

Orphan Works Reply Comment to the U.S. Copyright Office Notice of Inquiry (dated October 22, 2012)

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The 2013 Advanced Copyright and Orphan Works
Class

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Dear Ms. Karyn Temple Claggett,

Please accept this Reply Comment on orphan works by Professors Elizabeth Townsend Gard and Glynn Lunney, along with the 2013 Advanced Copyright and Orphan Work class at Tulane University Law School.¹ We set out to answer the two questions posed by the Copyright Office in its Notice of Inquiry relating to Orphan Works published on October 22, 2012.² After a six-week intensive study in which we read all ninety-one of the *2013 Comments*,³ we drafted our Reply Comment to illustrate our position in response to the concerns and suggestions regarding the occasional uses of orphan works rather than providing a comprehensive summary.⁴ We focused on the law itself and not on any particular point of view or interest group. In short, we came to the following conclusions:

- **Existing Laws:** Sections 512(c), 412(c), 302(e), 506, and 1202 already potentially provide support for concerns raised by many of the Commenters regarding orphan works.⁵
- **Objective Diligent Search:** We are concerned that anything but an objective diligent search will create impossible criteria to meet, based on our experiences on our six-year project, the Durationator® Copyright Experiment.⁶
- **Registration and Registries.** We think registration remains a key component in the copyright system, and any additional “registries” should supplement the system and be available or linked to the Copyright office website.⁷
- **Orphan Status as Reliable for Third-Party Uses.** We believe that if an orphan is designated in its source country, that orphan status should apply within the United States, and not require an additional search. We also have come to believe that if a work is deemed orphan in one scenario—i.e. mass digitization—that it should be deemed an orphan in all scenarios—i.e. third-party users or other projects.⁸
- **Duration and Copyright.** Regarding duration, we suggest that if a work is deemed “orphan,” the term of the “orphan’s” copyright should be no longer than Berne’s minimum requirements, with no work entering the public domain before the termination of transfer period has expired.⁹
- **Fair use:** For occasional uses of orphan works, fair use might work as a solution, but it could be better if there greater certainty in the law as to its application. With regard to fair use and *HathiTrust* within the context of mass

¹ See app. E for credits.

² Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555 (Oct. 22, 2012).

³ *Comments on Orphan Works (In response to Notice of Inquiry dated Oct. 22, 2012)*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/orphan/comments/noi_10222012/ [hereinafter *2013 Comments*] (last visited Mar. 5, 2013).

⁴ See *infra* Part I.B.

⁵ See *infra* Part II.C.

⁶ See *infra* Part II.B.3.i.

⁷ See *infra* Part II.B.3.ii.

⁸ See *infra* Part II.B.2.iv.

⁹ See *infra* Part II.C.8.

digitization projects for libraries, we suggest caution. *HathiTrust* is still only a district court level decision, and far from settled law. We are also concerned that while libraries may benefit from fair use, users of the works that have been digitized may not have the same defense, and that additional solutions may be necessary for the artist, scholar, teacher, or filmmaker wanting to use all those digitized works.¹⁰

Part I discusses our Statement of Interest, including our methodology and our previous work. Part II analyzes the *2013 Comments* and examines how existing law could be used to permit the occasional uses of orphan works. Part III sets out our recommendations for a solution to the orphan works problem. We have also included Appendices with materials we prepared to further our discussion and understanding of the subject.¹¹

I. Statement of Interest¹²

A. Our Work at Tulane University

We come to the question of orphan works from four perspectives.

1. The Durationator® Copyright Experiment

First, Dr. Elizabeth Townsend Gard¹³ has been conducting a now six-year project at Tulane University Law School: the Durationator® Copyright Experiment. We set out to try to build a software project which would determine the copyright status of any work (poem, book, photograph, film, etc.) from anywhere in the world, from any time period, and for any jurisdiction. It was a simple question: is the work under copyright or in the public domain? The task has been daunting. Along the way we found ourselves confronting orphans, complicated laws, difficult searches, and impossible facts to find as we tested our knowledge, helped people, and, eventually this past year, began working with strategic research partners. Many of the students in the orphan work course have also worked very hard as researchers on the Durationator®. We have had experiments both within the classroom and with real people trying to find answers to the basic question: what is the copyright status of a particular work?

Paul Courant's comments really rang true for us. He explained the problem with orphan works (and, we might add, determining the copyright status of any work):

One thing we have learned since 2006 is that establishing whether a work is an orphan work is difficult and costly, especially without federal

¹⁰ See *infra* Part II.C.9.

¹¹ See *infra* apps. A-E.

¹² Professor Elizabeth Townsend Gard.

¹³ Jill H. and Avram A. Glazer Professor in Social Entrepreneurship
Associate Professor in Law, Co-Founder and Co-Director, Tulane Center for IP Law and Culture, Co-Inventor and Director, Durationator® Copyright Experiment, Tulane University Law School.

standards that we can rely upon. To borrow from medicine, orphan work status is a diagnosis of exclusion; in order to establish that a work is an orphan work one must prove a complementary negative – that it cannot be claimed by rights holder [sic]. No matter how deeply one does the research, there may be one more avenue of inquiry or fact just out of reach that may lead to a putative rights holder – often a party who is so remote from the creation of the work as to be unsure or unaware of their rights.¹⁴

We have learned a lot from our experiment. Clear, achievable requirements are key. Aspects of our current law are often abstruse or ambiguous. Whereas the 1976 Copyright Act was elegant in its construction, the more recent amendments are filled with details that are difficult to implement or understand.¹⁵ We are concerned that the solutions will be complicated, impossible, or biased in favor of certain users. Our Reply Comment instead focuses on the works themselves, rather than on their users, and we hope that your office will take this input into account in any final rulemaking.

2. Pre-1972 Sound Recordings

The orphan work Reply Comment will be our second comment from students and faculty at Tulane University Law School. The Copyright Class of 2011, along with Dr. Townsend Gard, produced a Reply Comment for the pre-1972 sound recordings call for comments. The exercise was amazing, as it combined learning, research, understanding each Comment’s perspective, and then coming to consensus on our suggestions and conclusions. We are building on our experiences, and have created an advanced course specifically devoted to writing this Reply brief for Orphan Works.¹⁶

3. Professor Glynn Lunney

Originally, Professor Townsend Gard assumed that she would be working on the narrow question of duration, her specialty. Her colleague, Glynn Lunney, suggested also considering remedies. Together, they proposed and co-taught a course on Copyright and Orphan works for advanced copyright students. From the first day, it quickly became apparent that the scope was much larger than merely duration and remedies. Professor Lunney led the initial discussions and the final discussion in which we returned to the 2008 legislation as our last exercise. His broad knowledge of many subjects—in copyright, trademark and patents, along with statute of limitations and civil procedure—added breadth to our conversations and our final product.

4. Greg Stein

One of our 3L students, Greg Stein, has been working deeply on the question of orphan works: writing his law journal comment, a research paper, and a Comment for the Copyright Office¹⁷. Recognizing his interest and expertise, we saw an opportunity to

¹⁴ 2013 Comments, *supra* note 3 (scroll down to Document 89; follow link to “Courant, Paul”).

¹⁵ Compare 17 U.S.C. 110(1) (West 2012) with 17 U.S.C. 110(2) (West 2012).

¹⁶ See *infra* Part I.B.

¹⁷ 2013 Comments, *supra* note 3 (scroll down to Document 87; follow link to “Stein, Gregory Scott”).

build upon his knowledge. He has served as our Editor in Chief on the Reply Brief and helped teach the class. His knowledge helped us build the course and recognize key issues we needed to address in the brief. His focus was one more reason we felt that attempting a Reply Comment was possible.

5. The Law Students

Finally, this brief in many ways reflects the intellectual vigor, creativity, and dedication of our students here at Tulane University Law School. Each student brought their own unique perspective, style, knowledge, and skill set. We have students from every background imaginable, including a specialist on the WTO, a representative for library issues, a Ph.D. in Computer Science, a former in-house counsel employee for a major content creator in California, and a former museum employee. Their knowledge and sympathies outside of the law added to our discussion and informed our outcome. They worked collaboratively as a team and individually, taking an assigned topic and making it their own work. They put in way too many hours for the class credit they're receiving. They worked joyfully and with great purpose. I hope all of their hard work makes a difference in providing useful resources and information.

B. Our Methodology

Our Reply Comment was written by fifteen individuals—two professors and thirteen advanced copyright students—over the space of six weeks.¹⁸ We began with a discussion of orphan works and looked at the previous legislation, previous comments, the first Orphan Works Copyright Office report, the Copyright Office's Mass Digitization report, and the general discourse currently surrounding orphan works, including recent developments regarding orphan works in the European Union and around the world.

Once the Initial Comments were available at the U.S. Copyright Office website, we focused on understanding the positions of each commenter and the solvable legal issues we could identify. We first reviewed all ninety-one comments submitted to the Copyright Office regarding orphan works and discussed the issues, patterns, and conflicts we found. As a class, we identified twelve significant groups and issues for further analysis, with each student writing a brief summary for the class.¹⁹ Students represented various interests and groups from the Comments throughout the discussions that followed.²⁰ We also noted that different voices within each interest group added to the complexity of the issues and proposed their own solutions to the orphan works problem. Finally, we started to see patterns emerging, particularly after our statistical analysis of the 2006 and 2013 comments. In the end, we concluded that a common solution for everyone was preferable to specific solutions for specific groups, and that making use of

¹⁸ See *infra* app. E.

¹⁹ Mass Digitization, Berne, Photographic Works, Fair Use, Solutions Under Foreign Law, Judge Chin and the Google Books settlement, Digital Copying, Searchable Records, Museums, Users, Previous (2005 & 2008) Legislation.

²⁰ E.g., libraries, photographers, content owners, museums, and users.

existing laws to address the orphan works issue is preferable to adopting new, untested approaches.

The Notice of Inquiry asked a two part question: what has changed since 2008 with regard to orphan works, and how does mass digitization affect the orphan works problem? After much discussion, we decided to frame our Reply Comment in terms of utilizing existing law, as we found that many issues can be sufficiently addressed under the current legal system.

Much of the world has changed since 2008—we have seen the escalation of social media and of mass digitization projects like Google,²¹ HathiTrust,²² and Europeana.²³ The great race to digitize has changed our vision and expectations about the works that should and should not be protected under the law. We must recognize, however, that as users of our copyright system, digitizers often have distinctly different interests and ambitions from the scholar, artist, filmmaker, student, and others.

Our perspective of the law has changed dramatically since 2008, as well. For the last six years, Prof. Elizabeth Townsend Gard and Tulane Law students have been engaged in research and coding the copyright laws of every country in the world.²⁴ We have recognized that clear, attainable policy goals within the law are very important. Objective standards, clear boundaries, and knowable facts are the key to creating a legal system that achieves the desired results. We have run into significant problems with U.S. law on a number of occasions because legal elements are not defined clearly, requisite facts are not obtainable, or the laws themselves are contradictory. People want to be able to understand the law and use the copyright system effectively, but if the laws themselves are unclear or difficult to interpret, then the law’s purpose becomes frustrated. Whatever comes of orphan work legislation, we ask that the standards are clear, concise, objective, and consistent for all users.

II. Our Reply

A. Summary

We respect and recognize the concerns of all ninety-one Comments. Our goal in our Reply is to provide useful information and a context in which to continue the discussion of issues. Our class believes that we should build upon the solutions offered in existing laws to solve remaining orphan work problems. We do not believe that orphan works require the invention of a new system of copyright, and we think that many rights holders and users are simply unaware of existing tools. Too few of the Comments have taken into consideration existing mechanisms to combat the orphan work problem. On the other hand, too many Comments attempt to create new “registries” or other systems without carefully analyzing how the existing system operates or what mechanisms are already in

²¹ Google Books, GOOGLE, <http://www.books.google.com/books> (last visited Mar. 4, 2013).

²² HATHITRUST DIGITAL LIBRARY, <http://www.hathitrust.org> (last visited Mar. 4, 2013).

²³ EUROPEANA, <http://www.europeana.eu/portal/> (last visited Mar. 4, 2013).

²⁴ See *infra* Part I.A.1.

place. After much discussion, the class decided that our time was best spent in pointing out elements that already exist within the 1976 Copyright Act that might be helpful. Part II.C. discusses those solutions under the current 1976 Copyright Act that—if used effectively—would help to alleviate some of the problems associated with orphan works.

B. Our Analysis of Comments

In preparing our Reply Comment, we extensively analyzed the *2013 Comments*. Each Comment was assigned to a student, and each comment was summarized in a worksheet. We then grouped the Comments by type (photographers, museums, libraries, large content owners, etc.) and commenced a deeper analysis of the patterns and disagreements we observed within each group. Bri Whestone, a 3L law student, focused on rights holders as a group and Morgan Embleton, a 2L law student, looked at the Copyright Office’s categories of “users” as compared to the 2013 Comments. Dan Collier, a 3L law student, conducted a statistical analysis on both the 2005 and 2013 Comments to see what differences we could see in the commenters and the topics they addressed.

1. Rights Holders²⁵

While we recognize that many rights holders, authors, and content owners sent in comments, we focused on the major players in music and film. We read through each comment, but we felt that by focusing our summary on ASCAP/BMI, the RIAA, the MPAA, and SAG-AFTRA, we would be able to address the main arguments that were raised in other comments, as well.

i. There is No Orphan Works Problem

Since 1972, copyright owner information for sound recordings has been registered and tracked by major labels, so the orphan works problem does not exist with respect to this category of works in the same manner as it might in other categories.²⁶ Further, searchable databases for sound recordings have been reasonably comprehensive since the 1970s.²⁷ Because of new search capabilities and processes involving the Copyright Office’s online records, voluntary registries, and other such mechanisms, the MPAA believes that over time fewer works will fit under the “orphan” definition and has asked the Copyright Office to conduct a study on any “remaining orphan works”.²⁸

Similarly, ASCAP and BMI do not think there is a need for orphan work legislation aimed at musical works.²⁹ Together with SESAC, these organizations

²⁵ Written by Bri Whestone, 3L, Tulane University Law School.

²⁶ *2013 Comments*, *supra* note 3 (scroll down to Document 79; follow link to “Recording Industry Association of America (RIAA)”).

²⁷ *Id.*

²⁸ *Id.* (scroll down to Document 67; follow link to “Motion Picture Industry Association of America (MPAA)”).

²⁹ *Id.* (scroll down to Document 9; follow link to “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”).

represent 99% of the works registered with the Copyright Office as well as thousands of unregistered works.³⁰ Considering this reality, they believe it is unlikely that a user would be unable to locate a rights holder using their databases.³¹ Prospective users of musical works in cinematic works are also able to locate the clearance information needed for sync licenses through organizations like the Harry Fox Agency.³² All of these licensing organizations have up-to-date contact information for rights holders in their freely accessible, public databases on practically all copyrighted musical works.³³

ii. Searching and the “Diligent” Search

SAG-AFTRA points out that contacting rights holders is as simple as searching their publically available database of collective bargaining agreements or contacting their office and thus, a prospective user should be required to do so as part of his/her diligent search.³⁴

The RIAA wants an enumerated list of requirements for a diligent search that varies by industry.³⁵ While it would approve of a voluntary set of guidelines to inform the diligent search standard instead of formal rules, it believes the Copyright Office must take the lead for each industry to make sure these guidelines are properly drafted.³⁶

Further, the digital landscape of online media has changed since 2008. There are more services available to prospective users to help locate copyright owners. Sound recordings may employ audio fingerprinting software to identify owners and there are several independent databases with historical film information that can lead a user to the appropriate copyright holder.³⁷ The RIAA, ASCAP/BMI, and the MPAA believe that these databases and resources should be included as part of any diligent search standard.³⁸

iii. Rights Holders and Mass Digitization

Across the board, rights holders argue that orphan works legislation is not the place to address issues of mass digitization. They believe that mass digitizers will abuse an “orphan works” exception to the detriment of the copyright owners.

The RIAA believes that mass digitization is not an orphan works problem because many of the authors in a digital catalog can be readily identified.³⁹ They worry that users

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* (scroll down to Document 82; follow link to “Screen Actors Guild- American Federation of Television and Radio Artists (SAG-AFTRA)”).

³⁵ *Id.* (scroll down to Document 79; follow link to “Recording Industry Association of America (RIAA)”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (scroll down to Documents 9, 67, and 79; follow links to “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”, “Motion Picture Industry Association of America (MPAA)”, “Recording Industry Association of America (RIAA)”, respectively).

³⁹ *Id.* (scroll down to Document 79; follow link to “Recording Industry Association of America (RIAA)”).

will use orphan works legislation to alleviate the burden of locating owners and seeking permission.⁴⁰ “[T]he only entities that would be entitled to treat copyrighted works this way are ones that sought to reproduce them en masse rather than one at a time –so that only users of vast amount of copyrighted works would be entitled to dodge the orphan works requirements while users of individual works would need to comply with them.”⁴¹ Similarly, the MPAA and ASCAP/BMI believe that the public policy issues involved in mass digitization are different from those involved in orphan works.⁴² Like the RIAA, the MPAA does not think an exception should apply to mass digitizers simply because it would be too expensive or time-consuming to contact the owners of the thousands of works they seek to reproduce.⁴³ Similarly, SAG-AFTRA believes that such an exception will disproportionately impact its members’ financial and contractual rights.⁴⁴ While texts and photographs are usually used for preservation or education, music and audiovisual works have a stronger commercial market.⁴⁵

iv. Copyright “Owners” Aren’t the Only Ones Affected by Use of Orphan Works

SAG-AFTRA points out that the 2008 legislation only addressed remedies that the copyright owner would have against a potential user, but failed to provide remedies for the contractual rights a performer might have against a missing copyright owner.⁴⁶ While the owner would be able to seek compensation for the use of the work, the user “could ignore the economic damages to an author, or anyone, who held an enforceable contractual right to compensation from a missing owner.”⁴⁷ Even if an owner becomes “lost” because a small label or production company went out of business, the author or artist may yet have rights in the work, such as use-based royalties.⁴⁸ SAG-AFTRA points out that these artists may also have termination rights and will be easily locatable after the termination of transfer date, making the work less “orphaned.”⁴⁹ If a potential user contacts an artist with termination rights, this artist will be the one with the power to license or enjoin the use in the absence of a copyright owner.⁵⁰ Further, through collective bargaining agreements, recording artists and actors have the right to approve or deny the use of their works, which may be ignored in allowing the use of an “orphaned” work.⁵¹

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (scroll down to Documents 9 and 67; follow links to “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”, “Motion Picture Industry Association of America (MPAA)”, respectively).

⁴³ *Id.* (scroll down to Document 67; follow link to “Motion Picture Industry Association of America (MPAA)”).

⁴⁴ *Id.* (scroll down to Document 82; follow link to “Screen Actors Guild- American Federation of Television and Radio Artists (SAG-AFTRA)”).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

v. *Their Solutions*

SAG-AFTRA is willing to support an orphan works system that is limited in purpose to historical archiving, cultural preservation, and “other public interest and altruistic purposes.”⁵² However, SAG-AFTRA believes that sound recordings should be categorically excluded.⁵³

RIAA supports an ITU database that requires users to identify the work they intend to use and the user’s contact information.⁵⁴ Detailed information on the use of the work would not be required.⁵⁵

The MPAA is most concerned with technological advances that will make searching, and therefore finding authors, easier.⁵⁶ They suggest improving search capabilities at the Copyright Office, as well as partnering with public and private resources to promote cross-referencing with private and academic databases.⁵⁷

ASCAP/ BMI want any legislation to explicitly state that musical works that have a license available from a “readily locatable collective licensing organization” are not orphaned works.⁵⁸ Further, they think other groups, like photographers and other visual artists, should consider creating their own collective licensing organizations to address the problems specific to their fields.⁵⁹

2. Users⁶⁰

The Copyright Office, in its original orphan works report, categorized the users affected by the orphan works problem into four groups: large scale access users, subsequent users, enthusiast users, and private users.⁶¹ We analyzed this distinction between users by reviewing the ninety-one initial comments from 2013 and comparing them to the over 700 initial comments submitted in 2005. Our analysis shows that such theoretical categorizations confuse the orphan works discussion by obscuring the changing nature of the interest groups involved. Furthermore, analysis of the true interests underlying the initial 2013 comments left many class members concerned about their impact on future orphan works legislation.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* (scroll down to Document 79; follow link to “Recording Industry Association of America (RIAA)”).

⁵⁵ *Id.*

⁵⁶ *Id.* (scroll down to Document 67; follow link to “Motion Picture Industry Association of America (MPAA)”).

⁵⁷ *Id.*

⁵⁸ *Id.* (scroll down to Document 9; follow link to “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”).

⁵⁹ *Id.*

⁶⁰ Written by Morgan Embleton, 2L, Tulane University Law School; Dan Collier, 3L, Tulane University Law School.

⁶¹ See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, (Jan. 2006), 36-39, 122-125, *available at* <http://www.copyright.gov/orphan/orphan-report-full.pdf> [hereinafter Orphan Works Report].

The rights holders described in this first section represent large, powerful groups. Obviously, other rights holders wrote Comments as well, and they are included as part of our Reply Comment as well. And so, from the beginning the label is misleading. A writer wanting to use an old short story from a periodical as the basis for a new novel, a songwriter using an old musical composition as the basis for a new song, a film studio making a film with various photographs from the 1930s whose original owners cannot be found, or an actor wanting to create a one-person show based on an old radio play – these are all examples of how we can fit both classifications at once. The stuff of our culture—the building on the shoulder of giants—occurs every day. We are all creators and users of works.

i. The 2005 Initial Comments; Private Users

Our analysis began with keywords. Using third-party software,⁶² we aggregated the initial comments from 2005. After eliminating common English words, proper nouns, and terms associated with orphan works comments, such as “copyright” and “comment,” we determined the 87 most frequently used terms.⁶³ These key terms were clustered in a tree graph, combining words that tended to appear together into categories of related terms that refer to a common idea.⁶⁴ The clusters, in turn, were plotted on a two-dimensional field (see below). Size of the term represents its overall frequency, distance between terms represents the likelihood that they would coincide in a document, and lines show common combinations of terms. Terms appearing closer to the center of the field thus coincided with the greatest number of other words, and terms in higher line-density areas reflect the focus of conversation as the most common combinations.

⁶² Provalis WordStat, available at <http://provalisresearch.com/products/content-analysis-software> (last visited Mar. 3, 2013).

⁶³ See app. B.1, fig. 4. Conjugations and many synonyms were aggregated, so that, e.g., “user” includes “users” and “film” includes “movie.”

⁶⁴ See app. B.1, fig. 5. “Clusters” of a single term were omitted, so not every word out of the 87 most common is shown.

because copyright information is unavailable for parts of the collection.⁶⁷ Given the size of the collection, an individual work might have a much higher value to the project as a whole than its cost of inclusion.⁶⁸ The large scale access users fear the copyright holder who resurfaces requesting injunctive relief and/or monetary compensation.⁶⁹ The Copyright Office suggested that such users should conduct a reasonably diligent search, attribute the work to the author (if possible), and document every step taken to find and attribute the work to the proper copyright holder.⁷⁰ If a copyright holder resurfaces, LSAUs may then prove through documentation that it performed a reasonable search, limiting the remedies available to the copyright holder. Then, LSAUs could take down the work with no monetary penalty or, if the work is transformative, continue use after paying reasonable compensation.⁷¹

In the *2013 Comments*, many potential LSAUs submitted comments wishing to use mass digitization as a way to provide greater access to their collections. For instance, the University of North Carolina Library supports “digitization [to] promote[] access to materials that cannot be found anywhere else.”⁷² Further, the Council of University Librarians at the University of California (“Council”) believes that “new technologies offer libraries the opportunity to . . . provid[e] access to their collections.”⁷³ But the Council also expressed concern that orphan works would hinder digitizing: “Being forced to digitize only selected items, based on the uncertainty of copyright, significantly muddles the provenance for the digital items available, eviscerating valuable context and diminishing the usefulness for most research and teaching purposes.”⁷⁴

Enthusiast users (“EUs”) are defined as “enthusiasts of a particular work, or hobbyists or experts in a particular field.”⁷⁵ According to the Copyright Office, the majority of the works that concern EUs “are no longer available commercially, and therefore these users would like to republish them on a limited basis for others who share the same interest or expertise . . . or post these works to the Internet so that others with shared interests might enjoy the works as well.”⁷⁶ These users are described as lacking a preference for monetary or injunctive relief because they are mainly concerned with

⁶⁷ *2005 Comments, supra* note 62 (scroll down to Document OW0457; follow link to “Michael Keller/Stanford University Libraries”). (“The ability of researchers to learn about and make use of the ideas and knowledge within individual volumes is limited by the very physicality of these publications . . . The existence of Orphan Works, though, can significantly hinder the ability of research libraries and archives to use these [digital] advances to ‘promote the Progress of Science and useful Arts’ to their fullest extent.”).

⁶⁸ *Orphan Works Report, supra* note 58, at 38.

⁶⁹ *Id.*

⁷⁰ *Id.* at 122-23.

⁷¹ *Id.* at 123.

⁷² *See id.* (scroll down to Document 72; follow link to “North Carolina State University (NCSU) Libraries”); *see also id.* (scroll down to Document 89; follow link to “University of Michigan”) (“We wish to preserve books, to make books accessible to people who have disabilities, to enable people to identify and locate books relevant to their pursuits, to enable complex, state-of-the-art research on and about books, and to maintain the cultural and scholarly record for future generations.”).

⁷³ *2013 Comments, supra* note 3 (scroll down to Document 30; follow link to “Council of University Librarians at the University of California”).

⁷⁴ *Id.*

⁷⁵ *Id.* at 38.

⁷⁶ *Id.* at 39.

preserving the work while respecting the copyright holder; the Copyright Office concluded, “these users would be amenable to at least the availability of injunctive remedies as well as some form of monetary damages or compensation.”⁷⁷ The Copyright Office suggested that EUs, like LSAUs, will have to conduct a reasonably diligent search and attribute the work to the author.⁷⁸ EUs that post the information on the Internet may be subject to having to take it down or pay reasonable compensation if the copyright holder resurfaces.⁷⁹

In the *2013 Comments*, groups potentially representing EUs submitted comments concerned with using orphan works for cultural benefit. For instance, the Future of Music Coalition “acknowledge[d] the cultural benefits that proceed from access to expression, as well as the ability of artists to encounter and make new creative use of existing works.”⁸⁰ Further, the Dance Heritage Coalition expressed “the inability to engage effectively in negotiations for permission to use preexisting materials can operate as a major bar to new cultural production, namely because information about copyright ownership is absent or confused, or because presumed copyright owners are unresponsive.”⁸¹

The Copyright Office defined **Subsequent Users** (“SUs”) as those who “wish to incorporate existing works into their own creative expressions.”⁸² Many SUs described their interest in using historical video footage or photographs for educational purposes.⁸³ SUs expressed concern with using works when they cannot find the copyright holder for fear of being sued, and choose not to include the work for fear of legal repercussions.⁸⁴ The Copyright Office saw uses desired by SUs as too extensive for a fair use defense.⁸⁵ SUs would particularly fear injunctive relief, due to the financial losses sustained by a user who has already incurred costs of production and distribution.⁸⁶ The Copyright

⁷⁷ *Orphan Works Report*, *supra* note 58, at 39. (“[M]ost of these users would likely comply with the wishes of the copyright owner if the rightful party could simply be identified.”).

⁷⁸ *Id.* at 125.

⁷⁹ *Id.*

⁸⁰ *2013 Comments*, *supra* note 3 (scroll down to Document 44; follow link to “Future of Music Coalition”).

⁸¹ *2013 Comments*, *supra* note 3 (scroll down to Document 32; follow link to “Dance Heritage Coalition (DHC)”; *see also* *2013 Comments*, *supra* note 3 (scroll down to Document 91; follow link to “Zimmerman, Jill”) (“There is a cost to our cultural heritage when scholars, documentary filmmakers, curators, archivists, artists, educators, librarians and other individuals abandon projects because they cannot locate a copyright holder to ask permission for the use . . .”).

⁸² *Orphan Works Report*, *supra* note 58, at 36.

