



Orphan Works Analysis and Proposal

submission to the
Copyright Office -- March 2005

Center for the Study of the
Public Domain. Duke Law School

<http://www.law.duke.edu/cspd>

Center for the Study of the Public Domain © 2005

This work is made available under the terms of a Creative Commons
Attribution, Sharealike License.

<http://creativecommons.org/licenses/by-sa/2.0/>



Introduction

Thank you for your invitation in FR Doc. 05-1434 to address the question of problems in access to orphan works and to suggest ways in which the copyright system might be adjusted to deal with these problems. The Duke Center for the Study of the Public Domain welcomes this initiative. The Center is devoted to study of the balance between intellectual property and the public domain, and of the ways in which both realms contribute to innovation, cultural vitality, education, free speech and scientific progress. In this submission we survey some of the problems in access to orphan works in general, discuss and evaluate some of the leading suggestions and available models from other countries, and offer our own proposal. In preparing this submission, we studied problems in access to orphan works both as described in the scholarly literature and through interviews with scholars, artists and archivists. Some of the results of those contacts will be independently submitted to the Copyright Office by the people involved. A few of their stories are featured here in text boxes. A companion submission to this one, entitled *Access to Orphan Films*, discusses the particular problems of that medium.

Problems of Access to Orphan Works

The core purpose of copyright law is to “enrich[] the general public through access to creative works.”¹ As the copyright office has noted, these goals

The Redacted Life of a Native American Activist: Professor Cathy Davidson and Professor Ada Norris found themselves unable to document fully the public life of the remarkable Yankton Nakota writer and activist Zitkala-Ša. “Penguin Classics gave us very clear limitations in terms of our publishing guidelines; since they were operating on limited budgets, there was no room to even consider any works that fell outside of 1922, even if they seemed to be free of copyright claims.”

can be undercut in a number of ways in the case of orphan works. “First, the economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works. Subsequent creators may be dissuaded from creating new works incorporating existing works for which the owner cannot be found because they cannot afford the risk of potential liability or even of litigation.

Second, the public interest may be harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.”

¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”)

A Worsening Problem

These points are correct, but they actually understate the dimensions of the problem, the extent to which it is growing worse, not better, and thus the reason why the need for a solution is particularly acute.

- First, copyright law no longer has formalities. The absence of registration or of the copyright symbol confers no safe harbor, even to a good faith user. Indeed many works whose authors do not want copyright protection are now swept, willy-nilly, into the copyright scheme.
- Second, the nature of technology means that far more “fixed” works are created than ever before, many through non-standard distribution channels, whose record keeping is sporadic at best. Thus the problem will only increase.
- Third, repeated retroactive copyright term extensions mean that vast numbers of works whose authors had no reason to order their affairs in the belief that rights will subsist are still potentially under copyright. Many of

Music That Cannot Be Played: “I have been dealing with the problem of orphaned copyrighted works during my 15 years of research about women composers. Frankly, I can see why some people just blatantly break the law: there are so many barriers and dead ends and catch-22s that it's frustrating beyond words even to the most law-abiding person..... There needs to be an international registry of people who have legal rights over music so that it's easier to find out whom to contact for permission.” Dr. Susan Pickett, Catharine Chism Professor of Music, Whitman College

Delays to Contemporary Creators Independent filmmaker Eric Ristau conducted months of fruitless searching for copyright owners of little-known songs such as “Crawl out from the Fallout” and “A-Bomb Baby” for use in a film about the pop culture which developed out of a fascination with atomic energy. “For obscure works which might be inexpensive to license, the process of simply contacting the owners is a Kafkaesque nightmare.”

- those works are now orphan works.
- Fourth, changes in technology mean that publishing, reproducing, editing and commenting are now potentially within the hands of millions, who could offer restored, edited and revised orphan works to the world on the World Wide Web. Yet at this precise moment, which could be the golden age of copyright, it is probably true that the majority of 20th century culture consists of

orphan works. That is certainly true in the case of film, as the

accompanying comment from the Center makes clear. The result is particularly perverse. Having done its job and encouraged initial creation and distribution, copyright now stands as an unnecessary barrier to future dissemination.

- Fifth, many modern media simply do not last as long as the copyright term. Without a better scheme for handling orphan works it is likely that we will lose them not merely for “life plus seventy years,” but forever.

