

U.S. COPYRIGHT OFFICE ORPHAN WORKS INQUIRY: FINDING HOMES FOR THE ORPHANS

By Olive Huang

Copyright holders have exclusive rights to reproduce, distribute, perform, display, or prepare derivative works of their copyrighted work.¹ Any person who wants to use or copy the work must seek permission from the copyright holder. However, ownership information for a copyrighted work is sometimes hard to find, and tracking down the owner to ask permission presents daunting challenges for potential users. If the copyright owner cannot be found, the potential licensee faces the choice of either using the work and risking an infringement suit should the owner come forward, or scrapping the project entirely. “Orphan works,” then, are those whose rights holders cannot be located.

In January 2005, the United States Copyright Office initiated an inquiry into the orphan works issue, calling for public comments and policy proposals for increasing public access to the use of “copyrighted works whose owners are difficult or even impossible to locate.”² Individual creators, libraries and museums, nonprofit organizations, and some of the largest players in the entertainment industry filed over 850 initial and reply comments between January and May 2005.³ In addition, the Copyright Office held roundtable discussions on the issue in Washington, D.C., and Berkeley, California.⁴

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1. 17 U.S.C. § 106 (2000).

2. See Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005), available at <http://www.copyright.gov/fedreg/2005/70fr3739.pdf>.

3. See Orphan Works Initial Comments, <http://www.copyright.gov/orphan/comments/index.html> (last visited Jan. 30, 2006); Orphan Works Reply Comments, <http://www.copyright.gov/orphan/comments/reply> (last visited Jan. 30, 2006).

4. See Orphan Works Washington, D.C., Roundtable Transcript (Jul. 26-27, 2005), available at <http://www.copyright.gov/orphan/transcript/0726LOC.pdf>, <http://www.copyright.gov/orphan/transcript/0727LOC.PDF>; Orphan Works Berkeley, CA, Roundtable Transcript (Aug. 2, 2005), available at <http://www.copyright.gov/orphan/transcript/0802LOC.pdf>.

Though the comments submitted in response to the inquiry highlight the broad scope of the orphan works problem, many of the proposed solutions address only some of its causes while ignoring other considerations that would continue to plague the copyright system. Nonetheless, these proposals provide a good starting point for a discussion that requires much more information on the scope of the issue before an adequate resolution may be reached. An adequate solution cannot be reached unless more information is gathered on how many original authors' rights are involved, how often the problem arises, and how difficult it is for potential users of original works to negotiate around the problem.

This Note will discuss the debate that ensued from the Copyright Office's inquiry. Part I discusses the scope of the inquiry and the various players that have been impacted by the orphan works problem. Part II outlines the various causes of the orphan works problem and discusses the issues that a viable solution must resolve. Part III analyzes some of the major proposals submitted to the Copyright Office and illuminates their implications for the U.S. copyright system. Part IV highlights some additional developments regarding orphan works that have followed the conclusion of the inquiry. Part V concludes with a brief discussion of what common ground, if any, has been reached.

I. SCOPE OF THE ORPHAN WORKS PROBLEM

Despite the multitude of comments filed in response to the Copyright Office inquiry, comprehensive data on the frequency with which orphan works impede creative efforts—how many unsuccessful searches potential users perform, how irreplaceable the works sought after are, how often users decide to risk infringement and use the work anyway—does not exist. As a result, some commenters have characterized the orphan works problem as merely creating inconvenience for others to usurp copyrighted works.⁵ Other commenters caution against formulating policies that would stymie copyright protections based solely on anecdotes.⁶

5. See, e.g., Comment of Graphic Artists Guild, *In re Orphan Works*, No. 547, at 2 (Mar. 22, 2005) (“From the point of view of individual creators, this whole argument has nothing to do with copyright and everything to do with money. The EXPENSE of tracking down the owner of a copyright is the big issue, and this argument falls in line with the general attempt by art users to cheapen the cost of using created material.”), available at <http://www.copyright.gov/orphan/comments/OW0547-GAG.pdf>.

6. See Reply Comments of the Am. Soc’y of Composers, Authors and Publishers Regarding Orphan Works, *In re Orphan Works*, No. 106 (May 9, 2005), available at <http://www.copyright.gov/orphan/comments/reply/OWR0106-ASCAP.pdf>.

The degree to which orphan works present a problem varies greatly across different forms of copyrighted works. In the music industry, statutory copyrights only subsist in sound recordings if they were recorded after February 15, 1972.⁷ Label information that accompanies most sound recordings identifies the owner of the copyright. The recording industry has taken particular care to create databases with owner information for works still under copyright protection.⁸ Furthermore, compulsory licensing under § 115 of the Copyright Act grants users some rights to use the recording even if the copyright owner cannot be located so long as the user files a notice of intent to obtain compulsory license with the Copyright Office.⁹

Forms of copyrighted works that have no such statutory provisions, such as books, create greater orphan work concerns. Carnegie Mellon University Libraries conducted a study to determine the feasibility of acquiring copyright permission to digitize their collection. This study illustrates the orphan works problem libraries and archives face.¹⁰ Of the initial sample, 11% of the books (consisting of only copyrighted books) were taken out of the study as too complicated to even pursue because of third-party copyright ownership.¹¹ On average, the researchers could not find 22% of the publishers of the remaining books in the sample.¹² In general, the older the book was, the more difficult it was to find the copyright owner, and the more likely that the book was out of print and neither generating revenues nor aiding scholars.¹³ In the study, 36% of the publishers successfully located did not respond to multiple letters of inquiry.¹⁴ Approximately 79% of the books printed by these publishers were books that

7. 17 U.S.C. § 115(a)(1)(ii) (2000). However, creators of pre-1972 sound recordings might still seek protection through state common law copyright. See *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

8. See Comment of the Recording Indus. Ass'n of Am., *In re Orphan Works*, No. 687 (Mar. 25, 2005) [hereinafter RIAA Comment], available at <http://www.copyright.gov/orphan/comments/OW0687-RIAA.pdf>; Reply Comments of the Nat'l Music Publisher's Ass'n, Inc. and the Harry Fox Agency, Inc., *In re Orphan Works*, No. 120 (May 9, 2005), available at <http://www.copyright.gov/orphan/comments/reply/OWR0120-NM PA-HFA.pdf>.

9. 17 U.S.C. § 115(b) (2000).

10. Comment of the Carnegie Mellon Univ. Libraries, *In re Orphan Works*, No. 537 (Mar. 22, 2005) [hereinafter Carnegie Mellon Initial Comment], available at <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>.