⁸³ *See, e.g., 2005 Comments*, *supra* note 62 (scroll down to Document OW0030; follow link to “Kenn Rabin/Fulcrum Media Services”) (“Ultimately . . . an independent filmmaker rarely has the resources to fight a potential legal battle, and thus, even if they . . . would like to use a piece of film for which they have not been able to find a copyright holder, they have to decide whether or not to take the risk of being sued . . .”); *2005 Comments*, *supra* note 62 (scroll down to Document OW0275; follow link to “James Campbell/Modular Media”) (While we may believe that there is no longer any desire on the part of the owner of the copyright . . . to exploit the work, given the draconian penalties now in place for copyright violation, we dare not use such a piece and, even if the overall quality of the production suffers, we must simply pass on it.).

⁸⁴ *See id.*

⁸⁵ *Orphan Works Report*, *supra* note 58, at 36.

⁸⁶ *Id.* at 36-37.

Office suggested that SUs conduct a reasonably diligent search, attribute the work to the author (if possible), and “be prepared to pay reasonable compensation to the [copyright] owner[.]”⁸⁷ Because SUs’ works are commercial in nature, they may not be entitled to “elimination of monetary relief[.]”⁸⁸ The Copyright Office concluded that SUs “will be able to continue to prepare and exploit the derivative work . . . provided [they] pay[] reasonable compensation and make[] reasonable attribution to the author and owner.”⁸⁹

In the *2013 Comments*, groups potentially representing SUs submitted comments concerned with using an orphan work and facing costly litigation. For example, the Institute for Intellectual Property and Social Justice (IIPSJ) established that “when all of the rights owners to a work cannot be identified, it is not possible to make use of that work without risking suit for copyright infringement and the imposition of indeterminate damage awards.”⁹⁰ Further, Librarian Jill Zimmerman expressed that “[t]here is a cost that fear of being found guilty of copyright infringement causes projects of value to not be undertaken or not begun because an injunction may halt the project at any time.”⁹¹ Potential SUs also expressed concern with the loss of future derivative works. For example, the Digital Media Association argued that risk of copyright infringement would prevent access to future works because potential users who cannot reduce the risk of an injunction “would likely choose not to use the work . . . This would be unfortunate and inconsistent with the purpose of the Copyright Act, because . . . although no one objects to the use, the public nevertheless is deprived” of it.⁹²

Finally, **private users** (“PUs”) are defined by the Copyright Office as individuals who wish to use copyrighted materials for personal purposes. “The most common involves a user who wishes to make a reproduction of a family photograph, but the original photographer is unidentifiable, or long gone.”⁹³ Like EUs, PUs “generally appear motivated by honest attempts to follow the law, and in most cases also appear willing to provide some compensation to the copyright owner if that party could simply

⁸⁷ *Id.* at 124.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *2013 Comments*, *supra* note 3 (scroll down to Document 53; follow link to “Institute for Intellectual Property and Social Justice (IIPSJ)”); *see also 2013 Comments*, *supra* note 3 (scroll down to Document 55; follow link to “International Documentary Association, Film Independent, Independent Filmmaker Project, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, Gilda Brasch, Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films”). (“Even when an occasional filmmaker can stomach the risk of litigation, statutory damages, and an injunction that could stop the project completely, he or she generally cannot obtain insurance coverage, distribution deals, or broadcast deals.”).

⁹¹ *2013 Comments*, *supra* note 3 (scroll down to Document 91; follow link to “Zimmerman, Jill”).

⁹² *2013 Comments*, *supra* note 3 (scroll down to Document 35; follow link to “Digital Media Association (DiMA)”).

⁹³ *Id.* at 39; *see also 2005 Comments*, *supra* note 62 (scroll down to Document **OW0441**; follow link to “James Joseph Wagner”) (“I . . . took the image to Walgreens to print an enlargement that would help comfort all at the wake and funeral with happy memory of Mary's joyful smile . . . Unfortunately when I returned to the store to pick up the print . . . the Store manager had confiscated the print because, as it clearly was a school photograph, it must be a copyrighted work.”).

a. User Groups, Expanded

Although the 2013 Comments have followed the Copyright Office’s lead in discussing users and owners with similar focus and intensity, the user groups that the Copyright Office report identified were not widely addressed in explicit terms. In our first efforts to understand the 2013 Comments, we attempted to categorize the commenters within the four user groups. Although few of the commenters identified themselves as representing specific groups, e.g. enthusiast users, we marked the Comments according to whether they proposed plans that would support a given use. Comments supporting plans to encourage public, small-scale, non-commercial uses of orphan works were marked “EUs,”⁹⁸ Comments supporting plans to bolster public, small-scale, commercial uses were marked “SUs,”⁹⁹ and Comments supporting plans to improve public, large-scale, non-commercial uses were marked “LSAUs.”¹⁰⁰ We found that the four Copyright Office user groups do not accurately reflect the distribution of interests in the orphan works problem.

As an initial issue, the four groups do not represent every user interest. The Copyright Office didn’t provide a designation for users who seek public, large-scale, commercial uses of orphan works, so we followed Rutgers University Libraries in calling them “Large-Scale Access Beneficiaries.”¹⁰¹ But, even after expanding to five groups, there was still something missing from the group analysis: many commenters only wrote to oppose specific user groups.¹⁰² The Copyright Office’s structure lacks a group for users of orphan works who stand to lose more than they gain from enabling legislation.

To make matters worse, our reading of the Comments suggested that, among users who stand to gain more than they lose from enabling legislation, there is no real difference between the groups. Around 65% of the Comments that supported a user group supported more than one of the identified groups, demonstrating that most users are not clearly identified with any one group.¹⁰³ Furthermore, membership in a user group did not strongly correlate with advocating a given policy. In other words, there was no dramatic, reoccurring difference between the policies advocated by members of different user groups.¹⁰⁴

⁹⁸ See, e.g., *2013 Comments*, *supra* note 3 (scroll down to Document 76; follow link to “Picture Archive Council of America, Inc. (PACA)”).

⁹⁹ See, e.g., *id.* (scroll down to Document 43; follow link to “Films Around the World, Inc.”).

¹⁰⁰ See, e.g., *id.* (scroll down to Document 54; follow link to “International Association of Scientific, Technical and Medical Publishers (STM)”).

¹⁰¹ See *2013 Comments*, *supra* note 3 (scroll down to Document 80; follow link to “Rutgers University Libraries”).

¹⁰² See, e.g., *id.* (scroll down to Document 18; follow link to “Association of Medical Illustrators (AMI)”).

¹⁰³ See, e.g., *id.* (scroll down to Document 40; follow link to “Electronic Frontier Foundation (EFF) and Public Knowledge (PK)” (supporting many user-related groups)).

¹⁰⁴ See, e.g., *id.* (scroll down to Document 72; follow link to “North Carolina State University (NCSU) Libraries”) (supporting limited statutory damages and opposing ECL to assist LSAUs); *c.f.* *2013 Comments*, *supra* note 3 (scroll down to Document 35; follow link to “Digital Media Association (DiMA)”) (supporting limited statutory damages and opposing ECL to assist EUs and SUs).

The Copyright Office’s user designations mask the important distinctions between orphan works interests. For example, although one may theoretically distinguish a commercial use from a non-commercial use, this line blurs when applied to actual user groups operating in the intellectual property economy. A medical school’s “nonprofit” uses can constitute a medical illustrator’s entire economic livelihood.¹⁰⁵ Our research suggests that there are only two primary interest groups who drive the orphan works discussion: users who stand to gain more, overall, from orphan works uses than they expect to lose, and users who stand to lose more from orphan works uses than they expect to gain.

This fundamental interest group division explains the dramatic differences in keyword frequency and clustering between 2005 and 2013. A single private use represents minimal potential gain or loss. Accordingly, private users (and any who might represent them) lack motivation to stay involved in the orphan works discussion, and subjects like private family photographs, local Internet culture, and the costs of navigating a complex system are lost. But public use is nothing more than aggregated private uses. Thus, though the dedicated private users themselves drop out of the conversation, generalized discussion of users is increasingly weighted by those on both sides of the issue who continue to talk about them as justification for other positions.¹⁰⁶

b. Mass Digitizers

Mass digitization is a complex, intellectually ambiguous issue that has only recently entered public discourse. But the keyword clustering analysis shows that the subject has already radically shifted orphan works debate. Although only around 30% of commenters provided a clear answer regarding whether mass digitization is actually part of the orphan works problem, a large majority of those commenters both said that it is part of the orphan works problem and advocated for legislation that would encourage orphan works use. Our user groups analysis explains how it has rapidly become so influential.

We considered user groups who proposed plans that would support as many orphan works uses as they would oppose or more to represent users who stand to gain more, overall, from orphan works uses than they expect to lose. Google is the prototypical user who stands to gain more, overall, from orphan works uses than they expect to lose. Google stands to gain both directly and indirectly from large-scale commercial use of orphan works by monetizing the Google Books Project and through such applications as deriving better search algorithms through analysis of the Project’s vast quantity of linguistic data. Google also gains from individual people posting orphan works online because increased web traffic improves advertising revenues and increases users of Google search tools. On the other side of the equation, Google itself owns little

¹⁰⁵ See *2013 Comments, supra* note 3 (scroll down to Document 18; follow link to “Association of Medical Illustrators (AMI)”).

¹⁰⁶ See, e.g., *id.* (scroll down to Document 61; follow link to “Library Copyright Alliance (LCA), (including the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL)” (discussing the difficulty of complying with complex rules only to justify not implementing the protections that small individual users would require to employ orphan works)).

in the way of works that are likely to be orphaned in the near future. Accordingly, there are no potential uses of orphan works from which Google is not likely to derive a net profit. We were thus unsurprised to see Google firmly in our “beneficiaries” column, proposing plans to support every possible orphan works use and oppose none.

We found it important to keep in mind that large-scale users are not the only ones who stand to gain more, overall, from orphan works uses than they expect to lose. For example, another apex beneficiary that we identified was Jill Zimmerman, a librarian and scholar. Her thoughtful 2013 Comment speaks to the concerns of many academic researchers, who often run into orphan works problems when they seek to use older works as research material inside and outside the classroom. Like Google, such users stand to lose little of commercial significance from others using their works, should those works become orphaned. Such users can make dramatic improvements in research efficiency from their own small-scale commercial work with orphans and as indirect beneficiaries of their colleagues’ use of orphans in educational materials and of mass digitization projects. Accordingly, there are no potential uses of orphan works from which Jill Zimmerman is not likely to derive a net personal profit.

Photographers like Von R. Buzard represent the opposite extreme of users who reasonably expect to lose more than they stand to gain from orphan works uses. Photographers whose primary business lies in artistic images of people, animals, and places rarely, if ever, make use of another’s copyright-eligible material, whether potentially orphan or not. Accordingly, they have nothing to gain beyond social altruism from supporting anyone’s use of orphan works. We considered Von Buzard the perfect example of an orphan works “benefactor” because, as he seems all too aware, all potential benefits of orphan works legislation represent only lost profits to him.

We found that the set of users who have more to gain from orphan works uses than they expect to lose has a dramatic impact on the orphan works discussion, comprising around 83% of the Comments that explicitly support limiting injunctive relief, around 73% of the Comments that explicitly support limiting statutory damages, and around 87% of the Comments that explicitly reject collective licensing, despite making up only approximately 44% of the overall Comments.

We were surprised to find that, although it contained only around 50% of all commenters who were expressly affiliated with a user-focused organization (e.g. museums, academic institutions), this set held approximately 75% of the library Comments. By contrast, no museums proposed plans that would support as many or more orphan works as they rejected.¹⁰⁷

Overall, 40% of the commenters representing users who stand to gain more from

¹⁰⁷ See 2013 Comments, *supra* note 3 (scroll down to Document 17, 13; follow link to “Association of Art Museum Directors; Art Institute of Chicago, The J. Paul Getty Trust (operating the J. Paul Getty Museum), Los Angeles County Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, and The Solomon R. Guggenheim Foundation (operating the Solomon R. Guggenheim Museum in New York, the Guggenheim Museum in Bilbao, Spain, and the Peggy Guggenheim Collection in Venice, Italy)).

orphan works uses than they expect to lose submitted Comments explicitly stating that mass digitization is an orphan works problem. We believe that this is because mass digitization significantly changes the potential gain from orphan works uses for users who hold easily-digitized material. Such users have a powerful economic incentive to make mass digitization central to the orphan works discussion and thereby enable it through orphan works legislation.

iv. Conclusion: User Groups and the Evolving Orphan Works Discussion

Our findings suggest that combining the issue of orphan works with mass digitization has dramatically boosted support for those in favor of orphan works legislation while at the same time private voices are dropping out of the discussion. This combination of influences is shifting the orphan works conversation in a direction that many members of our class found worrying. Specifically, we are concerned that orphan works legislation based on the *2013 Comments* might carve out an exception tailored to those well-funded institutions that have the most to gain from mass digitization to the detriment of private orphan works users who are in dire need of legislative aid.

If the Copyright Office advocates an exception for orphan works on the basis of mass digitization, the potential for any legislation tailored to private orphan works users will likely drop dramatically—both because the chance of two separate orphan works solutions is small and because private users will feel even less incentive to become involved in future orphan works debates. Conversely, our analysis of the *2013 Comments* revealed that support for a carefully crafted one-size-fits-all solution is potentially quite high. Approximately 70% of the Comments that addressed it directly recognized that there is an orphan works problem. Though some Comments suggest that fair use resolves the issue sufficiently, they are outnumbered two-to-one by those who recognize that it does not, and many would support a legislative solution anyway.¹⁰⁸ There are large majorities in favor of reducing statutory damages and attorney’s fees for orphan works users, and as many as 10% of the Comments expressly favored even a solution that would permit massive, directly commercial use of orphan works.¹⁰⁹

3. Requirements for Obtaining Orphan Work Status¹¹⁰

There are two definitions of orphan work: a conditional definition and descriptive definition. The descriptive definition explains why a work is an orphan and is one of the few uncontested points that has been generally accepted by all stakeholders: an orphan

¹⁰⁸ See, e.g., *id.* (scroll down to Document 61; follow link to “Library Copyright Alliance (LCA), (including the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL)”).

¹⁰⁹ See, e.g., *id.* (scroll down to Document 86; follow link to “Software & Information Industry Association”).

¹¹⁰ Written by Dan Collier, 3L, Tulane University Law School; Gregory Scott Stein, 3L, Tulane University Law School; and Clare Adams, 3L, Tulane University Law School; Bri Whetstone, 3L, Tulane University Law School; Claire Carville, 2L, Tulane University Law School; Joanna Martin, 3L, Tulane University Law School; Melinda Schlinsog, 2L, Tulane University Law School.

work situation is “where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”¹¹¹ In contrast, the conditional definition explains why a work should be eligible for special treatment under the law, which has caused it to be the main issue in contention and the focal point of proposed statutory definitions by commenters. Keeping in mind that all owners are potential users, and vice versa, our class found it easy to consider this aspect of the orphan works problem from a user/owner perspective. Users and content owners have seemed to work backwards in offering requirement on those who would take advantage of orphan works status: they first decide what works they should be eligible for orphan works status and then formulate requirements that would effectively exclude those works.

In general, content owners are hesitant to define any work as an orphan, and are therefore largely supportive of strict definitions of any “diligent search” standard.¹¹² The Motion Picture Association of America (MPAA), for example, noted that the orphan works problem may not be as widespread now as it was in 2008, due in large part to improved searchable databases maintained by industry groups and others.¹¹³ Similarly, photographers seem to attribute the problem to “kidnapping”: “works beloved by their ‘parents’ but that have been ‘kidnapped’ or otherwise strayed from home.”¹¹⁴ Thus, while they agree that an orphan works problem exists, they see most of the threat in “kidnapped orphans,” and hope to see legislation that deals with the “accidental or purposeful deletion of bylines, captions, or digital watermarks.”¹¹⁵

Users of orphan works have been more supportive of broad standards that would allow a wider range of works to qualify as orphans. For instance, libraries recognize an orphan works problem but hope that any legislative or judicial solution will define “diligent search” in broad terms.¹¹⁶ For example, libraries suggest that “diligent search” should be defined by the courts on a case-by-case basis due to the fact-specific nature and variety of works under copyright.¹¹⁷ “Because courts would just have the discretion to reduce statutory damages, and would not be required to do so, there would be no need to define what constitutes a reasonably diligent search. That determination would be left to the courts.”¹¹⁸

Rather than permitting judges the discretion to decide eligibility, Congress has previously attempted to create a statutory, conditional definition of orphan work. Under

¹¹¹ *Orphan Works Report*, *supra* note 58.

¹¹² *See 2013 Comments*, *supra* note 3 (scroll down to Document 9, and 20; follow link to “American Society of Composers, Authors, and Publishers”, “Authors Guild”, respectively).

¹¹³ *See id.* (scroll down to Document 67; follow link to “Motion Picture Association of America”) (“It would be worthwhile, in the first instance, for the Office to study the current scope of remaining orphan works. To the extent legislation continues to have appeal following such a study, we would urge that any such proposal take these trends into account in defining ‘reasonably diligent search.’”).

¹¹⁴ *See id.* (scroll down to Document 8; follow link to “American Photographic Artists”).

¹¹⁵ *Id.*

¹¹⁶ *See id.* (scroll down to Document 61, follow link to “Library Copyright Alliance”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

the 2008 legislation, an unauthorized user of a copyrighted work is eligible for a limitation of remedies in a copyright infringement action if he or she:

- (i) proves by a preponderance of the evidence that before the infringement began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement--
 - (I) performed and documented a qualifying search, in good faith, for the owner of the infringed copyright; and
 - (II) was unable to locate the owner of the infringed copyright;
- (ii) before using the work, filed with the Register of Copyrights a Notice of Use under paragraph (3);
- (iii) provided attribution, in a manner that is reasonable under the circumstances, to the owner of the infringed copyright, if such owner was known with a reasonable degree of certainty, based on information obtained in performing the qualifying search;
- (iv) included with the use of the infringing work a symbol or other notice of the use of the infringing work, in a manner prescribed by the Register of Copyrights;
- (v) asserts in the initial pleading to the civil action the right to claim such limitations;
- (vi) consents to the jurisdiction of United States district court, or such court holds that the infringer is within the jurisdiction of the court; and
- (vii) at the time of making the initial discovery disclosures required under Rule 26 of the Federal Rules of Civil Procedure, states with particularity the basis for the right to claim the limitations, including a detailed description and documentation of the search undertaken in accordance with paragraph (2)(A).¹¹⁹

Additionally, an alleged infringer who claimed the limitation of remedies could lose such privilege

if, after receiving notice of the claim for infringement and having an opportunity to conduct an expeditious good faith investigation of the claim, the infringer--

- (i) fails to negotiate reasonable compensation in good faith with the owner of the infringed copyright; or
- (ii) fails to render payment of reasonable compensation in a reasonably timely manner.¹²⁰

Congress failed to enact this statutory definition, but we feel that the most important—and potentially troublesome to good and bad faith users—element was the “diligent search” requirement.¹²¹

¹¹⁹ Orphan Works Act of 2008, HR. 5889, 110th Cong. § 514 (b)(1)(A) (2008).

¹²⁰ Orphan Works Act of 2008, HR.5889, 110th Cong. § 514 (b)(1)(B) (2008).

¹²¹ For further discussion of previous orphan works legislation, see *infra* app. A.

i. Diligent Search

Many of our class' concerns over the direction of discussion in the *2013 Comments* were exemplified by those who addressed diligent searching. Diligent searching was discussed in the Orphan Works Act of 2008, as a condition for eligibility.¹²² The Act's proposed "fact-based" diligent search ultimately required that searches be "reasonable and appropriate under the facts relevant," rather than identifying specific steps to be taken by diligent searchers.¹²³ Many well-funded institutions, including prominent supporters of mass digitization, advocated such an approach in the *2013 Comments*.¹²⁴ Other commenters suggested a more objective definition,¹²⁵ to potentially incorporate Copyright Office certification,¹²⁶ third-party databases,¹²⁷ and paid experts.¹²⁸ In discussing the issue, our class addressed the broad acceptance for some form of diligent search among the Initial Comments, the role of the Copyright Office in a diligent search, and the debate between fact-based and objective searching. We ultimately concluded that the fact-based vs. objective search debate represented a false dichotomy that masked the concerns of the silent majority of private users. Nevertheless, we believe that it is still possible to create an orphan works information network accessible to all parties.

a. Broad Acceptance

Over half of the Comments described some measure of preferred diligent search requirements. Although some commenters argued that no diligent search can ever be sufficient, others devoted significant time to stating that it is essential.¹²⁹ Furthermore, organizations like ASCAP and BMI assert that orphan works users must search their databases because a copyrighted work for which a license is readily available through a collective licensing organization should not be considered orphaned.¹³⁰ Our class felt that some degree of diligent search requirement is a *fait accompli* in light of the 2008 legislative proposals.

¹²² Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

¹²³ *Id.* at § 514 (b)(2)(A)(ii)(I).

¹²⁴ *See, e.g., 2013 Comments, supra* note 3 (scroll down to Document 30; follow link to "Council of University Librarians at the University of California").

¹²⁵ *See id.* (scroll down to Document 27; follow link to "Cook Jr., Walter G."); *see also id.* (scroll down to Document 16 and 56; follow link to "Association of American Publishers (AAP)" and "Jarrell, Debora", respectively); *cf. id.* (scroll down to Document 13; follow link to "Art Institute of Chicago, The J. Paul Getty Trust (operating the J. Paul Getty Museum), Los Angeles County Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, and The Solomon R. Guggenheim Foundation (operating the Solomon R. Guggenheim Museum in New York, the Guggenheim Museum in Bilbao, Spain, and the Peggy Guggenheim Collection in Venice, Italy)").

¹²⁶ *See, e.g., 2013 Comments, supra* note 3 (scroll down to Document 85; follow link to "Society of American Archivists").

¹²⁷ *See, e.g., id.* (scroll down to Document 47; follow link to "Google Inc.").

¹²⁸ *See, e.g., id.* (scroll down to Document 77; follow link to "Professional Photographers of America").

¹²⁹ *See id.* (scroll down to Document 47; follow link to "Giordano, Michael"); *cf. id.* (scroll down to Document 56 and 65; follow links to "Jarrell, Debora" and "McHugh, Thomas", respectively).

¹³⁰ *See 2013 Comments, supra* note 3 (scroll down to Documents 3 and 9; follow links to "Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)" and "American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)", respectively).

b. Roles of the Copyright Office

Commenters disagreed over the role of the Copyright Office in such a system, with around 17% of those who addressed the issue arguing that it should take some responsibility for and aggregate the necessary databases, and others suggesting merely that it certify significant third-party resources.¹³¹ Some commenters advocated best practices guides to be drawn up under the Copyright Office’s supervision in support of diligent searches.¹³² But many did not explicitly recognize that conforming to such guides would most likely be required in addition to, rather than in lieu of, fact-based or objective diligent search requirements.¹³³

c. Fact-based vs. Objective

Around 30% of commenters who explicitly addressed the issue support a diligent search mandate and believe the necessary inquiries to be made and sources to be checked under the law should depend on the type of work and the uses to be made of the work, consistent with previously proposed orphan works legislation.¹³⁴ But some commenters argue that such proposals excessively burden rights holders by implicitly requiring them to prevent their works from being “orphaned” by maintaining reasonably discoverable ownership information.¹³⁵ Many of these commenters joined over 50% of those who addressed the issue to demand that this burden be placed on potential orphan works users by explicitly requiring them to search third-party databases and/or employ expert assistance to locate rights holders.¹³⁶

d. A False Dichotomy

Diligent searches may represent significant hurdles for all potential users of orphan works.¹³⁷ Additionally, many of the *2013 Comments* went beyond diligence to

¹³¹ See, e.g., *id.* (scroll down to Document 85; follow link to “Society of American Archivists”); cf. *2013 Comments*, *supra* note 3 (scroll down to Document 76; follow link to “Picture Archive Council of America, Inc. (PACA)”).

¹³² See, e.g., *2013 Comments*, *supra* note 3 (scroll down to Documents 9, 24, 76, and 79; follow links to “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”, “Carnegie Mellon University Libraries”, “Picture Archive Council of America, Inc. (PACA)”, and “Recording Industry Association of America (RIAA)”, respectively).

¹³³ As they were in the 2008 legislation. See Orphan Works Act of 2008, S. 2913, 110th Cong. § (b)(2)(A)(ii)(II) (2008).

¹³⁴ See, e.g., *2013 Comments*, *supra* note 3 (scroll down to Document 32; follow link to “Dance Heritage Coalition (DHC)”) (“[a]ny legal standard for determining whether a user has sufficiently searched for the original owner of a work should depend on the facts and circumstances”); see also *2013 Comments*, *supra* note 3 (scroll down to Documents 54 and 86; follow link to “International Association of Scientific, Technical and Medical Publishers (STM)” and “Software & Information Industry Association”).

¹³⁵ See, e.g., *2013 Comments*, *supra* note 3 (scroll down to Document 32; follow link to “Dance Heritage Coalition (DHC)”) (“[s]ubsequent generation owners of copyrighted works desiring full protection against good-faith unlicensed uses should maintain correct, searchable ownership information”).

¹³⁶ See, e.g., *2013 Comments*, *supra* note 3 (scroll down to Document 6; follow link to “American Federation of Musicians of the United States and Canada, ALF-CIO (AFM) and the Recording Academy”).

¹³⁷ See e.g., *2013 Comments*, *supra* note 3 (scroll down to Document 90; follow link to “University of

recommend what we felt would be a “rigorous” search before obtaining orphan works eligibility.¹³⁸ But our class felt that it was important to keep in mind that all creators of possible orphan works are also potential users of orphan works, and vice-versa. The diligent search debate is thus not over which of two different parties should be burdened, but rather over the precise balance necessary to permit use of orphan works while still rewarding creators. This explains the lack of Comments suggesting that there should be no diligent search requirement at all or arguing that it should be minimized.

The 2013 Comments reflect that fact-based and objective search proponents are both seeking the best way to protect rights holders while permitting use of orphan works. But these Comments lack the voice of those private users who wrote in 2005 that they did not have the resources to perform either kind of extensive diligent search. Many members of our class are concerned that a diligent search system created based on the *2013 Comments* will create a two-tiered system that permits orphan works use only for those with the financial resources to conduct expansive searches.

e. The One-Tier Solution

Our class was encouraged by the plethora of resources that seem to be available to identify happy parents of copyrighted works, and we thought a centralized hub for information was a terrific idea, whether at the Copyright Office or in the form of a third-party database. Greater availability of information could only be beneficial to all parties.¹³⁹ In order to facilitate the spread of accurate copyright information, the class

North Carolina-Chapel Hill”) (“In *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, Maggie Dickson detailed the challenges and impossibilities of researching the copyright status and locating rights holders for a collection in UNC-Chapel Hill’s Southern Historical Collection. The Watson Collection consists of 7.5 linear feet of correspondence written between 1873 and 1986. Dickson found that after significant work in identifying rights holders, researching death dates, and seeking permissions, she could only clear 35% of the collection definitely. In many cases, it was impossible not only to find the rights holder but also to determine whether the material had entered the public domain. Staff spent 450 hours on the project, and spent \$8,000 over 9 months. They were only able to obtain express permission to digitize letters in 4 instances. The mixture of materials in the Watson Collection is common throughout our special collections, and, indeed, throughout most library special collections.”)

¹³⁸ See *2013 Comments*, *supra* note 3 (scroll down to Document 11; follow link to “American Society of Journalists and Authors”); *2013 Comments*, *supra* note 3 (scroll down to Document 3; follow link to “American Association of Independent Music (A2IM)”) (requiring users to search for distributors, music labels, featured artists, songwriters, UPC codes, and ISRC codes); *2013 Comments*, *supra* note 3 (scroll down to Document 51; follow link to “Independent Film & Television Alliance (IFTA)”) (requiring a five-part list, including public announcements and all reasonably available experts); *see also 2013 Comments*, *supra* note 3 (scroll down to Document 48; follow link to “Graphic Artists Guild”) (“[A] diligent search should include fee-based search services as applicable . . . and fee-based searches must have preset criteria to ensure a cottage industry of “false diligent searches” does not emerge.”).

¹³⁹ For example, Jill Zimmerman, a graduate student and librarian, described various databases available to search for information related to copyrighted works:

The WATCH file, a database jointly maintained by the Harry Ransom Center of the University of Texas and the University of Reading Library, tracks information about the copyright owner of works. If the writer or artist is listed, one can find the contact information for either the current holder or the authorized representative. (Hirtle, 160). There are several other databases such as the Copyright Clearance Center (CCC), the

agreed that the data posted at the central hub must be subject to independent verification. Accordingly, such a database system should include penalties for false designation of relationships regarding orphan works.