A System that Offers No Real Benefits to Authors

The costs of an inadequate system of access to orphan works are huge: needlessly disintegrating films, prohibitive costs for libraries, incomplete and spotted histories, thwarted scholarship, digital libraries put on hold, delays to publication. In the cases where the work is truly an orphan work, those costs are tragic because they are completely unnecessary. Yet it is seldom noted that the rigidity of the current system does little, in fact, even to benefit the authors of the occasional apparently

Disintegrating Films: Orphan films make up the overwhelming majority of our cinematic heritage, and are a vital part of the culture and cultural record of the 20th century. Indeed, the Library of Congress declared that it is in the task of restoring these orphan films that “the urgency may be greatest” because these works are *literally disintegrating*.

orphan work that is actually under copyright management. The default response of scholars, archivists, film restorers, libraries and publishers – revealed again and again in both the scholarly literature and the anecdotal comments we received – is simply to drop all copyrighted work altogether unless it is clearly in the public domain. No license fee flows, the film is left unrestored and unseen, the forgotten director or composer does not have her work rediscovered, the song from the 50’s does not become a retro comeback classic. The undiscovered author of an apparently orphan work would actually be better off in many cases with a system that required a reasonable search and notice of intended use, and then gave qualified immunity to future use.

And, of course, the truly orphan work should be freely available in the first place.

Harms to Libraries: “To create digital collections that include “orphan works,” the library must go to extraordinary and expensive lengths to establish confidence that it is not violating copyright laws. The typical result is to avoid digitizing significant resources for scholarship if clearance cannot be obtained conclusively.” Deborah Jakubs Rita DiGiallonardo Holloway University Librarian, Duke University

A Search Process Made Harder by Technology

The problem of orphaned works is actually compounded by modern technology. A “Writing” in the form of a book may be produced, distributed, and consumed through relatively few channels. The same does not hold for many other works protected

under copyrights. Digital videos and films are produced through systems of computers, distributed via TV, internet, and a multitude of physical media formats such as VHS or DVD, and consumed through computers, TVs, media players, and movie theaters. Similarly, digital audio may be created in one location and distributed through numerous channels including radio, CDs, streaming webcasts, and downloadable media of various formats. The production, distribution, and consumption of digital photography, computer software and textual materials of every sort create similar web-like flows of works. The audience available to “Authors” of every sort is very nearly the entire world.

Locating a particular copyright owner of a particular work in the seemingly endless web of works is as difficult as intuition suggests. Whether searching for a copyright owner of a digital work floating along one of the many modes of digital access or a seemingly abandoned decades-old work collecting dust in an archive, potential creators are stymied despite their best efforts to obtain permission. The process is frustrating for historians, librarians, authors, artists, filmmakers, and many others who use the works of others as building blocks for their own.

The Implications of Search Costs

If these search costs eventually brought about benefits – incentive-producing flows of royalties, for example – then they might be worthwhile. But in practice, they are most often deadweight losses and they have a number of specifically undesirable characteristics that any proposed solution should avoid.

First, under the current system, searches must be so extensive and thus search costs are so high *in general* that many of our respondents said that they did not start any search in the first place. It is sometimes mistakenly assumed that we will help authors if we require a high level of search in order to produce any kind of immunity for uses of orphan works. This is based on a simple economic fallacy. Demand for copyright-goods is highly elastic. If costs are too high, users will simply forego even looking for an author, and will abandon the use of a work. If a reasonable, but lower level of required search were specified, searching would drop in price. More searches would be made. More authors would actually be discovered and perhaps allowed to benefit. Lower required search costs are *better* for authors overall, not worse.

Second, unlike licensing fees, search costs are not sensitive to types of intended use, nor of the amount of the work used. This has a disparate impact on socially valuable but low-profit, or non-profit activity, and on large scale archival

How Hard Must You Look for an Author? Search costs are currently so high that many users simply forgo using the work and never start the search in the first place. If a reasonable, but lower level of required search were specified, searching would drop in price. More searches would be made. More authors would actually be discovered and perhaps allowed to benefit. Lower required search costs are *better* for authors, not worse.

activity. A researcher seeking to make use of half of an apparently orphan poem in an academic biography must pay as much for a thorough search as a musician seeking to include the entirety of an apparently orphan composition in a popular and potentially profitable recording. The researcher simply will not use the work if forced to go through a cumbersome and expensive search or clearance procedure. The musician might still continue. Uses that require searches on many apparently orphan works – for example to create a thorough archive – are particularly disadvantaged by the current system. Thus a revised system might well separate types of potential use into two or three broad classes, each with a different level of required search. All the levels of required search should be much easier (and more clearly defined) than they are now, but a higher level of search could reasonably be required of a large scale commercial enterprise that wished to use the entirety of a work. An entity such as a library, which needs to use thousands of apparently orphan works in order to create a viable digital depository, should be able to use an extremely low cost, streamlined procedure, relying largely on notice.