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. *Id.*

were already out of print.¹⁵ Even when the publishers responded, some were uncertain about what types of rights they had, and some did not even have records of having published the book.¹⁶

Other types of copyrighted works do not typically present copyright information regardless of publication status, making them virtually impossible to trace. Graphical works present unique sets of problems. Photographs, for example, often lack even basic information about who owns the photograph, who took it, or even who is in it, rendering the clearance of the copyright in the photograph virtually impossible. Duke University conducted a project in 1998 to digitize and provide access to over 7,000 advertisement images that had been created between 1911 and 1955, but the copyright search process only yielded contacts for less than half of the companies whose advertisements were involved.¹⁷

II. CAUSES OF THE ORPHAN WORKS PROBLEM

The orphan works problem is largely a by-product of developments in U.S. copyright laws that have increased the strength and duration of protection for primary creators. The abolition of registration and renewal requirements, while insuring against the inadvertent loss of copyright protection for newly-created works, has also made it more difficult for potential users and licensees to locate the owners of copyrighted works. Also, longer copyright terms create longer periods over which copyright ownership can change hands and become even more difficult to trace. By making original works more accessible and derivative works easier to create, extrinsic factors such as technological advancements have expanded the number of users that are affected by the problem. This Section explores these causes in more detail.

A. Structural Causes

To a large extent, expansions in copyright law in the past few decades have led to the orphan works problem: the elimination of the registration, renewal, and notice requirements for copyright protection, retroactive protection of foreign works that were previously in the public domain in the United States, and extensions of copyright duration. Prior to the enactment of the Copyright Act of 1976, copyright protection lasted for twenty-eight

15. *Id.*

16. *Id.* at 3-4.

17. See Lynn Pritcher, *Ad*Access: Seeking Copyright Permissions for a Digital Age*, D-LIB MAGAZINE (Feb. 2000), http://www.dlib.org/dlib/february00/pritcher/02_pritcher.html.

years from the date of publication, with a twenty-eight year renewal term conditional upon the registration of the work with the Copyright Office.¹⁸ Works that were not registered at the end of the initial term automatically fell into the public domain.¹⁹ The 1976 Copyright Act abolished the renewal and registration requirements for works created prior to 1978, and the 1992 amendments automatically renewed all works created between 1964 and 1978.²⁰ From 1992 on, registration of a copyrighted work was only required prior to bringing an infringement suit, even for infringements that occurred prior to the actual registration.²¹ Registration prior to the actual infringement, however, does entitle the copyright holder to statutory damages and attorneys' fees.²²

Because rights holders receive benefits in the form of licensing royalties from these arrangements, they have an incentive to make their ownership information known. However, the efficacy of such incentives depends on factors such as the commercial value of the work in question, the ease of making such information found, and the amount of time that has transpired between the fixation of the work and the point at which ownership information is sought.²³ Because of these varying factors, the extent to which ownership information is available for different categories of works varies significantly. Landes and Posner's study reflects these variations in incentives by showing that copyright renewal rates were the highest for musical works (32%), but much lower for books (8%) and graphic-arts works (3%).²⁴ Thus, while some rather sophisticated organizations devoted to collecting registration information even above and beyond that of the Copyright Office exist for some industries, these organizations are lacking for others.

The difficulty of finding copyright ownership information is not limited to domestic works. Section 514 of the Uruguay Round Agreements Act restored full protection to foreign works that previously had been in the public domain in the United States.²⁵ Because many of these works

18. See Notice of Inquiry, 70 Fed. Reg. 3739, 3740 (Jan. 26, 2005), available at <http://www.copyright.gov/fedreg/2005/70fr3739.pdf>.

19. *Id.*

20. Copyright Renewal Act of 1992, Title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307 (1992) (codified at 17 U.S.C. § 304 (2000)).

21. 17 U.S.C. § 411 (2000).

22. 17 U.S.C. § 412 (2000).

23. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477-80, 496-513 (2003).

24. *Id.* at 506.

25. Pub. L. No. 103-465 (1994) (codified at 17 U.S.C. § 104A(a)(1) (2000)).

were never subject to registration or renewal requirements under U.S. law, there are no formal records identifying the copyright owners.²⁶

In addition to the elimination of registration and renewal requirements, the 1976 Copyright Act increased the duration of a copyright from an initial term of twenty-eight years to the life of the author plus fifty years for works created after January 1, 1978.²⁷ Copyrights existing in 1978 were extended for a renewal term of forty-seven years.²⁸ The Sonny Bono Copyright Term Extension Act extended copyright duration for both new and subsisting works by an additional twenty years.²⁹ The sheer length of the copyright term reduces the likelihood that the owner will be found in the later years of the copyright, since existing records, if any, would become more obsolete with time.

One of the motivations behind the extensions of copyright protection and elimination of the formalities requirements was Congress's desire to gain access to the Berne Convention.³⁰ This treaty provides the basis for most international copyright law.³¹ The United States had resisted joining the Berne Convention until 1988, when a growing appreciation of the global media market spurred Congress to pass the Berne Convention Implementation Act.³² Berne harmonizes international copyright law by simultaneously requiring signatories to provide specific minimum rights, and requiring that each nation treat a foreign rights holder as it would treat a domestic one.³³ While not a direct cause of the orphan works problem,

26. Comment of College Art Ass'n, *In re Orphan Works*, No. 647, at 6-7 (Mar. 25, 2005) [hereinafter College Art Ass'n Comment], available at <http://www.copyright.gov/orphan/comments/OW0647-CAA.pdf>; see also Comment of Save the Music / Creative Commons, *In re Orphan Works*, No. 643, at 3 (Mar. 25, 2005) [hereinafter Creative Commons Comment], available at <http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf>.

27. Pub. L. No. 94-553 (codified as amended by the Sonny Bono Copyright Term Extension Act, title I of Pub. L. No. 105-298 (1998) at 17 U.S.C. § 302 (2000)). In the case of anonymous works and institutional copyright holders, 75 years from the date of publication or 100 years from the date of creation, whichever comes first. 17 U.S.C. § 302(c).

28. Pub. L. No. 94-553 (codified as amended by the Sonny Bono Copyright Term Extension Act, title I of Pub. L. No. 105-298 (1998) at 17 U.S.C. § 304(a)-(b) (2000)).

29. Sonny Bono Copyright Term Extension Act, title I of Pub. L. No. 105-298 (1998) (codified at 17 U.S.C. § 302 (2000)).

30. See Christopher Sprigman, *Reform(al)izing Copyright*, 57 STAN. L. REV. 485, 489 (2004).

31. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B] (2005).

32. Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988).

