

January 30, 2013

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Re: Copyright Office Notice of Inquiry: Orphan Works and Mass Digitization, *Federal Register* (October 22, 2012), Vol. 77, No. 204: 64555-64561. [Docket No. 2012-12]

Responding on behalf of Carnegie Mellon University, we appreciate the commitment of Congress and the U.S. Copyright Office to solving the orphan works problem and the opportunity to address the issues articulated in the Notice of Inquiry. As noted in the *2006 Report on Orphan Works*, the orphan works problem is significant, pervasive, and thwarting the purpose of copyright.

Carnegie Mellon's response addresses the primary questions posed in the Notice of Inquiry. The discussion proceeds as follows:

- Current state of play for solving the orphan works problem
- Principles that should shape the solution
- Proposal for a two-pronged solution that might be palatable at this time

A two-pronged solution is required because, as Charles Cooper explains in "Orphan Works: Half a Loaf," the orphan works problem is really two problems.¹ The first problem is acquiring permission to use orphaned copyrighted material already discovered. The second problem is discovering orphaned copyrighted material worthy of use. User behavior and expectation indicate that the only way to solve the second problem in the digital era is to make the material discoverable online and available in digital format. One prong of our proposed solution would solve the first problem by enabling occasional uses of orphan works. The other prong would solve the second problem by allowing and encouraging libraries and archives to digitize and provide public access to orphan works.

THE CURRENT STATE OF PLAY FOR ORPHAN WORKS

The Notice of Inquiry requests information on how the business and legal environment has changed since efforts to address the orphan works problem stalled in Congress years ago. Business has changed dramatically in response to technological developments and user behavior. Copyright laws have not

¹ C. Cooper, "Orphan Works: Half a Loaf," *CNET News*, May 20, 2008. http://news.cnet.com/8301-10787_3-9948731-60.html Accessed December 14, 2012.

kept pace. Controversial legislation and lengthy litigation abound. There is heightened public consciousness of copyright, a significant gap between copyright laws and copyright norms, and talk of copyright reform from both sides of the political divide.

Technology, Users, and Business

Users want digital content, e.g., books, journals, news, music, video, images. They want quick and easy access to digital content whenever, wherever, and on whatever device they choose.² Revenues from the sale or licensing of digital content and devices to consume that content are increasing.³ As of April 2011, Amazon is selling more e-books than printed books.⁴

The future is not just digital, but mobile, social, and open:

- Tablets are driving all growth in the personal computing market.⁵
- Smartphones have a market penetration greater than 50%.⁶
- As mobile increases, all other media decreases, including television, radio, print, and online.
- Televisions are used increasingly not to view live TV, but to view digitally recorded shows, play digital video games, and stream digital videos.
- Smartphone users spend more time on apps than on the web and little time using the device as a telephone. They use apps for games, social networking, shopping, and consuming digital content.⁷
- Consumer consumption of digital content is fragmented across platforms, and the rate of fragmentation is accelerating. For example, television viewers are simultaneously using one or more of the following: a desktop or laptop computer, a mobile device, or a tablet. "Consumption increases across all screens as more screens are used."⁸
- Smartphones and tablets account for 13% of all Internet page views and the growth rate is accelerating.
- Revenue from online shopping is soaring, with an increasing percentage of e-commerce transactions being done on a mobile or portable device.⁹
- Digital advertising is growing rapidly; print advertising is declining.

² Trends identified in *Horizon Reports 2006-2012*. See <http://www.nmc.org/publications>. Accessed December 19, 2012.

³ H. Blodget, *The Future of Digital*. Slide deck. <http://www.businessinsider.com/future-of-digital-slides-2012-11#-1>. Accessed December 11, 2012.

⁴ See http://www.washingtonpost.com/blogs/faster-forward/post/amazon-now-sells-more-ebooks-than-print-books/2011/05/19/AFTGQH7G_blog.html.

⁵ Blodget, *The Future of Digital*. According to Gian Fulgoni, Executive Chairman and Co-founder of comScore Inc., the tablet is the fastest growing electronic device ever created. See G. Fulgoni (January 7, 2013), "The Top Ten Burning Issues in Digital," *comScore*. http://www.comscore.com/Insights/Blog/The_Top_Ten_Burning_Issues_in_Digital Accessed January 16, 2013.

⁶ J. Loechner, "Simultaneous Digital Users," *Research Brief*, December 10, 2012. <http://www.mediapost.com/publications/article/188823/simultaneous-digital-users.html#axzz2Ew0LEKj> Accessed December 13, 2012.

⁷ Blodget, *The Future of Digital*.

⁸ Fulgoni, "The Top Ten Burning Issues in Digital."

⁹ One in every ten dollars spent by U.S. consumers is spent online. Over the holiday season, 13% of e-commerce transactions were done using a mobile or portable device. Mobile e-commerce is growing at a rate of 30% per year. See Fulgoni, "The Top Ten Burning Issues in Digital."

- People spend more time on social networks than web portals.
- Users want and increasingly expect sharing, e.g., Facebook, YouTube, Flickr, Pinterest.¹⁰
- Users want and increasingly expect openness, e.g., open access, open data, open licenses, etc.
- Digital technologies have enabled unprecedented collective intelligence, collaboration, and mass amateurization, precipitating changes in the practice of scholarship and creating new forms of authoring, publishing, and researching (e.g., blogs, multimedia pieces, networked presentations, text mining).
- Unaddressed concerns about intellectual property and digital rights are affecting how and what work is done.¹¹

The Legal Landscape

Many people believe copyright law is out of balance, with private interests repeatedly trumping public good. The Notice of Inquiry acknowledges that changes in copyright law that eliminated formalities (i.e., registration, notice, renewal) and repeatedly extended the copyright term exacerbated the orphan works problem. Much of our current copyright law was written in the era of the photocopier. Attempts to update the law for the digital era have been few and yielded problematic outcomes.¹² As a result, unwitting copyright infringement has become commonplace¹³ and rent-seeking is stifling the creativity copyright is supposed to stimulate.¹⁴

The current legal landscape reveals an ongoing contest between those who want to increase copyright protection and enforcement (e.g., commercial content industries) and those who want to restore balance and protect Internet freedom and digital rights (e.g., consumers, libraries, educators). The U.S. government appears focused on zealous copyright enforcement.¹⁵ Activists are pushing back. Often

¹⁰ One-seventh of the world's population uses Facebook. (See Blodget, *The Future of Digital*.) Over thirty billion pieces of data are added to Facebook every month. Seventy-two hours of video are added to YouTube every minute. In November 2012, Facebook had over 150 million visitors in the U.S. and accounted for 10% of the total minutes spent online. That same month, LinkedIn, Twitter, Google+, Pinterest, and Instagram each received more than 25 million U.S. visitors. (See Fulgoni, "The Top Ten Burning Issues in Digital.")