Making Technology Part of the Solution

Bizarrely, technology is part of the problem in orphan works, but it has not yet become part of the solution. As was described earlier, technology means that more works are created and fixed by creators who make even less use of formal registration, or who do not even want the exclusive rights provided by copyright and yet are vested with them anyway. These works are then distributed outside of conventional material distribution chains that might produce a paper trail providing information about the copyright holder. The works are less stable, and disintegrate or decay more easily. Those who wish access to an orphan work, or who wish to restore it or reproduce it, in turn, are less likely to have the wealth, expertise and access to legal talent of the publishers of old. Yet the technology that has created the citizen publishers of cyberspace could also be deployed by the Copyright Office to help them through the maze of problems that copyright law creates. In the process, it could help authors quite substantially.

A Online Registry of Intended Uses? The technology that has created the citizen publishers of cyberspace could also be deployed by the copyright office to help them through the maze of problems that copyright law creates. In the process, it could help authors quite substantially.

Imagine a system with the following characteristics: Once a reasonable, and reasonably easy specified search had been performed, those who wished to use apparently orphan works could receive qualified immunity from suit by posting their intended use on a free, online searchable site for a reasonable period of time, say 30 days. If at the end of that time, they had not been contacted by anyone who could show reasonably convincing evidence of copyright ownership, they could proceed to use the work secure in the knowledge that they were

protected. This would have two beneficial results: First, copyright holders would receive reasonable notice, and would have a continuing Berne-compliant resource on which to monitor uses of their works. Some authors would, through this process, discover an interest in their work of which they had not previously been aware. Second, overall use of potentially orphan works would be increased. Some would be licensed because of lower search costs, while true orphan works would be made available for public use with a minimum of fuss. Both results are in keeping with the constitutional goals of copyright and the mandate of the Copyright Office.

Proposed Solutions to Orphan Works Concerns

A number of solutions to the problem of orphan works have been explored. Internationally there have been several such systems set up – strikingly they can be found in countries without the US copyright system’s strong constitutional mandate towards access. Thus for example, Canada and the United Kingdom have both developed schemes addressing orphan works. Under Canada’s copyright law, the Copyright Board may grant non-exclusive licenses for the use of published works when the copyright owner cannot be located.² Anyone seeking such a license must complete an application describing all efforts made to try to locate the copyright owner. If the Board determines that “reasonable efforts” have been made, it will set terms and fees for the proposed use. Fees will go to the relevant copyright collective society if the copyright owner does not surface to collect them within five years.

International Solutions:

There have been procedures set up internationally to attempt to solve orphan works problems – strikingly they can be found in countries without the US copyright system’s strong presumption of access. Any US proposal can learn from their strengths and their failings.

While this scheme allows certain uses of orphan works with possible remuneration to the copyright holder, it also raises several issues. First, the law does not define what constitutes “reasonable efforts” to find a copyright owner, beyond suggesting a variety of measures and the high bar of “do[ing] everything you could to find the copyright owner.” Both the lack of clarity and high standard could dissuade valuable uses and dissemination of orphan works.³ Second, the Canadian system deals with known but unlocatable copyright owners, but not with unknown copyright owners. Third, if a large number of applications are filed, a case-by-case analysis could become inefficient and costly. Finally, the default payment of fees to collection societies in effect taxes current users of

² Copyright Act, R.S.C., ch. C-42, §77 (1985) (Can.).

³ At any rate, the impact of these licenses appears to be minimal- only 143 orphan works licenses have been issued in the nearly 15 years since they have been available.

works with no copyright owners in order to benefit contemporary creators. This result serves neither the goal of access nor that of equity.

The United Kingdom has a more limited statutory provision stating that copyright infringement does not occur if it is “not possible by reasonable inquiry to ascertain the identity of the author and reasonable to assume that copyright has expired or that the author died 50 years or more before” the time the work is used.⁴ This provision only covers a small subset of orphan works – older works that have unidentifiable copyright owners, and, like the Canadian law, does not provide guidance as to what constitutes a “reasonable” inquiry or assumption.

