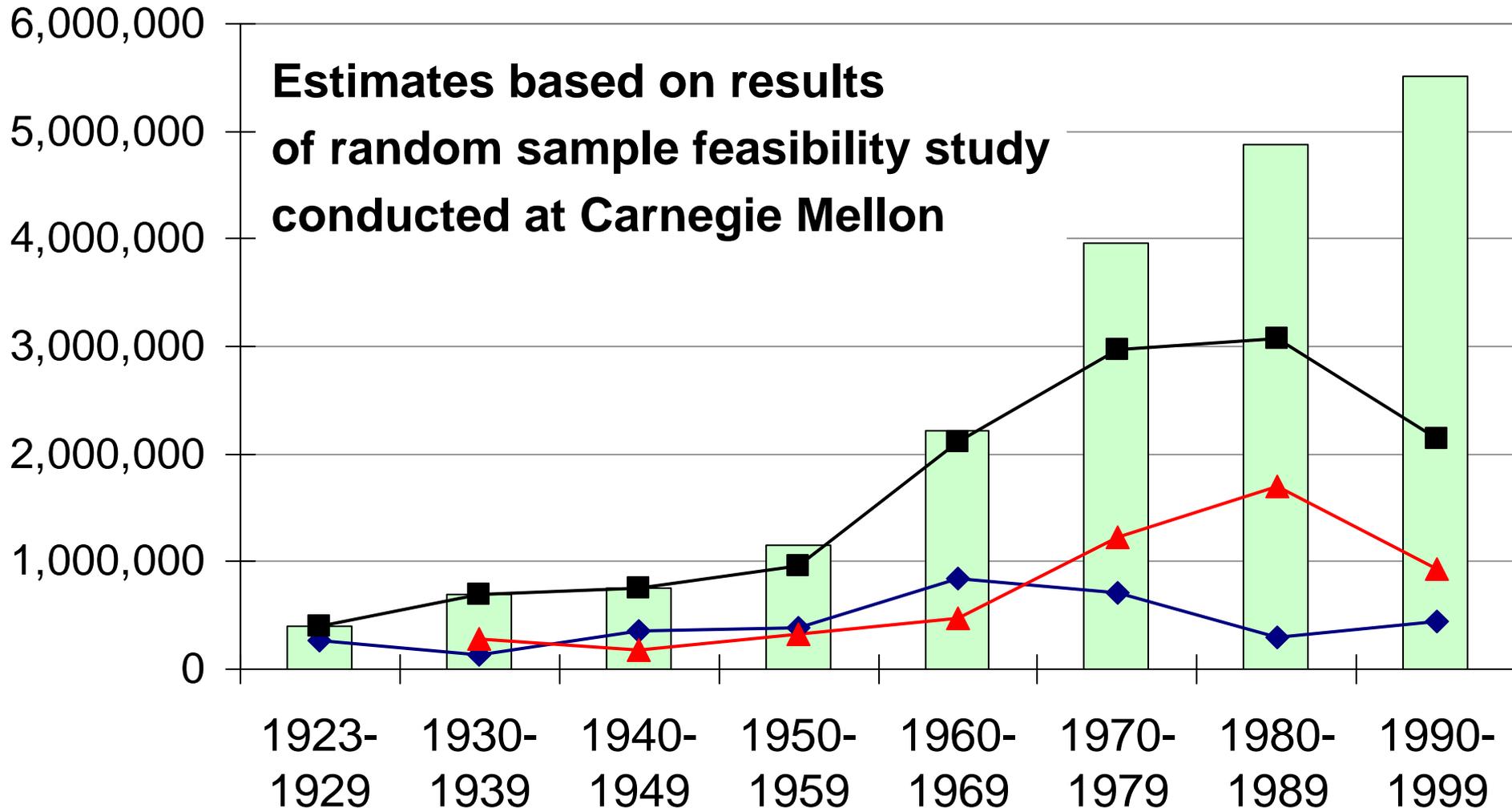
Slip of the tongue?



Scope of OW definition

- Copyright Office report
 - Situations where the owner is located but does not respond are “out of scope” (p. 22)
- Questions
 - What if the non-responsive person is not the owner?
 - How would including non-responsive situations benefit the public?
 - How would a categorical definition benefit the public?

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

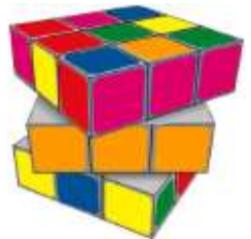


Concern #3:
Passing the buck
(tipping the balance)

To industries, associations & users

GOAL: Make it more likely that a user can find the © owner & negotiate permission

- No tools, limited incentive for © owners to make themselves “known & accessible”
- Onus, but no incentive, for industries & associations to develop tools
 - Zero compensation is disincentive
 - Could try but fail to develop tools
 - Could succeed, but overwhelm users



Was “proper balance” achieved?