¹¹ Trends and challenges identified in *Horizon Reports 2006-2012*.

¹² For example, the 1998 Digital Millennium Copyright Act's prohibition on circumventing digital rights management technologies in effect circumvents the legal doctrine of fair use. Implementing the 2002 Technology, Education and Copyright Harmonization (TEACH) Act turned out to be so onerous that few universities did it.

¹³ John Tehranian illustrates that a hypothetical law professor doing routine activities in the course of an ordinary day could face liability exceeding \$12 million. See J. Tehranian, "Infringement Nation: Copyright Reform and the Law/Norm Gap," *Utah Law Review*: 537-550. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029151 Accessed January 7, 2013.

¹⁴ J. Brito, "Why Conservatives and Libertarians Should Be Skeptical of Congress's Copyright Regime," in *Copyright Unbalanced: From Incentive to Excess*, ed. By J. Brito, Arlington, VA: Mercatus Center, 2012: 15-16.

http://mercatus.org/copyrightunbalanced/Copyright_Unbalanced-Chapter_1.pdf Accessed January 14, 2013.

¹⁵ The Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act signed by President Bush in 2008 created the position of U.S. Intellectual Property Enforcement Coordinator. Under the Obama administration, the government has promoted requiring Internet Service Providers to deny Internet access to users who commit a specified number of copyright violations, pushed to make illegal streaming of audio or video a felony, supported FBI wiretaps of suspected infringers, seized hundreds of allegedly infringing websites without due process, and aggressively pursued trade agreements (Anti-Counterfeiting Trade Agreement [ACTA] and the Trans-Pacific Partnership [TPP] Agreement) requiring other countries to adopt copyright restrictions – but not limitations or exceptions – modeled on American policy.

what results is a stalemate.¹⁶ Perhaps nowhere is the legislative tug-of-war between content owners and consumers more apparent than in the news-making skirmishes over mandatory public (open) access to articles reporting findings from federally funded research. While activists quickly defeated the proposed Research Works Act in 2012,¹⁷ the Federal Research Public Access Act was introduced in 2006, 2009, 2010, and 2012 only to languish.¹⁸

Despite the stalemates, there is reason for optimism in 2013. Bipartisan voices are calling for copyright reform. Republican Congressman Darrell Issa wants legislation to clarify fair use and digital copying rights.¹⁹ Democratic Senator Ron Wyden wants legislation to balance copyright, respect privacy rights, and facilitate sharing and innovation.²⁰ His remarks prepared for delivery at the Consumer Electronics Show indicate that Congress is going to pursue copyright reform, including legislation to penalize false representations, strengthen fair use, and provide due process for seizures of intellectual property. As further evidence of support and momentum for copyright reform, in 2012:

- The Mercatus Center published a book examining the lack of balance in copyright law.²¹
- The Republican Study Committee issued a memo outlining steps for copyright reform.²²

Meanwhile automated copyright enforcement bots identify and remove allegedly infringing Internet content, disallowing fair use claims and ignoring notice and take down provisions in the DMCA. See, for example, J. Mick, "Obama Conscripts ISPs as 'Copyright cops,' Unveils 'Six Strikes' Plan," *DailyTech*, July 8, 2011 (<http://www.dailytech.com/Obama+Conscripts+ISPs+as+Copyright+Cops+Unveils+Six+Strikes+Plan/article22107.htm>); D. McCullagh, "White House Wants New Copyright Law Crackdown," *CNET News*, March 15, 2011 (http://news.cnet.com/8301-31921_3-20043421-281.html); A. Coutts, "U.S. Seized 100-Plus 'Cyber Monday' Piracy Sites," *Digital Trends*, November 26, 2012 (<http://www.digitaltrends.com/web/cyber-monday-piracy-sites-seized/>). Accessed December 12, 2012.

¹⁶ For example, the January 2012 defeat of the proposed Stop Online Piracy Act (SOPA) in the Senate and the Protect Intellectual Property Act (PIPA) in the House of Representatives, which would have damaged the technical and legal infrastructure of the Internet and used copyright to regulate technology, was a great victory for Internet freedom and the digital rights of consumers, but activists remain vigilant in the face of relentless encroachments on citizen rights and liberties. Months after the defeat of SOPA and PIPA, the House passed the Cyber Intelligence Sharing and Protection Act (CISPA), sacrificing online privacy purportedly in the interest of national security. Internet rights supporters defeated the bill in the Senate. The FBI is pushing for a broad internet surveillance bill and the MPAA is pushing for SOPA 2.0.

¹⁷ The Research Works Act (RWA) would prohibit mandatory public access to research articles, thus overturning the National Institutes of Health (NIH) mandatory public access policy, transfer copyright to the publisher when articles are submitted (prior to peer review and acceptance for publication), and make the articles henceforth "private-sector works." The RWA was introduced in the House of Representatives on December 16, 2011, and withdrawn on February 27, 2012.

¹⁸ The Federal Research Public Access Act (FRPAA) would require federal agencies that fund more than \$100 million in research to develop public (open) access mandates along the lines of the NIH public access mandate. A petition of support created May 13, 2012, on whitehouse.gov failed to secure a response from President Obama despite passing the threshold that would require a response. The petition received 44,182 signatures by June 19, 2012, far more than the 25,000 needed to require a response. (See <https://petitions.whitehouse.gov/petition/require-free-access-over-internet-scientific-journal-articles-arising-taxpayer-funded-research/wDX82FLQ> and <https://petitions.whitehouse.gov/how-why/terms-participation>. Accessed December 19, 2012.)

¹⁹ A. Ali, "Issa Plans Bill to Clarify Digital Copying Rights," *Roll Call*, November 12, 2012. http://www.rollcall.com/news/issa_plans_bill_to_clarify_digital_copying_rights-219063-1.html Accessed January 11, 2013.

²⁰ "The Freedom to Compete," January 9, 2013. <http://www.wyden.senate.gov/news/blog/post/senator-wyden-speech-at-2013-ces> Accessed January 11, 2013.

²¹ *Copyright Unbalanced: From Incentive to Excess*, ed. By J. Brito (Arlington, VA: Mercatus Center), 2012.

