

I offer the following comments to the U.S. Office of Copyrights in regards to the “orphan works” problem, pursuant to the Notice of Inquiry published at 77 *Fed. Reg.* 64555-64561 (Oct. 22, 2012).

A reading of the Notice of Inquiry and the report entitled “Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document” (the “Discussion Document”) demonstrate that the Register of Copyrights understands the scope and gravity of the orphan works problem. Both documents contain excellent discussions of the history and causes of the orphan works problem, and properly characterize the issue as a presumably unintended consequence of Congressional enactments increasing the duration of the term of copyrights while reducing required formalities such as registration and renewal. In addition, mass digitization of information holds the promise of “promot[ing] the progress of science and useful arts,” but the copyright system itself is constraining the realization of this promise to the detriment of the public interest. The consequence of these legislative changes casts doubt on whether the current state of the law is in keeping with the Constitutional mandate “to promote the progress of science and useful arts.”

To redress this current imbalance, the U.S. Copyright Office should be vigorously advocating for statutory amendment of the Copyright Act that accomplishes the following goals:

1. Clearly and unambiguously declare that:
 - a. Legislative amendments of the Copyright Act that have lengthened the duration of the term of a copyright and eliminating certain formalities such as copyright registration and renewal have had the unintended consequence of creating a class of “orphan works” that are not under-utilized because the rightful current copyright owners cannot be located and approached about entering into license transactions;
 - b. Mass digitization and distribution of information by libraries, archives, and other third parties is a public good that deserves to be encouraged and supported by the nation’s copyright laws, subject to appropriate administrative oversight of [the Register of Copyrights or Copyright Royalty Board.] The mass digitization and distribution of information by libraries, archives, and other third parties is one way in which the “orphan works” problem can be addressed and rectified.
2. Creates an extended collective licensing regime supervised by the U.S. Copyright Office (or Copyrights Royalties Board) generally along the lines of a system described in pages 34-37 of the Discussion Document with the following features:
 - a. Copyright clearance centers that shall act as both registries and clearance houses approved by the Register of Copyrights (or Copyright Royalty Board) shall handle copyright license transactions (such approved copyright clearance centers may be private, public, non-profit and for-profit organizations, but in each case approved on such terms as the Register of Copyrights may determine in its sole discretion);
 - b. Approved copyright clearance centers could include existing entities such as the Copyright Clearance Center, the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC, Inc. (“SESAC”), and even privately-created entities such as the Registry created by

the Google Books Settlement, provided that such copyright clearance centers satisfy all the functions required by the Register of Copyrights (or Copyright Royalty Board), and are approved by the Register of Copyrights (or Copyright Royalty Board). Such functions shall include acting as a clearance center for licensing transactions as well as serving as a registry.

- c. All approved copyright clearance centers shall be networked in a manner that creates and facilitates a common and searchable database of copyright owners. Should it prove technologically unfeasible to be so networked, the Register of Copyrights (or Copyright Royalty Board) shall within one year of the Effective Date of this act, at its option, instead create and maintain a database of all known copyrighted works, which shall include the name, address, and email address (if known) of all current copyright owners. In the event that such common database fails to accurately reflect the name and address, and (if known) email address of the current copyright owner any person may petition the [the Register of Copyrights or Copyright Royalty Board] to have such copyrighted work removed from such approved copyright clearance center, and included in a compulsory license group of works under copyright that shall be included in such common database but any such copyrighted works in such compulsory license group shall earn *de minimus* copyright royalties until current copyright ownership information is provided satisfactory to the Register of Copyrights (or Copyright Royalty Board, as the case may be). All approved copyright clearance centers shall pay registration fees to the Register of Copyrights (or Copyright Royalty Board) pursuant to a fee schedule established thereby, and such fees shall be held in a trust fund administered by the Register of Copyrights (or Copyright Royalty Board) to defray the cost of such *de minimus* fees payable to members of the compulsory license group.
3. Amends the Copyright Act to add a new Section 514 with regard to actions that libraries and archives may take in regard to the orphan works problem. While the “diligent search” requirement heretofore may have seemed to have been a reasonable requirement, it is unfair to impose the burden and cost of discovering the current copyright owner on libraries and archives, especially since such discovery has been hampered by the relaxation of copyright formalities such as registration and renewal and by lengthened copyright terms. This new Section 514 would generally follows some of the text of HR 5998 (the proposed Copyright Act of 2008) but with certain significant changes. Importantly, this amendment would eliminate the payment of monetary damages (including attorneys’ fees and legal costs) payable by libraries and archives for any alleged infringement, and confine redress for any such infringement to injunctive relief (and civil contempt for non-compliance with any judicially ordered take-down notice or other willful non-compliance by a library or archive). In addition, absent actual knowledge of the identity and address of the current owner of a copyrighted work on the part of a library or archive, a copyrighted work may be presumed to be an orphan work under this Section 514 if such information is not included in the common database

described above. The “diligent search” requirement of the Copyright Act (and Berne Convention and other international treaties) will be deemed satisfied if:

- a. the library or archive has conducted a search for the current copyright owner on such common database, and has filed a Notice of Use with an approved copyright clearance center or the Register of Copyrights (or Copyright Royalty Board) in the event that the current owner of such copyrighted work is not included in the common database described above); and
- b. the library or archive has expressed in writing its intention to digitize and make available for distribution such copyrighted work in its holdings pursuant to a Notice of Use in a form prescribed by the Register of Copyrights (or Copyright Royalty Board) to either an approved copyright clearance center (if the current copyright owner is known) or to the Register of Copyrights (or Copyright Royalty Board) (if the current copyright owner is not known). The copyright license fee to be paid by the library or archive for any such use shall be established pursuant to a royalty schedule established by the approved copyright clearance center and approved by the Register of Copyrights (or Copyright Royalty Board); provided, however, that such copyright license fee shall be deemed waived if no such license fee has been so established and approved. The copyright license fee to be paid by the library or archive shall be set initially at \$ 0.01 or such greater but amount pursuant to a schedule set by the Register of Copyrights (or Copyright Royalty Board) from time to time, and such copyright license fee shall cover such digitization and future acts of distribution of a copyrighted work by a library or archive that derive from such digitization and distribution of the copyrighted work in digitized form.

4. Notwithstanding any other provision of the law, amends the Copyright Act to permit libraries and archives to digitize and make available for distribution without payment of a copyright license fee or any other amount of money any copyrighted work, whether or not the current copyright owner is known, if the copyrighted work has been out-of-print or is not being made available for purchase or license at a commercially reasonable price for a period of [three(?)] years. Out-of-print books are yet another case of where copyrighted works are being under-utilized to the detriment of the public good. In such case, a library or archive may file a Notice of Use with an approved copyright clearance center or the Register of Copyrights (or Copyright Royalty Board), indicating its intention to digitize the content of the copyrighted work that is out-of-print and made available to the public. In the event that such library or archive is notified that such copyrighted work is in print and is available for purchase or license at a commercially reasonable price, the then current copyright owner may file a Notice of Objection with the Register of Copyright with a copy of the library or archive which has filed such Notice of Use. In such case, the library or archive which has made the copyrighted work in question available in digitized form shall remove such copyrighted work from its digitized holdings within sixty (60) days of receipt of such Notice of Objection. If the library or archive disagrees with the Notice of Objection, it may appeal such Notice of Objection to the Register of Copyrights (or Copyright Royalty Board), and the determination of whether to permit such digitization and subsequent

distribution shall be determined by binding arbitration under regulation promulgated by the Register of Copyrights.