33. PAUL GOLDSTEIN, COPYRIGHT § 16.5 (2d ed. 2002).

certain aspects of the Berne Convention bear directly on the orphan works issue, and therefore limit the types of solutions that may solve the problem. For example, the Convention prescribes a minimum protection term of the life of the author plus fifty years.³⁴ Also, Article 5(2) of the Berne Convention dictates that “the enjoyment and the exercise of [copyright] shall not be subject to any formality.”³⁵ While the Berne Convention does not explicitly define what rights must be guaranteed so as to protect the “enjoyment and exercise of [copyright],” at its core, it at least protects the right to authorize reproduction and control the creation of derivative works.³⁶ Berne does not purport to regulate the standards that a country implements to control copyrights of its own nationals, but merely requires that member countries provide protection to nationals of other signatory countries without any formalities.³⁷ Still, subjecting domestic copyright protection to formalities such as registration and renewal while not requiring it for foreign creators may create concerns of forum shopping.³⁸

These changes to the protection structure of current copyright law create many holes through which creative works may slip and become orphan works. The comments submitted to the Copyright Office illustrate the various ways in which different types of works become orphaned. For example, copyrights may belong to corporate entities that go out of business, leaving no means of identifying the successor of the copyrights.³⁹ Sometimes businesses selectively abandon copyrights to certain titles in their catalogs, yet maintain sparse records on exactly which titles have been abandoned and which titles have been maintained.⁴⁰ Other times, a work may possess no signature or other imprint of the owner’s identity. The concern is that, in the long run, repeated experiences with orphan works will discourage potential users, causing them to turn to other kinds of crea-

34. *Id.* § 16.5.2.

35. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, revised in Paris July 24, 1971, amended in 1979, 25 U.S.T. 1341, 828 U.S.T.S. 221 (text revised in Paris) [hereinafter Berne Convention].

36. GOLDSTEIN, *supra* note 33, § 16.5.3.

37. 1 NIMMER, *supra* note 31, § 17.01.

38. See Comments of Jane C. Ginsburg & Paul Goldstein, *In re Orphan Works*, No. 519 (Mar. 18, 2005) [hereinafter Ginsburg & Goldstein Comment], available at <http://www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf>.

39. See College Art Ass’n Comment, *supra* note 26, at 20–22 (listing examples of individuals who are unable to find successors to copyrights owned by corporate entities).

40. See Comment of Prelinger Library, *In re Orphan Works*, No. 593, at 3–4 (Mar. 14, 2006) (providing an example of when corporate transitions result in the loss of copyright ownership information), available at <http://www.copyright.gov/orphan/comments/OW0593-PrelingerLibrary.pdf>.

tive efforts or give up creative efforts entirely.⁴¹ The greater the risk that an absent copyright owner will deny permission or bring an infringement suit if the user decides to go forward with the project anyway, the more creative projects will be abandoned or substituted with works whose authors are more easily found.

Studies conducted on the copyright clearance process indicate that clearance costs are extremely high, and have been increasing in the past twenty years.⁴² These costs comprise not only the monetary costs of time and effort spent in locating the copyright owners, but also the costs of negotiating and paying for the licensing fees after finding the owners. Many orphan works respondents stated that the high costs of even conducting the search meant that they avoided them altogether.⁴³ Though high search costs are not unique to orphan works but are rather a characteristic of the overall copyright licensing system, the prevalence of orphan works in the system increases the risk that the search will not be fruitful, thereby increasing the intangible search costs. As a result, a reduction in the monetary and transaction costs of conducting a search, either through the Copyright Office or through private industry, could help to alleviate disillusionment with copyright licensing for all users, regardless if the work for which they seek rights is orphaned.

Though the fair use exemptions described under 17 U.S.C. § 107 allow for some uses even without permission,⁴⁴ they give insufficient protection to creators seeking to use orphan works. In gathering comments from its members on the orphan works problem, the College Art Association found that a lack of understanding about fair use allowances, lack of access to

41. See College Art Ass'n Comment, *supra* note 26, at 22-27.

42. See generally PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILM-MAKERS (2004), http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf.

43. See Comment of the Ctr. for the Study of the Pub. Domain, Duke Law School, *In re Orphan Works*, No. 597, at 4 (Mar. 2005) [hereinafter Ctr. for the Study of the Pub. Domain Comment], available at <http://www.copyright.gov/orphan/comments/OW0597-CPD2.pdf>.

44. Fair use exemptions require courts to take into account the following factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2000).

legal resources for information, “uncertainties of the application of the fair use doctrine,” and a significant desire among many art publishers “to eliminate the risk of an infringement suit entirely” rendered fair use an imperfect solution.⁴⁵ Moreover, fair use would be insufficient to shield certain types of orphan work uses from liability. For example, the commercial sale of a photographic collage would probably fail the fair use test because a court must consider factors such as whether the derivative work is being used for commercial purposes⁴⁶ and the substantiality of the portion used in relation to the copyrighted work as a whole.⁴⁷

The Copyright Act also attempts to alleviate the burden on public access to copyrighted works through its exemptions for libraries and archives under § 108.⁴⁸ However, the exemptions do not apply to musical works, pictorial, graphical, or sculptural works, or audiovisual works.⁴⁹ Also, libraries and archives are only allowed to make one copy,⁵⁰ or three copies for preservation purposes,⁵¹ and then only upon a reasonable determination that the copyrighted work cannot be obtained at a fair price.⁵² These conditions are eased only in the last twenty years of the copyright term.⁵³ Because of the difficulty of determining when the copyright term began and the sparseness of ownership records, libraries must assume that the work has the longest possible copyright term, with the benefits for library and archive use only covering the last twenty years of it.⁵⁴ Even then, § 108(h)(2)(B) also requires a library or archive to determine if a copy of a work can be obtained at a “reasonable price.” Since this determination is largely subjective, libraries and archives fear that such a judgment call would expose them to liability.⁵⁵ Furthermore, while the exemptions provided to libraries and archives for the preservation of copyrighted works at risk of deterioration may have sufficed for more traditional forms of media, they are inadequate for libraries and archives to adapt to the changing technological forms of copyrighted works.

45. College Art Ass’n Comment, *supra* note 26, at 23.

46. 17 U.S.C. § 107(1).

47. *Id.* § 107(3).

48. *Id.* § 108.

49. *Id.* § 108(i).

50. *Id.* § 108(a).

51. *Id.* § 108(b).

52. *Id.* § 108(e).

53. *Id.* § 108(h)(1).

54. Comment of Stanford Univ. Libraries, *In re Orphan Works*, No. 457, at 2-3 (Mar. 18, 2005) [hereinafter Stanford Univ. Libraries Comment], available at <http://www.copyright.gov/orphan/comments/OW0457-StanfordUniversity.pdf>.

55. *Id.* at 3.