Most importantly, a centralized hub of orphan works information may mitigate the concerns of the silent majority as long as all users can rely on it. A centralized information network, to which all users may post their search results and on which subsequent users may rely for their own searches, would place all potential users of orphan works on an even footing by permitting poor follow-on users to benefit from research expenditures made by wealthier public service institutions.

We also, from our experiences with the Durationator® Copyright Experiment, realize the need for a system that allowed 1) transparency as to where information has come from so that third-parties can analyze the accuracy of the data; and 2) a way to contest or remove data that is not accurate. We saw with the Notice of Intent to Use with Section 104A that incorrect data could be filed with the Copyright Office without a way to have the information altered. We, as a class, also thought that a system similar to Section 512(c)—online, with one party notifying the Copyright Office and the other having an opportunity to respond—might be a good place to start. We felt that a dispute system would need to be in place to allow to quick, accessible, and inexpensive disputes to be settled, particularly if supplemental databases were required. If an outside database claimed ownership, when other records proved otherwise, a potential user or content holder should have a means for clearing up the issue. This is a burden, of course, on the system but necessary in order to allow uses of works still under copyright. They are, after all, being made wards of the state, and there should be a procedure in place to protect the accuracy of their record as an orphan.

We suggest within the system a need for a system to weed out the imposter parents, something dramatized in the musical, “Annie,” when many “fake” parents showed up to claim the little orphan when a reward was attached by Daddie Warbucks. The rewards of claiming ownership on a copyrighted work might be too great a temptation, and so with any system, we would need a way to review ownership when it is in dispute. The lack of a review process is also one of the problems with the NIE system under § 104A.¹⁴⁰ We believe that a Copyright Board could be established to hear disputes and determine ownership quickly and without great expense.

ii. Registration and Registries

Many Comments discussed the idea of a registry. We think the Copyright Office should expand the existing system, while also partnering with others for additional

Artists Rights Society (ARS), Visual Artists and Galleries Association (VACA), ASCA, BMI, and SESAC, as well as other Reproduction Rights Associations. Essentially the orphan works problem is a disconnect between the potential user and the rights holder. If they could meet to negotiate, the transaction is taken out of the realm of orphan works.

See 2013 Comments, supra note 3 (scroll down to Document 91; follow link to “Zimmerman, Jill”).

¹⁴⁰ *See* 17 U.S.C. § 104A (West 2013).

information regarding the work. As information about a particular work is gathered at various other databases, this information could be included as “Other Information” available for that record at the Copyright Office. We see the addition of information—the accumulation of knowledge from many places to the central location of the Copyright Office—as a way to better assist in acquiring information regarding the copyright status of the work.

Many Comments suggested that they already have large databases of information.¹⁴¹ We think this is very useful, and portals to all of these databases should be made available at the Copyright Office. If it is not at the Copyright Office, the difficulties of finding individual databases may be insurmountable. Moreover, foreigners and those less familiar with the copyright system domestically will be at a disadvantage in achieving the necessary diligent search requirements. We think a supplemental registry could be a great collaborative project that would bring together many sources of information about copyrighted works in ways that would greatly enhance the system itself. Orphans may even be reunited with parents.

iii. Intent to Use Database

The Intent to Use database (ITU) was addressed in the first round discussion on orphan works as well as in the *2006 Report on Orphan Works*.¹⁴² The Copyright Office declined to recommend an ITU database where potential users would be required to register their use for several reasons.¹⁴³ First, the Office felt that certain “types of works would be difficult to classify and accurately represent in a textual database.”¹⁴⁴ The Office concluded that a visual database would be costly and complicated.¹⁴⁵ Second, the Copyright Office thought an ITU database would be too burdensome on the users, especially those with large collections.¹⁴⁶ If there were a fee associated with the database, this cost could make it prohibitive for the user.¹⁴⁷

Many commenters believe that the Copyright Office should reconsider their position.¹⁴⁸ For instance, the Recording Industry Association of America (RIAA), who

¹⁴¹ See *2013 Comments, supra* note 3 (scroll down to Document 77, follow link to “Professional Photographers of America”).

¹⁴² See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, (Jan. 2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See generally Comments *supra* note 3 (scroll down to Document#8; follow link to “American Photographic Artists”) (stating that the APA supports a provision that would require users to file an ITU with a governmental agency prior to use of an orphaned work). See also Comments *supra* note 3 (scroll down to Document 27; follow link to “Cook Jr., Walter G.”) (suggesting a Notice of Use to be filed by library or archive with an “approved copyright clearance center or Register of Copyrights (or Copyright Royalty Board)” indicating their intention to digitize works. Mr. Cook also suggests implementing a takedown mechanism where someone could challenge by filing a Notice of Objection). See generally Comments *supra* note 3 (scroll down to Document 71; follow link to “National Writers Union”) (suggesting that the Copyright Office “post public notices of its proposed administrative determinations of ‘orphan’

represent major music labels, believes that the landscape has changed since 2005 and an image database or a sound database would be much easier than the Copyright Office originally believed.¹⁴⁹ Further, the RIAA disagrees that an ITU database would interfere with competition by revealing information about proposed use of works.¹⁵⁰ Instead, the RIAA thinks all that should be required for the ITU database would be information to identify the work and the user's contact information.¹⁵¹ This way use would be protected, but it would give owners a mechanism whereby they can ensure their work is not "erroneously treated as orphaned – much like the trademark ITU program allows trademark owners to object to registrations."¹⁵² Such a database would allow authors to police their rights and would further the goal of reducing the amount of orphan works.¹⁵³

However, not all commenters felt the ITU database should require such basic copyright information. Instead, the Graphic Artists Guild believes that users should be required to disclose their proposed use in any Notice of Use database with a documented copy of their diligent search.¹⁵⁴

Similarly, the Independent Film & Television Alliance (IFTA) recommends that the Notice of Use filings require:

- a) the type of work being used; (b) the description of the work; (c) a summary of the Diligent Search conducted; (d) the owner, author, recognized title and other available identifying elements of the work, to the extent the infringer knows such information with a reasonable degree of certainty; (e) a certification that the infringer performed a Diligent Search to locate the owner of the infringed copyright; and (f) the name of the infringer and how the work will be used.¹⁵⁵

The IFTA envisions this database to include both works where the copyright owner has been identified and where the owner has not to prevent users from using works where the author has been identified.¹⁵⁶ The IFTA acknowledges obstacles with creating an ITU database, but doesn't find them to be insurmountable: the database won't always be a complete resource, but the IFTA suggests that if the Copyright Office provided incentives

status or grants of licenses in a searchable database on its Web site for at least 90 days before any exercise of those rights is authorized, and should send notice of such proposed determinations to any known creator(s) of the works at issue, regardless of whether a creator is believed to hold the rights at issue"). *See also* Comments *supra* note 3 (scroll down to Document 91; follow link to "Zimmerman, Jill") (supporting the Notice of Use filings as stated in the Orphan Works Act of 2008.)

¹⁴⁹ *See 2013 Comments, supra* note 3 (scroll down to Document 79; follow link to "Recording Industry Association of America (RIAA)").

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.* (scroll down to Document 48; follow link to "Graphic Artists Guild").

¹⁵⁵ *See id.* (scroll down to Document 51; follow link to "Independent Film & Television Alliance (IFTA)").

¹⁵⁶ *Id.*

to registration, then there would be less orphans created.¹⁵⁷ This database would only designate works after a diligent search had been carried out.¹⁵⁸

The National Press Photographers Association (NPPA) wants to take the requirements for an ITU database even further. They believe, like the ITFA, that the user should list every intended use of the work.¹⁵⁹ Additionally, though, the NPPA believes that users must consent to pay the rights holder a minimum survey rate, to be established by the Copyright Office, and reasonable interest, should the rights holder come forward.¹⁶⁰ Further, they believe a user should consent to the theoretical owner's jurisdiction should any dispute arise.¹⁶¹ The NPPA also requests a bond or proof of insurance for an amount that corresponds to the use be posted and a filing fee to register.¹⁶²

Other commenters, though, rejected the idea of an ITU database entirely. The American Intellectual Property Law Association (AIPLA) thought that the onus should be on the copyright holder to ensure its registration information is available, while the user has the burden of conducting a reasonable search.¹⁶³ The AIPLA did, however, support a new image database at the Copyright Office to ease searching for registered pictorial, graphic, and sculptural works.¹⁶⁴ Similarly, the Software and Information Industry Association (SIIA) believes that there should be no intent to use system because it would “delay potential uses and be burdensome for owners to monitor.”¹⁶⁵ Further, the SIIA does not think such announcement would help find a copyright holder when a diligent search did not have any results.¹⁶⁶

4. The Photographs: A Case Study¹⁶⁷

After reviewing all ninety-one Comments and discussing the problems of orphan works for a month, we agreed as a class that photographs provide a useful example to understand the complexities of the problem presented by orphan works. Of the ninety-one Comments submitted, forty-two mentioned photographs.¹⁶⁸ Photographers have been a particularly vocal group regarding legislative solutions for orphan works in the past.¹⁶⁹ As a class, we looked specifically at the issues surrounding photographs in 2013 and the

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* (scroll down to Document 70; follow link to “National Press Photographers Association”).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* (scroll down to Document 7; follow link to “American Intellectual Property Law Association (AIPLA)”).

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* (scroll down to Document 86; follow link to “Software & Information Industry Association”).

¹⁶⁶ *Id.*

¹⁶⁷ Photographs section written by Dorian Thomas, 3L, Tulane University Law School; Morgan Embleton, 2L, Tulane University Law School; and Professor Elizabeth Townsend Gard.

¹⁶⁸ That would be 46% of the Comments.

¹⁶⁹ *See infra* app. D.B.

concerns of photographers for both past and present photographs. Photographic orphan works face several problematic issues. These issues include:

- Inadequate identifying information on the work;¹⁷⁰
- The large volumes of photographic works created, both in the past and currently;¹⁷¹
- The relative ease of creating photographic works, particularly in the digital age;¹⁷²
- The restoration process of decaying photographic works in the face of absent or unknown copyright holders;¹⁷³
- The donation of photographic works to various institutions from owners of the photographs who might not be the copyright holders;¹⁷⁴
- The deletion of metadata leading to the increased frequency of “kidnapped” orphan works;¹⁷⁵
- The ease of duplicating photographs in the digital age¹⁷⁶
- The desire to legally digitize old photographs;¹⁷⁷
- The cost of pursuing a claim of copyright infringement in relation to the value of the work;¹⁷⁸
- The ability and costs of users to search copyright registries for photographs; and
- The ability and costs of rights holders to register their photographs with the Copyright Office.

Authors of photographic works are not the only authors who are facing these issues, but they serve as a good example to understand the complexities of the orphan work problem.¹⁷⁹ The vast amount of photographic works in combination with the increasing frequency and ease of the creation, dissemination, and use of photographic works make them especially susceptible to the problems experienced by orphan works.¹⁸⁰

We recognized that libraries and museums also face issues with regard to photographs, as they are often the caretakers of thousands of photographs, many of which lack identifying information. For example, the North Carolina Collection includes 1.8 million photographs among other cultural works.¹⁸¹ Like many other special collections,

¹⁷⁰ See 2013 Comments, *supra* note 3 (scroll down to Document 77; follow link to “Professional Photographers of America”).

¹⁷¹ See *id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

¹⁷² See *id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

¹⁷³ See *Orphan Works Report*, *supra* note 58.

¹⁷⁴ See *id.*

¹⁷⁵ See 2013 Comments, *supra* note 3 (scroll down to Document 8; follow link to “American Photographic Artists”).

¹⁷⁶ See *id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* (scroll down to Document 71; follow link to “National Writers Union”) (arguing that writers face the issues of lack of identifying information and prohibitively high costs of pursuing a copyright claim, especially in regards to publishing online).

¹⁸⁰ See *id.* (scroll down to Documents 76, 77, and 78; follow links to “Picture Archive Council of America” “Professional Photographers of America,” “Pro-Imaging”, respectively).

¹⁸¹ See *id.* (scroll down to Document 90, follow link to “University of North Carolina-Chapel Hill”).

the North Carolina Collection wants to make their unique items available and preserve them as cultural artifacts. The orphan works issue is a legal impediment preventing them from digitizing and posting their collections online:

In many cases, people whose names are lost to history created these materials. In other cases, we know who created the materials but can no longer locate those creators or their heirs. Many works were never published, or we can no longer identify their publishing history because of their obscure origins. Often we cannot definitely ascertain whether the works have entered the public domain.¹⁸²

i. Issues Addressed in the Comments

Within the comments about photographs, we found the following themes and/or concerns.

a. Identifying Information

Perhaps the largest issue facing photographic works and other orphan works is the lack of identifying information on the work itself. The creation of photographic works does not necessarily entail the inclusion of the author's identity. We saw this problem with older photographs—a school picture from the 1940s, for example—as well as new photographs—works uploaded to Pinterest with no readily available identifying information. Whether it is an old photograph or new, the problem is the same: 1) Is there a way to reunite orphan (the copyrighted work) and parent (the rights holder)? 2) If not, how should the law treat these orphans? 3) What is the copyright term for the photograph if the author is not known?¹⁸³

b. Existing Practices

Although the Copyright Office provides a registration service, the majority of authors of photographic works fail to register their creations.¹⁸⁴ The Professional Photographer's Association believes that more than 90% of professional photographers have never registered a single work.¹⁸⁵ This statistic concerned us greatly, and led us to look into other areas of the system not being utilized that potentially hold solutions to alleviate elements of the orphan work problem.

c. Volume of Potential Orphans

The relative ease of creating a photographic work has led to an enormous amount of unidentifiable works. High-yield professional photographers are capable of creating

¹⁸² *Id.*

¹⁸³ The term of copyright under U.S. law is measured from the date of death of the author of the work. *See* 17 U.S.C. § 302(a) (West 2013).

¹⁸⁴ *See 2013 Comments supra* note 3 (scroll down to Document 77; follow link to “Professional Photographers of America”).

¹⁸⁵ *Id.*

more than 20,000 works a year.¹⁸⁶ Moreover, amateurs are snapping photos at a rate never before seen. Further, amateurs utilize social media and the internet to publish photographic works of all ages. Websites such as Facebook, Tumblr, Flickr, and Pinterest allow for individuals to upload and share photographs instantly and without verification of a legal right to do so.¹⁸⁷ Once uploaded, photographs may be shared repeatedly, further complicating the ownership issue. Additionally, the prevalence of smart phones and other handheld camera devices with applications such as Instagram facilitate easy creation and rapid dissemination of photographic works.¹⁸⁸ These technological developments have exacerbated the orphan works problem by creating more potential orphan photographs.¹⁸⁹

d. Care and Restoration of Old Photographs

While new works are being created every day, older photographic works are deteriorating.¹⁹⁰ Restoring these deteriorating works has become an increasingly large problem for owners of photographs and photofinishers.¹⁹¹ The problem typically occurs when the owner of an old family photograph (but not necessarily the copyright holder) attempts to refurbish and preserve the decaying picture.¹⁹² Unfortunately, photofinishers are often unable to reproduce the photograph because the owner of the photograph is unable to locate, and thus negotiate a license with, the author of the work. Photofinishers refuse to reproduce such works for fear of copyright infringement.¹⁹³ This has negative effects for both photograph owners and photofinishers: owners cannot rehabilitate priceless family photos while photofinishers have to refuse potential customers.¹⁹⁴

Donating photographs to archives, libraries, or museums creates another common orphan works issue.¹⁹⁵ Owners of historically and culturally important photographic works often choose to donate such works to public institutions who care for the works while sharing them with the public.¹⁹⁶ Unfortunately, donors typically do not have information regarding the creators of the works or even the legal status of the work. Therefore, libraries and museums who receive those donations are unable to negotiate licenses for use of these works.¹⁹⁷ Digitization to preserve photographs frustrates attempts to determine the copyright status of the works because institutions fear a potential

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* (scroll down to Document 70; follow link to “National Press Photographers Association”; scroll down to Document 78; follow link to “Pro-Imaging”).

¹⁸⁸ *See id.* (scroll down to Document 78; follow link to “Pro-Imaging”).

¹⁸⁹ *See id.* (scroll down to Document 70; follow link to “National Press Photographers Association”; scroll down to Document 78; follow link to “Pro-Imaging”).

¹⁹⁰ *See Orphan Works Report, supra* note 58.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See 2013 Comments, supra* note 3 (scroll down to Document 90; follow link to “University of North Carolina-Chapel Hill”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

copyright infringement suit.¹⁹⁸ This fear leaves a vast amount of works at risk to physical deterioration and limited accessibility to the public.¹⁹⁹

e. “Kidnapped” Orphans

Technological developments have also created new problems for creating orphan photographic works.²⁰⁰ Orphan works are not always works that have been intentionally or negligently cast aside by their authors.²⁰¹ According to American Photographic Artists, new technologies have aided “kidnappers” of photographs in stripping existing identifying information from the work and orphaning them.²⁰² These kidnapped orphaned works are then copied, posted, printed, published, and distributed without any identifying information further distancing the work from the original author and/or copyright holder.²⁰³ The reach of the Internet allows for kidnapped works to be disseminated far beyond the policing ability of any one author or even any one legal authority.

f. Remedies

Further problems exist if a kidnapped or otherwise orphan work is discovered and claimed by a valid author of the work. But the Copyright Act provides for statutory damages as well as attorney fees for copyright infringement.²⁰⁴ These remedies are only available if certain conditions have been met, specifically registering a work before the commencement of the litigation.²⁰⁵ As mentioned above, the overwhelming majority of photographers have failed to register their works with the copyright office.²⁰⁶ Thus, many authors may be precluded from receiving statutory damages and attorney’s fees, which lowers the incentive to file suit for an infringing use of their work. Furthermore, the potential cost of litigation may significantly outweigh the value of the infringing use and further dissuade authors from litigating against infringing uses.

ii. Proposed Solutions in the Comments Regarding Photographs

Various comments proposed solutions for the photographic orphan works. Specifically, three of these Comments illustrated the myriad of proposed solutions.²⁰⁷ The first Comment, submitted by the Picture Archive Council of America (PACA),²⁰⁸ proposed solutions covering four main topics: diligent search; good faith; safe harbors;

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.* (scroll down to document 8; follow link to “American Photographic Artists”).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See* 17 U.S.C. § 412 (West 2013).

²⁰⁵ *See* 17 U.S.C. § 412 (West 2013).

²⁰⁶ *See* 2013 Comments, *supra* note 3 (scroll down to Document 77; follow link to “Professional Photographers of America”).

²⁰⁷ *See id.* (scroll down to Documents 76, 77, and 78; follow links to “Picture Archive Council of America” “Professional Photographers of America,” “Pro-Imaging”, respectively).

²⁰⁸ *See id.* (scroll down to Document 76; follow link to “Picture Archive Council of America”).

and registries.²⁰⁹ First, PACA very much supports the requirement of a diligent search.²¹⁰ PACA proposes that the Copyright Office should maintain a list of certified registries as well as best practices guides in locating owners of works in various industries.²¹¹ Second, PACA believes there should be incentives for potential users to perform a good-faith diligent search.²¹² Such incentives would include the loss of any limitation of remedies (including court costs and attorney’s fees) in the absence of a good faith diligent search.²¹³ Third, PACA supports the idea of a safe harbor provision for nonprofit entities.²¹⁴ However, the safe harbor provision must be limited to cultural nonprofit organizations and the mission of those nonprofits must be non-commercial use of the visual work. Additionally, the safe harbor provision must require the nonprofit to perform a good faith diligent search before use. Further, the use may not be one that typically requires a license from the rights holder.²¹⁵ Finally, PACA believes that registries must be easily accessible and not cost prohibitive.²¹⁶

The second Comment, submitted by the Professional Photographers of America (PPA), focused their proposed response on the definition of a reasonably diligent search.²¹⁷ The PPA believes that a reasonably diligent search should be defined flexibly so it is capable of adjusting to technological and marketplace evolution.²¹⁸ Further, a good faith search should include searching relevant keywords, unique identifiers, metadata, digital watermarks, and visual fingerprints.²¹⁹ Moreover, all users should be required to perform a diligent search and secondary users should be required to update those searches.²²⁰ Finally, a reasonable diligent search should include policing searches made in bad faith.²²¹ Additionally, the PPA believes there should be a “reasonably royalty” standard calculated by comparing the use to licensing fees of similarly situated photographic works.²²² However, the PPA believes that such a royalty system will only function if there is a small claims court available to hear such claims or else the cost of litigation may outweigh the potential royalty payout.²²³

The third Comment, submitted by Pro-Imaging, proposed three “changes” to solve the orphan works problem.²²⁴ The first proposed change allows libraries and universities to publish images online for archival and educational purposes but that use

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *See id.* (scroll down to Document 78; follow link to “Pro-Imaging”).

may not be restricted to the entities holding the physical copy.²²⁵ Pro-Imaging also firmly believes that such images may not be used in any commercial capacity.²²⁶ The second proposed change forbids web delivery systems and social media sites from stripping metadata from any image for any reason.²²⁷ Additionally, this change requires software vendors to incorporate embedded metadata, allowing users to embed contact information. Further, web browsers would be required to have provisions to read metadata, allowing users to see the embedded contact information.²²⁸ The third proposed change has two parts: (1) since copyright protection is a constitutional right, registration should be free and (2) moral rights provisions, equal to or stronger than those found in the United Kingdom, should be introduced to the U.S. copyright system.²²⁹

C. Solutions under the Current Copyright Act

The current Copyright Act is rich with elements that are appropriate for addressing the orphan work problem: statutory damages and attorney’s fees, injunctive relief, criminal penalties, notice and takedown for online infringement, the statute of limitations, and fair use, to name a few that we will discuss below.

1. Section 412: A Limitation on Damages Already Exists²³⁰

The first step of solving the orphan works problem—eliminating statutory damages and the availability of attorney’s fees for good faith users—is already a part of the Copyright system under § 412 for some works. Without these two remedies, copyright infringement becomes much less of a threatening consequence of using an orphan work without a license from the rights holder. Because § 412 remedies are conditioned on the registration of the copyrighted work, for those users doing a “diligent” search, the first question to ask is whether the work been registered.

The Berne Convention, and our implementation in the Berne Convention Implementation Act of 1988 and Uruguay Round Agreements Act,²³¹ creates a system in the U.S. that requires no formalities in order to obtain copyright. However, in order to obtain statutory damages and/or attorney’s fees, registration is still required for both domestic and foreign works generally within three months of publication of a work or prior to infringement of the work for unpublished works.²³²

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Written by Dr. Elizabeth Townsend Gard; Dan Collier, 3L, Tulane University Law School; and R. Austin Blakeslee, 3L, Tulane University Law School.

²³¹ See Berne Convention for the Protection of Literary and Artistic Works, *supra* note , art. 5(2) [hereinafter Berne]; Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101 note (Effective Date of 1988 Amendment)); 17 U.S.C. § 104A (West 2012) (codified version of URAA).

²³² 17 U.S.C. § 412 (West 2013).

Our class was struck by the Comment by the Professional Photographers of America that 90% of photographers do not register their works at the Copyright Office, while at the same time a number of photography organizations were calling for a registry system.²³³ Another Comment from the same group suggested the numbers were even worse:

Only about 1% of photographers regularly register their copyrights, notwithstanding the Copyright Office’s group registration rules. Indeed, 84% of professional photographers have never registered even a single image with the Copyright Office. The average photographer creates over 20,000 images a year—that is simply too many photographs for a struggling small business to take the time to assemble and deposit.²³⁴

In contrast, in the music industry, we then noted that the RIAA suggested no post-1972 sound recording orphans exist precisely because of the registration system: “Sound recordings released or distributed by the major record companies after 1972 almost invariably have been registered for copyright and commercially-released[sic] versions of those recordings list the copyright owner. Therefore, it is unusual to encounter an orphan problem for this category of works.”²³⁵

Then, we contrasted this with the Society of American Archivists, who noted that most of their works were not registered.²³⁶ What was most interesting about SAA was that they recognized the power of registration, and then explicitly rejected the impact as a “technicality”:

Under 17 USC § 412, archival repositories are already immune from statutory damages and attorney’s fees for the infringement of unregistered unpublished works, and in most cases, the actual damages that would accrue to a copyright owner are small . . . Although they welcome the safety that § 412 affords, they are also reluctant to base ongoing practice on technicalities, preferring instead to operate archives as places of integrity.²³⁷

Section 412 is more than a technicality. Our class came to believe that registration could be an important step in solving many of elements of the orphan work problem, and we think that the Copyright Office should embrace and promote to users of orphan works the elements of § 412 as a potential tool to allow them to avoid liability for using unregistered orphan works. Furthermore, § 412 could potentially be very helpful in two specific contexts: photographs and unpublished and unregistered archival works.

²³³ See, e.g., *2013 Comments, supra* note 3 (scroll down to Document 77; follow link to “Professional Photographers of America”).

²³⁴ *Id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

²³⁵ *Id.* (scroll down to Document 79; follow link to Recording Industry Association of America (RIAA)).

²³⁶ *Id.* (scroll down to Document 85; follow link to “Society of American Archivists”).

²³⁷ *Id.*

First, photographers have made it clear that they do not register their works, for whatever reason, despite the ease and low cost of registration.²³⁸ Section 412 should give them the incentive to register. For example, let us assume that an unpublished and *unregistered* photograph is posted on the Internet. The posting is unauthorized by the copyright holder, and the copyright holder is upset. While the copyright holder may now register the work and sue for infringement, the unauthorized posting itself will not give the copyright holder a right to statutory damages (including for willful infringement) or attorney’s fees. The only remedies available would be injunctive relief, actual damages, or profits, and the latter two are difficult to show.²³⁹

Old photographs are unlikely to be registered (although registration can occur during the life of the copyright). New photographs—taken on Instagram and posted on Facebook—are also unlikely to be registered. This creates a system whereby, unless a copyright holder affirmatively takes steps to register a work, the significant remedies of statutory damages and attorney’s fees are not available. Those who are professionals or who want to have more control (read: ability to litigate effectively) should be registering their works.

Second, § 412 as a mechanism may be particularly helpful regarding orphan works, most of which have not been registered. For instance, if a letter from an archive today is not registered, a user infringing the copyright does not have to fear being held liable for statutory damages (including willful damages) or attorney’s fees. Again only actual damages and an injunction remain as remedies. Actual damages are difficult to measure or are nominal. An injunction requires going to court and registering the work, and without the additional remedies, it is generally less attractive. Moreover, with § 512(c) and even an ITU, other alternatives to injunctions might be available.

This means that neither attorney’s fees nor statutory damages (including willful infringement) are available *today* for unregistered unpublished works. All of the materials in archives or in personal family photo albums, to name two examples, will have no statutory damages (including willful damages) or attorney’s fees attached to them if they are posted online today as unregistered.²⁴⁰ Moreover, if they are registered, we know who claims ownership and authorship. We have information on the birth date, ways to contact the copyright holder for permission, and a recognition that the work is *not orphaned*.

Section 412, interestingly, applies to foreign works as well as domestic works. As William Patry points out, the language of § 412 includes the terms “*any* infringement” rather than “U.S. works” or “foreign works.”²⁴¹ While registration is not required to bring an infringement suit regarding a foreign work, registration is required to obtain statutory damages and/or attorney’s fees. Patry notes Congress addressed the application of § 412 three separate times, and each time Congress made it clear that § 412 applied

²³⁸ See U.S. COPYRIGHT OFFICE, CIRCULAR 40: COPYRIGHT REGISTRATION FOR WORKS OF THE VISUAL ARTS (2012).

²³⁹ See 17 U.S.C. § 501 et seq. (West 2013) (providing remedies for copyright infringement).

²⁴⁰ Willful damages are included under statutory damages. See 17 U.S.C. § 504(c)(2) (West 2013).