Domestically, Representative Zoe Lofgren and eight other representatives introduced a bill in June 2003 that would require copyright owners to renew their copyrights by paying a \$1 tax fifty years after a work’s publication and every ten years thereafter. If the copyright owner fails to pay the tax, the copyright expires. (Such a tax would have to be distinguished from fees forbidden by the Berne Convention.) While this bill might effectively address orphan works problems in the future in a way that is commendably more ambitious and far-reaching, it does not address the problem of presently orphaned works, and is – of course – beyond the immediate question posed by the Copyright Office.

Proposal from the Center for the Study of the Public Domain
Central Features

We believe that the solutions discussed so far are instructive both in their strengths and the ways in which they fall short. If one considers both the aspects of the orphan works problem described in this submission, and the proposals just enumerated, it becomes clear that any solution to the problem of orphan works will have to have the following features:

1. **Clear Guidelines:** A solution should provide clear and accessible standards for determining which works are covered, whether users have made good faith efforts to locate copyright owners, and what actions need be taken. Specifically, a solution will require:
2. **Low Levels of Required Search (Perhaps Specified According to a Few Context Sensitive Classes):** The level of good faith search required of someone intending to use an apparently orphan work should not be overly high. As was pointed out earlier, the response to current high search costs is frequently to refrain from searching altogether, and thus from use. This benefits no one. On average, authors will actually *gain* if the required level is not set too high – something that prior proposals seem to have missed. In addition, the required level of search should vary in a few broad classes based on type of use and extent of use, so as to make sure that the barriers to non-profit, low-profit and comprehensive archival uses do not remain insurmountable.

⁴ Copyright, Designs and Patents Act, 1988, c. 48, §57 (Eng.); *see also* Copyright and Related Rights Act, No. 28, 2000 §88 (Ir.); Laws of Hong Kong, Chapter 528: Copyright Ordinance, June 27, 1997 §66.

3. **Broad coverage:** A solution should cover as many orphan works as possible. It should apply to currently orphaned works, to works with identifiable but unlocatable copyright owners, and to works with unidentifiable copyright owners. The system should also be designed bearing in mind the torrent of new orphan works that will continue to flow into the copyright system because of the technological and legal factors discussed at the beginning of this Comment.
4. **Efficient Administration:** A solution should minimize administrative and logistical burdens, and avoid complicated case-by-case analysis and royalty determinations. The system will have to take into account the limited resources and legal knowledge of many of the citizen publishers of cyberspace. Copyright now applies to many more creators, distributors and re-workers than ever before. The system will have to be designed around their competences, not vice versa.
5. **Notice:** In order to be fair to copyright holders (and as fulfillment of a substantial proportion of the required search procedure), the Copyright Office should maintain an online, searchable directory where it is easy for users to identify proposed uses and for authors to search for uses of their works. This will actually give authors a much greater ability to detect uses of their works than they currently have. Users in turn will have strong incentives to identify proposed uses, precisely to gain the safe harbor specified in 6.
6. **Safe Harbor:** In order to encourage use of apparently orphan works, the system will have not only to make required search and notice costs low, it will have to guarantee that users who follow its procedures will automatically be immune from suit or royalty claim if subsequently contacted by a copyright owner, provided they desist from further use. The safe harbor would also immunize existing publications; no redaction should be necessary. Future publications would not be covered here, but by the next principle.
7. **Protection of Value-Added Restorers and Reusers:** Many users will be satisfied with a solution that allows them to use orphan works securely after a defined search and notice period. If a copyright owner subsequently appears, immunity based on a cessation of the challenged use will suffice. But for those users who plan to invest substantial hours or dollars in restoring, changing or adapting an orphan work for the future, this solution will not be adequate. It is small comfort, after thousands of hours or dollars have been spent digitizing a fragile film, to be told that if one stops and hands over one's work, no action will be brought. Indeed, such a system would encourage "submarine orphan works" – copyright owners who lurk and wait until value has been added by a second-comer, before announcing themselves. In order to give improvers the security they need, a second option must be provided – one that allows continued use on payment of a specified, low royalty.

Whatever the outcome of this process, the Copyright Office will obviously have much work to do before a final procedure is in place. While we offer a more specific outline of a procedure below, we believe that there are multiple possible systems that have these seven key features, and it is attention to the concerns identified here and thus consonance with this overall design that should be the ultimate criteria for evaluation. Indeed, subsequent hearings, comments by stakeholders, legal opinions on permissible and desirable administrative structures, and economic analysis of the needs of different types of potential users of orphan works, will all inevitably come together to produce a model very different than any of the ones proposed at this stage of the process. We believe that the broad features listed above, however, are relatively central. An example of how these features could be implemented in practice is given below.

