

U.S. Copyright Office
101 Independence Ave. S.E.
Washington D.C. 20559-6000

To the Librarian of Congress & Registrar of Copyrights:

"Orphan Works" are copyrighted works—books, music, records, films, etc—whose owner cannot be located. Works can become "orphaned" for a number of reasons: the owner did not register the work, the owner sold rights in the work and did not register the transfer, or the owner died and his heirs cannot be found. Works can become "orphaned" for a number of reasons: the owner did not register the work, the owner sold rights in the work and did not register the transfer, or the owner died and his heirs cannot be found.

Creators who are interested in using orphan works are often unwilling to do so for fear that they will have to pay a huge amount of money in damages if the owner ever emerges.

Libraries, museums and archives are carrying out small, medium and massive digitization projects and providing public access to the resulting digital collections. Google, Amazon, Yahoo, and Microsoft, among others, are partnering with cultural institutions to increase the pace at which these collections are brought to the public. Foundations are providing needed financial support as well. These projects now number in the millions! For too long copyright law has been expanded to give copyright owners more powers at the expense of the public domain. Copyright owners should not be granted indefinite copyrights or patents on works. They should be required every few years to apply for a new license to renew their copyright. The same rule should apply to the Federal Communications Commission in renewing licenses to companies to use the public airwaves for radio, TV or wireless Internet use.

A few years ago radio stations had to apply for renewal of their license every three to four years but now the license period has expanded to 8 years. In ECFS proceedings I have made clear to the FCC the requirement for public interest obligations be met by TV broadcasters, wireless carriers and even radio stations using public airwaves.

That being said I submit the following for consideration (from the text of an online petition to reclaim the public domain) this is background:

We, the undersigned, while believing in the importance of copyright, also believe in the importance of the public domain. We believe the public domain is crucial to the spread of knowledge and culture, and crucial in assuring access to our past. We therefore write to petition you to reconsider major changes that you have made to the copyright system.

These changes unnecessarily threaten the public domain without any corresponding benefit to copyright holders.

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA). That Act extended the term of all existing copyrights by 20 years. But as Justice Breyer calculated, only 2% of the work copyrighted during the initial 20 years affected by this statute has any continuing commercial value at all. The balance has disappeared from the commercial marketplace, and, we fear, could disappear from our culture generally.

For example: The vast majority of film created during the 1920s and 1930s is not commercially available. Because of the CTEA, much of it remains under copyright. Yet because it is often impossible to track down the copyright owners for these films, commercial and noncommercial preservationist and distributors cannot safely restore and distribute these films. And because these films were made from nitrate-based stock, by the time the copyright to these films expire, most of them will have dissolved.

The same is true with many other copyrighted works that are no longer commercially available. Though the Internet could facilitate the distribution of this work if the copyright owners could be identified, the costs of locating these copyright owners is wildly prohibitive. Schools and libraries are thus denied access to works that otherwise could be made available at a very low cost.

Such burdens on access to work that has no continuing commercial value serves no legitimate copyright purpose. It certainly does not "promote the Progress of Science" as the Constitution requires. We therefore ask Congress to consider changes to the current regime that would free unused content from continued regulation, while respecting the rights of existing copyright owners.

One solution in particular that we ask Congress to consider is the Public Domain Enhancement Act. [See http://eldred.cc](http://eldred.cc) This statute would require American copyright owners to pay a very low fee (for example, \$1) fifty years after a copyrighted work was published. If the owner pays the fee, the copyright will continue for whatever duration Congress sets. But if the copyright is not worth even \$1 to the owner, then we believe the work should pass into the public domain.

This legislation would strengthen the public domain without burdening copyright owners. It would also help clarify rights over copyrighted material, which in turn would enable

reuse of that material. The law could thus help restore balance to the protection of copyright, and support the public domain.

We therefore call upon Congress to introduce this legislation, and to hold hearings on the benefits that it might have to reviving a vibrant public domain.

When technologists have given us a tool that could spread knowledge universally, we should not allow the law to get in the way. The law does so now. This Congress should change it.

End Background

Public Knowledge's Position

Now Public Knowledge and many other organizations have proposed that the law should allow use of an orphan work if the user searched for the copyright owner in good faith and with reasonable diligence but failed to find the owner to ask permission.

Unfortunately groups of copyright holders, mainly photographers, illustrators, graphic artists, and textile designers have opposed any attempts to permit use without consent.