B. Extrinsic Causes

1. Technological Changes

Because the development of digital technologies has facilitated access to and use of copyrighted works, orphan works potentially impede more creative efforts than ever before. Technology has encouraged the creation of many more primary works than before, resulting in an even greater set of works that are potentially orphaned.⁵⁶ Therefore, although technology has the potential of promoting more creative efforts, orphan works hamper the creative potential that new technologies could unleash.

Easy and inexpensive access to digital technologies has encouraged new forms of creative works that are based entirely on incorporating existing works into visual and audio collages. As Professor Van Houweling argues, "the cultural importance and ubiquity of copyrighted texts, images, and sounds may make multimedia collage and other forms of creativity that incorporate existing copyrighted works even more vital forms of cultural commentary than they have been in the past."⁵⁷ The documentary film *Tarnation*, the surprise hit of the 2004 Cannes Film Festival, exemplifies how technology has facilitated this form of cultural expression. The film was made by piecing together photographs, home videos, and footage of individual interviews on the Apple Macintosh software package iMovie, for a total budget of \$218.32.⁵⁸

Traditionally, researchers could only use a copyrighted work if they had access to a physical copy. Technology breaks down these limitations by enabling the wide-ranging dissemination of nonphysical digital copies.⁵⁹ People seeking to access or use a copyrighted work no longer have to travel to its physical location. The internet and advancements in digital publishing have also facilitated the distribution of these works.

The prevalence of orphan works undermines the benefits that these digital technologies provide. The new forms of derivative works can only legitimately progress with the copyright permissions of the works incorporated into them. Also, the difficulty of obtaining permission to copy materials still under copyright protection has impeded the digitization efforts

56. Ctr. for the Study of the Pub. Domain Comment, *supra* note 43, at 2.

57. Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539 (2005).

58. Charlotte Higgins, *Cannes 2004: \$200 Family Film Is Festival Hit*, GUARDIAN, May 18, 2004, at 6, available at http://www.guardian.co.uk/uk_news/story/0,3604,1219070,00.html.

59. Stanford Univ. Libraries Comment, *supra* note 54, at 1-2.

libraries have made to create digital library collections.⁶⁰ In addition, though the Digital Millennium Copyright Act allows libraries and archives to make a digital copy under some circumstances, that digital copy must remain within the confines of the library in which the physical copy is located.⁶¹ Therefore, the digital copy is even more constrained than the physical, which can at least be checked out of the library. These barriers confine a large body of works to the physical environment “just at the time when digital technologies offer the capacity to ‘liberate’ the world’s collective scholarly record.”⁶²

2. Institutional Changes

Another extrinsic cause of the orphan works problem has been the development of institutional safeguards against the risk of infringement, particularly in the film industry. Many movie studios require that a film carry infringement liability insurance before they will agree to distribute and market the film.⁶³ Often, these liability insurers have minimum thresholds of risk that are higher than what the derivative work creator may be willing to undertake and may not be met if large numbers of orphan works are involved in the making of the film.⁶⁴ Other movie studios even require that the copyrights of all the works involved in a film be cleared before the movie can be distributed.⁶⁵ Therefore, even if the owner of the derivative work is willing to risk infringement and continue with the use of the orphan work, that owner may not be able to clear the thresholds established by the liability insurers and market distributors. This barrier further exacerbates the deterrent effect that orphan works have on the cumulative use of creative works.

Creators traditionally have been able to leverage their copyright interest to secure resources for a creative work by granting some portion of the

60. See Comment of MIT Libraries, *In re Orphan Works*, No. 515 (Mar. 14, 2006) [hereinafter MIT Libraries Comment], available at <http://www.copyright.gov/orphan/comments/OW0515-MIT-Libraries.pdf>; Comment of the Library of Congress, *In re Orphan Works*, No. 630 (Mar. 25, 2005), available at <http://www.copyright.gov/orphan/comments/OW0630-LOC.pdf>; Comment of Sidney Verba, Harvard Univ. Libraries, *In re Orphan Works*, No. 639 (Mar. 25, 2005), available at <http://www.copyright.gov/orphan/comments/OW0639-Verba.pdf>. See generally Alicia Ryan, *Contract, Copyright, and the Future of Digital Preservation*, 10 B.U.J. SCI. & TECH. L. 152 (2004); Peter B. Hirtle, *Digital Preservation and Copyright*, http://fairuse.stanford.edu/commentary_and_analysis/2003_11_hirtle.html.

61. See 17 U.S.C. § 108(b)(2) (2000).

62. MIT Libraries Comment, *supra* note 60, at 1.

63. AUFDERHEIDE & JASZI, *supra* note 42, at 9-10.

64. AUFDERHEIDE & JASZI, *supra* note 42, at 9-10.

65. AUFDERHEIDE & JASZI, *supra* note 42, at 9-10.

rights guaranteed under copyright to film studios and other like institutions.⁶⁶ In the film industry, where many studios require infringement insurance, the risk that a copyright interest will be void because the copyrights of the underlying works have not been cleared severely undermines this ability.⁶⁷ This risk can prevent a film project, regardless of how valuable it is, from being distributed or marketed.⁶⁸

C. Individual Uses versus Libraries and Archives

The orphan works problems affect two main categories of creative functions. The underlying concerns of—and therefore solutions for—these two categories differ and must be analyzed accordingly. The first category is the cumulateness problem; that is, the extent to which orphan works construct barriers to the creation of works that seek to build upon copyrighted works. The second category is the issue of maintaining public access to copyrighted works. This category has more to do with the extent to which orphan works are inhibiting libraries and archives from using current technologies to maximize public access capabilities. A subset of this group includes the archiving of purely digital information that is transient in nature, such as webpages. For each of these categories, the balance among the rights of cumulative creators, the original creators, and the public good that copyright law promotes varies, rendering a one-size-fits-all approach unsatisfying to all parties involved.

Orphan works have more of a system-wide impact on the decision to provide public access to all copyrighted works. Allowing access to digitized copies of archived materials often involves computer networks that may expose libraries and archives to additional legal liability.⁶⁹ Uncertain legal standing for making copies, even for preservation purposes, discourages libraries from engaging in the venture at all.⁷⁰ What hinders these libraries and archives in their attempts to digitize copyrighted works and provide public access to them is the cumulative uncertainty that their searches will prove fruitful, which is a combination of both the orphan works problem and the denial of permission problem. The aim of a feasibility project like the one Carnegie Mellon conducted is to determine whether the cost of such a project is even feasible, given the prevalence of

66. See Van Houweling, *supra* note 57, at 1540-42.

67. See AUFDERHEIDE & JASZI, *supra* note 42, at 9-10.

68. AUFDERHEIDE & JASZI, *supra* note 42, at 9-10.

69. Comment of Internet Archive / Samuelson Law, Tech. and Pub. Policy Clinic, *In re Orphan Works*, No. 657, at 2 (Mar. 25, 2005) [hereinafter Internet Archive Comment], available at <http://www.copyright.gov/orphan/comments/OW0657-InternetArchive.pdf>.