²⁴¹ 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:201.50.

with equal force to foreign works as it did to domestic works. Patry notes that during the BCIA discussions, Congress “deliberately left ‘unaffected the provisions of existing law granting . . . statutory damages and attorneys’ fees upon timely registration of claims to copyright.’”²⁴² During the discussion related to the removal of formalities left in place under the 1976 Copyright Act, § 412 again was distinguished. Patry explains:

In hearings on the bills, the Register of Copyrights acknowledged that Section 412 still required registration for all works. This remains true today, and no international agreement is to the contrary, and therefore Section 412 does not conflict with any international obligation of the United States. I am aware of no scholar who contends it does.²⁴³

Finally, Congress returned to the question of § 412 with the URAA, where, again, it decided that § 412 applies to foreign works, in the form of Section 104A(d)(4).²⁴⁴

Similarly, David Nimmer notes that § 412 applies to both foreign and domestic works: Not only is registration a prerequisite for obtaining statutory damages and/or attorney’s fees, it is also a prerequisite for filing suit, no matter the work’s country of origin.²⁴⁵ Thus, Nimmer refers to the lack of formalities for obtaining copyright as a “hollow advantage” for foreign authors.²⁴⁶ Although a foreign author might be unfamiliar with the U.S. registration process or might find it needlessly burdensome, this does not constitute a treaty violation, as U.S. authors are subject to the same requirements.²⁴⁷

²⁴² *Id.* (citing House Joint Explanatory Statement on House-Senate Compromise Incorporated In Senate Amendment to H.R. 4262, reprinted in 134 Cong. Rec. H10097 (daily ed. Oct. 12, 1988)).

²⁴³ *Id.*

²⁴⁴ Patry explains:

The third occasion on which Congress considered Section 412 and statutory damages dealt entirely with foreign works. In 1994, when Congress passed the implementing legislation for the GATT Agreement, Congress restored copyright to foreign works that had fallen into the public domain for failure to comply with formalities. In doing so, Congress was worried about Fifth Amendment takings problems for U.S. citizens who had previously used public domain foreign works, including the ability of foreign authors to receive statutory damages for infringement of their newly restored rights. Obviously, if Section 412 didn’t apply to foreign works at all, Congress wouldn’t have had to address this problem, but because Section 412 does and has always applied to foreign works, Congress amended the Copyright Act, by protecting U.S. citizens from statutory damages awards with respect to *foreign* copyrighted works for acts that occurred before rights were restored; such U.S. citizens are called “reliance parties.” Congress protected them in 17 U.S.C.A. § 104A(d)(4): “Commencement of Infringement for Reliance Parties. For purposes of Section 412, in the case of reliance parties, infringement shall be deemed to have commenced before registration when acts which would have constituted infringement had the restored work been subject to copyright were commenced before the date of restoration.” This provision not only expressly deals with the issue of statutory damages for foreign works, but it occurred in an act that dealt only with foreign works.

Given the unambiguous language of the statute and its unusually clear legislative history, the courts have uniformly concluded that Section 412 precludes a plaintiff from recovering statutory damages for unregistered foreign works.” *Id.*

²⁴⁵ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C][1][a][iv].

²⁴⁶ *Id.*; see also *id.* § 7.16[B][6][c].

²⁴⁷ *Id.* § 7.16[C][1][a][iv].

Of particular interest, especially for photographers, is Nimmer's discussion of the grace period afforded by § 412.²⁴⁸ Statutory damages and/or attorney's fees will still be available if registration is made within three months after the first publication of the work.²⁴⁹ This provision was designed to allow the full range of remedies for works that might be infringed immediately upon publication, due to their newsworthiness or popularity, but nevertheless applies to all copyrighted works.²⁵⁰ However, even if registration occurs after this grace period has elapsed, statutory damages and/or attorney's fees will still be available as long as the work was registered before the first instance of infringement occurred.²⁵¹

Nimmer also mentions two exceptions to the registration requirement: There is no limitation on statutory damages and/or attorney's fees for infringement of works that are first fixed simultaneously with their transmission (i.e., live broadcasts), nor is there a registration requirement for violations of artists' rights.²⁵² Thus, it appears that authors have significant leeway in registering their works: Registration within three months of publication would be optimal, but failure to do so would not completely preclude the full range of remedies going forward.

In addition, Nimmer states that registration has gained a new importance under the 1976 Copyright Act that it did not have under the 1909 Act.²⁵³ The House Report on § 412 described a need to encourage and incentivize registration, due to its usefulness to the public and to users of copyrighted works.²⁵⁴ While works that were properly registered under the 1909 Act do not need to be reregistered, Nimmer urges that works published under the 1909 Act that went unregistered prior to January 1, 1978, should be registered as quickly as possible to ensure the full range of remedies.²⁵⁵ Ultimately, § 412 as it currently exists affords copyright owners substantial protection of their works, but also requires some affirmative action on their part.

As for protecting the rights of copyright owners, we have a few suggestions that could encourage more authors to register their works. First, while registration under § 412 does not solve all of the orphan work problems, it does allow for those who are concerned about copyright infringement (and want the potential for statutory damages and attorney's fees) to stake a claim to their works, providing copyright data that is very important to the system. For those works that are not registered, it signals (and should signal) that the copyright holder is only concerned with infringement that rises to actual damages or the effort to obtain an injunction in federal court. All other uses seem to be

²⁴⁸ *Id.* § 7.16[C][1][b].

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Prof. Nimmer notes that artists' rights are distinct from copyright ownership. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C][1][c], 8D.06.

²⁵³ *Id.* § 7.16[C][2].

²⁵⁴ *Id.*; see also H.R. Rep. No. 94-1476, at 158 (1976).

²⁵⁵ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C][2].

implicitly permitted, and therefore, these orphans are burdened less than those that have been registered.

Second, we think a registration form could be created by the Copyright Office for archival materials, but precautions should be taken to ensure that archive would have to prove ownership in the works to register them rather than merely owning the object itself. Third, the creation of an incentive period might be helpful to encourage the registration of older works. Fourth, reducing the fees for individual photographs might be useful to encourage the registration of photographs by professionals and amateurs alike.

2. Injunctive Relief²⁵⁶

There is no consensus—in the Comments or in our class—on limiting injunctive relief. In comparison with the enormous amount of support for at least some reduction of statutory damages, limiting injunctive relief cannot be said to enjoy widespread support among other commenters. Any legislation limiting injunctive relief is likely to put the United States in direct violation of international IP treaties like Berne and TRIPs, just when we have begun making efforts to move into full compliance with international IP law.²⁵⁷ For these reasons, our class could not unanimously agree with those commenters who call for orphan works legislation that would explicitly limit injunctive relief.²⁵⁸

Organizations like the International Documentary Association²⁵⁹ and the Software and Information Industry Association²⁶⁰ believe that injunctive relief must be limited as a part of orphan works legislation.²⁶¹ They argue that users who seek to create derivative works based on orphan works cannot afford to take the risk that a rights holder will re-appear and destroy the entire value of a derivative work by enjoining it.²⁶² And they point out that this risk is particularly dire for works, such as movies, that require significant

²⁵⁶ Written by Dan Collier, 3L, Tulane University Law School; and Prof. Glynn Lunney, Tulane University Law School.

²⁵⁷ See generally Berne, *supra* note 231; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 44 §1 [hereinafter TRIPs].

²⁵⁸ Distinguished from, *e.g.*, reducing the availability of injunctive relief through fair use.

²⁵⁹ *2013 Comments, supra* note 3 (scroll down to Document 55; follow link to “International Documentary Association, Film Independent, Independent Filmmaker Project, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, Gilda Brasch, Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films”).

²⁶⁰ *Id.* (scroll down to Document 86; follow link to “Software & Information Industry Association”).

²⁶¹ *Id.* (scroll down to Documents 7 and 55; follow links to “International Documentary Association, Film Independent, Independent Filmmaker Project, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, Gilda Brasch, Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films” and “American Intellectual Property Law Association (AIPLA)”, respectively).

²⁶² *Id.* (scroll down to Documents 9 and 55; follow links to “International Documentary Association, Film Independent, Independent Filmmaker Project, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, Gilda Brasch, Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films” and “American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)”, respectively).

initial capital investment, cannot easily be divided or refocused to eliminate enjoined subject matter, and deliver no reward at all if they do not reach the public.²⁶³ But the initial Comments in favor of this argument are equally matched by Comments from organizations like the American Association of Independent Music,²⁶⁴ the NMPA, and Harry Fox,²⁶⁵ who maintain that injunctive relief must be available to rights holders to prevent abuses of their copyrights at minimal cost.²⁶⁶

Other parties, including the Association of American Publishers²⁶⁷ and the American Society of Illustrators,²⁶⁸ submitted initial Comments insisting that any orphan works legislation should be consistent with international IP law embodied in the Berne and TRIPs Conventions.²⁶⁹ These international conventions require that courts be free to impose injunctive relief in cases of copyright infringement, regardless of orphan status.²⁷⁰ Although the language of these provisions suggests that they were crafted with an eye towards border seizures,²⁷¹ there is no case law expressly limiting the injunctive relief requirement to that circumstance. One may be able to apply, however, damages in place of injunction, as seen in *Ebay v. MercExchange L.L.C.*, 547 U.S. 388 (2006).

In *eBay*, the Court rejected, in patent cases, the general rule that a patentee was entitled to a permanent injunction based upon a showing of patent infringement alone, absent exceptional circumstances.²⁷² Instead, the Court held that a patent plaintiff, to obtain injunctive relief, had to satisfy equity's traditional four-part test and demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."²⁷³ Although *eBay* was a patent case, the Court's reasoning extends directly to copyright cases and would seem to reject any rule granting injunctive relief based upon a showing of copyright infringement alone. Instead, the Court's decision in *eBay* would seem to limit the availability of injunctive relief in the copyright context to those cases where a plaintiff, in addition to proving copyright infringement, could also satisfy equity's four-part test.

²⁶³ *Id.*

²⁶⁴ *Id.* (scroll down to Document 3; follow link to "American Association of Independent Music (A2IM)").

²⁶⁵ *Id.* (scroll down to Document 69; follow link to "National Music Publishers' Association (NMPA) and The Harry Fox Agency (HFA)").

²⁶⁶ *Id.* (scroll down to Documents 2 and 3; follow links to "American Association of Independent Music (A2IM)" and "Abraham, Daniel", respectively).

²⁶⁷ *Id.* (scroll down to Document 16; follow link to "Association of American Publishers").

²⁶⁸ *Id.* (scroll down to Document 10; follow link to "American Society of Illustrators Partnership (ASIP)").

²⁶⁹ *See id.* (scroll down to Documents 2 and 16; follow links to "Association of American Publishers" and "Abraham, Daniel", respectively).

²⁷⁰ *See Berne*, supra note 231, art. 16, para. 1; TRIPs art. 44, para. 1; *see also* TRIPs art. 46, 50.

²⁷¹ *See, e.g.*, TRIPs art. 44, para. 1 ("inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods").

²⁷² *Ebay v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006).

²⁷³ *Id.*

This may leave a court with the flexibility, in appropriate copyright cases, to deny injunctive relief and relegate a successful plaintiff to damages. Indeed, the Court has expressly suggested such an approach in copyright cases, where, for example, the case presents a close fair use question. In *Campbell v. Acuff-Rose Music, Inc.*,²⁷⁴ the Court wrote:

Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.²⁷⁵

While written specifically in terms of the “parodist” then before the Court, this language may provide a basis for limiting injunctive relief in close fair use cases more generally.

Denying injunctive relief may provide a mechanism to offer breathing room for, at least some, uses of orphan works and mass digitization projects. Even without an injunctive relief, a defendant with a reasonable, but ultimately losing fair use defense, would still be liable for damages, including potentially their own profits attributable to the infringement, and to statutory damages. Limiting the available relief to damages may nonetheless allow some productive use of orphans, and for some mass digitization projects, by eliminating the threat of hold-up that an injunction provides. For example, if the defendants were to lose their fair use argument on appeal in *Authors Guild v. HathiTrust*, a court would still need to apply the four-part test under *eBay* before granting injunctive relief. Granting injunctive relief would shut down the entire project, unless the defendants satisfied the plaintiff’s demands. If, instead, a court denied the availability of injunctive relief under the four-part test and relegated the plaintiff to damages, the threat of hold-up would be minimized. For those works that were not registered at the time the digitization project began, Section 412 would bar the availability of statutory damages. Moreover, given the nonprofit status of the defendants, the plaintiff’s recovery under Section 504(a) might well be limited to those actual damages that the plaintiff could prove were attributable to the infringement.²⁷⁶

While there are uncertainties associated with such an approach, such an approach could potentially remove one of the most serious impediments to the productive use of orphans and mass digitization projects. The availability of statutory damages with respect to those works registered before a use began would however still prove a substantial barrier to such productive use.

²⁷⁴ 510 U.S. 569 (1994).

²⁷⁵ *Id.* at 578 n.10 (citation omitted).

²⁷⁶ 17 U.S.C. § 504 (a)(1) (West 2012).

Orphan works legislation is controversial enough even when it does not involve an express violation of international law. And although 19 U.S.C. § 3512(a)(1) permits U.S. law to be in violation of TRIPs,²⁷⁷ recent changes like the addition of 17 U.S.C. § 104A to the Copyright Act and the Supreme Court’s holding in the *Golan v. Holder*²⁷⁸ strongly suggest that U.S. lawmakers intend to bring this country into compliance with Berne and TRIPs. Accordingly, though we are concerned with the problems caused to derivative works creators by the specter of orphan injunctions, our class could not unanimously agree that limitations on injunctive relief should be a part of orphan works legislation at this time.

3. Section 512(c): Current Economical Solutions to Copyright Infringement²⁷⁹

Section 512(c) created a safe harbor for Internet Service Providers to shield them from copyright infringement for users’ illegal behavior. The system indirectly provides a low-cost mechanism for copyright holders to stop unauthorized uses of their work. Moreover, it also provides a low-cost system to rebut the copyright holder’s notice of infringement.

Within the orphan work setting, § 512(c) can be used to deal with issues of “kidnapped orphans” and unauthorized uses of copyrighted works within a digital context. A “kidnapped orphan” is a copyrighted work whose notice- or owner-related information has been removed. The notice-and-take down provisions under § 512 are fairly cost effective (compared to litigation) and require no valid registration—although we think that should be encouraged—and create a mechanism for accused users to respond.²⁸⁰

For example, imagine that a user posts a photograph on Pinterest unlawfully without the copyright holder’s consent.²⁸¹ The copyright holder contacts Pinterest through an automated system, and the photograph is removed.²⁸² The user would then have an opportunity to provide evidence of why it should be put back up.²⁸³ If the work is reinstated, the copyright holder may then litigate the matter in court.²⁸⁴

Many of the issues facing orphans are in the digital context, and therefore, § 512(c) may provide an immediate answer as well as a starting point for further implementing a system to deal with the use of copyrighted works, both for owners and users.

²⁷⁷ It voids any condition of TRIPs inconsistent with U.S. law.

²⁷⁸ See *Golan v. Holder*, 132 S.Ct. 873 (2012).

²⁷⁹ Written by Professor Elizabeth Townsend Gard.

²⁸⁰ See generally 17 U.S.C. § 512(c)(3) (West 2012).

²⁸¹ Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249 (2012).

²⁸² See *id.*

²⁸³ See 17 U.S.C. § 512(g)(3) (West 2012).

²⁸⁴ See *id.* § (g)(3)(D) (West 2012).

4. Criminal Penalties for “Kidnapped Orphans:” 17 U.S.C. § 506²⁸⁵

A problem raised in several of the initial comments was that of so-called “kidnapped orphans.”²⁸⁶ These are works (often photographs) that are still under copyright, and whose owners can be readily located, but that have nevertheless had their identifiable copyright information stripped away prior to dissemination.²⁸⁷ The American Photographic Artists (“APA”) were especially concerned with this problem, claiming that under the previously proposed legislation the owners of such works would be left without any remedies.²⁸⁸ The previously proposed legislation would have granted infringers immunity from statutory damages if they had engaged in a “reasonably diligent search” for the work’s owner(s).²⁸⁹ However, the APA argued, this would have left photographers who had duly registered their works in a timely fashion, and who were easily locatable, with no remedies for the willful orphaning of one of their works.²⁹⁰ Any new legislation, they urged, should thus take this problem into account.²⁹¹

However, under the current Copyright Act, there are remedies for the owners of these “kidnapped orphans.” Section 506 details the criminal penalties that result from willful infringement.²⁹² In particular, Section 506(d) explicitly mentions the fines that can result from the fraudulent removal of copyright notice.²⁹³ Section 506(e) also provides a criminal penalty for fraudulent copyright notices and for falsifying a copyright registration application.²⁹⁴ It should also be noted that Section 405(c) specifically notes that the “removal, destruction, or obliteration” of a work’s copyright notice without the authorization of the copyright owner does not affect its actual copyright protection.²⁹⁵ While photographic works (due to the nature of the medium) might very well be more vulnerable to being “kidnapped” and forcibly orphaned, the copyright owners of these works are not without recourse under the current law.²⁹⁶ Although Section 506(c) does

²⁸⁵ By Claire Carville, 3L Tulane University Law School; Professor Elizabeth Townsend Gard; Austin Blakeslee, 3L, Tulane University Law School; and Dan Collier, 3L, Tulane University Law School.

²⁸⁶ *2013 Comments, supra* note 3 (scroll down to Documents 8, 12, 31, 38, 57; follow links to “American Photographic Artists (APA);” “American Society of Media Photographers (ASMP);” “Croxtton, Matthew David;” “Dufresne, Walter;” “Kane, Chris”, respectively).

²⁸⁷ *Id.* (scroll down to Document 8; follow link to “American Photographic Artists (APA)”).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*; *see also id.* (scroll down to Document 12; follow link to “American Society of Media Photographers (ASMP)”). The ASMP proposed, as part of their solution to this problem, an extension of the right of attribution (although they did not explicitly mention 17 U.S.C. § 106A) to all photographic works, no matter their context.

²⁹² 17 U.S.C. § 506 (West 2012).

²⁹³ *Id.* § 506(d).

²⁹⁴ *Id.* § 506(e).

²⁹⁵ *Id.* § 405(c).

²⁹⁶ A person may be held liable for Fraudulent Copyright Notice if he or she, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

Id. § 506(c).

not give rise to a private cause of action,²⁹⁷ a copyright owner would still be able to report a violation to a district attorney to initiate a lawsuit.

It should be noted, though, that according to the Carnegie Mellon University Libraries, the U.S. Senate and Copyright Office have recently discussed amending § 506.²⁹⁸ Congressmen, including Senator Ron Wyden of Oregon and Representative Darrell Issa of California, have called for copyright reform, advocating for legislation to penalize false representations, strengthening and clarifying fair use, and providing due process for seizures of intellectual property.²⁹⁹ These proposals are still just calls to action for the coming year,³⁰⁰ and it is not yet clear what form any new legislation in this area might take.

5. Copyright Information Management³⁰¹

i. Definitions

Another way to look at the “kidnapped orphan” problem is from a metadata or Copyright Management Information angle, and for that we turn to Chapter 12 of the 1976 Copyright Act.

Metadata is, literally, data about data; despite its literal simplicity, what constitutes metadata is ambiguous. Certain digital image formats explicitly support metadata fields for storing additional information such as timestamps, geolocation information, or camera settings in their specifications;³⁰² this usage is consistent with the literal meaning of metadata. Copyright Management Information (“CMI”) is a specific type of information that may be stored, *inter alia*, in such metadata fields and is defined by the Copyright Act as follows:

(c) Definition. — As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

²⁹⁷ 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 6:72 n. 2; *see also* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.02 n. 3.

²⁹⁸ In its comment Carnegie Mellon also highlighted the importance of knowing who the actual copyright owner is because of the risk of false representations of ownership. *2013 Comments*, *supra* note 3 (scroll down to Document 24; follow link to “Carnegie Mellon University Libraries”).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ By Brian Roux, 3L, Tulane University Law School; Dan Collier, 3L, Tulane University Law School.

³⁰² *See Specifications*, METADATA WORKING GROUP, <http://metadataworkinggroup.com/specs/> (last visited Mar. 6, 2013).

(2) The name of, and other identifying information about, the author of a work.

(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(6) Terms and conditions for use of the work.

(7) Identifying numbers or symbols referring to such information or links to such information.

(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.³⁰³

Several Comments have referred to metadata without explicitly defining the scope of the commenting party's interpretation while others refer to metadata and CMI as separate. The presence or lack of precision in this regard is significant because many commenters who raised concerns about the stripping of metadata advocate for solutions that do not distinguish between CMI and non-CMI stored in metadata fields.

For instance, the Association of Medical Illustrators ("AMI") described wide consensus in the professional illustrator community for the inclusion of additional author-oriented information in the digital image metadata.³⁰⁴ The Berkeley Digital Library Copyright Project argued that metadata combined with registries may be helpful in reducing the number of orphan works to begin with.³⁰⁵ Public Knowledge and the EFF noted, unlike physical images, existing tools make it easy to embed CMI in digital images via metadata fields or watermarks.³⁰⁶

³⁰³ See 17 U.S.C. § 1202(c) (West 2012).

³⁰⁴ *2013 Comments, supra* note 3 (scroll down to Document 18; follow link to "Association Medical Illustrators").

³⁰⁵ *Id.* (scroll down to Document 21; follow link to "Berkeley Digital Library Copyright Project").

³⁰⁶ *Id.* (scroll down to Document 40; follow link to "Electronic Frontier Foundation (EFF) and Public Knowledge (PK)").

AMI also raised concerns regarding the ease with which metadata can be removed or “stripped.”³⁰⁷ The AMI’s concerns were echoed in numerous Comments.³⁰⁸ The ability to remove metadata or the handling of metadata by specific software or file formats is a technical concern rather than a legal one, and is not germane to the orphan works discussion. The removal or falsification of Copyright Management Information (“CMI”)³⁰⁹ is already addressed by existing remedies and protections defined in Sections 1202,³¹⁰ 1203,³¹¹ and 1204³¹² of the 1976 Copyright Act, which provide for criminal penalties and civil remedies for the removal of CMI, including removing such information from the metadata encoded in a digital image file. Further, as noted above, any concern over hypothetical infringers creating orphans intentionally can be covered under existing copyright law³¹³ as a willfully infringing action.

Where metadata represents CMI within the meaning of Section 1202,³¹⁴ existing law already addresses the concerns raised by various commenters.³¹⁵ A complete ban on the removal of metadata ignores potential privacy implications resulting from leaving certain types of metadata intact and fails to account for the technical issues involved in converting between different file types. Where metadata is construed to include data external to the digital image file, it is burdensome to consider mandating social media sites capture non-embedded information from non-standardized data structures. The development of standards which may mitigate these problems, however, are not the domain of the Copyright Office and are not germane to this inquiry.

Finally, the assumption presented (but not addressed) by commenters is the fundamental question of whether such data accurately represents current copyright ownership, particularly where such rights may be sold or transferred subsequent to the metadata being embedded in the particular file. In this respect, the stripping of metadata may be helpful by not preserving information that has become erroneous and out of date. It would be more viable if a standardized identifier were incorporated, such as a copyright registration number, which could be easily identified (from a technical standpoint) for preservation in the midst of other metadata and would always point back to an authoritative source, which can be subsequently updated.

ii. Legal Protections for CMI

³⁰⁷ *Id.* (scroll down to Document 18 from website; follow link to “Association Medical Illustrators”).

³⁰⁸ *Id.* (scroll down to Document 19, 31, 38, 57, 70, 76, 77, 78; follow links to document “Atlantic Feature Syndicate”, “Croxtton, Matthew David”, “Dufresne, Walter”, “Kane, Chris”, “National Press Photographers Association”, “Picture Archive Council of America, Inc. (PACA)”, “Professional Photographers of America”, “Pro-Imaging.org”, respectively).

³⁰⁹ See 17 U.S.C. § 1202(c).

³¹⁰ 17 U.S.C. § 1202 (West 2012).

³¹¹ *Id.* § 1203.

³¹² *Id.* § 1204.

³¹³ See *id.* § 506.

³¹⁴ See 17 U.S.C. 1202(c).

³¹⁵ See *id.* §§ 1202-04.

Section 1202 of the 1976 Copyright Act provides legal protection for copyright management information.³¹⁶ It addresses false copyright management information and the removal or alteration of copyright management information, effectively addressing the concerns about those who claim copyright to works that are not actually theirs in any context (“kidnapped orphans” as well as false copyright holders).

Copyright management information (“CMI”) is defined as information connected to copies or displays of a work³¹⁷ identifying or referring to an identification³¹⁸ of the work,³¹⁹ its author,³²⁰ its copyright owner,³²¹ any performers,³²² writers or directors,³²³ terms and conditions for use of the work,³²⁴ and any other information prescribed by the Register of Copyrights.³²⁵ There is some debate regarding whether 17 U.S.C. § 1202 protects analog information, like handwritten tags sewn onto fabric patterns, but courts and scholars agree that it protects all digital CMI.³²⁶

All CMI is protected from false representations and/or removal or alteration by 17 U.S.C. § 1202. False representation is defined as provision or distribution of false information,³²⁷ and removal or alteration includes distributing or performing items with removed or altered CMI.³²⁸ Violators of these provisions may be liable for statutory damages (between \$2,500 and \$25,000),³²⁹ with triple damages for repeated violations by a person within three years.³³⁰ Furthermore, 17 U.S.C. § 1204 contains criminal penalties for “any person who violates section . . . 1202 willfully and for purposes of commercial advantage or private financial gain.”³³¹

Our class felt that this constitutes a strong deterrent to the removal, tampering or false recording of copyright management information without the creator’s permission.³³² Our only concern was the possibility of innocent or accidental infringement. Fortunately,

³¹⁶ *Id.* § 1202.

³¹⁷ *Id.* § 1202(c).

³¹⁸ *Id.* 1202(c)(7).

³¹⁹ *Id.* 1202(c)(1).

³²⁰ *Id.* § 1202(c)(2).

³²¹ *Id.* § 1202(c)(3).

³²² Except for live performances. *Id.* § 1202(c)(4).

³²³ Of audiovisual works. *Id.* § 1202(c)(5).

³²⁴ *Id.* § 1202(c)(6).

³²⁵ *Id.* § 1202(c)(8). Though it cannot be extended to personally identifying information about users. *Id.* § 1202(c).

³²⁶ *Id.* § 1202(c); *see also* 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16A:3.60; 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.09(B)(2); RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 1:41; Agence France Presse v. Morel, 769 F.Supp.2d 295 (S.D.N.Y. 2011); *c.f.* *Textile Secrets Intern., Inc. v. Ya-Ya Brand Inc.*, 524 F.Supp.2d 1184 (C.D.Cal. 2007); *IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F.Supp.2d 587 (D.N.J. 2006).

³²⁷ 17 U.S.C. § 1202(a)(1)-(2).

³²⁸ *Id.* § 1202(b)(1)-(3).

³²⁹ *Id.* § 1203(c)(3)(B).

³³⁰ *Id.* § 1203(c)(4).

³³¹ *Id.* § 1204 (a).

³³² *See id.* § 1202(b). *But see* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.10(B)(2)(a).

violating the 1202 provisions requires knowledge of the infringing action and at least having reasonable grounds to know that it will “induce, enable, facilitate, or conceal infringement.”³³³ There are also explicit exceptions, reducing potential damages and eliminating criminal penalties for a non-profit library, archive, educational institution, or public broadcasting entity that “was not aware and had no reason to believe that its acts constituted a violation.”³³⁴

Although it is a relatively new addition to Copyright Law, courts have not been lax in enforcing 17 U.S.C. § 1202 across all levels of infringement.³³⁵ Overall, we felt that 17 U.S.C. § 1202 is a compelling reason for photographers and others to feel comfortable that there are solutions already in place for the “kidnapped” orphans scenario.

6. Statute of Limitations³³⁶

The statute of limitations on copyright infringement claims also limits the impact of infringement proceedings on users with regard to orphan works. Criminal proceedings must occur within five years³³⁷ and civil actions must commence within three years after the alleged infringement.³³⁸ This limits the threat of being sued for infringement by requiring a copyright holder to be timely and helps to eliminate cases in which an unintentional infringer is caught unawares and unprepared to defend herself from a legal claim brought long after the alleged infringement.