- Two university presses published books on how unauthorized copying has helped create new markets and how so-called piracy has been monetized.²³
- Maria Pallante, Register of Copyright, said in her keynote address at the Symposium on Orphan Works & Mass Digitization: “today the orphan works phrase seems to appear everywhere, from blogs to Supreme Court opinions, everyone calling for a solution.”²⁴

The Judicial Landscape

For years, copyright lawsuits have been headline news and the threat of litigation has chilled the exercise of legal rights. The doctrines of fair use and first sale are being challenged repeatedly.²⁵ Lawyer fees and court costs mount as cases are appealed. In addition to lengthy, high profile litigation, copyright is being abused. Copyright overreaching is an everyday occurrence. Museums, for example, often assert rights of control over photographic images of artworks that redefine concepts of copyright ownership and control and curtail the availability and downstream use of art images beyond what copyright law allows.²⁶ Rights holders use digital rights management technologies to exercise control over their work beyond what copyright law allows. Copyright trolls, predators in the copyright system, aggressively pursue mass litigation opportunities – for use of works they neither own nor license – to make money. Like the Recording Industry Association of America (RIAA), they leverage the threat of high statutory damages to pressure and intimidate defendants to settle quickly out of court.²⁷

²² D.S. Khanna, U.S. House *Republican Study Committee Policy Brief: Three Myths about Copyright Law and Where to Start to Fix It*, November 16, 2012. <http://lauren.vortex.com/WITHDRAWN-Republican-Study-Committee-Intellectual-Property-Brief.pdf> The memo was posted online on November 16, 2012, and removed within 24 hours, reportedly because of pressure from the recording and motion picture industries. See K. Smith, “A Foray Into Politics,” November 20, 2012. <http://blogs.library.duke.edu/scholcomm/2012/11/20/a-foray-into-politics/> See also G. Sohn, “The Debate over Copyright Reform Cannot Be Censored,” *Public Knowledge*, November 19, 2012. <http://publicknowledge.org/blog/debate-over-copyright-reform-cannot-be-censor> Accessed January 11, 2013.

²³ See K. Raustiala and C. Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (NY, NY: Oxford University Press), 2012, and P. Decherney, *Hollywood’s Copyright Wars: From Edison to the Internet* (NY: Columbia University Press), 2012.

²⁴ M.A. Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities.” Keynote address delivered at the Symposium on Orphan Works & Mass Digitization: Obstacles and Opportunities, Berkeley, CA, April 12-13, 2012: 5. http://www.law.berkeley.edu/files/2012-04-12_Pallante_Orphan_Works_Speech-1.pdf Accessed January 13, 2013.

²⁵ The fair use rulings in the Cambridge University Press, Oxford University Press, and Sage Publications v. Georgia State University e-reserves lawsuit and the Authors Guild v. HathiTrust lawsuit were received by libraries as great victories, but both cases are being appealed. The Authors Guild v. Google lawsuit over fair use is ongoing. The doctrine of first sale is also being challenged. Courts have interpreted the law differently and appeals have been made to the Supreme Court (Costco v. Omega, Vernon v. Autodesk). The outcome of the forthcoming Supreme Court ruling in the Kirtsaeng v. Wiley case could have serious implications for library lending. Attacks on first sale led to the formation of the Owners’ Rights Initiative in October 2012, aimed at championing before Congress the premise: “if you bought it, you own it, and you can resell it, rent it, lend it or donate it.” See <http://ownersrightsinitiative.org/about/>. Accessed January 11, 2013.

²⁶ See K.D. Crews, “Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching,” *Fordham Intellectual Property, Media & Entertainment Law Journal*, Vol. 22: 795-834, 2012. <http://ssrn.com/abstract=2120210> Accessed December 14, 2012.

²⁷ “They begin by suing unnamed John Does, then seek to subpoena the ISPs of users in order to obtain their identities and sue the individuals themselves.” See “USCG v. The People,” <https://www.eff.org/cases/uscg-v-people>. Accessed December 14, 2012.

Potential Impact on Orphan Works Legislation

Addressing orphan works and other copyright related issues in 2013 will be difficult, but the focus of legislators is slowly shifting from enforcement to balance and the problems have sufficient media attention to compel a response. A legislative solution to the orphan works problem is necessary to assuage fears fed by a litigious environment and threats of excessive statutory damages. The Copyright Office recommended a legislative solution to Congress in 2006. When Judge Chin rejected the amended Google Books Settlement in 2011, in part because of its handling of orphan works, he said that Congress, not the courts, bears responsibility for providing guardianship for orphan works and adapting copyright law to technological change.

Powerful content industry lobbies have made the exclusive rights of copyright owners sacrosanct. The Notice of Inquiry reminds us that the exclusive rights of copyright owners should not be usurped as a matter of convenience. The *Analysis* on which the Notice is based highlights as the core principle of the Copyright Act: “copyright owners generally control whether and how to exploit their works during the term of copyright.”²⁸ We assert that there is another, equally important core principle required to achieve the balance necessary to accomplish the purpose of copyright, the balance Congressman Lamar Smith acknowledged orphan works legislation must restore in the public interest.²⁹ The other core principle is that users of copyrighted materials generally have the opportunity to access and use copyrighted works, particularly those that have been publicly disseminated. Use may require permission, but would-be users should have the wherewithal to request permission. With orphan works there is no opportunity to ask permission.

We need to design legislation that serves the legitimate interests of both rights holders and potential users, rescues orphan works from obscurity, and creates appropriate incentives for managing copyright in the 21st Century. Carnegie Mellon proposes a two-pronged solution to enable discovery and use of orphan works based on the following principles and parameters.

PRINCIPLES AND PARAMETERS OF A LEGISLATIVE SOLUTION TO THE ORPHAN WORKS PROBLEM

In 1787, the Constitution empowered Congress to create the copyright monopoly “to promote the progress of science and useful arts.”³⁰ In 1948, the Supreme Court clarified copyright’s purpose: “The

²⁸ Office of the Register of Copyrights (October 2011). *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*. Washington D.C.: Library of Congress Copyright Office, p. 7.

http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf Accessed January 15, 2013.

²⁹ In the 2008 Oversight Hearing “Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users,” Lamar Smith (Ranking Member of the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary in the House of Representatives) said,

The enactment of orphan works legislation is in the public interest. The elimination of formal registration and the increased term of copyright protection have fostered a growing recognition that orphan works legislation is required to restore balance to the law of copyright. (March 13, 2008)

See <http://www.copyright.gov/orphan/orphan-hearing-3-10-2008.pdf>, p. 14.