70. *Id.* at 1.

orphan works and denial of permission.⁷¹ Whereas in the derivative use context failed searches may result in a scrapped project while successful searches could result in the grant of permission (and therefore the rate of use will be directly related to the rate of successful searches), a significant probability of failed searches on a cumulative level would lead a library to abandon digitization efforts of both orphan works and works where the owner is identifiable.⁷²

There is some overlap between the policy considerations for orphan works in the cumulative creation and public access contexts, since a reduction in individual transaction costs leads to a reduction in cumulative transaction costs. For libraries and archives, though, the deterrent cumulative costs of search mean that non-orphan works contribute to the problem just as much as orphan works do.⁷³

III. ANALYSIS OF THE PROPOSALS AND IMPLICATIONS

The Copyright Office Notice of Inquiry laid out a series of questions regarding the orphan works problems that the office hoped to answer:

- [1.] What are the difficulties faced by creators or other users in obtaining rights or clearances in pre-existing works?
- [2.] How should an “orphan work” be defined?
- [3.] Should a certain amount of time have elapsed since first publication or creation in order for a work to be eligible for “orphaned” status?

71. CARNEGIE MELLON UNIV. LIBRARIES, EXPLORING THE FEASIBILITY OF SEEKING COPYRIGHT PERMISSIONS (2002), <http://www.library.cmu.edu/Libraries/FeasibilityStudy-FinalReport.pdf>.

72. See MIT Libraries Comment, *supra* note 60, at 1.

73. The Copyright Office has established a separate working group that aims specifically to look at changes to the copyright regime that should be made in order to bring § 108, dealing with exemptions for libraries and archives, in line with digital technologies of the present day. See Section 108 Study Group (Library of Congress), <http://www.loc.gov/section108> (last visited Jan. 26, 2006). There has also been a bill introduced in the House of Representatives that would attempt to solve the problem by extending the library and archive right to reproduce in the last twenty years of a copyright term to musical, pictorial, graphical works, and motion pictures. See Preservation of Orphan Works Act, H.R. 5136, 108th Cong. (2004), available at <http://www.govtrack.us/congress/bill.xpd?bill=h108-5136>.

[4.] Should the status of “orphan works” only apply to published works, or are there reasons for applying it to unpublished works as well?

[5.] However a work is identified and designated as “orphaned,” what would be the effects of such designation?

[6.] How would the proposed solutions comport with existing international obligations regarding copyright?⁷⁴

At a minimum, according to commenters, a web-based, centralized database of all existing registration information should be created.⁷⁵ The Recording Industry Association of America, for example, argues that digitizing pre-1978 registration records at the Copyright Office would be a great first step since those records are currently only available on-site at the Copyright Office in Washington, D.C.⁷⁶ Beyond this minimum step, however, the proposals diverge in their approaches to the solution, with each proposal emphasizing different policy concerns.

Though technological advancements have increased the incidence of orphan works serving as a barrier to creative efforts, they have also made solving the problem of orphan works more feasible.⁷⁷ For example, databases that keep track of owner information are easier to create. Also, security technologies may alleviate concerns about abuse of unauthorized copies by making specific uses of orphan works easier to track and contain.

A. Method of Identifying Orphan Works

Since the elimination of formalities has contributed to the orphan works problem, some commenters have advised the reinstatement of some form of formalities. The biggest proponent behind this proposal is Stanford’s Center for Internet and Society, which filed comments with the Copyright Office on behalf of Save the Music and Creative Commons.⁷⁸

74. Notice of Inquiry, 70 Fed. Reg. 3739, 3741-43 (Jan. 26, 2005), available at <http://www.copyright.gov/fedreg/2005/70fr3739.pdf>.

75. See, e.g., Reply Comment of Carnegie Mellon Univ. Libraries, *In re Orphan Works*, No. 49, at 2 (May 4, 2005), available at <http://www.copyright.gov/orphan/comments/reply/OWR0049-CarnegieMellon.pdf>; RIAA Comment, *supra* note 8, at 3-5.

76. RIAA Comment, *supra* note 8, at 2.

77. See Ginsburg & Goldstein Comment, *supra* note 38, at 2.

78. See Creative Commons Comment, *supra* note 26; Reply Comment of Save the Music / Creative Commons, *In re Orphan Works*, No. 114 (May 9, 2005), available at <http://www.copyright.gov/orphan/comments/reply/OWR0114-STM-CreativeCommons.pdf>. For more information on Save the Music, a nonprofit group dedicated to the preser-

Its proposal calls for a mandatory registration of copyrighted works after the initial twenty-five years of protection, with an additional renewal requirement after the first fifty years of protection.⁷⁹ Works that fail to be registered or renewed will automatically be designated orphan works, which can be used without prior permission upon the payment of a default licensing fee into an “orphan fund.”⁸⁰ Owners of these unregistered works who discover uses of their work after the fact can subsequently claim any orphan fund payments that were submitted for the use of their work.⁸¹

The majority of commenters, however, have proposed identifying orphan works based on the failure of a “reasonable search” to locate the copyright owner. These commenters fall into two categories: those who would prefer a formal definition of “reasonable search” through statute, administrative rulemaking, or industry roundtables,⁸² and those who propose that the reasonableness of a search be determined on a case-by-case basis.⁸³ Yet another proposal that falls into the category of reasonable search solutions is the Canadian model, whereby the copyright office grants a de facto license upon finding that the search record presented by the potential user is sufficient.⁸⁴

The Canadian model exemplifies an overextension of administrative burden in creating certainty. Anyone who seeks to use a work but cannot find the copyright owner can petition the Canadian Copyright Board for a license, which is granted upon a finding by the Board that the applicant

vation of Jewish cultural music, see Save the Music, <http://savethemusic.com> (last visited Dec. 13, 2005). For more information on Creative Commons, a nonprofit group that offers a set of tools for creators to signal how they want their works used, see Creative Commons, <http://creativecommons.org> (last visited Jan. 20, 2006). One form of this proposal has been submitted to Congress in the form of a bill, where it is currently making its way through chambers. See Public Domain Enhancement Act, H.R. 2408, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-2408>.