However, each time a work is copied, distributed, publicly performed, or publicly displayed, a new claim for infringement arises, and a new limitations period begins. As a result, particularly for mass digitization projects, where copies are routinely and repeatedly made each time a work is loaded for viewing, the protection that the statute of limitations offers is limited. As long as a use continues and new copies are made, a copyright owner will usually be able to pursue an infringement claim for those uses that have occurred within the last three years. So long as the work has been copied, distributed, publicly performed or publicly displayed within the last three years, the fact that a given defendant has been using the work in the same manner for years will not bar a lawsuit under the statute of limitations. In such a case, a plaintiff’s delay in pursuing litigation would bar the claim for infringement only if the plaintiff’s long delay would make it inequitable for the plaintiff to enforce the copyright under the more difficult to establish doctrines of laches, estoppel, or acquiescence.³³⁹

³³³ See 17 U.S.C. § 1202(a)-(b); see also 2 NIMMER ON COPYRIGHT § 12A.10(A)-(B); 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16A:4.

³³⁴ 17 U.S.C. §§ 1203(c)(5)(B)(ii), 1204(b).

³³⁵ See, e.g., *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295 (3d Cir. 2011); *Agence France Presse v. Morel*, 769 F.Supp.2d 295 (S.D.N.Y.2011).

³³⁶ Written by Professor Glynn Lunney.

³³⁷ 17 U.S.C. § 507(a).

³³⁸ *Id.* § 507(b)

³³⁹ Written by Professor Glynn Lunney.

7. Sections 302(d) and (e)³⁴⁰

Section 302(d) provides for the ability to record the death date of the author or a statement that the author is still living and include in the copyright record information related to who provided that information. This is vital for the assistance in determining the copyright status of works. This system—already part of the law—is available for those who have information to submit to the Copyright Office. We think libraries and content owners should take advantage of § 302(d) and submit information to develop the Copyright Office’s records. Additionally, their databases should be used as supplemental information attached to the records available at the Copyright Office.

Section 302(e) relates to the presumption of an author’s death. For orphan works, § 302(e) is necessary when the death date cannot be determined. Section 302(e) reads as follows:

After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.³⁴¹

Currently, § 302(e) is a rarely used mechanism. We think it needs to be amended to be more helpful. In connection with our suggestions regarding duration, if a work is deemed orphan (by whatever mechanism is adopted), we think this should alter its term of copyright. One should be able to get a certificate from the Copyright Office regarding its orphan work status. A modified version of § 302(e) could be that mechanism. For now, § 302(e) is available, and might be useful in some orphan work situations.

8. Duration and Orphan Works³⁴²

i. The Problem

Copyright lasts for “limited Times”.³⁴³ Real-life orphans grow up. Copyright orphans may not, in some cases. When a child loses their parents and becomes a ward of the state, that period of “orphanhood” is limited. Unless the question of duration is addressed, our copyright orphans will suffer the fate being orphans for much longer than necessary. This section discusses elements of the current copyright system—the 1976 Copyright along with the minimum standards required by the Berne Convention. The goal is to help “orphans” grow up—become unencumbered by copyright, and be free to live the next stage of their adult life in the public domain.

³⁴⁰ Written by Professor Elizabeth Townsend Gard.

³⁴¹ 17 U.S.C. 302(e).

³⁴² Written by Professor Elizabeth Townsend Gard.

³⁴³ U.S. CONST., art. I, § 8, cl. 8.

If such work is determined to be published before 1978, Section 304 of the 1976 Copyright Act would govern the duration of the work.³⁴⁴ Determining this classification presents a variety of difficulties, such as defining exactly what publication entails, the date of publication, proper notice (if applicable), and the status of renewal for the original copyright.³⁴⁵ If a work was unpublished before 1978, or created after 1978, the term of copyright will be governed generally by the life of the author, and therefore, a new problem arises—who is the author, and when did they (did they) die?³⁴⁶

In this section, we consider the problem of determining the copyright term for orphan works in general and specific types of orphan works (photographic, cinematographic, and anonymous.) Restrictions on copyright terms under U.S. (termination of transfer) and international law (the Berne Convention and rule of the shorter term) are also discussed. In conclusion, we propose amending the Copyright Act to create a special copyright term for orphan works.

ii. The General Term

To be in compliance with our Berne obligations, we must meet the minimum terms of copyright, as described under Article 7, which begins with a general minimum term for copyrighted works:

“The term of protection granted by this Convention shall be the life of the author and fifty years after his death.”³⁴⁷

The minimum term is 50 years after the author’s death. The U.S., and many other countries, including the EU countries, has extended the term to 70 years after an author’s death. For some authors, the death date, however, will remain unknown. Without a known death date, calculating the term becomes quite difficult because the basic mechanism for transitioning from a copyrighted work to a public domain work is not available, thus, creating orphans who never reach the age of maturity.

For example, an author could have died in 1930, having created his last great masterpiece the year of his death. Under U.S. law (and many others’ laws), the term of the work would expire at the end of 2000. However, without knowledge of the death date, how would one know? Under U.S. law, this causes a problem for Section 302 and Section 303(a), both of which rely on the death date for determining the end of the copyright term. Section 302(e) provides a mechanism to presume an author’s date, transferring the life + system back to a 95/120 system, as long as there is no evidence that the author is still living or has died within the last seventy years. This seems problematic and not in keeping with the spirit of Berne. Using the same example, the 1930 work

³⁴⁴ See 17 U.S.C. § 304.

³⁴⁵ See *id.* §§ 303, 304.

³⁴⁶ 17 U.S.C. §§ 302, 303(a).

³⁴⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 7(1), Sept. 9, 1886, 1161 U.N.T.S. 3 (as revised at Paris on July 24, 1971, and amended on Sept. 28, 1979, in S. Treaty Doc. No. 99-27).

should be in the public domain as of January 1, 2001. For the current system under Section 302(e), the term would be 95 years from publication, or 2025, or alternatively, 120 years from creation, or 2050, when in fact, if we knew the death date, the work would have been in the public domain in 2001.

If Section 302(e) is altered to read: “70 years from creation and/or making available to the public, whichever is later,” rather than 95/120, we would meet our Berne obligations and bring in Section 302(e) within international norms while still solving the duration problem for orphans

iii. Cinematographic Works Under Berne and the Orphan Problem

While the United States does not provide special terms for cinematographic works, Berne does allow specific terms to be applied:

However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.³⁴⁸

An orphan cinematographic work could have its term reduced to fifty years from creation or when the work was made available to the public, whichever is longer. This would free up many of the works currently held at the Internet Archive and other archives, as well as home movies and other films that have lost connection to their original owner, while still providing protection to large content owners (whose ownership is clear), who would continue to rely on ninety-five years from publication. This would trigger early removal of copyright for only works 1) that were not made public within the first fifty years after creation; or 2) whose copyright holders are not findable and fifty years from publication has passed. Existing registration and renewal records could serve as presumption of an interested (non-absent) copyright holder. The system would also encourage registration of current and older works, again as a presumption that the copyright holder is not absent, and that the work is not orphaned.

iv. Anonymous Works – Rethinking What Anonymous Means

Under Berne, anonymous and pseudonymous works have a special term of protection, in great part, because the system relies on death dates, and without knowledge of the author’s death date, no term could be calculated. Section 7(3) reads:

In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses

³⁴⁸ *Id.* art. 7(2).

his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.³⁴⁹

Some orphan works suffer from an “anonymous” problem: we do not know who their authors are. We suggest applying the Berne minimum term to works whose authors are not known and where the work has been declared an orphan. For those works deemed “orphan,” who have become anonymous because we do not know who their authors are, the work would carry a term of fifty years after a work has been lawfully made to the public, or created, whichever is longer. If, as in the case above, the identity of the author is made, the term could be converted back to a life +70 term. However, once the “orphan” term is complete, no opportunity for “reviving” the copyright would exist. If one did choose to restore the copyright, one would have to include provisions for reliance parties, similar to Section 104A. Article 7(3) in Berne also includes the notion that a fifty-year presumption of death regarding authors of anonymous works is not required. We think this should be adopted as well.

v. Photographic Works under Berne

Article 7(4) of Berne also addresses the minimum term of photographic works under Berne:

It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.³⁵⁰

Photographic works and applied art only need to be protected for twenty-five years from creation.

We proposed a few solutions. First, all orphan photographs are given the term of 25 years from creation. Second, registered photographic works and applied art could carry a rebuttable presumption of not being orphans. This would encourage registration (even in large bulks of photographs) for both domestic and foreign photographers. To alleviate the problem that many photographic works would come into the public domain upon enactment, a number of possibilities could be enacted, namely a grace period to identify works as “*not orphan*.” Just as with Section 303(a) and 104(a), there could be a five-year grace period to allow for the registration period for photographs that are older than twenty-five years to assert the presumption that the works are *not orphans*. Copies of the photographs and identifying information would be helpful, potentially leading to a searchable photographic database of registered works.

³⁴⁹ *Id.* art. 7(3).

³⁵⁰ *Id.* art. 7(4).

vi. Rule of the Shorter Term

The Berne Convention also allows for the Rule of the Shorter Term. Article 7(8) reads:

In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.³⁵¹

Currently, the U.S. does not apply the “rule of the shorter term,” even though the EU and other countries around the world do.³⁵² One potential use of the “rule of the shorter term” could be implemented with regard to orphan works. If a work were designated as an orphan in its country of origin or region (e.g. EU), that work would be deemed an orphan under U.S. law. No additional “diligent” search would be necessary, and all of the laws related to orphan works in the U.S. would apply. Because of the designation, shorter terms would apply. For those countries that have shorter terms, the shorter term would be applied to works where the work has not been designated as an orphan in the country of origin. Registration could reverse the Rule of the Shorter Term for foreign works.

vii. Termination of Transfer

Termination of transfers is an important consideration in the orphan work discussion, as SAG-AFTRA explained in their comment, where they wrote

Beginning this year, authors - including sound recording artists and songwriters who assigned or transferred their rights to a copyrighted work in 1978 - will be able to regain a valuable ownership interest in their creative works. Special consideration must be given to authors who can exercise a right to termination to protect future interests in their works. It is therefore imperative that any orphan works regime require a potential new user to locate the owner of an unvested termination right, or an author where there is a missing owner, in the course of conducting a good faith due diligence search. In that instance, the author should be treated in all respects as the owner of the orphan work, and all rights and obligations of the missing owner should inure to the author. Similar to a copyright owner, the author would have the right to negotiate a license with the new user, and to have the option to stop the usage, to prevent any unintended harm that may result from the new user.³⁵³

When considering shortening the effective term for orphan works, we must consider termination of transfers. Therefore, we cannot exclude exploration of the two sections of the Copyright Act, Section 203 and Section 304(c), which provide each author

³⁵¹ *Id.* art. 7(8).

³⁵² *See* 17 U.S.C. §104 (West 2012).

³⁵³ *2013 Comments, supra* note 3 (scroll down to Document 82; follow link to “Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)”).

or author's statutory successors with “an inalienable and unwaivable right to terminate transfers or licenses of copyright after a set period of years.”³⁵⁴ Although there are distinct differences between Sections 304(c) and 203, there are a few aspects that are governed the same, including: 1) termination only cuts off domestic grants; therefore, foreign grants remain in effect if they are otherwise valid; and 2) termination does not prohibit the exploitation of derivative works created during the grant.³⁵⁵ However, as provided in Sections 203(b)(1) and 304(c)(6)(A), the termination “privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.”³⁵⁶ The provisions “cut-off the right to make derivative works from the date the termination notice is effective.”³⁵⁷ Therefore, derivative works authorized by the grant between the date the notice of termination is served and the effective date of the notice be prepared.³⁵⁸ It is also important to note that termination only applies to domestic grants; therefore, under both sections, foreign grants remain in effect if they are otherwise valid, despite termination.³⁵⁹

Generally, Section 304(c) governs transfers and licenses executed before January 1, 1978.³⁶⁰ Section 304(c) is limited to only works in either their first or renewal term on January 1, 1978; therefore, Section 304(c) does not cover works that were unpublished on January 1, 1978.³⁶¹ For example, a novel for which an author grants a publishing license to a publishing house on November 11, 1977 would be covered by Section 304(c). Termination of transfer, in an orphan work context, then, would not apply to unpublished works. This is particularly important in the archival context, along with radio scripts not registered, and other materials that did not meet the definition of general publication.

For all transfers and licenses executed on or after January 1, 1978, Section 203 governs.³⁶² Thus, Section 203 effectively covers three categories of works: “(1) works that were subject to common law copyright on January 1, 1978; (2) works protected under the 1909 Act that were in the first or renewal term on January 1, 1978, but where the transfer or license was executed on or after that date; and (3) works created on or after January 1, 1978.”³⁶³

In terms of dealing with orphan works, we must realize that we need to provide the original authors or creators and opportunity to gain back full copyrights from the orphan work status. Therefore, if a user takes all the legal steps necessary to use an orphan work and protect themselves from damages, the original rights holder must be given the right to terminate their orphan work status, under termination of transfers. If the

³⁵⁴ 3 WILLIAM F. PATRY , PATRY ON COPYRIGHT § 7:42.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

term of orphan works is shortened, there must also be a time at which the sections 304(c) and 203 terminations are allowed.

viii. Summary

In sum, we propose the following changes be made to the Copyright Act with regards to the duration of the copyright term for orphan works:

- Twenty-five years from creation for photographic works and applied art that have qualified as orphans.
- “Anonymous” status for works whose author and copyright holder is not identifiable, and if deemed orphan, the longer of fifty years from creation or making available the public.
- For cinematographic works identified as “orphan,” the longer of fifty years from creation, or making available the public.
- If a work is identified as an orphan work in its country of origin, no new diligent search or “orphan” analysis is necessary.
- Section 302(e) is modified to shorten the terms to meet Berne’s minimum standards to the longer of fifty years from creation or making available to the public, and anonymous works need not meet the requirement of “presumed fifty years from death.”
- Section 302(d) is used more vigorously, with additional resources given to the Copyright Office, along with the Copyright Office working with additional groups to create supplemental registries linked at the Copyright Office to provide additional information regarding the copyright status of a work.
- Registration serves as prima facie evidence that a work is not orphaned.
- Any shortening of the term must take into account termination of transfer rights.

9. Fair Use³⁶⁴

i. Fair Use as an Existing Solution for Occasional Uses of Orphan Works³⁶⁵

Various commenters representing libraries have taken the position that legislative reform is no longer needed to address the occasional use of orphan works.³⁶⁶ They report that a clarified fair use doctrine means libraries can more confidently rely on fair use when undertaking projects involving orphan works.³⁶⁷ Some commenters also noted that

³⁶⁴ Written by Austin Blakeslee, 3L, Tulane University Law School; and Alessandra Suuberg, 2L, Tulane University Law School.

³⁶⁵ Written by Alessandra Suuberg, 2L, Tulane University Law School.

³⁶⁶ 2013 *Comments*, *supra* note 3 (scroll down to Document 5, 61, 64, 72, 76, 89; follow link to “American Bar Association Section of Intellectual Property Law,” “Library Copyright Alliance (LCA),” “Massachusetts Institute of Technology (MIT) Libraries,” “North Carolina State University (NCSU) Libraries,” “Picture Archive Council of America, Inc. (PACA),” “University of Michigan,” respectively).

³⁶⁷ The Library Copyright Alliance cites to *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); and *A.V. v. iParadigm*, 562 F.3d 630, 639 (4th Cir. 2009), in which courts found that repurposing or recontextualizing entire works for a commercial purpose was “transformative” and a fair use; and *Cambridge Univ. Press v. Becker*, 863 F.

a *Code of Best Practices in Fair Use for Academic and Research Libraries*³⁶⁸ currently provides additional guidance to libraries and “explicitly concludes that the orphan status of a work in a special collection enhances the likelihood that its use by a library is fair.”³⁶⁹

Currently, the Library of Congress posts statements to support a fair use defense when presenting works online citing the examples of disclaimers posted along with its Hannah Arendt Collection, American Memory, and Performing Arts Encyclopedia.³⁷⁰ Meanwhile, Duke University has digitized a number of special collections and describes the four-pronged strategy it uses “to manage the risk associated” with these projects.³⁷¹ Beyond libraries, the Electronic Frontier Foundation and Public Knowledge point out that fair use is accessible to any user.³⁷² In support of relying on fair use, they say recent case law has shown that “a wide range of uses are sufficiently clearly fair that users can rely upon the doctrine to use orphan works.”³⁷³

a. Drawbacks of Fair Use: High Cost and Uncertainty

At the same time, while a number of libraries suggest that there is no need for legislative reform, others express concern with the idea of relying entirely on fair use as a defense to a copyright infringement claim.³⁷⁴ The high cost and uncertainty of relying on a case-by-case,³⁷⁵ seek-forgiveness-not-permission solution is most frequently cited by commenters as a drawback of relying on fair use for protection.³⁷⁶

Supp. 2d 1190 (N.D. Ga. 2012); *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012); *Ass’n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx), 2011 WL 7447148 (C.D.Cal. Oct. 3, 2011); and *Ass’n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx) (C.D.Cal. Nov. 20, 2012), in which nonprofit educational purposes weighed in favor of fair use. *Id.* (scroll down to Document 61; follow link to “Library Copyright Alliance (LCA)”).

³⁶⁸ *Id.* (scroll down to Document 30, 64, 72; follow link to “Council of University Librarians at the University of California,” “Massachusetts Institute of Technology (MIT) Libraries,” “North Carolina State University (NCSU) Libraries”).

³⁶⁹ *Id.* (scroll down to Document 61; follow link to “Library Copyright Alliance (LCA)”).

³⁷⁰ *Id.* (scroll down to Document 60; follow link to “Library of Congress”).

³⁷¹ First, they recognize that some materials are likely to be in the public domain; second, they seek permission from identifiable individuals or organizations, though in some cases this is impossible, because the process is too labor-intensive; third, they recognize that creation of themed collections with definite pedagogical and historical purposes are strong examples of transformative use; and, finally, they provide contact information so that any resurfacing rights holder can subsequently get in touch with the University Libraries. *Id.* (scroll down to Document 39; follow link to “Duke University Libraries”).

³⁷² *Id.* (scroll down to Document 40; follow link to “Electronic Frontier Foundation (EFF) and Public Knowledge (PK)”).

³⁷³ *Id.*

³⁷⁴ *Id.* (scroll down to Document 4, 24, 60, 80; follow link to “American Association of Law Libraries (AALL),” “Carnegie Mellon University Libraries,” “Library of Congress,” “Rutgers University Libraries”).

³⁷⁵ *Id.* (scroll down to Document 5, 85; follow link to “American Bar Association Section of Intellectual Property Law,” “Society of American Archivists”).

³⁷⁶ *Id.* (scroll down to Document 7, 28, 39, 62; follow link to “American Intellectual Property Law Association (AIPLA),” “Copyright Alliance,” “Duke University Libraries,” “Mackie, Jane Beasley,” respectively); see also *id.* (scroll down to Document 60; follow link to “Library of Congress”) (“reliance on fair use can be a risky, inadequate, and expensive solution, particularly if litigation ensues”). The Digital

Rather than functioning as a license or a remedy, as the Art Institute of Chicago points out, fair use “is simply an affirmative defense that . . . users can assert against the copyright holder” after he or she has already been accused of infringement,³⁷⁷ and the American Intellectual Property Law Association notes that proving fair use in court may be prohibitively expensive for precisely the nonprofits and educational institutions to which it would most readily apply.³⁷⁸ Still others are concerned about relying on fair use as a strategy that generates wasteful, expensive litigation and does nothing to bring the parties together.³⁷⁹

b. Beyond Libraries: Who Cannot Rely on Fair Use

While it is true that fair use is available to anyone, commenters point out that projects by commercial actors may be less likely to qualify as fair use.³⁸⁰ For example, the Dance Heritage Coalition (“DHC”) reports that small commercial entities in the dance community worry that their uses will be less likely to qualify as fair use than will those of libraries.³⁸¹ These entities—which advertise and sell books and performance tickets, for example—may not want to run the risk of litigation.³⁸² Furthermore, the DHC indicates that even when a member might be confident that a particular use will be covered, a funder might still take a more conservative line on fair use and remain concerned about legal liabilities.³⁸³ According to the International Documentary Association, even though filmmakers today, like libraries, know how to use fair use better than ever before, they still remain exposed to “crushing liability” and the possibility that injunctions will shut down projects.³⁸⁴ And although documentary filmmaking will likely be covered by fair use, filmmakers may often want to use third party materials in ways that would not qualify as a fair use.³⁸⁵ When it comes to libraries (or other “archivists and repositories”), the Society of American Archivists notes that even when these entities believe they are exercising their fair use rights in a particular instance, “resource allocators and administrators are often not willing to support any level of risk.”³⁸⁶ Other entities have also expressed concerns about reliance on fair use because it is a detriment

Media Association says counting on fair use is too uncertain and costly to be a truly viable business practice. *Id.* (scroll down to Document 35; follow link to “Digital Media Association (DiMA)”).

³⁷⁷ *Id.* (scroll down to Document 13; follow link to “Art Institute of Chicago”) (asserting fair use is not a “total solution”).

³⁷⁸ *Id.* (scroll down to Document 7; follow link to “American Intellectual Property Law Association (AIPLA)”).

³⁷⁹ *Id.* (scroll down to Document 77; follow link to “Professional Photographers of America”).

³⁸⁰ *Id.* (scroll down to Document 5; follow link to “American Bar Association Section of Intellectual Property Law”).

³⁸¹ *Id.* (scroll down to Document 32; follow link to “Dance Heritage Coalition”).

³⁸² *Id.* (scroll down to Document 5; follow link to “American Bar Association Section of Intellectual Property Law”).

³⁸³ *Id.*

³⁸⁴ *Id.* (scroll down to Document 55; follow link to “International Documentary Association”).

³⁸⁵ *Id.*

³⁸⁶ *Id.* (scroll down to Document 85; follow link to “Society of American Archivists”).

to certain industries,³⁸⁷ and prior court rulings may complicate the picture for orphaned musical works.³⁸⁸

c. Preserving Fair Use in Legislative Solutions

The Council of University Librarians at the University of California points out that the orphan work bills introduced in the House and Senate in 2008 failed to address fair use at all, requiring that users compensate copyright owners who reappear but providing no exemption from payment for fair uses of works.³⁸⁹ The Council expresses a concern that diligent search and license fee requirements would discourage libraries from taking advantage of their fair use rights, which may hurt the legitimacy of fair use as a legal mechanism.³⁹⁰ To avoid this problem, the Berkeley Digital Library Copyright Project, among others,³⁹¹ recommends that fair use be preserved in potential legislative solutions, possibly in the form of an explicit savings clause like that in 17 U.S.C. § 108(f)(4).³⁹²

ii. Fair Use for Mass Digitizers

While rights holders and users are understandably concerned with the growing number of mass digitization projects dominating the headlines, as a class, we came to see mass digitization as not an orphan works problem. Comments from a diverse group of content owners and users have reached a similar conclusion—mass digitization carries a number of complex policy implications that require special consideration by Congress and a separate legislative framework.³⁹³ We agree with this conclusion and have decided to focus our reply on the applicability of the fair use doctrine to the case of occasional users of orphan works.

Furthermore, to the extent that the Comments suggest a reliance on fair use to justify digital reproduction en masse, orphan works do not present any additional hurdles to mass digitization efforts as they would still require special provisions or exceptions to copyright protection as recent litigation has shown.³⁹⁴ In particular, the October 2012

³⁸⁷ *Id.* (scroll down to Document 50; follow link to “Illustrators’ Partnership of America”).

³⁸⁸ *Id.* (scroll down to Document 44; follow link to “Future of Music Coalition”).

³⁸⁹ *Id.* (scroll down to Document 30; follow link to “Council of Librarians at the University of California”).

³⁹⁰ *Id.*

³⁹¹ *Id.* (scroll down to Document 24, 64, 72; follow link to “Carnegie Mellon University Libraries,” “Massachusetts Institute of Technology (MIT) Libraries,” “North Carolina State University (NCSU) Libraries,” respectively).

³⁹² *Id.* (scroll down to Document 21; follow link to “Berkeley Digital Library Copyright Project”).

³⁹³ *See id.* (scroll down to Document 9, 47, 79; follow link to “Joint Comments of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. Regarding Orphan Works,” “Google, Inc.,” “Comments of the Recording Industry Association of America,” respectively); *see also id.* (scroll down to Document 67; follow link to “Comments of the Motion Picture Association of America, Inc.”) (“The mass digitization conflict between copyright owners and institutional users needs to be resolved in some other way, whether through the courts or through legislation unrelated to orphan works.”).

³⁹⁴ *See e.g., Ass’n for Info. Media and Equip. v. The Regents of the Univ. of California, et al.*, No. 2:10-cv-09378-CBM-MAN (C.D. Cal. Nov. 20, 2012); *The Authors Guild, Inc., et al. v. HathiTrust, et al.*, 2012 WL 4808939 (S.D.N.Y. Oct. 12, 2012); *Cambridge Univ. Press, et al. v. Georgia State Univ., et al.*, No.

decision by Judge Baer in *Authors Guild v. HathiTrust*³⁹⁵ has generated significant attention, as it addresses mass digitization by a non-commercial entity. Although it does not directly relate to the orphan works problem,³⁹⁶ it deserves a brief mention here. The case provides an example (although perhaps not an ideal one) of what fair use might look like when applied to the concept of mass digitization.

a. The Authors Guild v. HathiTrust

The HathiTrust partnership worked with Google to create a digital database of works from the libraries of a number of universities around the country and around the world.³⁹⁷ According to the partnership, the purpose of this database was threefold: it provided users with the ability to conduct full-text searches of the works, it allowed for preservation of the works, and granted access to the works for print-disabled users.³⁹⁸

The court held that the defendants' activities would qualify as a fair use.³⁹⁹ To begin with, the first factor favored the defendants. HathiTrust's primary purpose for the database was scholarship and research, which are explicitly mentioned in Section 107 of the Copyright Act, and are thus well within the realm of fair use.⁴⁰⁰ The court also held that the use of the works in the database was transformative, as its purpose was an enhanced search capability rather than simple access to the works.⁴⁰¹ In looking at the second factor, the court continued to rely on the transformative character of HathiTrust's use. It found that the second factor was not dispositive, due to the transformative use, despite the fact that many of the identified works were fiction.⁴⁰² The court then noted, with respect to the third factor, that it is sometimes necessary to copy the entire work, as

1:08-cv-01425-ODE (N.D. Ga. May 11, 2012); *The Authors Guild, et al. v. Google, Inc.*, 770 F.Supp.2d 666 (S.D.N.Y. 2011).

³⁹⁵ *HathiTrust*, 2012 WL 4808939.

³⁹⁶ See *infra* text accompanying note 6.

³⁹⁷ *HathiTrust*, 2012 WL 4808939 at *1.

³⁹⁸ *Id.* at *3. Another major purpose of this project was the identification of orphan works, as part of what the HathiTrust partnership called the "Orphan Works Project." *Id.* at *2. However, the Orphan Works Project has been indefinitely suspended as a result of the current litigation against HathiTrust. *Id.* at *4. The University of Michigan also stated that the methods it had used in determining whether or not a particular work was an orphan had inadvertently allowed a number of works to be erroneously classified as orphans. The University has not yet developed a new process for identifying orphan works. *Id.* In addition, Judge Baer stated that he would not enjoin the Orphan Works Project in its current state due to a lack of "crucial information" as to what its final form will look like, and who all it will impact. *Id.* at *11.

³⁹⁹ The fair use factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2006).

⁴⁰⁰ *HathiTrust*, 2012 WL 4808939 at *15.

⁴⁰¹ *Id.* at *16. In addition, the use of the digital copies to allow print-disabled users to access the works went beyond the original intended use of the copyrighted works and was thus also transformative. *Id.* at *18.

⁴⁰² *Id.*

was done here.⁴⁰³ Finally, in looking at the fourth factor, the court held that any potential harm would be to a “transformative market,” rather than the plaintiffs’ actual market.⁴⁰⁴ Uses that are within a transformative market do not harm the copyright holder, according to the court.⁴⁰⁵

The *HathiTrust* litigation was mentioned in several of the initial Comments submitted to the Copyright Office,⁴⁰⁶ although commenters were ultimately divided over how thorough a solution *HathiTrust* may prove to be. For some, it heralded the end of any looming doubts as to the validity of mass digitization projects,⁴⁰⁷ while for others it represented an unsatisfactory and disappointing resolution of the thorny problems of mass digitization and orphan works.⁴⁰⁸ A number of those commenters who made mention of *HathiTrust* also stated that the concerns raised by mass digitization and the orphan works problem need to be decided separately.⁴⁰⁹ In light of these Comments, and for the reasons discussed below, we do not think that *HathiTrust* can, at this point, reasonably serve as a complete, valid solution to either the mass digitization or orphan works problem.

b. Our Reply to *HathiTrust*

Relying too heavily on *HathiTrust* at present could prove detrimental, due to the unsettled, unresolved nature of the litigation. It remains, at this point, just a district court decision, and the result may yet change if and when the case is appealed. Judge Baer’s broad finding of fair use might be overturned or narrowed, taking the wind out of the sails of those commenters that hailed the decision as a solid resolution of the mass digitization problem. Even if the case goes unappealed (and the result thus remains unchanged), it will not have substantial weight outside of the Southern District of New York.⁴¹⁰ Entities engaged in mass digitization in other jurisdictions could still face litigation in a court system that is not bound by the precedent set in *HathiTrust*.