**GOAL: Balance removing “unnecessary obstacles”
to use with preserving “interests of authors & © holders”**

- Identifies obstacles to locating © owners, but passes the buck on removing them
- Removes significant obstacle to use under certain conditions, in return for significant user investment



Concern #4:
Cost & scale

Too costly to succeed?

Goal: Provide a solution that is “the least burdensome on all the relevant stakeholders”

- No burden on © owners or federal government
- Tremendous burden on users
 - No concern for user investment
 - Protect owner’s right to ensure investment is wasted
 - No acknowledgement that © owners can appreciate use or free ride on markets created by users
- Will the cost of tool development be passed to owners or users?!

“The cost of clearing rights for these works is likely to be hundreds of times greater than the cost of actually digitizing the works.”

– Clifford Lynch

“The Battle to Define the Future of the Book in the Digital World”

**Opening NOI question remains:
Does the law impose
inappropriate burdens on users?**

The cost of “reasonable” effort

Transaction costs per book	Random, feasibility study		Fine & rare books study	
	Publisher	Title	Publisher	Title
Permission granted	\$228	\$197	\$251	\$65
Permission granted plus not located (OW)	\$129	\$109	\$147	\$54
Permission granted plus not located plus no response	\$81	\$67	\$138	\$50

Few titles
per publisher

Many titles
per publisher

Cost to digitize a book is \$25

**Concern #5:
Missed opportunities**

Sunset after ten years

- Why terminate & “allow” study rather than maintain OW law & require periodic study?
 - Why is recommended OW legislation different from DMCA?



Copyright term



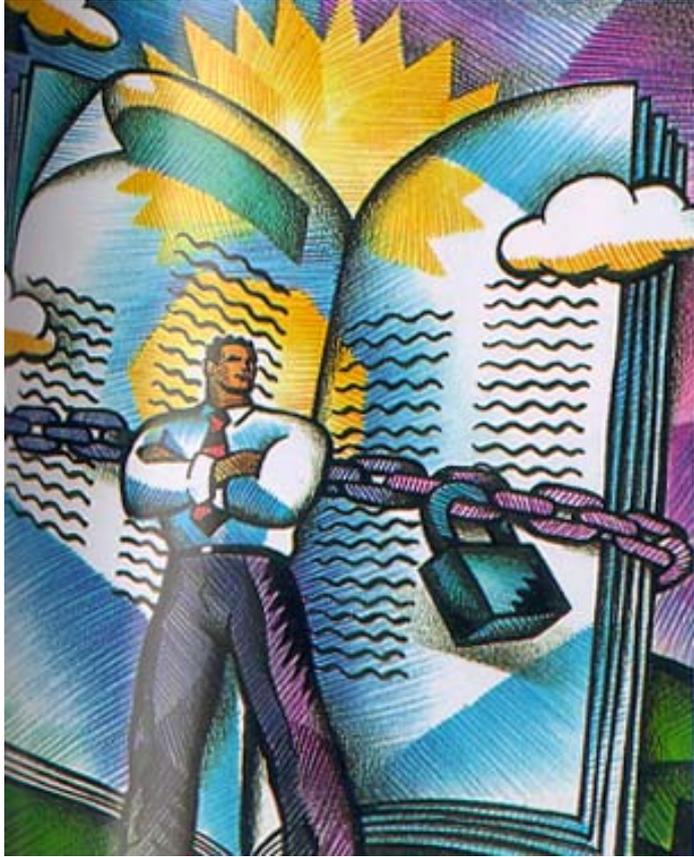
- Federal government knew that the 1976 CTEA would exacerbate the orphan works problem
- No recommendation to reconsider the © term, despite the severity & predictable continuance of the orphan works problem & the invitation to recommend a solution
- Copyright Office report reasserts that the benefits of the CTEA outweigh the costs

Change or no change?

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



The copyright absurdity



- 95% of books ever printed are still in copyright
- Fewer than 3% are still in print
- 92% of the world's books are neither generating revenue for the copyright owner nor easily accessible to potential readers

What's it all about, Alfie?

Is it just for the moment we live?

What's it all about, when you sort it out, Alfie?

Are we meant to take more than we give?

Or are we meant to be kind?

And if only fools are kind, Alfie,

then I guess it's wise to be cruel.

And if life belongs only to the strong, Alfie,

what will you lend on an old golden rule?

Thank you!