Public Knowledge and other proponents of an orphan works policy (including myself) are hopeful that, working with other copyright holders, we can work toward a common policy goal of making sure orphan owners are found. I support Public Knowledge's proposals (below) in order to facilitate the use of orphan works:

- 1) Users should be able to use the work after a reasonably diligent search for the owner.
- 2) A search would be reasonably diligent if it was conducted in good faith with resources and technology reasonably available to the user.
- 3) Reasonableness of the search would have to be decided on a case by case basis.
- 4) Industry groups could establish a guideline of best practices for conducting searches.
- 5) The user should provide attribution
- 6) The user would have to provide attribution to the owner to the extent possible based on the information obtained during the course of the reasonable search.
- 7) The attribution information would have to be updated if more information became available to the user.
- 8) If the owner emerges after the use has commenced, the user's liability should be limited.

- 9) The user would only be required to pay to an emerging owner a fee capped at a maximum amount; for example \$200.
- 10) A court would not give an injunction against the use of a work
- 11) In cases of web-based uses, the user would not be required to take down the work.
- 12) The owner would not be entitled to attorney's fees or statutory damages.
- 13) The user should be allowed to continue with the use of the work.
- 14) Uses that commenced before the owner emerged should be allowed to continue. For example, if an author used certain orphan illustrations in his book, he could continue to use these illustrations after the owner emerged. The use would include subsequent editions of the book
- 15) New uses would require permission from the owner. In the above example, the author would not be able to use the same illustrations in another book.

In May 2008 the U.S. House and the Senate both [introduced new legislation](#) to allow for greater use of so-called "[orphan works](#)" -- books, music, photos, movies or other works whose owners can't be found. Why are these bills important? Because there are literally millions of works in existence that are currently under copyright protection but for which the copyright owner cannot be easily found. Because if you use a copyrighted work without permission, you could be on the hook for statutory damages of up to \$150,000 per work, orphans go unused. Think of a diary kept by someone during the second world war and recovered from an attic. Think of a box of old photographs happened upon at a yard sale. Think of an illustration used in an advertisement but not clearly attributed. At the moment, these works are unavailable to publishers, filmmakers, collage artists and many other creative professionals who would like to use them and gladly pay for the privilege, but can't because of the potential for massive penalties if the original copyright owner does emerge.

The newly introduced bills allow artists to use orphan works as long as that user makes a diligent effort to find the original copyright owner. In the unlikely event that the original owner does emerge, the compensation that a user pays should be reasonable. The two bills currently on the table -- [S. 2913, the Shawn Bentley Orphan Works Act of 2008 \(PDF link\)](#) and [H.R. 5889: The Orphan Works Act of 2008 \(PDF link\)](#) -- go a long way to address these issues and if passed, would grant the public access to millions of previously inaccessible works of art.

Specifically, there are key differences between the House and Senate bill that deserve to be scrutinized. While the Senate bill can be seen as a "base bill" of sorts, the House bill tacks on a number of provisions for copyright owners. These provisions include:

- A "Notice of Use Archive" (NUA), a repository to which users will have to formally submit their diligent effort searches. In the House bill, the Copyright Office is given a great deal of discretion as to how this archive will be structured. What fee will users have to pay in order to formally file with the NUA? Will the archive be open for anyone to view? If so, what will prevent copyright "trolls" and identity thieves from menacing users who file with the NUA?
- A "useful articles" exemption that would make any work with commercial or use value--for example, mousepads, T-shirts and mugs printed with an image--exempt from orphan works legislation. This exemption could discourage the creation of derivative works that blur the lines between art piece and commodity.
- A provision that grants courts the discretion to take into account the value of a copyright registration when considering reasonable compensation. This provision is designed to "reward" copyright owners for having filed for a copyright registration in the first place. However, this would also reward owners who failed to maintain their copyright registration, which would have allowed their copyright to be easily found in the first place.

While the Senate bill contains few, if any, questionable provisions like those above, it does fail to specify that the visual copyright registries that will be established under the bill be free for public searches and machine readable. These registries could be setup by industry groups (i.e. professional photographers associations) or by adapting existing services already available on the Internet, but they may not be subject to public access unless specified in the bill.

Finally, the House and Senate bills have different effective dates for photographs, illustrations, graphic and textile designs. For the House, the effective date for these works could be delayed till as late as 2013 and for the Senate it could be delayed till 2011. We'd rather that the dates on the two bills match and as far as we're concerned, the sooner orphan works legislation goes into effect, the sooner artists can start taking advantage of existing works.

Copyright reform is desperately needed and I think copyright laws and copyright directives and policies from the Copyright Office need to make accessing electronic media or other content more easily accessible for lawful fair use and to encourage more orphaned works on which the copyright expired to be able to enter the public domain.