⁴⁰³ *Id.* at *18-19. As in *Perfect 10 v. Amazon.com*, entire copies were necessary for the defendants’ intended use, namely searching the works and allowing for access by print-disabled users. 508 F.3d 1146, 1157 (9th Cir. 2007) (holding that Google’s reproduction of Perfect 10’s copyrighted images for search purposes was sufficiently transformative to qualify as fair use).

⁴⁰⁴ *Id.* at *20.

⁴⁰⁵ *Id.*

⁴⁰⁶ 2013 Comments, *supra* note 3.

⁴⁰⁷ *Id.* (scroll down to Documents 21, 40, 42, 61; follow links to “Berkeley Digital Library Copyright Project;” “Electronic Frontier Foundation (EFF) and Public Knowledge (PK);” “Emory University Libraries;” “Library Copyright Alliance (LCA), (including the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL);”).

⁴⁰⁸ *Id.* (scroll down to Documents 7, 62, 66, 67; follow links to “American Intellectual Property Law Association (AIPLA);” “Mackie, Jane Beasley;” “Microsoft Corporation;” “Motion Picture Association of America (MPAA)”).

⁴⁰⁹ *Id.* (scroll down to Documents 21, 40, 67; follow links to “Berkeley Digital Library Copyright Project;” “Electronic Frontier Foundation (EFF) and Public Knowledge (PK);” “Motion Picture Association of America (MPAA)”).

⁴¹⁰ And even if the Second Circuit does uphold the finding of fair use, the other federal appellate courts will not necessarily be bound by the decision.

If, however, Judge Baer’s current analysis is left unaltered, it still might not avail as many entities as will likely seek to rely on it. The *HathiTrust* decision offers protection for certain non-commercial entities that are engaged in mass digitization of copyrighted works. The entities that would be able to rely on *HathiTrust* most readily would only be those entities that are most like the HathiTrust libraries: those that are engaged in mass digitization for non-commercial, scholarly, and educational purposes (i.e., libraries, universities, and archives).⁴¹¹ Entities performing mass digitization projects for any sort of commercial purpose will find *HathiTrust* to be of little benefit. In addition, (and perhaps most importantly for the purposes of this reply comment) the fact remains that Judge Baer’s analysis only covers the mass digitization aspect of HathiTrust’s project. The orphan works portion of the organization’s activities is still undecided (Judge Baer explicitly refused to decide anything on it),⁴¹² and HathiTrust’s Orphan Works Project itself has been indefinitely suspended.

On the other hand, if *HathiTrust* is appealed, the Second Circuit might uphold the finding of fair use, either confirming Judge Baer’s analysis, or applying a new affirmative analysis of its own. This still will not solve the problems presented by orphan works and mass digitization. *HathiTrust* addresses the fair use potential of just one particular kind of mass digitization project; other projects might not fall within its reach and would require separate litigation. In addition, as mentioned above, *HathiTrust* does not address orphan works directly, and can thus hardly be used as a solution to this problem. Legislation and case law can work together to resolve legal problems, but in this case the legislation is still missing.

*iii. Fair Use Going Forward*⁴¹³

Taking into account the Comments⁴¹⁴ submitted to the Copyright Office in response to its Notice of Inquiry, we do not consider the fair use doctrine as applied in *HathiTrust* to be a complete solution to the orphan works problem, because occasional orphan works’ users will not be able to rely on the defense as confidently as mass digitizers. Occasional users of orphan works and mass digitizers should have equal access to any limitation or exception to copyright for orphan works. While fair use may be considered part of an existing set of tools that prospective users can rely on, or a complement to a new solution (e.g., preserved in a savings clause), the fair use doctrine, as it is today, does not obviate the need for some other legislative solution to the orphan works problem.⁴¹⁵

⁴¹¹ However, none of this protection extends fair use to later users; it merely safeguards the parties that actually digitize the works, not the individuals who might later seek to use the newly digitized works.

⁴¹² *The Authors Guild, Inc., et al. v. HathiTrust, et al.*, 2012 WL 4808939, at *11 (S.D.N.Y. Oct. 12, 2012).

⁴¹³ Written by Alessandra Suuberg, 2L, Tulane University Law School.

⁴¹⁴ 2013 *Comments*, *supra* note 3.

⁴¹⁵ *See id.* (scroll down to Document 87; follow link to “Stein, Gregory Scott) (discussing the application of the fair use doctrine in *The Authors Guild, Inc., et al. v. HathiTrust, et al.*, 2012 WL 4808939 (S.D.N.Y. Oct. 12, 2012)).

III. Conclusion⁴¹⁶

A. The Need for Further Education

Some of the initial Comments indicate that there is general misunderstanding surrounding copyright, the fair use doctrine, and their potential applications to orphan works.⁴¹⁷ This misunderstanding creates concern among users about potential litigation, and in addition, stifles their ability to use the orphan works.⁴¹⁸ Providing potential users with better copyright education may offset this misunderstanding. The US Copyright Office already provides circulars, available on the US Copyright Office website, that provide guidance for registering a copyright and information regarding the fair use defense.

Some users may be unaware of the benefits of registering copyright and others believe that the registration process can be expensive and tedious with little benefit.⁴¹⁹ But in regards to guidance for registration, the Copyright Office provides several circulars breaking down the registration and deposit process: “Copyright Basics”⁴²⁰; “Make Sure Your Application Will Be Acceptable”⁴²¹; “Mandatory Deposit of Copies or Phonorecords for the Library of Congress”⁴²²; and “Copyright Registration for Works of the Visual Arts.”⁴²³ In addition, there are circulars available for registering specific works, like motion pictures including video recordings, musical compositions, and multimedia works.⁴²⁴ Further, the Copyright Office makes it known that there are more efficient, cost-effective ways to register a work online.⁴²⁵ Regarding fair use, the

⁴¹⁶ Written by Morgan Embleton, 2L, Tulane University Law School; Gregory Scott Stein, 3L, Tulane University Law School; Professor Elizabeth Townsend Gard.

⁴¹⁷ *Id.*; see also *id.* (scroll down to Document 32; follow link to “Dance Heritage Coalition (DHC)”). (“Members of the dance community are hesitant to rely on the right of fair use because they are unsure whether fair use includes commercial uses and whether it can be used in conjunction with orphan works.”).

⁴¹⁸ *Id.* (scroll down to Document 2; follow link to “Abraham, Daniel”) (“Allegedly, this inability to contact the author or rights holder results in many works being kept out of use for fear of liability. The corollary to this claim is that this fear of liability results in a chilling effect upon creative activity that is at odds with the oft-stated purpose of the copyright law “to promote the progress of science and the useful arts.”)

⁴¹⁹ *Id.* (scroll down to Document 84; follow link to “Singer, Andrew B.”) (“If registering work with the US Copyright office and searching it was free and easy, then one might be able to make a half-hearted case for requiring registration. The reality, however is that registering work is a long, expensive, bureaucratic and tedious process, full of clerical errors and Copyright Office incompetence . . . Because I failed to register my work, I was unable to collect attorney’s fees and damages and thus was unable to hire an attorney, even though I had a good case.”).

⁴²⁰ Copyright Basics, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ01.pdf> (last visited Mar. 6, 2013).

⁴²¹ Make Sure Your Application Will Be Acceptable, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ01c.pdf> (last visited Mar. 6, 2013).

⁴²² Mandatory Deposit of Copies or Phonorecords for the Library of Congress, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ07d.pdf> (last visited Mar. 6, 2013).

⁴²³ Copyright Registration for Works of the Visual Arts, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ40.pdf> (last visited Mar. 6, 2013).

⁴²⁴ Information Circulars and Factsheets, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs> (last visited Mar. 6, 2013).

⁴²⁵ See Copyright Office Fees, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ04.pdf> (last visited Mar. 6, 2013) (“Advantages of online filing include a lower filing fee of \$35”); see also Copyright

Copyright Office also provides a factsheet, but it is not as comprehensive a guide to understanding fair use as the previously mentioned circulars are for registering works.⁴²⁶ Furthermore, the Copyright Office’s current factsheet may actually be deterring users from using an orphan work:

When it is impracticable to obtain permission, you should consider avoiding the use of copyrighted material unless you are confident that the doctrine of fair use would apply to the situation. The Copyright Office can neither determine whether a particular use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.⁴²⁷

But the educational efforts of the Copyright Office need an enhanced mechanism for outreach. Something was missing. Why weren’t photographers registering their works? It is evident from the Comments that fundamental elements about the system were not being understood. We did not have solutions for the problem, but it seemed that education on many levels was needed—within interested groups, working together with the Copyright Office, and through non-profits developed for copyright education. At the very least, there needs to be greater awareness of the availability of the existing mechanisms under the current Copyright Act that can be used to alleviate some of the burdens that orphan works place on rightsholders and users.⁴²⁸

B. Our Proposed Solutions

Our analysis of the 2013 initial comments, existing law, and previous legislation has led us to the following conclusions regarding what should be done to solve the orphan works problem:

1. Encourage Registration of Works at the U.S. Copyright Office.

We were shocked that the photographers admitted to not registering their works at a rate of 90% or more. More education for rightsholders is needed, as registration brings significant legal benefits, including:

- Establishes a public record of the copyright holder, creator, and additional information (including underlying works and public domain works within the work itself).⁴²⁹ Lack of information regarding the copyright holder is

Basics, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ01>. (last visited Mar. 6, 2013) (“Online submissions of groups of published photographs and automated databases consisting predominantly of photographs may be permitted if the applicant first calls the Visual Arts Division (202) 707-8202 for approval and special instructions.”).

⁴²⁶ Fair Use, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fls/fl102.html> (last visited Mar. 6, 2013).

⁴²⁷ *Id.*

⁴²⁸ *See supra* Part II.C.

⁴²⁹ Copyright Basics, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ01.pdf> (last visited Mar. 6, 2013).

one of the key problems associated with orphan works. Registration provides the beginning of a public record.⁴³⁰

- Provides access to the courts for a copyright infringement suit. A work must be registered in order to file a complaint in the U.S. court system.⁴³¹
- If registered within five years of publication, the registration “establishes prima facie evidence in court of the validity of the copyright.”⁴³² Therefore, the registrant is presumed to be the copyright holder, unless evidence is produced to the contrary.
- “If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney’s fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.”⁴³³
- Provides additional protection against importation of infringing copies through the U.S. Customs Service.⁴³⁴

While registries are useful, registration with the U.S. Copyright Office affords far greater protection. We suggest encouraging the leaders of content owner communities (especially photographers) to educate their constituents, assist them with registration, and if there are impediments to registration, work with the Copyright Office in lowering the barriers.

2. Use § 412 as a mechanism more aggressively with regard to unregistered works.

Section 412 requires registration to obtain statutory damages and attorney’s fees. This applies equally to domestic and foreign works. On its own, Section 412 could be better utilized, recognizing that after infringement has occurred in registered works, only actual damages and injunction are available. For many orphan work uses, this should offer tremendous comfort, particularly to library digitization projects.

3. Registries should enhance the Copyright Office records, not replace them.

We saw a number of calls for registry systems or databases of information. We think many sources of information are useful and should be connected to the Copyright Office. We do not think a separate registry should be set up but that connections to other systems should be enhanced in a collaborative partnership between government and private sources. The Copyright Office should remain the central body responsible for records of copyrighted works.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

4. Create a Copyright Ownership and Misinformation Dispute Mechanism.

We also think that if others are contributing information, we need a system within the Copyright Office to dispute ownership and misinformation. We are concerned that registries outside of the purview of the Copyright Office will not have a mechanism for correcting false information.

Section 512(c) creates a notice-and-take down system to identify copyright holders and assist with small issues of infringement in the social media context, without tremendous expense. This new dispute mechanism for orphan works could operate on a similar system, but might also need a body to make independent decisions.

5. Fair Use needs to be clearer for occasional users of orphan works and mass digitizers.

HathiTrust may be a key turning point for fair use and digitization projects. However, it is still only a district court opinion. In the end, we think whatever the solution is, the proper application of fair use and/or mass digitization with regard to uses of orphan works should be added to the Copyright Act itself, and not be relied upon by judge-made law.

6. If a work is deemed orphan in its original source country, that designation should be available for use in the U.S. without a further diligent search.

This is a modified version of the Rule of the Shorter Term. If the European Union or Canada has determined a work is orphaned in the source country, parties in the United States should be able to rely upon that determination without conducting a new search. This will allow for more efficient sources to determine the copyright status of works, and also put U.S. users at a greater advantage by being able to rely on the processes both at home and abroad regarding orphan works.

7. If a work is deemed orphan, that work should be measured for duration purposes on a knowable term (particularly if the death date is unknown and necessary for determining the copyright status of the work), taking into account both the Berne minimum requirements and termination of transfer rights.

Duration is a key element that was not discussed enough in the Comments. We think if a work is deemed an orphan, a new term of duration should apply, based on the minimum terms required by Berne.

We suggest altering Section 302(e) from 95/120 to 50 years from creation and/or making available to the public, whichever is later. This would allow orphans to come into the public domain quicker when the death date of the author is not known. The alteration would be in compliance with our Berne obligations and bring us in line with international norms.

We believe the baseline term of protection for an orphan should be the Berne minimum requirements, with the caveat that we must take into account and let the system play out for termination of transfer rights. While the copyright holder may be absent, the author may be readily findable. Existing termination of transfer rights or even a specific system for termination of transfer for orphan works might be implemented.

8. Any solution should be comprehensive to all orphan works, rather than to a specific group or use.

While we understand the desirability of tackling a little bit of the orphan work problem at a time, we are concerned that if libraries or photographers carve out special orphan work legislation, then less powerful groups will not have the means to gain protection for their own orphan work problems. Just as many worried what would happen if Google was allowed to judicially solve their own orphan work problem, we worry that if a solution specific to the needs of mass digitizers (e.g., libraries) is implemented, other users will be left without solutions.

9. ITUs may be useful in identifying orphan works.

A number of comments suggested an Intent to Use database for those wanting to use orphan works. We endorse this idea as part of the Copyright Office, with the idea that after the set period of time, any subsequent registration would not allow for statutory damages or attorney's fees. If an ITU were already filed and no known copyright holder came forward, statutory damages and attorney's fees would be forfeited. However, the system would have to be voluntary with incentives, with no requirement of how the work will be used, merely that the work will be used. Copyright holders should not be allowed to pick and choose which uses to object. Instead, the system should alert an absent parent that the legal copyright status of a work will soon change to orphan.

10. Third-parties should be able to rely on the orphan status of a work.

Once classified as an orphan work, the designation relates to the work itself, and not the original "user" of the work; a third-party can rely on the orphan work status of the work.

A database of known orphan works should be compiled as part of the use requirement for orphan work status. Any work deemed orphan would then be able to be used by any third party without a further diligent search.

11. Provide more copyright law education for rightsholders and users.

We think more education is necessary on how copyright law works and believe interest groups should work with the U.S. Copyright Office to develop better educational programs for their particular groups, especially for the photographers.

12. Expand § 302(d).

An expansion of § 302(d) would help in acquiring more information regarding a copyrighted work by including supplemental information from various sources, enhancing the Copyright Office records, and providing an online dispute system for the information in the records.

13. The Diligent Search requirement should be objective.

In the event that Congress proposes orphan works legislation, we think that any requirement on users to perform a diligent search for the copyright owner before using an orphan work should be based on clear, objective standards. The U.S. Copyright Office should be responsible for administering a system for verifying that a user's search was diligent under those standards and providing publicly accessible records of what registries were searched and the information that was found. Any supplemental information acquired during the diligent search should be attached to the copyright office record and should be available in a digital form to attach to the digital file for the object.

C. Concluding Thoughts

In its October 2012 Notice of Inquiry, the U.S. Copyright Office asks “how has the legal landscape or legal thinking evolved in the past four years?” Through our extensive research we have found that the law remains essentially the same, but that those who are calling for a solution to the orphan works problem have changed. Now, libraries and archives (public and private) are demanding a special legal exception to copyright to facilitate the digitization of their collections to the exclusion of other users. On the other hand, the initial comments have showed us that the voices of occasional users of orphan works have been all but drowned out by the din created by mass digitizers and the rightsholders. The mass digitization issue is not the problem that the U.S. Copyright Office considered in 2005 – 2006, nor can it be addressed through the same legal process that Congress proposed in 2008. However, we feel that a fair balance between allowing certain uses of orphan works for all users and protecting the interests of copyright holders can still be achieved under existing law without addressing the issue of mass digitization.

Parsing the many legal issues involved was no easy task, but our Advanced Copyright Class on Orphan Works delved deeply into the provisions of the Copyright Act and found that the more we learned, the less of a problem orphan works seemed to be. The law already provides rightsholders ways to enforce their copyrights and deter abuses of the copyright system. Furthermore, the U.S. Copyright Office already has the tools to help bring users and rightsholders together—namely, the Copyright Registry and its publication service for educational materials. What has been missing from the conversation has been the knowledge and understanding that we have provided in this Reply Comment. Rightsholders and users are both guilty of failing to exercise the legal rights they already have under the copyright system, so we feel it is both unnecessary and unhelpful to create a brand new system that may upset the balance between the rights of users and copyright owners. Instead, the U.S. Copyright Office and Congress should work to improve the system we already have by following the recommendations we have provided herein.

Orphan works are an important issue. Improvements are needed. We suggest, in the end, beginning with the system we have and making careful alterations to create better records, encourage registration, and encourage the use of the tools that are already part of the law. Libraries serve an important place in our world, and they may need a codified version of fair use specific to their digitizing needs. We also see great opportunities to rethink elements of the system, and add more useful legal and non-legal tools—an online dispute system for copyright ownership and rights questions, for instance. We see the system itself as the starting point, and additions—like supplemental registries and working with others to create a more robust record and information system an exciting opportunity—only available now in the twenty-first century.

We thank you for the opportunity to submit our Reply Comment, and we hope our research, analysis, and thoughts are helpful in the ongoing discussion of orphan works. Additional research materials are on file at Tulane University Law School with Professor Townsend Gard.

APPENDIX A: The 2008 Legislation Reviewed⁴³⁵

A. Summary of 2008 Legislation

The previous legislation regarding Orphan Works consisted of the Orphan Works Act of 2006 (H.R. 5439), The Orphan Works Act of 2008 (H.R. 5889) and Shawn Bentley Orphan Works Act of 2008 (S. 2913). All of these bills drew heavily from the recommendations in the 2006 Copyright Office Report on Orphan Works. Specifically, they followed the recommendations that a user benefit from a limitation on remedies that a copyright owner could obtain against him when the user conducted a reasonably diligent search for the copyright owner and provided attribution to the author and copyright owner.

The 2006 Act added a specification of just what constitutes a diligent search. Under that bill, the search required reviewing the Register of Copyright information and the use of reasonably available technology. Under the 2006 Act a diligent search consisted of reviewing the Register of Copyright records that identify and locate owners.⁴³⁶ The information collected in §302 would be publicly available in the records and would be maintained and updated by the Copyright Office.

The Orphan Works Act of 2008 also included further requirements on top of the Report's recommendations. It required the infringer to file a Notice of Use with the Register of Copyrights and include with the infringing work a mark or symbol providing notice of the use of an infringing work⁴³⁷. The Act's definition of a diligent search also differs. Unlike the 2006 Act, which stated that useful authorities for the search could be found from the Register of Copyrights, the 2008 Act required the infringer to use those "best practices" of authorities that the Register had listed. With the importance of the Register under the search requirement, the Act also sought to make it more accessible, as is seen in Section 3, which established an electronic database to facilitate the search for pictorial, graphic, and sculptural works that are under copyright. The Act also introduced a further search requirement that the infringer conduct his search within a time reasonably proximate to the infringement.

The Shawn Bentley Orphan Works Act of 2008 proposed nearly identical legislation⁴³⁸. However, the version that passed the Senate (before being referred in the House) further specified diligent search. The focus continued to be on databases, particularly those online, with the Act requiring a search of the Copyright Office records available on the Internet and the use of other appropriate databases online.

In terms of relief available, the proposed legislation also followed the 2006 Copyright Report. The Report recommended limiting relief to reasonable monetary

⁴³⁵ Written by Melinda Schlinsog, 2L, Tulane University Law School.

⁴³⁶ Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

⁴³⁷ Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008).

⁴³⁸ Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

compensation with a noncommercial exception and injunctive relief with a new use exception. All three of the bills use the Report suggestions to define available remedies.

B. Our Analysis

Our class looked at the 2008 legislation at the beginning of our discussions (before the Comments were available) and as one of our last exercises before completing our Reply Comment.

As a class, we reviewed the 2008 legislation, and we found that a good number of issues involved with the 2008 legislation had not been addressed by many commenters in this round of Comments, so it was hard for us to reply. We also did not have any consensus (again because we had no Comments on which to guide us) on individual components of the legislation. Professor Lunney led the discussion. He pointed out a number of inconsistencies, and we discussed the implication of each element of the legislation. Our conversations were very different when we parsed the proposed language than they had been when we were discussing the Comments or our own work—more contentious, more divided. We came to no consensus on whether the 2008 legislation met the needs of 2013. Focusing on the Shawn Bentley Act of 2008, we worked carefully through the legislation. The following documents the questions that arose.

1. Reasonable Compensation:

The Act would limit remedies to reasonable compensation if the user followed specific steps (performed a qualifying search in good faith to locate and identify the owner of the infringed copyright and was unable to locate the owner). We discussed the issue with such a policy is that the price that could be agreed upon after the infringing activity has taken place will be different (for example if the use made money, the parties are unlikely to agree to a lower price). As a class, we did not devote time to reasonable compensation, as the topic was not reflected enough in the Comments to allow for discussion.

2. Attribution

The Act required attribution to the legal owner of the infringed copyright. The class discussed the difference between the legal owner and the author, and that this seemed like a departure from moral-rights based attribution system. The class thought that the goal of attribution here was to alert the legal owner, but that put a good burden on the user to determine the legal owner, rather than merely listing the author's name. As a class, we did not devote time to attribution, as the topic was not reflected enough in the Comments to allow for discussion.

3. Orphan Work Symbol

The Act requires that a symbol is included with any use of an Orphan Work that marks it as such. Our class discussed that such a marking serves two purposes: warning to the copyright holder that the work is being used as an Orphan (so owner know that they

need to take action to reclaim it) and providing notice to other potential users (a come and get it symbol). Some members of class did not like the idea of marking a work. Others believed that if a work was marked as orphan, then others should be able to rely on the mark. As a class we decided to not deal with the symbol since it wasn't addressed in any of the Comments.

4. Civil Action Restrictions

The Act provided for civil action restrictions in the form that initial pleadings must assert eligibility for the limitations. Otherwise, the pleader waives the defense. Professor Lunney noted that this as out of the ordinary for civil procedure, and limited the use of the defense. As a class, we did not devote time to attribution, as the topic was not reflected in the Comments to allow for discussion.

5. Limitations on Remedies

The Act remedies aren't limited if owner and user find each other and fail to engage in good faith negotiations based on reasonable compensation or fail to render payment in a reasonably timely matter after reaching an agreement. Our class discussed the implications that this section could have for libraries. Library groups generally, in their Comments, expressed the belief that their actions in use of orphan works were protected under fair use as had been allowed under the *HathiTrust* case. Our class discussed that the *HathiTrust* was not stable law for the libraries to rely on since it was only a district court decision.

6. Qualifying Search

The Act defined qualifying search as composed of four main elements. First, the search needed to occur as a time reasonably proximate to the infringement. The class debated whether this was a good idea to require a search each time a user wants to use a possibly orphan work or whether there should be a universal label of Orphan Work after the first qualifying search is performed. Second, the user needed to use diligent effort including a minimum search of the Copyright Office records and the Internet. Our class felt that effort should also include searching other databases like BMI's and ASCAP's but only after they have been linked to the Copyright Office page. Third, the search requires reliance on best practices. Our class pointed out that such reliance does not set a reliable legal standard. Fourth, the lack of identifying information on the copy of the material did not count as a qualifying search. If any of these qualifications weren't met, then the user receives to limitation of remedies.

APPENDIX B: Foreign Solutions as Models?⁴³⁹

Various countries have developed or adapted legislative solutions to solve problems, such as those posed by orphan works, before and during the age of mass digitization. Some of these solutions are directed specifically at making orphan works available to prospective users (Canada), while, for others, orphans fall within larger categories of out-of-commerce works (France), or the scope of a collective license (the Nordic countries). Generally, while the United States has previously considered legislative solutions to the orphan works problem that limit remedies in the event that a copyright owner resurfaces, foreign approaches have focused on licensing schemes.⁴⁴⁰ These tend to share with previous U.S. approaches the feature of a diligent search requirement prior to use, though licensing schemes generally differ from a limited liability approach in that the prospective user must apply for a license before using the work.⁴⁴¹ We include the work that we did regarding foreign solutions as reference materials.

As a class, we decided in the end that our focus was not on licensing schemes; rather, we choose to look at what existing elements within the Copyright Act might help to solve the orphan work problem. However, our analysis of the following existing approaches under foreign law taught us an appreciation for the strengths and weaknesses of each country's solution.

A. The E.U. Directive⁴⁴²

The European Union's Directive 2012/28 permitting certain uses of orphan works was passed in late 2012 to provide libraries and educational institutions with more efficient legal means for digitizing large volumes of in-copyright works.⁴⁴³ The Directive requires that member states create an exception to copyright for orphan works for libraries and educational institutions and provides for certain requirements that must be met on the part of institutions that take advantage of this statutory exception to copyright infringement.⁴⁴⁴ The way in which these requirements were defined—and how they will be construed—will determine the Directive's success and provide insight into the practicality of creating a statutory copyright exception for orphan works.

The scope of eligibility for the exception was defined narrowly. First, only permitted users—libraries or educational institutions—are allowed to take advantage of

⁴³⁹ Written by Alessandra Suuberg, 2L, Tulane University Law School; Zachary Zelaney, LL.M., Tulane University Law School.

⁴⁴⁰ The E.U. Directive is also a limitation on remedies scheme.

⁴⁴¹ Lecture Summary, Orphan Works, WIPO Seminar (May 2010), http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf.

⁴⁴² Written by Gregory Scott Stein, 3L, Tulane University Law School; *see also 2013 Comments, supra 3* (scroll down to Document 87; follow link to “Stein, Gregory Scott”) (discussing the E.U. Directive).

⁴⁴³ Directive 2012/28, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5 [hereinafter Directive].

⁴⁴⁴ *Id.* art. 6.

the exception.⁴⁴⁵ Second, the exception only applies to the following uses of orphan works: “digitisation, making available, indexing, cataloguing, preservation or restoration.”⁴⁴⁶ Third, only the following types of copyrighted works are eligible for the exception: published written works, cinematographic, and audiovisual works in collections of eligible institutions.⁴⁴⁷ Photographs are explicitly prohibited from obtaining orphan works status.⁴⁴⁸ Compared to other sections in the Directive, these provisions were clear.

Although the Directive requires that a “recorded diligent search” be made prior to use of the orphan work, there is no clear definition of what such a search would entail.⁴⁴⁹ Determination of the resources and registries to be searched is left up to the individual countries to implement in their national laws, but the Directive provides a few guidelines: 1) the search must be performed by the user in the state of origin of the work;⁴⁵⁰ 2) the designated registries must be specific to the type of work;⁴⁵¹ and 3) states must consult with rights holders and users when deciding on which registries a user should be required to search.⁴⁵² In addition, the Directive prescribes a list of registries that must be searched, organized by type of work.⁴⁵³

Our Reply Comment takes on the much broader issue of creating an exception for all types of orphan works for all users and is, therefore, a much more difficult task than what the Directive seeks to accomplish. On the other hand, the Directive has shown us the importance of clear and careful legislative drafting and the difficulty of defining a diligent search. As EU member states implement national laws providing an exception for orphan works, we hope that Congress—in creating legislation for orphan works in the United States—will learn from their successes and failures.

