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**COMMENT IN RESPONSE TO
COPYRIGHT OFFICE
NOTICE OF INQUIRY ON
ORPHAN WORKS AND MASS DIGITIZATION
77 Federal Register 64555 (Oct. 22, 2012)**

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The **Convergence Law Institute (CLI)** is a non-profit organization dedicated to research and education on public policy issues. CLI's guiding principle is that the institutions of markets and property rights are essential to technological and economic development, and to the freedom and creativity of the peoples of the world. Its mission is to analyze the interconnections between governments on the one hand and markets and property rights on the other, to suggest better approaches to the relationship, and to educate policy makers, the press, and the public.

The observations in these comments are based on our shared emphasis on the importance of property rights and markets. For Orphan Works, as with other property rights issues, the essential question is: What set of policies and rules will produce sharper definitions of property rights, reduce transaction costs, and facilitate efficient markets?

It should be emphasized that favoring property rights does not necessarily mean favoring an excessive extension of the same. In some particular situations, obviating or truncating property rights can serve as the best way to promote property rights and markets over the long term. An excess of claims can freeze markets and forestall entrepreneurial activity. Therefore, society must have mechanisms for freeing up assets for productive use by avoiding excessive claims.

The need for arrangements to eliminate and adjust property rights is recognized in many areas of the law. Laws provide for the disposition of abandoned property and recognize the principle of adverse position in land law. Laws provide for the division of the value of salvage at sea, with some going to the ship owner and some to the salvager.

Perhaps the most common method of adjusting property rights is bankruptcy. A firm or person goes bankrupt when the claims on its future revenues exceed what it can meet through its earning power. Only by scaling down or eliminating the claims upon that person or firm can the relevant assets be freed up for new uses.

This need to scale back existing rights deserves serious consideration in the context of Orphan Works. Under the current situation, these works simply lie fallow. This is of no benefit to either the creators or the public.

Furthermore, the incentives that usually impel property rights holders to find, protect, and develop their property are not working for Orphan Works. As is often pointed out, only a small percentage of copyrights have much value. Even for these, value declines greatly over time. As a result, while occasional lost diamonds may be found among Orphan Works, in most cases the value will be limited. In many cases, a work may have little value on its own, but be of interest

as part of a collection, such as, for example, theatre programs, 1920s labor photographs, or early corporate reports.

The limited value that attaches to most Orphan Works renders any elaborate scheme for finding lost copyright holders mostly pointless. Few works will have the cost to justify the effort, which means that most will continue to languish. Yet works that have little economic value may be important for scholarly purposes.

In a 2006 panel session, Prue Adler of the Association for Research Libraries gave three examples of the practical problems involved:¹

In trying to digitize a core collection in agriculture with text from the early 19th century to mid-20th century, which is very rich with statistical information and lots of history in the fields of agriculture, economics, animal science, food science, forestry, nutrition and more, Cornell spent \$50,000 in staff time working on copyright issues seeking permissions, tracking children of deceased authors, contacting publishing houses and more. Fourteen percent of their inquiries resulted in denial. But with the majority, 58 percent, Cornell was unable to determine the current owner.

Now, Cornell was seeking permission for 343 monographs. So we're not talking a large swath here, for \$50,000.

With regards to photographs, the Cornell Center for Labor Management Documentation in Archives has over 350,000 unpublished photographs in just this one collection alone. They would like to digitize these and make them publicly available. But only 1 percent of the photos have any indication as to who took the photograph. If you think about the time, energy and resources expended for 343 monographs; that pales in comparison to 350,000 photos without any identification.

Finally, in Cornell's rare book and manuscript collection, there are manuscript illustrations done by a Japanese-American artist in a relocation camp during the war. In the past, these have been published with permission of the artist. The current owner has disappeared and the paintings are now Orphan Works. No future scholar can publish them again until they enter the public domain some 120 years after the events they depict.