³⁰ See Article 1, Section 8. <http://www.law.cornell.edu/constitution/article1> Accessed January 11, 2013.

sole interest of the United States, and the primary object in conferring the monopoly, lie in the general benefits derived by the public”; rewarding the copyright owner is a “secondary consideration.”³¹

In solving the orphan works problem, Congress should focus on the general benefits to be derived by the public and be mindful that many uses of orphan works will **not** fall within the domain of copyright law.³² For example, viewing an image, listening to a song, reading a book, or building on the ideas presented do not constitute use in the copyright context. Rick Prelinger, founder of Prelinger Archives, categorizes the foreseeable uses of orphan works that **will** fall within the domain of copyright law as:

- Highly visible uses, such as use in a publicly available book or documentary film.
- Less visible uses, for example, in libraries, archives, or classrooms.
- Ordinary, everyday uses, for example, on Facebook, You Tube, or via a photocopier.³³

Borrowing from the Occupy Movement, Prelinger refers to the ordinary, everyday uses as the 99%. He elaborates the nature and value of these uses as sociopolitical commentary or engagement with an inherited cultural heritage:

These are the billions of unbillable events that are now combining into an accelerando of personal expression. These are the citations, quotations, samples and extracts that we edit into our personal timelines as references not only to what we’ve done but to what we’ve heard, seen, read or played. This is also remixing – the kind of popular authorship we celebrate as an index of an emerging participatory culture.

These ordinary, everyday uses and the less visible uses could well be fair uses under copyright law. Prelinger cautions that designing orphan works legislation to minimize the risks to rights holders posed by the highly visible uses will fail to achieve the public policy goals driving the legislation. We agree.

Congress should declare that enabling orphaned intellectual and cultural artifacts to be discovered, enjoyed, used (in the copyright sense), and built upon is in the national interest. To that end, Congress should pass legislation that enables discovery and use of orphan works. The marketplace will not engage in these activities without legislation because the risk of litigation and statutory damages is too great. Congress can assume management of orphan works because copyright law is in its purview and because orphan works are not being routinely licensed and normally exploited by the rights holder.

A legislative solution to the orphan works problem should:

³¹ U.S. v. Paramount Pictures, 334 U.S. 131, 158 (1948).

<http://supreme.justia.com/cases/federal/us/334/131/case.html#158> Accessed January 11, 2013.

³² In the context of the Copyright Act, to “use” a work means to engage in one of the activities covered by the exclusive rights granted to copyright owners under the law, i.e., to reproduce, distribute, publicly perform and display, and create derivatives of a work.

³³ R. Prelinger, “Orphan Works talk for 4/12/2012,” paper delivered at the Symposium on Orphan Works & Mass Digitization: Obstacles and Opportunities, Berkeley, CA, April 12-13, 2012.

http://www.law.berkeley.edu/files/Orphan_Works_Talk.pdf Accessed January 11, 2013.

- Focus on benefiting the public (the primary consideration of copyright), not rewarding the rights holder (the secondary consideration).
- Aim at balancing the rights of copyright owners with the rights of would-be users. Both rights holders and users should bear some responsibility in solving the orphan works problem.
- Enable and encourage discovery and use of orphan works.
- Treat similar uses by similar users equitably, regardless of scale.³⁴
- Provide incentives to digitize orphan works and make them easily discoverable and freely accessible online.
- Provide incentives to eliminate or reduce the possibility of works being orphaned in the future.
- Include an explicit savings clause that nothing in the provision in any way affects the right of fair use (17 U.S.C. § 107) or library exceptions (17 U.S.C. § 108).
- Avoid creating highly technical or prescriptive regulations that will discourage use.
- Avoid reliance on unfunded registries or best practices that will take years to implement.

PROPOSED LEGISLATIVE SOLUTION

Carnegie Mellon suggests a two-pronged legislative approach: the granting of a right to all potential users to use orphan works under specified conditions, and the granting of an exception to libraries and archives for specified uses of orphan works under specified conditions.

1. Right to Use Orphan Works on an Occasional or Case-by-Case Basis

The framework, but not the details, of the legislation proposed in 2008 might still be viable for occasional uses of orphan works. Requiring the would-be user to conduct a good faith reasonably diligent search for the copyright owner, allowing use of the work if the owner appears to have abandoned it, and limiting remedies if the copyright owner later comes forward to claim infringement could be palatable in the current environment. The approach acknowledges and balances the exclusive rights of copyright owners and the public's right to access inherent in copyright law. For the legislation to be most effective in encouraging use and incentivizing copyright owners to exercise and manage their copyrights, we suggest a few refinements to

- The definition of an orphan work.
- The limited remedies provided to copyright owners who come forward and prove ownership and infringement.

In support of these refinements, we cite Maria Pallante's first point of stakeholder agreement on solving the orphan works problem: "it is not good policy to protect a copyright when there is no evidence of a copyright owner."³⁵ We contend that "evidence" of a copyright owner must entail clear ownership and responsible exercise of exclusive rights. For far too long, ownership has been falsely

³⁴ For example, a non-profit archive digitizing and providing open access to ten historical photographs has the same rights as a non-profit archive digitizing and providing open access to two hundred historical photographs.

³⁵ Pallante, "Orphan Works & Mass Digitization: Obstacles and Opportunities": 1.

represented or wielded to discourage the exercise of fair use rights, and attempts have been made to turn librarians, educators, and Internet Service Providers into copyright police.

Definition of Orphan Work

The Notice of Inquiry defines an orphan work as “an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law.” Notwithstanding the difficulty of deliberating whether a use is allowed by the fair use doctrine, we suggest adding to the definition:

- Works with copyright owners who do not respond to requests for permission. Under current copyright law, the copyright owner’s control is a power that need not be exercised or managed. This must change. Copyright is a social contract. Users must request permission to use a copyrighted work and copyright owners must respond to these requests. Rights holders can grant or deny permission, but to ignore requests is to orphan the work.³⁶ Continuing to unburden rights holders and to burden potential users will exacerbate the existing imbalance in copyright law. Restoring balance should be a primary aim of the legislation.
- Works where ownership of electronic rights to digitize material is ambiguous or contested. Without this provision, these works cannot be made available in the format that will facilitate discovery and use, i.e., these works cannot be rescued and will ironically be orphaned by orphan works legislation.