B. Extended Collective Licensing

Nordic countries have used extended collective licensing for rights clearance since the 1960s to solve copyright problems.⁴⁵⁴ These are a hybrid of compulsory and traditional (collective) agreements, and considered appropriate for situations in which rights holders are many, dispersed, and difficult to find.⁴⁵⁵ In Denmark, for example, Section 50 of the Consolidated Act on Copyright gives users the right to exploit the works of authors unrepresented by the collective rights organization “in the manner and on the terms that follow from the license agreement made with the organization,” and

⁴⁴⁵ *Id.* art. 2(1).

⁴⁴⁶ *Id.* art. 6.

⁴⁴⁷ *Id.* art. 1(2).

⁴⁴⁸ *Id.* art. 10.

⁴⁴⁹ *Id.* art. 2(1).

⁴⁵⁰ *Id.* art. 3(3).

⁴⁵¹ *Id.* art. 12.

⁴⁵² *Id.* art. 2(2).

⁴⁵³ *Id.* app. I.

⁴⁵⁴ Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience – It’s a Hybrid but is it a VOLVO or a Lemon?*, 33 COLUM. J.L. & ARTS 471 (2010).

⁴⁵⁵ *Id.*

under Section 51, unrepresented rights holders can still claim individual compensation.⁴⁵⁶ In Finland, Section 13 of the Copyright Act provides for reproduction of a published work by virtue of an extended collective license.⁴⁵⁷

It is important to note that extended collective licensing schemes can be seen as a product of the systems they are part of, and “should be seen in the cultural context of the Nordic societies,” as this could affect the evaluation of the rules and influence their transplantability to other systems.⁴⁵⁸

Outside of Scandinavia, an extended collective licensing scheme is being considered in the UK. The proposed legislative changes affecting orphan works in the UK are contained 116A through 116D of the Enterprise and Regulatory Reform (ERR) Bill, which is being read at the report stage in Parliament.⁴⁵⁹

Government licenses have been used to allow for use of orphan works in Canada since 1988.⁴⁶⁰ Section 77 of Canada’s Copyright Act calls for prospective users to submit applications to the Copyright Board, an administrative tribunal, which uses its discretion to determine whether or not to grant a license.⁴⁶¹ The “Unlocatable Owner Provision” requires that the applicant make reasonable efforts to locate the owner, and gives the copyright owner a five year window after the license has expired to collect the royalties or commence an action for their recovery.⁴⁶²

In 2009, a Canadian study cited a total of more than 400 files opened for applications covering more than 12,000 works, and a median of 47 days spent by the board processing non-commercial applications and 63 spent on commercial applications, and indicated that commercial organizations had accounted for 37% of applicants, individuals for 31%, educators and educational institutions for 13%, government agencies for 11%, galleries and museums for 3%, with charitable groups and other community groups making up the difference.⁴⁶³ The same study suggested that the Canadian model has not previously been considered a viable solution for the United States, but that entities contemplating mass digitization have looked favorably on the system’s certainty.⁴⁶⁴

⁴⁵⁶ Consolidated Act on Copyright 2010, No. 202, Art. 50-51 (2010) (Den.).

⁴⁵⁷ Copyright Act, No. 404, §§13-14 (2010) (Fin.).

⁴⁵⁸ Riis & Schovsbo, *supra* note 2.

⁴⁵⁹ Enterprise and Regulatory Reform Bill 2012-13, UK Parliament Website, <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html> (last visited Mar. 4, 2013).

⁴⁶⁰ Lesley, Orphan Works in Canada: Unlocatable Copyright Owners, COPYRIGHTLAWS.COM (Jan. 9, 2013), <http://www.copyrightlaws.com/canadian/orphan-works-in-canada-unlocatable-copyright-owners/>.

⁴⁶¹ See Rina Elster Pantalony, The Canadian Model for Orphan Works, BIBLIOTECA NACIONAL DE ESPAÑA, http://www.bne.es/opencms/es/LaBNE/Docs/Canadian_model_R_Pantalony.pdf (last visited Mar. 6, 2013).

⁴⁶² Copyright Act, R.S.C. 1985, c. C-42, s. 77 (Can.).

⁴⁶³ JEREMY DE BEER & MARIO BOUCHARD, CANADA’S “ORPHAN WORKS” REGIME: UNLOCATABLE COPYRIGHT OWNERS AND THE COPYRIGHT BOARD (Dec. 1, 2009), <http://www.cb-cda.gc.ca/about-afpropos/2010-11-19-newstudy.pdf>.

⁴⁶⁴ *Id.* at 40.

South Korea, Japan and India have taken approaches similar to that of Hungary.⁴⁶⁵ Hungary amended its Copyright Act in 2009 to permit the use of orphan works under certain circumstances. Under the amended act, the Hungarian Patent Office has the right to grant licenses for certain use of orphan works to applicants who carry out a documented diligent search and pay compensation for such use⁴⁶⁶.

In South Korea, prospective users of orphan works submit applications to a designated board or government agency that can grant a license to use the work.⁴⁶⁷ Article 50 of the Korean Copyright Act grants the Ministry of Culture and Tourism the authority to issue licenses for the use of orphan works after (a) the user conducted “considerable effort” to search for the author, (b) the user indicates the intent of the use, and (c) the use is licensed with approval and meets other criteria specified by a Presidential decree. The Ministry posts information on such licenses in its information and communication network.⁴⁶⁸

South Korea defines a “considerable effort” to search for a rights holder to include inquiring within a collective management organization that manages the work in question. If there is no answer, or an answer indicating no knowledge of a right holder, within one month from the inquiry, then the user may apply for a license from the Ministry. The user must also publish an announcement in a newspaper of general circulation or on the web page of the Ministry of Culture for ten days.⁴⁶⁹

The Ministry of Culture must publish the content of an application for use of an orphan work in the Official Gazette for fifteen days. The Ministry of Culture must also notify the applicant of, and publish in the Official Gazette, the approval of any license for the use of orphan works. It must also publish on its website the title and date of publication of the work, the name of the author or rights holder, the name of the applicant, conditions for the approval of exploitation of the work, the period for exploitation, compensation money to be paid, and the method and type of exploitation. A rights holder who objects to an application may submit the certificate of registration indicating that he or she is the author of the work, along with a copy of the work, along with a copy of the work indicating his or her name or title.⁴⁷⁰

The Ministry of Culture and Tourism defines compensation amounts for the use of orphan works. Users of orphan works must deposit these amounts in jurisdictions specified in the Enforcement Decree, and must notify the persons entitled receive the deposit and announce the deposit, pursuant to an Ordinance of the Ministry of Culture.⁴⁷¹

⁴⁶⁵ Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555, 64,560 (Oct. 22, 2012).

⁴⁶⁶ Government Regulation on the Detailed Rules Related to the Licensing of Certain Use of Orphan Works, Arts. 2(1), 2(2), 3, Decree 100/2009, V. 8 (Hun.).

⁴⁶⁷ *See id.*

⁴⁶⁸ Copyright Act of Korea, No. 9785 (2009) (S. Kor.).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

Japan institutes their approach under Article 67 regarding the exploitation of works in the case where the copyright owner thereof is unknown:

(1) where a work has been made public, or where it is clear that it has been offered to or made available to the public for a considerable period of time, the work may be exploited under the authority of a compulsory license issued by the Commissioner of the Agency for Cultural Affairs and upon depositing on behalf of the copyright owner compensation the amount of which is fixed by the Commissioner as corresponding to an ordinary rate of royalty, in the case, designated by Cabinet Order, where, after the due diligence, the copyright owner cannot be found for the reason that he is unknown or for other reasons.

(2) A person, who intends to apply for a compulsory license mentioned in the preceding paragraph, shall submit to the Commissioner of the Agency for Cultural Affairs an application stating means of exploiting a work and other matters designated by Cabinet Order, together with data for explanation to the effect that the copyright owner cannot be found or other data designated by Cabinet Order.

(3) Copies of the work reproduced under the provisions of the preceding paragraph (1) shall bear an indication to the effect that the reproduction of these copies has been licensed in accordance with the provisions of that paragraph and give the date when the license was issued.⁴⁷²

Additionally, Japan discusses the issue of just compensation under Article 74:

(1) A person who is liable to pay compensation:

(i) where the copyright owner refuses to receive or cannot receive the compensation;

(ii) where the copyright owner cannot be identified with no fault on the part of the above-mentioned person;

(iii) where that person brings an action mentioned in Article 72, paragraph (1) with respect to the amount of the compensation;

(iv) where the right of pledge has been established on the copyright (except in the case where the authorization is obtained from the pledgee).

(2) In item (iii) of the preceding paragraph, a person who is liable to pay the compensation shall, at the request of the copyright owner, pay the sum according to his estimate and deposit the balance between his estimate and the amount of the compensation fixed.

(3) The deposit of a compensation under the provisions of Article 67, paragraph (1), Article 67bis, paragraph (4) or the preceding two paragraphs or that of a security money under the provisions of Article 67bis, paragraph (1) shall be made at a deposit office conveniently near to the known domicile or residence of the copyright owner if he has such in

⁴⁷² Chosakuken-Ho [Copyright Law], Law No. 48 of 1970, 2009, art. 67, 74 (Japan).

this country or otherwise near to the domicile or the residence of the depositor.

(4) The depositor mentioned in the preceding paragraph shall notify the copyright owner of that deposit, except in the case where he cannot notify him thereof because he is unknown or for other reasons.⁴⁷³

India is among other noteworthy jurisdictions that have taken a more pragmatic approach, this includes Bangladesh and Canada which have allowed orphan works to be licensed from a central authority, upon proof those efforts to locate the authors remained unsuccessful; whereas in Argentina, Brazil and Chile, orphan works pass into the public domain.⁴⁷⁴ India, too has established a Copyright Act of 2012 which elaborates on definitions used previously in their 1957 Act.⁴⁷⁵

C. Out-of-Commerce Books

In France, a law passed last year on the digital exploitation of unavailable books from the 20th century will begin a five-year operation to scan 500-700,000 out-of-commerce works, consisting of 20% orphan works, to go into a database overseen by the French National Library.⁴⁷⁶ The law, intended to take precedence over the EU directive on orphan works,⁴⁷⁷ provides for transfer of the rights to a work to collecting society once the work has been in the database for six months, before which the author can opt out of the system.⁴⁷⁸

⁴⁷³ *Id.*

⁴⁷⁴ Copyright (Amendment) Act, S. 17, 2012 (India).

⁴⁷⁵ *Id.*

⁴⁷⁶ Barbara Casassus, *French law on out of print works 'world first'*, THE BOOKSELLER (Mar. 2, 2012), <http://www.thebookseller.com/news/french-law-out-print-works-world-first.html>.

⁴⁷⁷ *Id.*

⁴⁷⁸ Loi n° 2012-287 (Mar. 1, 2012) (Fr.).

APPENDIX C: A Note from Professor Elizabeth Townsend Gard

This is the second time we at Tulane University have submitted a Reply Comment. The first came in 2011 when we submitted as a class a Reply Comment for pre-1972 sound recordings.⁴⁷⁹ Both were a tremendous experience for our students, and for me. My goal is really to let the students explore the materials and come up with their own thoughts and solutions. We advocate 1) for the law itself (what laws already exist and what are our current expectations of how law works); 2) look at all of the points of view and start to see where compromise is possible and where tensions will rise; and 3) make sure to bring into conversations voices that may be under-represented. I think we have accomplished our goal on all three points with our Reply Comment on Orphan Works. Our students put in great time and thought, and I appreciate their efforts and enthusiasm. All of the work, points of view, and the ideas (e.g. statistical analysis of both sets of Initial Comments) came from them, and my role was to help create a semi-cohesive narrative of the project as a whole. We have included authorship attribution for each section to acknowledge the collaborative but at the same time individual contribution to the work.

Finally, a personal revelation occurred on our last meeting before the Reply brief: Dan Collier, who was reviewing the initial Comments, noted that I had written a Comment in 2005. I had not remembered. That was a long time ago, professionally for me – I was just finishing law school and heading to my first job as a post-doctoral fellow teaching copyright at London School of Economics. I had not started my intense research on the Durationator®--that would come two years later. I was still hoping to become a law professor. Now, seven years later, I read the letter I had written, believing I was a transformed, much more enlightened, and certainly more knowledgeable person.

Two elements were very striking. First, I was one of those little, private voices writing about my need for orphan work legislation as a historian. Those voices have nearly disappeared from the second round of Comments, as Dan Collier and Morgan Embleton have shown in the work. Second, my concerns (which I had forgotten) had not changed. Both my young history-post-doc/recent-law-graduate self and my current nearly tenured/heavily focused-on-Durationator®/teaching-copyright-and-international-intellectual-property-for-the-last-seven-years self found common ground in the needs of orphan work legislation. So, in addition to the class' hard work and conclusions, I add my own conclusions—from 2005 and 2013:

- 1) Any solution should apply for published and unpublished works
- 2) The orphan work problem inhibits one's scholarship and the use of orphaned works
- 3) Finding copyright holders is difficult and time consuming
- 4) Archives do not always provide useful information to support finding copyright holder

⁴⁷⁹ See Elizabeth Townsend Gard, *Federalizing Pre-1972 Sound Recordings: An Analysis of the Current Debate*, 15 TUL. J. TECH. & INTELL. PROP. 123 (2012).

- 5) We need a system that is beneficial to and does not further impede orphan works
- 6) We need a system that identifies a work as orphaned for everyone to use
- 7) A centralized system of information would help alleviate the problem

What has changed in seven years? We all have changed because of mass digitization, social media, and the Internet to name only three. Yet, the underlying problems remain the same: § 106 exclusive rights versus limitations on those rights. We are obviously in a major transition stage of what role technology will have in altering our conceived vision of what copyright is, how it protects works, and what limitations on the protection exist. The problem expands because of social media, libraries wanting to digitize old works, and content owners being legitimately worried how they will fare under any new system. I hope our Reply Comment adds to the discussion, and it will be interesting to see what develops and becomes our standard norms within copyright in the next seven years.

I have attached as an appendix my original Comment for your convenience.

Comments to the Copyright Office on Orphan Works

March 25, 2005

From Elizabeth Townsend, Ph.D., J.,D.

I am responding to the Notice of Inquiry Concerning Orphan Works put out by the Copyright Office. I am a scholar with a Ph.D. in Modern European History, a J.D. from the University of Arizona, and am finishing a LL.M. in International Trade, also from the University of Arizona. I am currently a non-resident fellow at Stanford Law School's Center for Internet and Society, and next year, I will be the Leverhulme Trust Visiting Fellow at the London School of Economics (in the law department, focused on copyright). I also have a blog, Academic Copyright [<http://academiccopyright.typepad.com>], which looks specifically at copyright issues affecting scholars, teachers, students, and others who both use copyrighted materials as well as create copyrighted works of their own, usually in an non-commercial setting.

My interest in copyright came while working on my doctorate in European Intellectual and Cultural history at the University of California, Los Angeles. I work in the field of biography. It was the 1990s when court cases were restricting fair use in the biography setting, which I found as a scholar quite disturbing. I began researching what materials I could and could not expect to use (with and without permission). Then, in the classroom and in conducting oral histories, more copyright questions surfaced -- who owns what, what can one use and in what context. I wanted to know the answers -- for both myself and other scholars. I decided to go to law school. I completed my J.D. at the University of Arizona James E. Rogers College of Law in 2002.

One more piece added to my copyright background. While going to school in LA, I had the fortune to work as a professional actor for a time. (I had co-starring and starting roles in about a half dozen projects, including a big-budget feature film, a series, a pilot for a different series, and two movies of the week.) It was during this time that I had a taste of right of publicity and other IP issues connected to acting. I also saw what happened to some of the unprotected and struggling artists and writers. I see myself as an advocate for scholars, students, struggling artists, and others who need a place to turn for copyright questions. I hope one day to have a Virtual Copyright Clinic, but for now, the blog will have to do.

My comments are based on my own experiences and those told to me by colleagues, students, and strangers. The issue of orphan works touches historians and other scholars, both in terms of published as well as unpublished works. In my own work as a historian, I myself have chosen only to focus on more well-known authors if their work is still under copyright because I did not want to have to deal with the problem of not being able to track down copyright holders. This has greatly shaped the nature of the work, which is a comparative biography of the Great War generation, and admittedly, made it more focused on well-known writers (Agatha Christie, for example, as opposed to Katherine Prest.) But my real concern is over the unpublished orphan works, particularly with the recent creation of the unpublished public domain. My thoughts and comments will focus on this aspect of the problem.

1. Nature of the Problems Faced by Subsequent Creators and Users

I love archival materials. It is one of the main reasons I wanted to be a historian. But, there are many legal problems associated with their use. My inquiry into copyright began because I wanted to know more about fair use and copyright, but I soon found that that was not where the problem was greatest. It is with the orphan works in the unpublished arena. Here is one example. I work with the Papers of Vera Brittain, a well-studied World War I writer. But to my knowledge no one has used her vast collection of fan mail - people who responded to her memoir with their own stories. But how is one to track down these people - from the 1930s to the 1960s? The orphan work problem inhibits one's scholarship. Let me further elaborate.

The argument in my current project, a book-length project, currently titled *The Making of the Great War Generation*, is that women, along with men, should be included as part of the primary space of war. One of the ways we can see this is that women wrote novels and memoirs, and then men wrote to these authors, corroborating that they too experienced, felt, and remembered events and moments in the war at the front in the same manner, that the women writers got it right. I have seen this in the fan mail to two authors, British author Vera Brittain (papers housed at McMaster University, Canada), and American writer Mary Lee (housed at Radcliffe College in the Schlesinger Library). I am sure that I would find it in the others I profile in my work as well, and I would have also looked to see what kind of fan mail the male authors received, particularly from women, but I stopped this portion of the project because of the orphan work problem.

To make this argument, to use these letters, I would want to quote a good deal from them, because I would not want other scholars to have to take my word for the sentiments. I would want to show that men were actually writing to these women writers in great detail the similarities they found in their experiences. But I was not going to spend my time trying (unsuccessfully) to pursue all of the copyright holders in the still-copyrighted letters (because they are unpublished, and so life + 70 applies). Some, of course, have fallen into the public domain (if the author has been dead for more than 70 years). But others have not. And moreover, under the current system, it is often impossible to figure out which ones are in the public domain and which are not, since death dates of one-time letter writers can be nearly impossible to confirm. So, this chapter has been dropped from my work, and every few days, I must say, I regret the decision but feel I had no choice.

Letters to presidents and other correspondence carry the same problem, as do diaries and other writings when they are donated or bought by a library or archive, but somehow the copyright owner is lost or untraceable. What is a scholar to do? The materials become unusable in any significant way (because, as you know, fair use is not a reasonable alternative in the current climate.)

Scholars often just shy away from these materials, unable to figure out what to do. Archivists, who are usually not trained as lawyers, can offer only limited help. We need a system that is easy to understand and accessible to the non-legal but educated audience, that can help to broaden the materials available to scholars. In an age where expanding the canon is not only acceptable but encouraged, we need a copyright system that allows this to occur, especially in the unpublished arena.

So, as I see it the problem is two-fold. First, there are the orphaned unpublished works (diaries, letters, photographs, scrapbooks, etc.) in archives and libraries across the United States that would be so wonderful to be able to use in a meaningful way. Second, we need a system that is of benefit to the scholar and student, and not another impediment—something that would allow the user to figure out if the work is in copyright, who the copyright holder is, and if they can't be located, would provide a system that would be easy to understand and use. Think, for example, in the instance I gave before. If I wanted to use, say twenty or thirty of the fan mail letters, I would want a system that did not overwhelm my resources and time to make sure they were indeed orphaned.

2. Nature of "Orphan Works": Identification and Designation

I know that many people and organizations are proposing various systems dealing with orphan works. I think the problem is bigger. There needs to be a system to be able to identify *when* a work is orphaned. That is, as users we need in the age of the Internet, to be able to access contact information for a copyright holder in order to gain permission, and if current copyright information is not available, to have some way to get a declaration from the Copyright Office (or an officially recognized legal source) that the work is orphaned.

I think the most radical proposal I have - as a user - is to require as part of copyright registration that a copyright holder keep updated contact information in order to keep the privileges attached to registering (statutory damages, attorney's fees, etc.) The heirs should also be required within a period of time, to report the death of the copyright holder, and who now is the literary executor to whom interested users should contact. This information should be made public in an easy and accessible way, and if not managed by the Copyright Office itself, there should be a link on the Copyright Office site. UT-Austin's WATCH is a good model, but it does not cover a good deal of the copyrighted and unpublished materials. We need an expanded system.

Under an ideal system, scholars and others using copyright materials would be able to look up on a website information on the copyright holder of published as well as unpublished works (that is collections held in an archive or other public space). The website would identify when the copyright work would go into the public domain, if the death date was known, and if not, would lead a scholar/user to a site where they could contact the copyright holder, and if the copyright holder was not known, then it would connect them to a site that would allow them to file an intent to use an orphaned work.

3. Nature of "Orphan Works": Age

I do not have a strong opinion on this - any shorter time than the system currently is great. Take again, the problem of letters from World War I: an orphan letter could have been written by a soldier that died during the war (1914-1918), but under the current system, the letter could not be used until 120 after creation (because it was not published). This is crazy and not good for scholarship. These letters, under this scheme, would not be available until between 2034 and 2038 (120 years after the creation). That's a long time. I'm not sure how long is reasonable, but something shorter would be nice -- 50 years, perhaps, as the question indicates? (I hope this would be from publication OR creation, which ever was longer, instead of adding years if there is no publication.)

And yes, it would be nice if scholars and others could use the work in that 20 year window, now afforded libraries and archives, if the work is not subject to commercial exploitation or available at a reasonable price. If a scholar could also use the materials (publish quotes, use in a reader, put on a website) during the last 20 years of the term that would be great (life of the author + 70, and then during the last 20 years one could use it for scholarly purposes like it was in the public domain). But we must have a working definition of "not subject to commercial exploitation" so that publishers of academic work would be willing to allow the use of such works without permission from the copyright holder.

Finally, the question about what to do when there is no information about an author's death date is not answered. I don't know, but again, the uncertainty is maddening. I have tried to search on different obituary websites, but I have never had much luck. I think there would have to be specific sites one would be required to view rather than a general requirement, or at least suggestions on what websites to use.

4. Nature of "Orphan Works": Publication Status

The status of "orphan works" should apply NOT ONLY to published works, but also unpublished works. There are too many orphan unpublished works -- fan mail, one-time letter writers to Presidents, photographs, archival materials that just suddenly appear at libraries, old photographs where the photographer is unknown, to name a few. We need to be able to use these materials. We want to be able to use these materials.

As to the issues of right of first publication, I think the difference with the Harper and Row case was that, like the case of competing newspapers, the question was about a competitor trying to first publish excerpts from a memoir about to be published. This is market-driven. The works that I am concerned about have little market value -- they are not in the market because their owners cannot be found. They have been abandoned. Like other kinds of orphans, they are still amazing creations, but there is no one to nurture and foster their care and growth. I think that is different from the President Ford situation. I think if an owner cannot be found, there should be a presumption favoring a user over the right of first publication. (*For those less familiar with the Harper case, 471 U.S. 539, the publisher contracted with Time to include excerpts regarding Nixon's pardon in the magazine before publication. An unauthorized person gave The Nation the excerpts, and they published first. The Supreme Court did not find this a fair use, and instead based their decision on right of first publication, emphasizing the differences between published and unpublished. HOWEVER, after this case, the fair use provision was revised TO INCLUDE unpublished materials.) As to the negative implications of applying an orphan work system to unpublished works, I cannot see any. For those who do not want their unpublished works out in the world, they would still hold copyright, because presumably they would tend to their works and they would not become orphans. Alternatively, access controls (keeping them in one's possession, not allowing access to the works for a specified time when donated to an archive) would also eliminate privacy and other concerns. Again, we are talking about abandoned works.

5. Effect of a Work Being Designated an "Orphan Work"

There are lots of people working on ideas for a system. I think in terms of my comments, I would say that I hope any system would USER FRIENDLY in a couple of aspects. First, I hope that a user would not need a legal background to figure it out, that somehow it would be set up so that you could put in the information you had, and you would get an answer or an "Intent to Use" application, or a formal certificate that you could give to a publisher that the work is useable, even though you have not tracked down a copyright holder.

Second, I hope that whatever system is adopted, it would keep in mind users who do not have great funds - scholars, graduate students, struggling artists, and others. Any kind of fee to a fund should keep these users in mind, otherwise the fee-system would just be another barrier for using materials.

Finally, I would hope a system would automatic, and not require a hearing or anything else that would take legal counsel or considerable time. It should be accessible to all users in an easy and convenient manner, like a website.

6. International Implications

I think this is an important part of the questions to consider, as both someone who works materials from European authors (housed in Canada, the U.S., U.K., and German libraries), and also as someone concerned with International Trade issues.

It would also be greatly appreciated if a system would address foreign works housed in U.S. archives that are orphaned, as well as U.S. works housed in foreign archives. What law applies, and what does a scholar need to do in that situation? Would the system set up by the Copyright Office apply in these situations? I have had a number of requests through my blog from people using foreign works that have been orphaned and they have no idea what they need to do to be able to post the materials online legally.

APPENDIX D: Statistical Supplement⁴⁸⁰

A. 2013 Initial Comments⁴⁸¹

1. Remedies

- 1) Limitation of Injunctive Relief
 - a) 27% addressed this issue explicitly, out of all comments
 - i) 7% favored at least some, out of all comments
 - ii) 13% opposed any, out of all comments
 - iii) 7% did not directly state whether they favored or opposed, out of all comments
 - (1) 2% favored at least some by implication, out of all comments
 - (2) 5% opposed any by implication, out of all comments
 - b) 24% favored at least some, out of those who addressed this issue explicitly
 - c) 48% opposed any, out of those who addressed this issue explicitly
 - d) 28% did not directly state whether they favored or opposed, out of those who addressed the issue explicitly
 - i) 8% favored at least some by implication, out of those who addressed this issue explicitly
 - ii) 20% opposed any by implication, out of those who addressed this issue explicitly
- 2) Limitation of Statutory Damages and Attorney's Fees
 - a) 58% addressed this issue explicitly, out of all comments
 - i) 36% favored at least some, out of all comments
 - ii) 13% opposed any, out of all comments
 - iii) 8% did not directly state whether they favored or opposed, out of all comments
 - (1) 5% favored at least some by implication, out of all comments
 - (2) 3% opposed any by implication, out of all comments
 - b) 62% favored at least some, out of those who addressed this issue explicitly
 - c) 23% opposed any, out of those who addressed this issue explicitly
 - d) 15% did not directly state whether they favored or opposed, out of those who addressed the issue explicitly
 - i) 9% favored at least some by implication, out of those who addressed this issue explicitly
 - ii) 6% opposed any by implication, out of those who addressed this issue explicitly
- 3) Limitation of Copyright Term
 - a) 13% addressed this issue explicitly, out of all comments
 - i) 4% favored, out of all comments

⁴⁸⁰ Written by Daniel Collier, 3L, Tulane University Law School.

⁴⁸¹ 2013 Comments, *supra* note 3. All statistics are based on our class' subjective interpretation of the text of each comment. They may contain individual irregularities and are best treated as approximations. All statistics are rounded to the nearest percent.

- ii) 3% opposed, out of all comments
- iii) 5% did not directly state whether they favored or opposed, out of all comments
 - (1) 3% favored by implication, out of all comments
 - (2) 2% opposed by implication, out of all comments
- b) 33% favored, out of those who addressed this issue explicitly
- c) 25% opposed, out of those who addressed this issue explicitly
- d) 42% did not directly state whether they favored or opposed, out of those who addressed the issue explicitly
 - i) 25% favored by implication, out of those who addressed this issue explicitly
 - ii) 17% opposed by implication, out of those who addressed this issue explicitly

2. Diligent Search

- 1) 56% suggested a specific diligent search requirement, out of all comments
 - a) Fact-based⁴⁸²
 - i) 16% favored, out of all comments
 - ii) 29% favored, out of those who suggested a specific diligent search requirement
 - b) Copyright Office⁴⁸³
 - i) 10% favored, out of all comments
 - ii) 18% favored, out of those who suggested a specific diligent search requirement
 - c) Third-party Databases⁴⁸⁴
 - i) 24% favored, out of all comments
 - ii) 43% favored, out of those who suggested a specific diligent search requirement
 - d) Experts⁴⁸⁵
 - i) 5% favored, out of all comments
 - ii) 10% favored, out of those who suggested a specific diligent search requirement
- 2) Intent to Use Registry⁴⁸⁶
 - a) 16% addressed the issue directly, out of all comments
 - i) 11% favored, out of all comments

⁴⁸² This includes any variation of the “reasonable and appropriate under the facts relevant” standard employed by the proposed 2008 Orphan Works legislation, as opposed to requiring that a diligent search employ specific databases or systems. *See* Orphan Works Act of 2008, S. 2913, 110th Cong. (2008) § (b)(2)(A)(ii)(I).