79. Creative Commons Comment, *supra* note 26, at 16-18.

80. Creative Commons Comment, *supra* note 26, at 16-18.

81. Creative Commons Comment, *supra* note 26, at 17.

82. See Ctr. for the Study of the Pub. Domain Comment, *supra* note 43, at 9-10; RIAA Comment, *supra* note 8, at 3-5; Comment of the Motion Picture Ass’n of Am., *In re Orphan Works*, No. 646, at 4-5 (Mar. 25, 2005) [hereinafter MPAA Comment], available at <http://www.copyright.gov/orphan/comments/OW0646-MPAA.pdf>.

83. See Comment of the Copyright Clearance Initiative / Glushko-Samuelson Clinic, *In re Orphan Works*, No. 595, at 3-6 (Mar. 24, 2005) [hereinafter Copyright Clearance Initiative Comment], available at <http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf>; Comment of Pub. Knowledge, *In re Orphan Works*, No. 629, at 5-6 (Mar. 25, 2005) [hereinafter Pub. Knowledge Comment], available at <http://www.copyright.gov/orphan/comments/OW0629-PublicKnowledge.pdf>.

84. Copyright Act, R.S.C., ch. C-42, § 70.7 (1985).

has conducted a reasonable search.⁸⁵ The Board defines a reasonable license fee, collects it from the user, and deposits the fee into a fund from which the copyright owner can collect should she later appear.⁸⁶ Though obtaining a definitive decision on the reasonableness of the copyright search protects potential users against infringement suits, the Canadian system has had limited success. The Canadian system requires that potential users actually summon all the paperwork collected during the reasonable search for a finding of reasonableness in front of an administrative panel.⁸⁷ The complexity and burden of this task likely daunts potential users of copyrighted works. Since its inception in 1985, only 171 licenses have been issued,⁸⁸ and six applications denied.⁸⁹

These proposals illustrate a tradeoff between certainty and flexibility. The variance in the severity of the orphan works problem across different copyright industries suggests that a flexible approach would be less intrusive on the rights of the primary creators. However, the increased certainty from a fixed approach might ease individual decision-making for the derivative users. The Copyright Clearance Initiative argues that, although the case-by-case proposal does not completely eliminate uncertainty, the gatekeepers of the copyright licensing world—the publishing companies, music studios, and liability insurers that require clearance before allowing a project to go forward—do not require absolute certainty, but rather a mere reduction in uncertainty.⁹⁰ Still, completely leaving the determination of a reasonable search up to the individual user's conscience leaves more room than necessary for abuse of the system. Duke University's Center for the Public Domain proposes a reasonable search definition that would be defined specific to the class of work, presumably through discussion of major industry players, and would also be tiered according to the type of use (e.g., educational, noncommercial, or commercial), thus balancing specificity and flexibility. Though this proposal would also be more expensive to implement upfront, given the degree of information-gathering necessary, this expense would be justified because the definition of the orphan work is crucial to the success of the solution.

85. *Id.*

86. *Id.*

87. *Id.*

88. See Unlocatable Copyright Owners: Licenses Issued, <http://www.cb-cda.gc.ca/unlocatable/licences-e.html> (last visited Jan. 31, 2006).

89. See Unlocatable Copyright Owners: Other Decisions, <http://www.cb-cda.gc.ca/unlocatable/otherdecisions-e.html> (last visited Jan. 31, 2006).

90. See Copyright Clearance Initiative Comment, *supra* note 83, at 9.

Professor Sprigman argues that the registration and renewal system may be the most efficient system, since it would only require a natural selecting of works into valuable and non-valuable categories.⁹¹ However, its validity under the Berne Convention is dubious, not only because registration after twenty-five years may be interpreted as violating the no-formalities requirement, but also because it could result in the loss of protection after only fifty years, which is shorter than the life plus fifty-year requirement of the Berne Convention. Creative Commons argues that registration would not violate the no-formalities requirement of the Berne Convention, primarily because noncompliance with the formalities would not vitiate copyright entirely, but would rather subject the copyright holder to a default license fee:

Failure to register a work in the Orphan Works Registry would not remove the work's copyright protection; it would, rather, serve as a signal that the unregistered work was an orphan, and, therefore, that the rightsholder was no longer exploiting the work through any of the channels—customized licensing, infringement damages, injunctions—that the copyright laws currently offer. Rightsholders who fail to register their works would be choosing to exploit their works through a lower-cost system of one-size-fits-all default licenses with no need to identify a rightsholder and ask permission.⁹²

Professor Sprigman further argues that an “author who fails to comply with new-style formalities is merely converting an entitlement that is initially protected by a property right . . . into an entitlement protected by a liability right,” which is not prohibited under Berne.⁹³ However, regardless of the validity of the Creative Commons proposal under Berne, there are other reasons to believe that a formalities solution based on the age of the work would not suffice to remedy the causes behind the orphan works problem.

Because the age of copyrighted works bears a direct relationship to many causes of the orphan works problem, many commenters other than Creative Commons have suggested that an orphan works designation be based on the age of the work in question. The more time that has passed

91. See Sprigman, *supra* note 30, at 519-21 (describing formalities as an “ex post test of commercial viability”); see also Landes & Posner, *supra* note 23, at 517-18 (arguing that even a system of indefinite renewals would be efficient because only the most commercially valuable works would be renewed, while the remainder would fall into the public domain).

92. Creative Commons Comment, *supra* note 26, at 20.

93. Sprigman, *supra* note 30, at 557.

between the initial fixation of the copyrighted work and the seeking of permission, the more likely it is that the copyright has been transferred, the ownership records are outdated, and the more uncertainty there may be over who owns the rights.⁹⁴ Furthermore, the more time that has passed, the greater the chances are that changes and extensions in copyright law will create more uncertainty as to whether or not the copyright remains valid.⁹⁵ On the other hand, because of the discounting of future revenue streams, the value of commercial works that is realized further along in the life of the copyright will provide increasingly smaller increases in the incentives for an increase in creative effort.⁹⁶ These relationships between time and orphan works suggest to many commenters that twenty-five to twenty-eight years is the optimum period of unrestricted copyright protection, after which a work will be presumed orphaned unless the owner registers and renews their interest in the copyright.⁹⁷

A determination based on age, however, would not suffice to protect newly-created digital works. Works such as computer software and the webpages that the Internet Archive is trying to preserve⁹⁸ have much shorter life spans, with computer software rarely having a useful life beyond ten years⁹⁹ and webpages even shorter than that. Furthermore, many of the comments submitted by users of copyrighted works describe frustrating experiences tracking down the owners of even very recent works, for which a twenty-five-year threshold would not solve the orphan works problem.¹⁰⁰

Thus, while time may serve as an adequate proxy for the difficulty of locating a copyright owner, it is imperfect, and any proposal based on the age of a work alone would result in unintended exclusions from orphan works. To the extent possible, then, solutions that are tailored to the source of the problem—the difficulty of finding ownership information—would do best in solving the problem without inflicting collateral damage. Because the difficulty of finding ownership information would vary across industries, as discussed above, efforts targeted at defining what would

94. See Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 434-35 (2002).

95. *Id.*

96. *Id.* at 417; cf. Landes & Posner, *supra* note 23, at 481-82.