Limited Remedies

Limiting remedies is one way to encourage use of orphan works. Concerns about limiting remedies – even if the copyright owners are “missing, asleep, or ignorant of their rights” – have dissipated.³⁷ Orphan works legislation should provide a safe harbor for noncommercial users making noncommercial uses of orphan works. Copyright owners should be entitled to reasonable compensation from commercial users and commercial uses of their work. To encourage copyright owners to make their identity and location publicly available we propose two refinements to the legislation proposed in 2008:

- The reasonable compensation must be capped. Otherwise the risk and uncertainty will continue to have a chilling effect on use.³⁸

³⁶ Concern that the person or organization contacted is only the presumed copyright owner, not the actual copyright owner, belittles the user’s diligent search and does not change the nature of the social contract. Respect for copyright and the purpose it was designed to serve should compel a response from the presumed copyright owner contacted. Those who cannot respond because of illness, travel, or other circumstances can respond at their earliest convenience.

³⁷ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 3.

³⁸ Setting a cap is not price fixing because payment would be within the range up to the cap. The cap must be low enough not to discourage use, yet high enough to encourage a diligently search for the copyright owner.

- The copyright owner’s right to compensation must have a termination date. For example, as of January 1, 2025, if the copyright owner comes forward, she will not be compensated for prior use of the work.

Pallante questions whether the remedies available to copyright owners under orphan works legislation should be proportionate to the degree to which they assert their whereabouts.³⁹ We believe the remedies should be proportionate to this assertion and to the copyright owner’s responsiveness to requests for permission (as noted above). Furthermore, the remedies and the term of their availability should be restricted as an incentive for copyright owners to participate fully in the copyright system, not only in receiving reward, but in serving the public. Copyright owners must understand that they have an obligation to potential users.

The Library Copyright Alliance (LCA) proposes reliance on fair use and litigation to solve the orphan works problem. We strongly disagree. Recent rulings in fair use lawsuits have been encouraging, but the rulings are being appealed. Many gatekeepers remain vigilant and users wary, unaware or suspicious of broadening interpretations of fair use rights. The LCA proposes as a back-up strategy, if remedies must somehow be addressed, a one sentence amendment to 17 U.S.C. § 504 (c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search for the copyright owner prior to the use. We contend that the court’s discretion does not remove the primary barrier to the exercise of fair use rights: the threat of litigation. Relying on the court’s discretion to reduce or remit statutory damages is little comfort to a would-be user who does not want to risk even actual damages and court costs. The LCA’s primary and back-up strategies are too ominous and potentially expensive to achieve the public policy goals of orphan works legislation.

Reasonably Diligent Search

The 2006 Report on Orphan Works prepared by the Copyright Office recommended to Congress that “users and stakeholders” should decide what constitutes a reasonably diligent search by developing “guidelines or even binding criteria.” The 2008 proposed legislation required users to search the online records of the Copyright Office and to consult the applicable best practices to be developed by copyright owners in collaboration with users, an activity to be coordinated by the Register of Copyrights. The legislation also encouraged copyright owners to make themselves locatable via registries and search tools. All of these regulations are problematic:

- *Copyright Office records.* We applaud the ongoing efforts to digitize and make searchable the Copyright Office’s historic copyright records and agree that these records should help copyright owners manage their rights and help users find information.⁴⁰ However, given that copyright owners are not required to register their work or to keep the information in the records current and that costs and complications discourage voluntary registration, the record collection is incomplete and out of date. At best the records provide a starting point for a search for the

³⁹ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 3.

⁴⁰ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 5.

copyright owner; at worst they are historical artifacts. Requiring potential users to search the records that are available online is acceptable if and only if it can be done at no charge.

- *Best practices.* Requiring users to consult existing best practices on what constitutes a reasonably diligent search for a copyright owner is acceptable, but postponing the effective date of orphan works legislation until best practices are available is not acceptable.
- *Private registries.* Encouraging copyright owners to identify their works and make themselves locatable is a worthwhile endeavor. At the very least it signals that they bear some responsibility for solving the orphan works problem. However, given all the press that orphan works have received since the initial Notice of Inquiry in 2005 and the lack of any successful initiative to implement a private registry, such encouragement is unlikely to bear much fruit without substantial funding. Furthermore, a voluntary registry of orphan works will no doubt be incomplete and possibly rife with unsubstantiated copyright claims that would only serve to intimidate potential users.⁴¹

According to June M. Besek, Executive Director of the Kernochan Center for Law, Media, and the Arts at Columbia Law School, the scope of users who will benefit from orphan works legislation will be affected by the requirements of a diligent search.⁴² Recall that many uses of orphan works will occur outside the domain of copyright law, and that many of those that occur within the context of the law will be fair uses (e.g., research, education, commentary). The reasonably diligent search, therefore, will apply to the occasional uses for which copyright owners rightfully expect compensation, i.e., to the highly-visible uses – the less than 1% of uses – that Prelinger cautions must not drive orphan works legislation. In a recent address, Democratic Senator Ron Wyden explained that economic stagnation “is the natural outcome of the ability of the incumbent interests to rig the system in their favor with superior political and economic power.”⁴³ Rights holders focused on the secondary consideration of copyright (their reward) rather than the primary consideration (benefits to the public) must not be allowed to complicate orphan works legislation. Complicated regulations will discourage use and exacerbate confusion, disrespect, and disregard for the law.

According to the Register of Copyrights, the appropriate solution to the orphan works problem hinges on the issue of practicality.⁴⁴ To achieve the public policy goals that are the aim of orphan works legislation, the requirements of a reasonably diligent search must be simple to understand and easy to perform: search appropriate databases, follow appropriate best practices, which will specify trusted databases or registries to be searched, and consult appropriate experts. Straightforward guidelines will incentivize the development of best practices and trusted registries and encourage use of orphan works. As noted in our guiding principles, orphan works legislation must not create highly technical or

⁴¹ R. Prelinger, “Orphan Works talk for 4/12/2012.”

⁴² J.M. Besek, “Who Is Concerned About Broader Access to Orphan Works and Why?” Paper delivered at the Symposium on Orphan Works & Mass Digitization: Obstacles and Opportunities, Berkeley, CA, April 12-13, 2012. http://www.law.berkeley.edu/files/Berkeley_April_2012rev.pdf Accessed January 11, 2013.

⁴³ In his address at the Consumer Electronics Show, he noted that, “Members of Congress are going to file legislation that would penalize false representations, strengthen fair use, and provide real due process for seizures of property.” “The Freedom to Compete,” January 9, 2013. <http://www.wyden.senate.gov/news/blog/post/senator-wyden-speech-at-2013-ces> Accessed January 11, 2013.

