Comments of Bruce A. Lehman

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These comments are the personal views of the author and should not be attributed to any organization with which he is or has been associated. They do, however, reflect the perspective of one who has spent 40 years as a specialist in the field of intellectual property policy, beginning as congressional committee counsel in enactment of the 1976 Copyright Act and later as the Executive Branch officer with responsibility for Administration policy leading to the 1996 WIPO Copyright and Phonograms Treaties and the 1998 Digital Millennium Copyright Act.

The current review of the issue of so-called "orphan works" follows Congress's unwillingness to enact previous recommendations of the Copyright Office that were embodied in legislation introduced five years ago as the "Orphan Works Act of 2008". (H.R. 5889, 110th Cong.) That legislation invoked substantial opposition, particularly from the authors of works of visual art, and I remain sympathetic to the concerns the concerns they conveyed to Congress at that time. I believe that Congress was wise in rejecting the 2008 Orphan Works Act and strongly urge that whatever recommendations, if any, made to Congress as a result of its current review bear no resemblance to the 2008 proposal.

The 2008 legislation would have relieved any party engaging in unauthorized use of a copyrighted work from liability for damages and injunctive relief as set forth in Sections 502 through 505 of Title 17 as long as they performed and documented an unsuccessful, good-faith search for the copyright owner of a work prior to infringing. If such a documented, good-faith search had been performed, and the copyright owner subsequent to the infringement found out and sought judicial relief, that copyright owner's remedies would have been limited to "reasonable compensation" and cessation of continuing infringement. However, even this limited injunctive remedy would not have been available in cases where the infringer had already commenced the "preparation of a work that recasts, transforms, adapts or integrates the infringing work with a significant amount of the infringers [own] expression." Only in the case where the rights holder satisfied a federal district court that the infringer had not met his or her due diligence search and notification obligations would the rights holder have been eligible for full remedies of damages and injunctive relief. It is hard to imagine circumstances that would justify a rights holder bringing action where the monetary relief would almost never amount to more than a fraction of litigation costs. For all practical purposes such a law would consign every work where the author is hard to find to the public domain.

The justification for this radical restriction of authors' rights seems to have been that the works to which it would have applied don't have much value otherwise they wouldn't have become orphaned. To my knowledge this is the first time in American history that the ability to protect one's property rights has been subject to the limitation that only the rich have rights to legal redress. In fact, very few authors – unless they are among the handful of those most commercially successful – have the financial means to enforce the rights currently afforded them under the letter of the law. That is because of the complexity and expense of modern-day litigation in federal courts which are the only forum for redress in a federally preempted field of law. And, in today's digital economy the most common engines of infringement are under the control of some of the largest and wealthiest institutions in our society for whom the hiring of

expensive lawyers is routine. Indeed, it is hard to understand the urgency with which the Copyright Office approached this matter in 2008 when there was no evidence whatever that the federal courts had been flooded with infringement lawsuits brought by long lost authors of works whose provenance was obscure.

The radical limitations on the enforcement of constitutionally mandated intellectual property rights proposed in 2008 would have constituted a historically unprecedented assault on the rights of the authors of literary and artistic works.

There is a stark contrast between the 2008 Orphan Works Act that would have taken rights away from artists and authors of limited means and legislation in recent Congresses that would add new safeguards for the rights of the wealthy commercial interests that dominate the media, publishing and information industries. I do not mean to suggest that these legislative proposals do not have merit and may be needed in the era of an "information-wants-to-be-free" ideology that glorifies copyright scofflaws. But, public servants should not be prejudiced in favor of any specialized interest much less be proposing legislation that would eviscerate the few remaining rights of individual creators who struggle to support their families in an increasingly work-made-for hire culture and economy.

Other comments submitted in response to this inquiry will make a strong case that there is no orphan works crisis requiring a legislative response. Indeed, since 2008 best practices of libraries and archives have evolved that respond to earlier concerns about orphan works. These best practices have been developed using fair use principles and innovative information technologies and have largely eliminated the need for new legislation. Our colleagues across the Atlantic have recognized this in the orphan works directive of the European Union which is limited to addressing the circumstances of that community.

I strongly urge the Copyright Office to recommend that there is no need for legislative intervention on the issue of Orphan Works.