97. See, e.g., Creative Commons Comment, *supra* note 26, at 16-18; Stanford Univ. Libraries Comment, *supra* note 54, at 3.

98. See Internet Archive Comment, *supra* note 69.

99. Liu, *supra* note 94, at 474.

100. See College Art Ass'n Comment, *supra* note 26, at 9, 14, 19, 22 (citing anecdotes from members who have had difficulty locating ownership information for works created in the past twenty years).

constitute a reasonable search in each industry, as proposed by the Center for the Public Domain and RIAA, would provide a more narrowly-tailored solution.

B. Effect of Owner Reappearance

Most commenters agree that the exchange of information to facilitate licensing exchange must exist in both directions.¹⁰¹ If registries and databases provide ownership information to potential users, then users should also provide usage information to owners who might resurface. As a result, many proposals have a “notice of intent to use” database.¹⁰² Though this notice facilitates the reappearance of copyright owners to police their rights, it also raises the question of what to do with the derivative work once the owners make their voices heard.

Almost all commenters agree that the appearance of the owner should prevent any future uses of the copyrighted work.¹⁰³ However, a closer inspection shows diverging views on what effect the reappearance should have on ongoing uses that commenced prior to the reappearance. The Copyright Clearance Initiative proposal suggests that the derivative use should continue without interruption, so long as the derivative work owner makes attribution adjustments accordingly.¹⁰⁴ Other proposals suggest that the ongoing uses should be subject to a notice and takedown provision; that is, an ongoing use should cease at the moment the copyright owner makes clear her intentions.¹⁰⁵ However, notice and takedown would also be problematic in instances where the derivative user has invested large amounts of time, money, and marketing in creating the derivative work.

The proposal submitted by the Duke Center for the Study of the Public Domain attempts to balance the rights of primary and derivative users

101. See, e.g., RIAA Comment, *supra* note 8, at 3-7; Creative Commons Comment, *supra* note 26, at 16-19 (discussing notice of intent to use database for unpublished works).

102. See, e.g., MIT Libraries Comment, *supra* note 60, at 2; Ctr. for the Study of the Pub. Domain Comment, *supra* note 43, at 10.

103. See, e.g., Stanford Univ. Libraries Comment, *supra* note 54, at 3; RIAA Comment, *supra* note 8, at 6 (discussing need for removing work from “orphan” registry upon owner reappearance); Comment of Soc’y of Am. Archivists, *In re Orphan Works*, No. 620, at 11-12 (Mar. 25, 2005) [hereinafter Soc’y of Am. Archivists Comment], available at <http://www.copyright.gov/orphan/comments/OW0620-SAA.pdf>.

104. See Copyright Clearance Initiative Comment, *supra* note 83, at 4.

105. See, e.g., Stanford Univ. Libraries Comment, *supra* note 54, at 3 (proposing that a take-down request by the author should cut off orphan work protections); Carnegie Mellon Initial Comment, *supra* note 10, at 8.

rather than categorically determine *ex ante* what those rights should be. The proposal establishes a tiered remedy approach:

[1.] Absolute immunity is retained if the user takes down or refrains from further use of the orphan work. . . .

[2.] The user may, at his or her discretion, continue to use the orphan work, provided he or she pays predetermined royalties going forward [subject to] a reasonable cap that will both encourage uses . . . while providing remuneration should a lost copyright owner reappear. . . .

[3.] The above cap would be applied for uses of a single orphan work in its entirety. When an individual chooses option 2, but makes use of only a portion of an orphan work or uses multiple orphan works or portions of multiple works the royalty calculation should be discounted by the substantiality of the orphan work in proportion to the finished project and the number of orphan works owners seeking royalties.¹⁰⁶

This approach effectively provides the derivative user with choices that allow her to recoup the desired amount of the effort spent on the derivative work while adequately compensating the reappearing copyright owner. The absolute immunity provision shields potential users from infringement suits after they have used an original work, and the certainty of absolute immunity reduces the risk that the user has to face prior to the work's use. The reasonable royalty option and the requirement that the original work's importance to the derivative work be taken into account simulates the licensing negotiations that might have taken place had the owner been found in the first place.

However, since the work has already been used, the bargaining leverage of the original owner is significantly reduced, and the reasonable royalty is left purely to the discretion of the derivative user. Therefore this proposal, while flexible enough, does require a further enforcement mechanism that protects the original owner should the derivative user choose the reasonable royalty option but fail to offer a royalty that is truly reasonable given the circumstances. A separate arbitration or dispute resolution mechanism may suffice as an objective determinant of what a reasonable royalty is after the owner reappears. This safety net is necessary to the proposal to guard against holdouts, though the additional administrative resources it requires may be a significant consideration.

106. Ctr. for the Study of the Pub. Domain Comment, *supra* note 43, at 11.

C. Limitations on Remedies

While there is considerable agreement that the forms of remedies available to copyright holders should be limited in some manner, specific proposals of ways to implement these limitations vary widely. Most commenters agree that injunctions, statutory damages, and attorneys' fees should not be available as remedies to the copyright owner upon reappearance.¹⁰⁷ However, the monetary compensation that proposals advise for the copyright owner range across a spectrum from a flat per-use rate¹⁰⁸ to reasonable royalties to be determined either through private negotiation or by a judicial body.¹⁰⁹

Some commenters have proposed that uses of orphan works should be conditioned on the payment of a default license fee into an escrow account¹¹⁰ or "orphan fund"¹¹¹ from which reappeared copyright owners can collect monetary remedies. Escrow accounts and default licenses may be inefficient, however, since most orphan works likely will not be reclaimed by their original owners. Many of these funds will, therefore, sit unused and are essentially wasted. Furthermore, setting a single default fee for uses that range in value could still result in litigation, since some reappeared owners may argue that they are entitled to more than the default fee for uses that are commercially valuable.¹¹² Still, upfront payments of a default license fee could serve as an indication that the search was conducted in good faith and therefore act as an enforcement mechanism.