⁴⁴ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 2.

prescriptive regulations or mandate reliance on unfunded or non-existent registries or best practices. The problem is urgent and we need a solution that can be implemented immediately with the resources at hand.

Scope

All types of materials, users, and uses should be covered under this legislation. No genre, person, or activity should be disenfranchised if the goal is to rescue resources at risk by encouraging their use. However, if orphan works legislation must be passed piecemeal, then we suggest that initial legislation address the types of works where the copyright owner is frequently identified on the work (e.g., books, manuscripts) and provide a funded mandate to resolve contentious issues and craft legislation related to other types of works (e.g., photographs).

2. Orphan Works in the Context of Mass Digitization

Pallante’s second point of stakeholder agreement on solving the orphan works problem is that the effort and expense of the case-by-case approach to finding copyright owners will not scale to accommodate mass digitization projects that can serve the public good. The case-by-case approach can create market gridlock and is therefore “difficult to justify for certain projects, provided we can define those projects responsibly.”⁴⁵ We agree. Digitization projects that enable users to discover orphan works are essential to achieving the public policy goals of orphan works legislation.

Carnegie Mellon University proposes a legislative educational and cultural heritage exception – an amendment to 17 U.S.C. § 108 – to allow libraries and archives to digitize older works in their collection and make the digital copies freely available on the Internet.⁴⁶ This exception would help potential users discover orphaned copyrighted material worthy of use, encourage use by providing the broadest possible dissemination of the material, and deliver the material in the format users want. Use of the material could be restricted to non-commercial,⁴⁷ personal, or educational use and uses allowed by other exceptions or limitations in copyright law, e.g., fair use. Commercial and other downstream uses would require the case-by-case reasonably diligent search for the copyright owner.

The Library Copyright Alliance (LCA) contends that changes in the copyright environment have rendered the doctrine of fair use sufficient for libraries to make appropriate uses of orphan works. Specifically, a non-profit library can digitize special collections and make them publicly available on the Internet because – should this use be contested – the courts will evaluate the library’s fair use defense in light of the *Code of Best Practices in Fair Use for Academic and Research Libraries*. The *Code* states that the orphan status of a work in a special collection enhances the likelihood that its use by a library is fair use. We have several concerns about the LCA’s proposed solution to the orphan works problem:

⁴⁵ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 1.

⁴⁶ If the ruling in the Authors Guild v. HathiTrust lawsuit holds, libraries and archives can digitize copyrighted books, create full-text indexes, and enable text mining and computational research under fair use. However, they cannot provide open access to the full text.

⁴⁷ Printing or print-on-demand services could be restricted to cost recovery.

- Fair use is still shaky ground. High profile lawsuits are ongoing or on appeal, and none of them addresses the right to digitize and provide public access to orphan works. Trusting that the courts will consult the *Code of Best Practices* is little comfort to a library seeking to avoid litigation.
- We need a solution to the orphan works problem that applies to more than special collections. Work that has been distributed commercially can be orphaned.
- We need a solution that does not hinge on Congress, courts, or rights holders agreeing that the professional judgment of librarians is sufficient to determine which works are orphans.

As Besek points out, relying on fair use alone leaves too many questions unanswered: What can be digitized by whom? What can be made available and to whom? What security is required for these valuable assets?⁴⁸ The balancing of interests is the purview of Congress.

Public Policy Goals

The exception proposed by Carnegie Mellon would enable libraries and archives to preserve and to provide public access to the nation’s intellectual and cultural heritage currently at risk because the materials are fragile, not easily discoverable, or not widely available in the marketplace. As noted in the Notice of Inquiry, important public interest goals could justify restricting or limiting certain exclusive rights to allow and encourage mass digitization and dissemination. According to Pallante, “confirming, and in some cases resetting, the copyright relationship between copyright owners and libraries and archives is of special importance to the public.”⁴⁹

Eligibility

If necessary, the legislation could include the eligibility criteria that stakeholders participating in the Section 108 Study Group agreed upon in 2008: eligible libraries and archives must have a public service mission, employ a trained staff, provide professional services normally associated with libraries and archives, and possess a collection of lawfully acquired or licensed materials.⁵⁰ Congress might consider the eligibility of other organizations with public service missions, such as museums.

In addition, the criteria stakeholders in the Section 108 Study Group agreed upon for digital preservation of publicly disseminated works could be adapted to require libraries and archives engaged in mass digitization to:

- Maintain the digital copies in a secure, managed, and monitored environment utilizing recognized best practices.
- Provide an open, transparent means of auditing archival practices.
- Possess a demonstrable commitment to and the ability to fund long-term preservation.

⁴⁸ Besek, “Who Is Concerned About Broader Access to Orphan Works and Why?”: 7.

⁴⁹ Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 2.

⁵⁰ U.S. Copyright Office, *The Section 108 Study Group Report*, March 2008: iv.

<http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> Accessed December 14, 2012.

- Provide a succession plan for copies in the event the qualified library or archives ceases to exist or can no longer adequately manage its collections.⁵¹

Ability of Public and Private Sectors to Collaborate

To achieve the public policy goals driving the proposed exception, eligible libraries and archives should be allowed to authorize outside contractors to perform on their behalf (“outsource”) activities allowed under the proposed exception. Here again recommendations agreed upon by stakeholders in the Section 108 Study Group can be adapted. Specifically, meeting the following conditions could be required for allowable outsourcing:

- The contractor acts solely as the provider of a service for which compensation is made by the eligible library or archive, and not for any other direct or indirect commercial benefit.
- The contractor is contractually prohibited from retaining copies other than as necessary to perform the contracted-for service.
- The agreement between the library or archives and the contractor preserves a meaningful ability on the part of the rights holder to obtain redress from the contractor for infringement by the contractor.⁵²

Definition of Orphan Work

Many academic library responses to the 2005 Notice of Inquiry on Orphan Works urged the Copyright Office to consider a categorical definition of an orphan work that would scale to accommodate mass digitization projects and, in the case of published works, enable identification by a computer. The 2012 Notice of Inquiry on Orphan Works and Mass Digitization acknowledges that the case-by-case, reasonably diligent search approach is time and cost prohibitive for mass digitization projects. A legislative exception to allow mass digitization requires a categorical definition of an orphan work. It does not require a definition of what constitutes mass digitization, as the setting of any threshold will be arbitrary and counterproductive. The proposed exception hinges not on the volume of material digitized and made publicly available, but on the mission of those eligible to do such work in the service of public policy goals.