Clearly, it benefits neither the owner nor the public to have these intellectual assets lie fallow because their owners cannot be found. That this occurs is *ipso facto* proof that the legal arrangements and incentives governing the situation are out of whack with reality. As one of the panelists said in response to Adler's comment, corporate and university general counsels are a nervous lot, and the prospect that an owner will suddenly appear and demand major damages or an injunction makes them very timid in making Orphan Works available to the public.

¹ Solveig Singleton (Moderator) et al., *Orphan Works: A Search for Solutions*, Progress and Freedom Foundation, poprelease 13.13 (June 2006), http://www.pff.org/issues-pubs/pops/pop13.13orphanworks_transcript.pdf.

An additional drawback to the scheme contained in the proposed legislation was noted in the notice of inquiry itself: It did not take into account the possibilities of mass digitization. To the extent that diamonds exist in the pile of Orphan Works, they are usually found by the digital equivalent of hydraulic mining, not by painstaking panning for gold. To require digitizers to undertake a search process for every item added to a large database is unrealistic.

These factors lead to several conclusions about the treatment of Orphan Works:

1. While not universally true, the fact that a work is orphaned usually means that the copyright holder did not place high value on it. Thus, while the holder deserves some consideration, that consideration should be limited.
2. U.S. Copyright Office efforts to digitize records and to encourage others to digitize should affect rules in the future by making it easier for potential users to find owners. This is especially important for photographs, music, and other works that do not lend themselves to verbal description. Treatment of Orphan Works might need to be revised as search and transaction costs decline thanks to digitization.
3. The meaning of “fair use” for old works should be expanded. Fair use is a common law, judge-made doctrine and its [statutory embodiment](#) reflects this. The courts—and the Copyright Office—should adapt the concept to apply to modern circumstances and media. If ownership is not easily ascertainable, then it should be fair to use the work (preserving a record of provenance). If a rights holder were to show up later, the rights can be adjudicated at that time and any economic returns can be equitably adjusted. The Copyright Office can and should encourage this evolution without legislative action.
4. An expansion of “fair use” could also be applied to efforts to digitize existing works. For example, digitizing and displaying snippets from an out-of-print book could be considered fair use, period. One could go further, and say that if a work is commercially unavailable, then making the whole work available is fair. Or a use could be fair as long as the original work is acknowledged, but not if it is simply appropriated. A hybrid approach could also be used: If snippets are made available and the rights holder does not come forward within reasonable time, then it could be considered fair use to make the whole work available on the theory that property has been abandoned.
5. The structure of penalties for copyright infringement needs reform. Heavy statutory penalties were designed to deter deliberate mass piracy. They are not suited to the Orphan Works problem, where fear of quixotic, hefty penalties over-deters, and forces people to pass up opportunities to use intellectual property that would be of benefit to all. The Cornell examples above illustrate the point. Obviously, all of these projects should have

been undertaken, and the university should not have been subjected either to the expense of seeking the copyright holders or the risk of substantial penalties.

6. The Copyright Office should consider a one-shot cleanup program, under which all works produced before a specified date would go into the public domain unless the copyright holder registered the copyright. A reasonable date might be 1976, when the copyright registration requirement was eliminated. When a technological revolution occurs, such as the digital revolution, it makes good sense to respond to it.
7. The Orphan Works problem is likely to grow steadily worse. Since the 1976 revision of the law, everything is under copyright—every email and every blog post, for example. But the custom of the Internet is quite different—works are copied and recopied endlessly, sometimes with attention to fair use doctrine and sometimes not. For the most part, a custom is arising whereby a work is considered open for use unless it is protected by the copyright holder. Some intermediate approaches are also developing through private action, such as various kinds of Creative Commons licenses. Generally, it would be wiser to put the burden on the copyright holder to take some elementary steps to protect the work rather than to require an inquiry from every user. Again, this could be accomplished by evolutions of “fair use” doctrine.

On the whole, the Copyright Office continues to do an admirable job of analyzing an intractable problem, but in our view it needs to pay attention to transaction costs, the relationship between penalties and incentives for use of Orphan Works, lessons on abandoned property from other areas of the law, and the reality of the limited value of most Orphan Works.