Procedural Design

Administrative Body: The orphan works procedure, directory, and rulemaking will require a simple administrative body whose charge is to fulfill the constitutional goal of access, while preserving author interests. The Copyright Office seems the logical candidate—constitutional and APA concerns permitting.

Class of Works: The orphan works procedure should apply to all copyrighted works where the person intending to make use of the work (hereinafter the user) certifies a *bona fide* belief, based on Reasonable Search Efforts (below), that the work has no copyright holder or that the copyright holder cannot be located.

Reasonable Search Efforts to Identify Copyright Owner:

In order to make legitimate use of an orphan work an individual must make a reasonable effort under the circumstances to locate the copyright owner. The category of reasonableness under the circumstances should be defined in rules issued by the Administrative Body, which divide required search levels into a few broad classes, based on types of work and nature of intended use.

- **Class of Work:** The Administrative Body would specify simple methods appropriate to particular types of work. For example, a user attempting to locate the copyright owner of a song should contact ASCAP, BMI, SESAC, and consult standard (and identified) musicological directories.
- **Levels of Search:** The highest level of required search would be for commercial use of entire works, the lowest for non profit or educational use of fragments of work, or for archival use of multiple works. In all cases the level of search should not be burdensome or time consuming. The average search for an individual non-commercial user should be easy to complete in two weeks, for example. The general operating presumption should be that, if no answer is received to inquiries, then the work is indeed an orphan work.
- **Definition of Reasonable Search Efforts:** In general, reasonableness is defined in broad, rule-like classes by the administrative body. In determining these classes, the administrative body should aim only to require the steps that would be reasonable to demand of a user of that type

and of those average resources. Reasonable efforts should involve simple, mechanistic steps involving few transaction costs. For example, a user intending non-commercial educational use who was searching for a missing copyright owner would be required merely to conduct internet and telephone directory searches.

- **Definition of Reasonable Contact Efforts:** Reasonable effort must be made to contact any potential copyright owner found through such a search. Again, the level of effort should be both clear and not unduly burdensome— the sending of 2 registered letters, for example. In all cases, the user should be guided into the appropriate search level through a set of simple questions in an online form. (Are you using the whole of the work Y/N? Is your use commercial or moneymaking Y/N? Is this a musical work,? Etc. See www.creativecommons.org for an illustration of the type of interface required.)

Online Registration of Intent to Use:

Having completed the Reasonable Search, the user submits an online certification that she believes the work to be an orphan work to the administrative body. She specifies which class of Reasonable Search she engaged in, and certifies that she fulfilled the required steps in the search. She is then eligible to submit an “intent to use” Declaration which is entered into a searchable online directory.

- **Details of the Work:** The Declaration specifies as much information about the work as possible, including title, genre, apparent author if known, believed copyright date, and description. Where the identity of the work is obscure, fragments of the work may be attached to aid identification; for example, a portion of a musical score, lines from a poem, a low resolution thumbnail picture of graphical or sculptural works, a few frames from a film and so on. (In all such cases, such submissions should be considered fair use.)
- **Details of the Use:** The intent to use Declaration also specifies the nature of the intended use, including the amount of the work to be used, its proportion of whatever the larger project the user is engaged in, status as commercial or non commercial, educational or non educational, archival, performance and so on. Each of these attributes of the intended use, as well as the description of the work, should be entered as metadata through a simple user form, so that the Directory can be searched in as many ways as possible. (Again, see www.creativecommons.org for an illustration of the type of interface required.)
- **Contact Details:** Finally the intent to use declaration gives detailed contact information for the user.

Waiting Period:

For a period of 30 days after the Registration of Intent to Use, the user may not use the work. After that period, if she has not been contacted by the copyright owner, the work is now automatically classified as a Presumptive Orphan Work for purposes of the procedure.