No categorical definition will be perfect or uncontested. Responses to the 2005 Notice of Inquiry argued the pros and cons of using the age of a work or its print or publication status as the bright line for identifying categorically whether the work was an orphan. All these options are problematic:

- The age of a work can be unknown, and newer works as well as older works can be orphaned.
- What “publication” means in the era of the web is unclear.
- Publishers disagree on the definition of “in print,” and the possibility of print-on-demand service could mean a work is never really out-of-print.

⁵¹ *The Section 108 Study Group Report*: vii.

⁵² *The Section 108 Study Group Report*: iv.

Furthermore, borrowing terms from information retrieval, any categorical definition will be flawed in its precision and recall of orphan works. Applying the definition will undoubtedly identify some works that are not orphaned and fail to identify some works that are orphaned. Nevertheless, enabling discovery and use of orphan works is in the public interest. As noted earlier, many uses will fall outside the domain of copyright law or within the scope of fair use.

As a starting point, Carnegie Mellon University suggests a categorical definition based on date and if the work was publicly disseminated its commercial availability. The initial date should be set conservatively and the date extended over time to rescue works for which electronic rights will be ambiguous or contested. Research should be funded to determine when publishing contracts routinely specified ownership of electronic rights.

We suggest that the line be drawn initially at 1963, the year at which published works entered the public domain if their copyright were not renewed.⁵³ Research reported in 1960 revealed that only 7% of copyrights were renewed.⁵⁴ A later study reported that less than 11% of the copyrights registered between 1883 and 1964 were renewed.⁵⁵ Another study reported that less than 15% of copyrights were renewed in 1973.⁵⁶ The upshot is that most of these works are no longer copyright protected, which means the risk to rights holders of making these works discoverable and available for use is minimal. Moreover, in regard to occasional downstream uses of this material that fall within the domain of copyright law, this approach argues for straightforward, easy to implement guidelines for conducting a reasonably diligent search.

The proposed educational and cultural heritage exception would initially recognize as orphans:

- Works dated 1963 or earlier that are not currently commercially available at a reasonable price.⁵⁷ There must be an agreed upon methods for a computer to determine commercial availability.
- Undated material that can be dated 1963 or earlier by an examination of the content, e.g., a World War II photograph.

⁵³ Copyright renewal records for books published in the United States between 1923 and 1963 can be searched at <http://collections.stanford.edu/copyrightrenewals/>.

⁵⁴ B.A. Ringer. June 1960. Study No. 31: Renewal of Copyright. In 1 *Studies on Copyright*, Arthur Fisher Memorial Ed.: 513-514. Reprinted in Library of Congress Copyright Office. *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. Washington: U.S. Government Printing Office, 1961.

⁵⁵ W.M. Landes and R.A. Posner. August 2002. "Indefinitely Renewable Copyright." John M. Olin Law & Economics Working Paper No. 154: 2. https://www.law.upenn.edu/fac/pwagner/ip/2003sp/downloads/landes-posner_indefinite.pdf Accessed January 18, 2013.

⁵⁶ L. Lessig. 2004. *Free Culture* (New York: Penguin Press): 135.

⁵⁷ International treaties do not provide or require a moral right of first publication. In the United States, the copyright owner's right to first publication focuses on commercial exploitation. Hence our proposal includes consideration of commercial availability. If the copyright owner has not commercially exploited the work in fifty years, enjoyment or use of the work is likely not to harm future markets or to breach international treaties by unreasonably prejudicing the legitimate interests of the copyright owner.

Types of Works

The *Analysis*⁵⁸ on which the 2012 Notice of Inquiry is based focuses on mass digitization of books. The categorical definition proposed above would allow eligible libraries and archives to digitize and provide open access not only to books, but to historic films, photographs, audio recordings, and other archival materials, i.e., the special collections that are the focus of the LCA response to the Notice of Inquiry. If necessary, the proposed exception could be limited to books, but this would severely limit legislative success in solving the orphan works problem.

Safe Harbor

A safe harbor should be provided so that if copyright owners come forward, they can have their work removed from online public access, but no financial compensation is required for the prior reproduction and dissemination. The safe harbor is necessary to meet the public policy goals of orphan works legislation.

INTERPLAY OF LIBRARY EXCEPTIONS, FAIR USE, AND LICENSING

Nothing in the proposed orphan works legislation – neither the grant of rights to end users nor the exception for eligible libraries and archives – should interfere with or undermine fair use rights (17 U.S.C. § 107) or other library exceptions (17 U.S.C. § 108).

Legislation is required because copyright owners are unable to provide now or in the near future efficient cost-effective licensing options to solve the orphan works problem. Attempts to create opt-in, voluntary licensing collectives have not been successful (e.g., Authors Guild, American Society of Media Photographers), and even if they were, the ambiguity of who owns electronic rights to works created in the pre-digital era will prevent the licensing of the very rights needed to provide what the public wants and what research has shown accelerates education, innovation, and economic growth: open access to digital material. The only viable solution in the current environment is for Congress to legislate how apparently abandoned copyrighted material is to be managed until the copyright owner comes forward and assumes responsibility.

We agree with the LCA that any legislative approach that involves licensing is completely unacceptable. Licensing will create unnecessary delays, costs, and possibly restrictions that will hamper the success of orphan works legislation. According to the Notice of Inquiry, under current law, mass digitization and orphan works cannot be separated from licensing because of the definition of an orphan work. Though the Notice provides only a case-by-case definition of an orphan work, not a categorical definition needed to support mass digitization projects, the assumption seems to be that Congress acting on behalf of absent copyright owners can and should license use of their work. We agree that Congress has the authority to act on behalf of absent copyright owners, but we disagree that a license is required. In the context of orphan works, all of the licensing options require an organization, expertise, and funding. As noted in the Notice of Inquiry, the cost of negotiating direct licenses could

⁵⁸ *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document.*

exceed the benefits and the funds needed to create a new collective rights organization are substantial.⁵⁹ Furthermore, a recent report by Jonathan Band exploring the actual track record of collective rights organizations documents “a long history of corruption, mismanagement, confiscation of funds, and lack of transparency.”⁶⁰ Collective rights organizations often serve their own interests at the expense of copyright owners and the public, failing to fulfill their promise. As Brandon Butler said, “we are leery of wasteful proposals like extended collective licensing, which would empower organizations like the CCC to demand payment for use” of orphan works.⁶¹