Since the derivative user has contributed to the rebirth of the original work and has played a part in making the work commercially viable once again, she should be rewarded for her efforts. The original copyright holder still receives the benefit of future licensing arrangements that result from this new exposure. Therefore, monetary remedies against the derivative user should be limited to actual damages suffered by the copyright

107. See, e.g., Creative Commons Comment, *supra* note 26, at 16; MPAA Comment, *supra* note 82, at 5-6; RIAA Comment, *supra* note 8, at 8; Soc'y of Am. Archivists Comment, *supra* note 103, at 11.

108. See, e.g., Pub. Knowledge Comment, *supra* note 83, at 6-7 (capping per-use recoveries at \$200); see also Copyright Clearance Initiative Comment, *supra* note 83, at 5 (proposing an award cap of \$100 per work used as an alternative to actual damages).

109. See, e.g., MPAA Comment, *supra* note 82, at 6.

110. Copyright Act, R.S.C., ch. C-42, sec. 77 (1985).

111. Creative Commons Comment, *supra* note 26, at 17.

112. See Reply Comment of the Electronic Frontier Found., *In re Orphan Works*, No. 142, at 2-3, available at <http://www.copyright.gov/orphan/comments/reply/OWR0142-EFF.pdf>.

holder, which indicate situations where the derivative user has usurped part of the market of the original copyright holder.¹¹³

IV. FURTHER DEVELOPMENTS

The Copyright Office inquiry was merely the first step in addressing the orphan works problem. By drawing attention to the issue, the inquiry has sparked various other approaches. In fact, the Copyright Office has established a separate working group to address the issue of orphan works as applied to libraries and archives.¹¹⁴ The § 108 working group is notable for the fact that its members come from many of the libraries and archives that submitted comments during the inquiry, as well as prominent industry players.¹¹⁵ At the time of writing, proposals for registration and other amendments to the Copyright Act were circulating in Congress.¹¹⁶ The Stanford Center for Internet and Society has even filed suit in federal court requesting declaratory judgment that copyright restrictions on orphan works resulting from the copyright term extensions are unconstitutional.¹¹⁷ These developments further highlight the scope of the problem, and the desire from both government and industry to reach amenable solutions.

In January 2006, the Copyright Office issued its report and findings from the orphan works inquiry.¹¹⁸ The Copyright Office noted that, although the evidence submitted by the commenters suggested the orphan works problem was real, the magnitude of the problem remained difficult to quantify.¹¹⁹ It found that only 24% of the comments submitted presented enough information for the Office to categorize it as a true orphan works situation; many of the comments presented situations where the copyright owner was identifiable and locatable, but where other impedi-

113. See Copyright Clearance Initiative Comment, *supra* note 83, at 5 (proposing that remedies be limited to either actual damages or an award of \$100 per work used); RIAA Comment, *supra* note 8, at 8.

114. See The Section 108 Study Group Homepage, <http://www.loc.gov/section108> (last visited Jan. 26, 2006).

115. See The Library of Congress, Members of the Section 108 Study Group, <http://www.loc.gov/section108/members.html> (last visited Mar. 17, 2006).

116. See Preservation and Restoration of Orphan Works for Use in Scholarship and Education Act, H.R. 24, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-24>; Public Domain Enhancement Act, H.R. 2408, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-2408>.

117. See *Kahle v. Ashcroft*, No. C-04-1127 MMC, 2004 WL 2663157 (N.D. Cal. Nov. 19, 2004) (order granting motion to dismiss; vacating hearing).

118. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

119. *Id.* at 21-23.

ments to copyright clearance arose.¹²⁰ The Copyright Office also discussed the various historical and legal factors that affect the orphan works problem,¹²¹ and concluded that “[t]he orphan works problem is thus a by-product of the United States’ modern copyright system, and has been with us since at least the day the 1976 Act went into effect.”¹²² It found that, though many solutions to certain orphan works situations exist in the current copyright framework, they are insufficient to resolve the issue.¹²³

Based on these findings, the Copyright Office recommended a legislative remedy in the form of an amendment to Chapter 5 of the Copyright Act.¹²⁴ The remedy would allow a user to proceed with the use of a copyrighted work, provided that she has performed a “reasonably diligent search” in “good faith” prior to commencement of use.¹²⁵ The Office also recommended an additional requirement that the user provide attribution to the author and copyright owner as long as the copyrighted work is being used.¹²⁶ The burden of showing that these two conditions have been met rests on the user.¹²⁷ The satisfaction of these two conditions would mean that, in an infringement suit brought by a reappeared copyright owner, monetary damages would be limited to “reasonable compensation” (equivalent to a reasonable licensing fee in most cases), or none at all in cases of noncommercial use and where the user ceases use upon owner reappearance.¹²⁸ Also, injunctive relief would be limited to situations where the user has not incorporated a “substantial” amount of her own expression into the derivative work, provided the user pays reasonable compensation; in all other situations, the court must account for any reliance interest of the user that might be harmed by injunctive relief.¹²⁹ The Office rejected the idea of a centralized user registry of intent to use as costly and placing too great of a burden on a potential user.¹³⁰ It also rejected the Canadian escrow account; it concluded that the system would be highly inefficient because, in the large majority of cases, no copyright owner would actually reappear to claim the funds.¹³¹ Notably, the Copyright Office ul-

120. *Id.* at 21-23, 34-36.

121. *Id.* at 41-44.

122. *Id.* at 44.

123. *Id.* at 92.

124. *Id.* at 93. For the recommended statutory language, see *id.* at 127.

125. *Id.* at 96-109.

126. *Id.* at 110-12.

127. *Id.* at 115.

128. *Id.* at 115-19.

129. *Id.* at 119-21.

130. *Id.* at 113.

131. *Id.* at 113-14.

timately recognized the lack of information on the orphan works problem and recommended that the proposed provisions sunset after ten years, giving Congress an opportunity to revisit the issue and examine the system's efficacy.¹³²

V. CONCLUSION

The wide range of responses to the Copyright Office inquiry demonstrates the wide-ranging effects of the orphan works problem. Inevitably, the viewpoints of the various players involved do not extend much beyond the agreement that there is a problem. Still, all sides have devoted genuine efforts to decreasing uncertainty in the licensing process and reducing the costs of searching and licensing. Technology plays a large role in most of the proposals, suggesting that the time is now ripe for effective change. At a minimum, the use of technologies to facilitate the exchange of information between potential users and copyright owners must be implemented, regardless of whether any structural changes are made to the copyright system.

As technology advances and as people gather more information about the scope of the problem, one can expect even more proposals to surface. The myriad of developments that have followed the Copyright Office inquiry will contribute to a deeper understanding of the problem and potential solutions. Even the Copyright Office Report accounts for the inadequate information currently available on the issue. The orphan works inquiry, therefore, serves as a starting point for ongoing investigation and discussion of this issue.

132. *Id.* at 121.