Consequences of Classification as Presumptive Orphan Work:

A user who has followed the protocols of Reasonable Search and Online Registration of Intent to Use and who as a result has had the work classified as a Presumptive Orphan Work is absolutely immune from copyright liability for uses of the kind specified, from that date forward. If, after the classification as a Presumptive Orphan Work, a person demonstrates reasonably conclusive proof of a copyright in the Presumptive Orphan Work, the user has two options:

1. **Absolute immunity retained through take-down.** Absolute immunity is retained if the user takes down or refrains from further use of the orphan work. This would apply to both commercial and noncommercial uses. In addition, the user would not be liable for any subsequent contributory or vicarious infringement, unless the actions grounding such liability occurred after the notification by the copyright holder.
2. **Capped royalty for continued use.** The user may, at his or her discretion, continue to use the orphan work, provided he or she pays predetermined royalties going forward. Royalties should have a reasonable cap that will both encourage uses such as film restoration while providing remuneration should a lost copyright owner reappear. For example, one reasonable cap would be the greater of 5% of the profits derived from the use of the work or 0.5% of the total input costs to create the finished product. Input costs should be determined using Generally Accepted Accounting Principles. Volunteer labor and donated facilities should not be included in input cost calculations.
3. **Pro Rata Reduction for Partial Uses:** 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 work owners seeking royalties. A person using multiple presumptively orphan works would have an absolute cap on the total of all royalties of 20% of the profits from the work or 2% of the total input costs, whichever is the greater. It is important for the royalty scheme to have well-defined parameters so a potential user of a presumptively orphaned work can make an informed choice with as much information about potential liability as possible.

Status of Subsequent Users:

For one year after the first Online Registration of Intent to Use, other users who wish to use the work must file their own applications and complete their own searches, according to the relevant type of use they desire to make. For the period one to three years after the first registration of intent to use, any user may use the orphan work for any purpose without completing a search, provided they file their

own Registration of Intent to Use. Finally, three years after the first Intent to Use registration, anyone may use the work in any way, without registration or search.

Subsequent Access and DMCA Anti Circumvention:

It is possible that a user may incorporate the Presumptive Orphan Work into a new work of sufficient originality to receive copyright protection. This could range from an excerpt of restored orphan film in a longer documentary, to a new edition of an orphan work, with scholarly comment and analysis. In such cases, three safeguards should be applied to preserve access:

- the user should be required, as a condition of copyright registration for the new work, to deposit with the Library of Congress a copy of the original orphan work,
- the Copyright Office should stress that, as a matter of existing copyright law, the boundaries of the copyright will be interpreted narrowly so as only to cover the new material and
- the Copyright Office should hold a rulemaking proceeding under § 1201 of the DMCA on problems of access to this class of works. The goal of the rule-making would be to guarantee that the DMCA's anti-circumvention provisions would not be used to deny access to any component of the original orphan work, since the user does not have a copyright in those components.

Misuse of Process:

The system would have to have safeguards against three main classes of misuse:

- **Misuse by new user:** If it can be shown that the user deliberately falsified the certification that the Reasonable Search had been completed with negative results, then that factor would weigh towards a finding of willful copyright infringement.
- **Misuse by parties falsely claiming copyright in orphan works:** Such claims would be an abuse of the administrative process and should be subject to substantial penalty. They would also expose the claimant to civil suit by the user. In the longer term, the Copyright Act should be amended to penalize any false claim of copyright.
- **Misuse by copyright owners "timing" the system:** If it could be shown that a copyright owner knew of an intent to use registration, and deliberately waited until the user invested significant resources to restore the presumptive orphan work before revealing herself, that would constitute copyright misuse, and be cause for cancellation of the copyright.

Five Year Review:

Five years after instituting the orphan works procedure, the Administrative Body should conduct a hearing to assess its operation. The assessment would focus particularly on numbers of orphan works used under the procedure, comments by users about the ease and appropriateness of the specified search steps, and examples, if any, of copyright holder complaints about the system.

Conclusion

The orphan works problem is so tragic because it denies access without producing incentives. It undercuts the constitutional goals of the copyright scheme, hurts libraries and archives, presents the new generation of authors and innovators with obstacles rather than solutions, and condemns large swathes of culture to literal physical destruction. Yet it does all this harm while actually serving authors very poorly. We believe our analysis of the orphan works problem indicates its magnitude and severity, and we are grateful to have been accorded the opportunity to put forward a proposal to solve it. The comments we received from artists, archivists, librarians and academics will be submitted independently by the parties themselves.

This submission was researched, prepared and drafted with valuable assistance from Duke law students, Garrett Levin, and Megan Ristau.

For further details, please contact

James Boyle, William Neal Reynolds Professor of Law & Faculty Co-Director,
Center for the Study of the Public Domain, Duke Law School, Durham NC 27708

Jennifer Jenkins, Director Center for the Study of the Public Domain