We do not consider the Copyright Clearance Center (CCC) to be a viable existing collective licensing organization that could be deployed in the service of orphan works legislation. Though the CCC does have relationships with academic institutions that have libraries and archives willing, able, and eager to engage in mass digitization projects, decades ago the Internal Revenue Service (IRS) revoked the CCC’s nonprofit, tax-exempt status; the revocation was affirmed by the U.S. Tax Court in 1982. The Commissioner for the Internal Revenue Service stated that any public benefits from the CCC’s activity were subordinate to its primary purpose “of furthering the economic interest of publishers and copyright owners”; the court ruled that there was little evidence that the publishers’ trade group that founded the CCC “had interests of any substance beyond the creation of a device to protect their copyright ownership and collect license fees.”⁶² The CCC used the copyright license fees it collected to underwrite half the expense of litigation against Georgia State University, in effect an attack on the exercise of fair use rights.⁶³ The CCC has overstated its authority and ignored the interests of rights holders.⁶⁴ The terms of the CCC’s standard end user licensing agreement are problematic for academic institutions.⁶⁵ Orphan works legislation should aim at restoring balance in copyright law and serving the public good, not further tipping the scale in favor of the commercial interests of rights holders or collective rights organizations.

If there is no need for a license for occasional uses of orphan works, there should be no need for a license for an exception for eligible libraries and archives to digitize and provide open access to orphan

⁵⁹ According to Besek, extended collective licensing (opt-out) is probably not a good fit for U.S. law, voluntary collective licensing (opt-in) will not solve the orphan works problem, and compulsory licensing will raise concerns among rights holders, including concerns about the fairness and efficiency of government administration of such a license. See Besek, “Who Is Concerned About Broader Access to Orphan Works and Why?”: 6.

⁶⁰ J. Band, “Cautionary Tales About Collective Rights Organizations,” September 19, 2012: 1. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036 Accessed January 3, 2013.

⁶¹ A. R. Albanese, “Overruled: PW Talks to ARL’S Brandon Butler: ALA Preview 2013.” *Publishers Weekly*, November 30, 2012. <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/54961-overruled-pw-talks-to-arl-s-brandon-butler-ala-preview-2012.html>

⁶² *Copyright Clearance Center v. Commissioner of Internal Revenue*, 79 T.C. 793 (U.S. Tax Court 1982). Quoted in J. Band, “Cautionary Tales About Collective Rights Organizations”: 32.

⁶³ J. Band, “Cautionary Tales About Collective Rights Organizations”: 5.

⁶⁴ *Resnick v. Copyright Clearance Center, Inc.*, 422 F. Supp. 2d 252 (D. Mass 2006). Cited in J. Band, “Cautionary Tales About Collective Rights Organizations”: 14.

⁶⁵ For example, the end user is an employee not empowered to indemnify the CCC or to grant the CCC the right to access and audit university records. K. Smith, “Is the CCC having an ‘Instagram’ moment?,” December 20, 2012. <http://blogs.library.duke.edu/scholcomm/2012/12/20/is-the-ccc-having-an-instagram-moment/> Accessed January 11, 2013.

works, particularly if the legislation provides a safe harbor that requires only removing the material from public access if the copyright owner comes forward. Section 108 of the Copyright Act grants other exceptions to libraries and archives without requiring a license, e.g., the right to make replacement or preservation copies in certain circumstances.

Furthermore, in regard to orphan works, all of the licensing options suffer from a similar flaw: To whom will the fees be distributed given that the copyright owner is absent? How do we reconcile charging a fee when the copyright owner might have allowed the use for free had she been found? To achieve the public policy goals of preserving and encouraging use of the nation's intellectual and cultural heritage, orphan works legislation must facilitate digitization projects, not burden them with licensing negotiations and fees or the threat of "reasonable compensation" owed to the rights holder.

CONCLUSION

The orphan works problem is severe and pervasive. We urgently need a solution that enables discovery and use of existing orphans and takes steps to prevent work from being orphaned in the future. The problem will not be solved by an unfunded mandate or requirements that heavily burden would-be users while continuing to free rights holders of any responsibility for managing their copyrights. Copyright owners, like other property owners, need to exercise responsible control of their property. They must stop expecting librarians, educators, and Internet Service Providers to police their copyrights and stop wielding their exclusive rights to thwart the purpose of copyright. The doctrine of fair use limits their exclusive rights under the law and excessive rent-seeking harms the public good. We need to restore balance and change the system that enabled so many works to be orphaned.

For copyright to achieve its purpose of promoting the progress of science and art, copyrighted work must be discoverable, accessible, and used. Increasingly in the digital era, users want copyrighted work to be available in digital form. For many, if something is not available online, it does not exist. If we agree that important cultural and intellectual artifacts are orphaned in our copyright system, and that enabling orphan works to be discovered, enjoyed, used (in the copyright sense), and built upon is in the national interest, then these works must be discoverable online, available in digital format, and whenever possible packaged for delivery on mobile devices and available for non-consumptive use.

Members of Congress are supposed to represent the public interest, not the interests of copyright owners and content industries. The task before them is to restore balance, which means tipping the scale toward public access and freedom and away from greater privileges for rights holders. There is no evidence that strong copyright enforcement yields unlimited economic benefit, but rather clear evidence that creativity can thrive without it and that protection can reach a point where it stifles innovation and economic growth.⁶⁶ U.S. copyright law has reached that point.

According to former Congressman Robert Kastenmeier, copyright legislation "should respond to palpable problems," and those who push for change "bear the burden of proving that the change is

⁶⁶ J. Brito, "Why Conservatives and Libertarians Should Be Skeptical of Congress's Copyright Regime": 17, 19, 7.

necessary, fair and practical.”⁶⁷ Responses to the 2005 Notice of Inquiry leave no doubt that the orphan works problem is palpable. A legislative solution is necessary because the threat of litigation discourages use. The proposed two-pronged solution is both fair and practical. It addresses the discovery and use of orphan works with respect for copyright ownership and the public benefits to be derived from the copyright monopoly. It can be implemented now with the resources at hand and is sufficiently straightforward to encourage compliance. It will rescue orphan works, end market gridlock, and begin to restore balance and faith in the operation of copyright law.

We look forward to participating in the discussion as the inquiry proceeds.

Sincerely,



Denise Troll Covey
Scholarly Communications Librarian

⁶⁷ R. W. Kastenmeier, *The 1989 Horace S. Manges Lecture – “Copyright in an Era of Technological Change: A Political Perspective,”* 14 Colum.-VLA J.L. & Arts 1, 4 (1989-1990), cited in Pallante, “Orphan Works & Mass Digitization: Obstacles and Opportunities”: 4.