⁴⁸³ This includes the specific requirement that a diligent search be conducted through the Copyright Office. Comments requiring third-party databases and/or paid experts as well are not included.

⁴⁸⁴ This includes the specific requirement that a diligent search include third-party databases, usually in addition to the Copyright Office. Comments requiring only the Copyright Office or paid experts as well are not included.

⁴⁸⁵ This includes specific requirement that a diligent search include paid experts, usually in addition to third-party databases and the Copyright Office. Comments requiring only third-party databases or the Copyright Office are not included.

⁴⁸⁶ An Intent to Use Registry is basically a collection of uses of orphan works at a central office.

- ii) 5% opposed, out of all comments
- b) 67% favored, out of those who addressed the issue directly
- c) 33% opposed, out of those who addressed the issue directly

3. Copyright Office User Groups⁴⁸⁷

- 1) Large-Scale Access Beneficiaries⁴⁸⁸
 - a) 32% discussed plans to support LSABs, out of all comments
 - i) 7% favored plans to support LSABs, out of all comments
 - ii) 24% opposed plans to support LSABs, out of all comments
 - b) 22% favored plans to support LSABs, out of those who discussed them
 - c) 77% opposed plans to support LSABs, out of those who discussed them
- 2) Large-Scale Access Users⁴⁸⁹
 - a) 40% discussed plans to support LSAUs, out of all comments
 - i) 32% favored plans to support LSAUs, out of all comments
 - ii) 8% opposed plans to support LSAUs, out of all comments
 - b) 81% favored plans to support LSAUs, out of those who discussed them
 - c) 19% opposed plans to support LSAUS, out of those who discussed them
- 3) Secondary Users⁴⁹⁰
 - a) 37% discussed plans to support SUs, out of all comments
 - i) 20% favored plans to support SUs, out of all comments
 - ii) 17% opposed plans to support SUs, out of all comments
 - b) 54% favored plans to support SUs, out of those who discussed them
 - c) 45% opposed plans to support SUs, out of those who discussed them
- 4) Enthusiast Users⁴⁹¹
 - a) 42% discussed plans to support EUs, out of all comments
 - i) 36% favored plans to support EUs, out of all comments
 - ii) 6% opposed plans to support EUs, out of all comments
 - b) 87% favored plans to support EUs, out of those who discussed them
 - c) 13% opposed plans to support EUs, out of those who discussed them
- 5) Private Users
 - a) No commenter identified himself as a private user or discussed primarily private uses of orphan works.

⁴⁸⁷ See *Report on Orphan Works*, *supra* note 58, at 36-39.

⁴⁸⁸ Not included in the Copyright Office report, but defined by Rutgers University Libraries as large-scale commercial users of orphan works. See *2013 Comments*, *supra* note 3 (scroll down to Document 80; follow link to “Rutgers University”).

⁴⁸⁹ These are large-scale noncommercial users of orphan works.

⁴⁹⁰ These are small-scale commercial users of orphan works.

⁴⁹¹ These are small-scale noncommercial users of orphan works.

4. Stakeholder Affiliation

- 1) 47% stated an Academic, Library, or Museum affiliation, out of all comments
 - a) Academic⁴⁹²
 - i) 25% stated an academic affiliation, out of all comments
 - ii) 53% stated an academic affiliation, out of this group of commenters
 - b) Library
 - i) 18% stated a library affiliation, out of all comments
 - ii) 37% stated a library affiliation, out of this group of commenters
 - c) Museum
 - i) 3% stated a museum affiliation, out of all comments
 - ii) 7% stated a museum affiliation, out of this group of commenters

- 2) 58% stated a Movies, Music, Photography, Visual Art, Writing/Publishing, or Software affiliation, out of all comments
 - a) Movies⁴⁹³
 - i) 7% stated a movies affiliation, out of all comments
 - ii) 11% stated a movies affiliation, out of this group of commenters
 - b) Music
 - i) 9% stated a music affiliation, out of all comments
 - ii) 15% stated a music affiliation, out of this group of commenters
 - c) Photography
 - i) 13% stated a photography affiliation, out of all comments
 - ii) 23% stated a photography affiliation, out of this group of commenters
 - d) Visual Art⁴⁹⁴
 - i) 13% stated a visual arts affiliation, out of all comments
 - ii) 23% stated a visual arts affiliation, out of this group of commenters
 - e) Writing/Publishing
 - i) 11% stated a writing/publishing affiliation, out of all comments
 - ii) 19% stated a writing/publishing affiliation, out of this group of commenters
 - f) Software
 - i) 5% stated a software affiliation, out of all comments
 - ii) 9% stated a software affiliation, out of this group of commenters

5. Selected Topics in Orphan Works

- 1) 17 U.S.C. § 412
 - a) 3% discussed 17 U.S.C. § 412 explicitly, out of all comments

- 2) 17 U.S.C. § 512
 - a) 3% discussed notice and takedown, out of all comments
 - i) 1% discussed 17 U.S.C. § 512 specifically, out of all comments

⁴⁹² This includes those who primarily engage with orphan works through public education or discussion programs, but does not include academic libraries.

⁴⁹³ This does not include writing or music.

⁴⁹⁴ This does not include photography or movies.

- ii) 2% discussed notice and takedown without addressing 17 U.S.C. § 512 specifically, out of all comments
- 3) Termination of Transfer
 - a) 5% discussed reversion of rights to the original creator, out of all comments
 - i) 3% discussed termination of transfer specifically, out of all comments
 - ii) 2% discussed reversion of rights to the original creator without addressing termination of transfer specifically, out of all comments
 - 4) Metadata
 - a) 11% discussed metadata, out of all comments
 - 5) Fair Use
 - a) 33% discussed fair use explicitly, out of all comments
 - i) 3% stated that fair use does not resolve the orphan works problem, out of all comments
 - ii) 20% stated that fair use solves some of the orphan works problem, out of all comments⁴⁹⁵
 - iii) 10% stated that fair use solves all of the orphan works problem, out of all comments
 - b) 10% stated that it does not resolve the orphan works problem, of those who addressed fair use explicitly
 - c) 60% stated that it solves some of the orphan works problem, of those who addressed fair use explicitly⁴⁹⁶
 - d) 30% stated that it solves all of the orphan works problem, of those who addressed fair use explicitly
 - 6) Extended Collective Licensing
 - a) 27% addressed ECL explicitly, out of all comments
 - i) 10% favored ECL, out of all comments
 - ii) 16% opposed ECL, out of all comments
 - b) 38% favored ECL, out of those who addressed the issue explicitly
 - c) 62% opposed ECL, out of those who addressed the issue explicitly
 - 7) Berne/TRIPs
 - a) 15% addressed international treaties explicitly, out of all comments
 - i) 12% favored upholding our obligations under international treaties, out of all comments
 - ii) 1% opposed upholding our obligations under international treaties, out of all comments
 - iii) 2% did not clearly state an opinion but favored upholding our obligations under international treaties by implication, out of all comments

⁴⁹⁵ This does not include comments stating that it resolves all or comments stating that it resolves none of the orphan works problem.

⁴⁹⁶ This does not include comments stating that it resolves all or comments stating that it resolves none of the orphan works problem.

- b) 79% favored upholding our obligations under international treaties, out of those who addressed the issue explicitly
 - c) 7% opposed upholding our obligations under international treaties, out of those who addressed the issue explicitly
 - d) 14% did not clearly state an opinion but favored upholding our obligations under international treaties by implication, out of those who addressed the issue explicitly
- 8) Is there an orphan works problem?
- a) 68% addressed whether there is an orphan works problem directly, out of all comments
 - i) 48% stated that there is an orphan works problem directly, out of all comments
 - ii) 20% stated that there is not an orphan works problem directly, out of all comments
 - b) 71% stated that there is an orphan works problem, out of those who addressed the issue directly
 - c) 29% stated that there is not an orphan works problem, out of those who addressed the issue directly
- 9) Does the possible orphan works problem include mass digitization?
- a) 32% addressed whether mass digitization is part of the orphan works problem directly, out of all comments
 - i) 22% stated that mass digitization is part of the orphan works problem, out of all comments
 - ii) 10% stated that mass digitization is not part of the orphan works problem, out of all comments
 - b) 70% stated that mass digitization is part of the orphan works problem, out of those who addressed the issue directly
 - c) 31% stated that mass digitization is not part of the orphan works problem, out of those who addressed the issue directly

6. Proposed User Groups

- 1) Beneficiaries⁴⁹⁷
- a) 44% of all comments were beneficiaries
 - b) 83% of all comments that explicitly favored limiting injunctive relief were beneficiaries
 - i) 18% of all beneficiaries addressed injunctive relief explicitly
 - (1) 13% of all beneficiaries explicitly favored limiting injunctive relief
 - (2) 5% of all beneficiaries explicitly opposed limiting injunctive relief
 - ii) 71% of beneficiaries who addressed injunctive relief explicitly favored limiting it

⁴⁹⁷ This includes those with more potential uses of orphan works from which they would profit than from which they would lose.

- iii) 29% of beneficiaries who addressed injunctive relief explicitly opposed limiting it
- c) 73% of all comments that explicitly favored limiting statutory damages and attorney's fees were beneficiaries
 - i) 60% of all beneficiaries addressed statutory damages and attorney's fees explicitly
 - ii) 100% of beneficiaries who addressed statutory damages explicitly favored limiting them
- d) 50% of all comments that explicitly favored limiting the term of protection for orphan works were beneficiaries
 - i) 5% of all beneficiaries addressed limiting the term of protection explicitly
 - ii) 100% of beneficiaries who addressed limiting the term of protection favored it
- e) 87% of all comments that explicitly opposed extended collective licensing were beneficiaries
 - i) 45% of all beneficiaries directly addressed ECL
 - (1) 33% of all beneficiaries explicitly opposed ECL
 - (2) 13% of all beneficiaries explicitly favored ECL
 - ii) 72% of beneficiaries who directly addressed ECL opposed it
 - iii) 28% of beneficiaries who directly addressed ECL favored it
- f) 51% of all comments that stated an Academic, Library, or Museum affiliation were beneficiaries
 - (1) 43% of those who stated an academic affiliation were beneficiaries
 - (2) 75% of those who stated a library affiliation were beneficiaries
 - (3) None of those who stated a museum affiliation were beneficiaries
 - ii) 55% of all beneficiaries stated an Academic, Library, or Museum affiliation
 - (1) 25% of all beneficiaries stated an academic affiliation
 - (2) 30% of all beneficiaries stated a library affiliation
 - iii) 45% of beneficiaries out of this group stated an academic affiliation
 - iv) 55% of beneficiaries out of this group stated a library affiliation
- g) 36% of all comments that stated a Movies, Music, Photography, Visual Art, Writing/Publishing, or Software affiliation were beneficiaries
 - (1) 50% of those who stated a movies affiliation were beneficiaries
 - (2) 38% of those who stated a music affiliation were beneficiaries
 - (3) 33% of those who stated a photography affiliation were beneficiaries
 - (4) 8% of those who stated a visual arts affiliation were beneficiaries
 - (5) 50% of those who stated a writing/publishing affiliation were beneficiaries
 - (6) 60% of those who stated a software affiliation were beneficiaries
 - ii) 48% of all beneficiaries stated a Movies, Music, Photography, Visual Art, Writing/Publishing, or Software affiliation
 - (1) 8% of all beneficiaries stated a movies affiliation
 - (2) 8% of all beneficiaries stated a music affiliation

- (3) 10% of all beneficiaries stated a photography affiliation
 - (4) 3% of all beneficiaries stated a visual arts affiliation
 - (5) 13% of all beneficiaries stated a writing/publishing affiliation
 - (6) 8% of all beneficiaries stated a software affiliation
 - iii) 16% of beneficiaries out of this group stated a movies affiliation
 - iv) 16% of beneficiaries out of this group stated a music affiliation
 - v) 21% of beneficiaries out of this group stated a photography affiliation
 - vi) 5% of beneficiaries out of this group stated a visual arts affiliation
 - vii) 26% of beneficiaries out of this group stated a writing/publishing affiliation
 - viii) 16% of beneficiaries out of this group stated a software affiliation
- h) 64% of all comments that stated that there is an orphan works problem were beneficiaries
- i) 83% of all beneficiaries explicitly addressed whether there is an orphan works problem
 - (1) 70% of all beneficiaries stated that there is an orphan works problem
 - (2) 13% of all beneficiaries stated that there is not an orphan works problem
 - ii) 85% of beneficiaries who explicitly addressed whether there is an orphan works problem stated that there is
 - iii) 15% of beneficiaries who explicitly addressed whether there is an orphan works problem stated that there is not
- i) 80% of all comments that stated that mass digitization is part of the orphan works problem were beneficiaries
- i) 50% of all beneficiaries explicitly addressed whether or not mass digitization is part of the orphan works problem
 - (1) 40% of all beneficiaries stated that mass digitization is part of the orphan works problem
 - (2) 10% of all beneficiaries stated that mass digitization is not part of the orphan works problem
 - ii) 80% of beneficiaries who explicitly addressed whether mass digitization is part of the orphan works problem stated that it is
 - iii) 20% of beneficiaries who explicitly addressed whether mass digitization is part of the orphan works problem stated that it is not
- 2) Benefactors⁴⁹⁸
- a) 15% of all comments were benefactors
 - b) 42% of all comments that explicitly opposed limiting injunctive relief were benefactors
 - i) 36% of all benefactors addressed injunctive relief explicitly
 - ii) 100% of all benefactors who addressed injunctive relief explicitly opposed it

⁴⁹⁸ This includes those with more potential uses of orphan works from which they would lose than from which they would profit.

- c) 58% of all comments that explicitly opposed limiting statutory damages and attorney’s fees were benefactors
 - i) 64% of all benefactors addressed statutory damages and attorney’s fees explicitly
 - (1) 50% of all benefactors explicitly opposed any limitation on statutory damages and attorney’s fees
 - (2) 14% of all benefactors explicitly supported at least some limitation on statutory damages and attorney’s fees
 - ii) 78% of benefactors who addressed statutory damages and attorney’s fees explicitly opposed any limitation on them
 - iii) 22% of benefactors who addressed statutory damages and attorney’s fees explicitly supported at least some limitation on them

- d) 100% of all comments that explicitly opposed any reduction in the term of protection for orphan works were benefactors
 - i) 21% of benefactors explicitly addressed limiting the term of protection for orphan works
 - ii) 100% of benefactors who addressed limiting the term of protection for orphan works explicitly opposed it

- e) 11% of all comments that explicitly favored extended collective licensing were benefactors
 - i) 7% of all benefactors addressed ECL explicitly
 - ii) 100% of benefactors who addressed ECL explicitly favored it

- f) 9% of all comments that stated an Academic, Library, or Museum affiliation were benefactors
 - (1) 17% of all comments that stated an academic affiliation were benefactors
 - (2) 6% of all comments that stated a library affiliation were benefactors
 - (3) None of the comments that stated a museum affiliation were benefactors
 - ii) 29% of all benefactors stated an Academic, Library, or Museum affiliation
 - (1) 21% of all benefactors stated an academic affiliation
 - (2) 7% of all benefactors stated a library affiliation
 - iii) 75% of benefactors out of this group stated an academic affiliation
 - iv) 25% of benefactors out of this group stated a library affiliation

- g) 25% of all comments that stated a Movies, Music, Photography, Visual Art, Writing/Publishing, or Software affiliation were benefactors
 - (1) None of the comments that stated a movies affiliation were benefactors
 - (2) 38% of all comments that stated a music affiliation were benefactors
 - (3) 8% of all comments that stated a photography affiliation were benefactors
 - (4) 67% of all comments that stated a visual arts affiliation were benefactors
 - (5) 10% of all comments that stated a writing/publishing affiliation were benefactors
 - (6) None of the comments that stated a software affiliation were benefactors

- ii) 93% of all benefactors stated a Movies, Music, Photography, Visual Art, Writing/Publishing, or Software affiliation
 - (1) 21% of all benefactors stated a music affiliation
 - (2) 7% of all benefactors stated a photography affiliation
 - (3) 57% of all benefactors stated a visual arts affiliation
 - (4) 7% of all benefactors stated a writing/publishing affiliation
 - iii) 23% of benefactors out of this group stated a music affiliation
 - iv) 8% of benefactors out of this group stated a photography affiliation
 - v) 62% of benefactors out of this group stated a visual arts affiliation
 - vi) 8% of benefactors out of this group stated a writing/publishing affiliation
- h) 39% of all comments that explicitly stated that there is no orphan works problem were benefactors
 - i) 79% of all benefactors explicitly addressed whether there is an orphan works problem
 - (1) 50% of all benefactors explicitly stated that there is no orphan works problem
 - (2) 29% of all benefactors explicitly stated that there is an orphan works problem
 - ii) 64% of benefactors who addressed whether there is an orphan works problem explicitly stated that there is not
 - iii) 36% of benefactors who addressed whether there is an orphan works problem explicitly stated that there is
 - i) 22% of all comments that explicitly stated that mass digitization is not part of the orphan works problem were benefactors
 - i) 21% of all benefactors explicitly addressed whether mass digitization is part of the orphan works problem
 - (1) 14% of all benefactors explicitly stated that mass digitization is not part of the orphan works problem
 - (2) 7% of all benefactors explicitly stated that mass digitization is part of the orphan works problem
 - ii) 67% of benefactors who addressed whether mass digitization is part of the orphan works problem explicitly stated that it is not
 - iii) 33% of benefactors who addressed whether mass digitization is part of the orphan works problem explicitly stated that it is

B. Charts and Tree Graphs

1. 2005 Initial Comments

	FREQUENCY	NO. CASES	% CASES	TF / IDF		FREQUENCY	NO. CASES	% CASES	TF / IDF
OWNER	1736	229	34.10%	811.6	INDIVIDUAL	263	109	16.20%	207.8
ILLUSTRATOR	1640	17	2.50%	2618.9	SOLUTION	263	86	12.80%	234.8
AUTHOR	1255	191	28.40%	685.7	SOFTWARE	250	81	12.10%	229.7
PUBLIC	1169	345	51.30%	338.5	PURPOSE	235	100	14.90%	194.4
USER	1115	116	17.30%	850.6	UNPUBLISHED	219	53	7.90%	241.6
LAW	1078	229	34.10%	504	FREE	216	106	15.80%	173.2
REGISTER	946	545	81.10%	86.1	DATABASE	214	66	9.80%	215.7
PUBLISH	936	192	28.60%	509.2	WEB	211	94	14.00%	180.2
INTERNATIONAL	912	556	82.70%	75.1	EDUCATION	208	75	11.20%	198.1
HOLDER	776	271	40.30%	306.1	RENEWAL	207	44	6.50%	245.1
LICENSE	776	121	18.00%	577.8	BUSINESS	204	116	17.30%	155.6
BOOK	719	152	22.60%	464.1	DIGITAL	199	66	9.80%	200.6
LIBRARY	677	133	19.80%	476.3	REGISTRY	197	46	6.80%	229.4
ARTIST	657	122	18.20%	486.8	INFRINGEMENT	194	60	8.90%	203.5
POLICY	634	532	79.20%	64.3	PHOTOGRAPHER	192	48	7.10%	220.1
FILM	619	88	13.10%	546.5	ROYALTY	184	56	8.30%	198.6
ART	595	112	16.70%	463	COURT	181	59	8.80%	191.2
CREATOR	571	144	21.40%	382	PERSON	172	99	14.70%	143.1
INTERNET	527	174	25.90%	309.3	STUDY	169	58	8.60%	179.8
NOTICE	515	103	15.30%	419.5	IDEA	162	94	14.00%	138.4
REGISTRATION	480	74	11.00%	459.9	SCIENCE	159	55	8.20%	172.8
PERMISSION	470	152	22.60%	303.4	FUTURE	152	84	12.50%	137.3
REASONABLE	468	118	17.60%	353.6	INTENT	141	48	7.10%	161.6
COPY	444	166	24.70%	269.6	RISK	141	71	10.60%	137.6
TERM	444	105	15.60%	357.9	INCENTIVE	140	57	8.50%	150
PROTECTION	434	109	16.20%	342.8	TECHNOLOGY	134	53	7.90%	147.8
RECORD	427	101	15.00%	351.4	COMPUTER	133	69	10.30%	131.5
UNIVERSITY	420	113	16.80%	325.2	LIABILITY	130	48	7.10%	149
FORMALITY	406	44	6.50%	480.7	WRITER	130	38	5.70%	162.2
COMMERCIAL	405	85	12.60%	363.7	LETTER	125	52	7.70%	138.9
BERNE	400	47	7.00%	462.1	RIGHTSHOLDERS	123	7	1.00%	243.8
CONTACT	398	174	25.90%	233.6	STUDENT	123	61	9.10%	128.2
LIMIT	392	132	19.60%	277.1	CULTURE	120	54	8.00%	131.4
FEE	357	97	14.40%	300.1	FAITH	120	45	6.70%	140.9
SOCIETY	356	79	11.80%	331	GAME	117	38	5.70%	146
HISTORY	355	126	18.80%	258.1	LIFE	115	65	9.70%	116.7
COMPANY	347	155	23.10%	221.1	SPECIFIC	115	67	10.00%	115.1
ARCHIVE	337	74	11.00%	322.9	REMEDY	111	29	4.30%	151.5
ORIGINAL	311	153	22.80%	199.9	COMPULSORY	108	30	4.50%	145.8
PROTECT	304	121	18.00%	226.4	FAMILY	108	61	9.10%	112.5
COST	303	87	12.90%	269	EXCEPTION	106	36	5.40%	134.7
PHOTOGRAPH	283	90	13.40%	247.1	PAINTER	102	2	0.30%	257.7
MUSIC	281	82	12.20%	256.7	EXPLOITATION	100	35	5.20%	128.3
FAIR	274	93	13.80%	235.3					

Figure 4: 2005 Initial Comments Keyword Chart

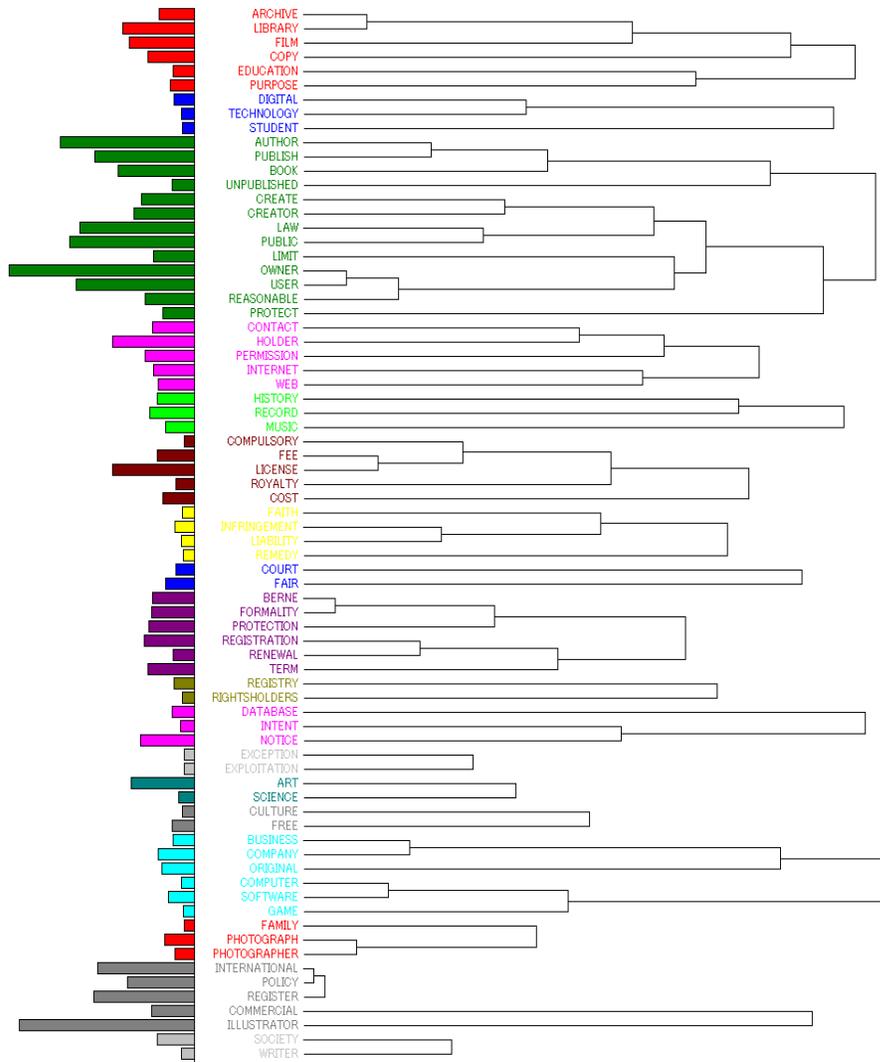


Figure 5: 2005 Initial Comments Tree Graph

2. Copyright Office Report

	FREQUENCY	% TOTAL	TF / IDF		FREQUENCY	% TOTAL	TF / IDF
USER	529	1.00%	0	INTERNATIONAL	40	0.10%	0
OWNER	489	0.90%	0	ATTRIBUTION	39	0.10%	0
AUTHOR	161	0.30%	0	FORMALITY	38	0.10%	0
REASONABLE	161	0.30%	0	SOFTWARE	38	0.10%	0
COMMENTERS	124	0.20%	0	BOOK	36	0.10%	0
PUBLIC	114	0.20%	0	COURT	35	0.10%	0
REMEDY	92	0.20%	0	RELY	35	0.10%	0
LAW	86	0.20%	0	RENEWAL	34	0.10%	0
REGISTRY	82	0.20%	0	CREATOR	31	0.10%	0
PROTECT	81	0.20%	0	DERIVATIVE	31	0.10%	0
INFRINGEMENT	79	0.20%	0	IDEA	31	0.10%	0
LICENSE	78	0.20%	0	MUSEUM	31	0.10%	0
BERNE	74	0.10%	0	DATABASE	30	0.10%	0
FEE	73	0.10%	0	FILM	26	0.10%	0
TERM	69	0.10%	0	HISTORY	26	0.10%	0
COMMERCIAL	64	0.10%	0	MUSIC	26	0.10%	0
INDIVIDUAL	64	0.10%	0	PHOTOGRAPHER	25	0.00%	0
INTERNET	62	0.10%	0	PRIVATE	24	0.00%	0
PHOTOGRAPH	61	0.10%	0	ROYALTY	23	0.00%	0
REGISTRATION	60	0.10%	0	HOLDER	22	0.00%	0
ART	59	0.10%	0	WEB	22	0.00%	0
RELIEF	58	0.10%	0	FREE	20	0.00%	0
DILIGENT	57	0.10%	0	LIABILITY	19	0.00%	0
COPY	55	0.10%	0	RESURFACE	19	0.00%	0
PERMISSION	53	0.10%	0	ARTIST	18	0.00%	0
PUBLISH	53	0.10%	0	DIGITIZATION	18	0.00%	0
FAIR	51	0.10%	0	EDUCATION	17	0.00%	0
MONETARY	45	0.10%	0	ATTORNEY	16	0.00%	0
UNIVERSITY	44	0.10%	0	ENTHUSIAST	15	0.00%	0
EXPLOIT	43	0.10%	0	ESTATE	15	0.00%	0
INJUNCTIVE	43	0.10%	0	FUTURE	15	0.00%	0
UNPUBLISHED	42	0.10%	0	PRIVACY	15	0.00%	0
ARCHIVE	41	0.10%	0				

Figure 6: Copyright Office Report Keyword Chart

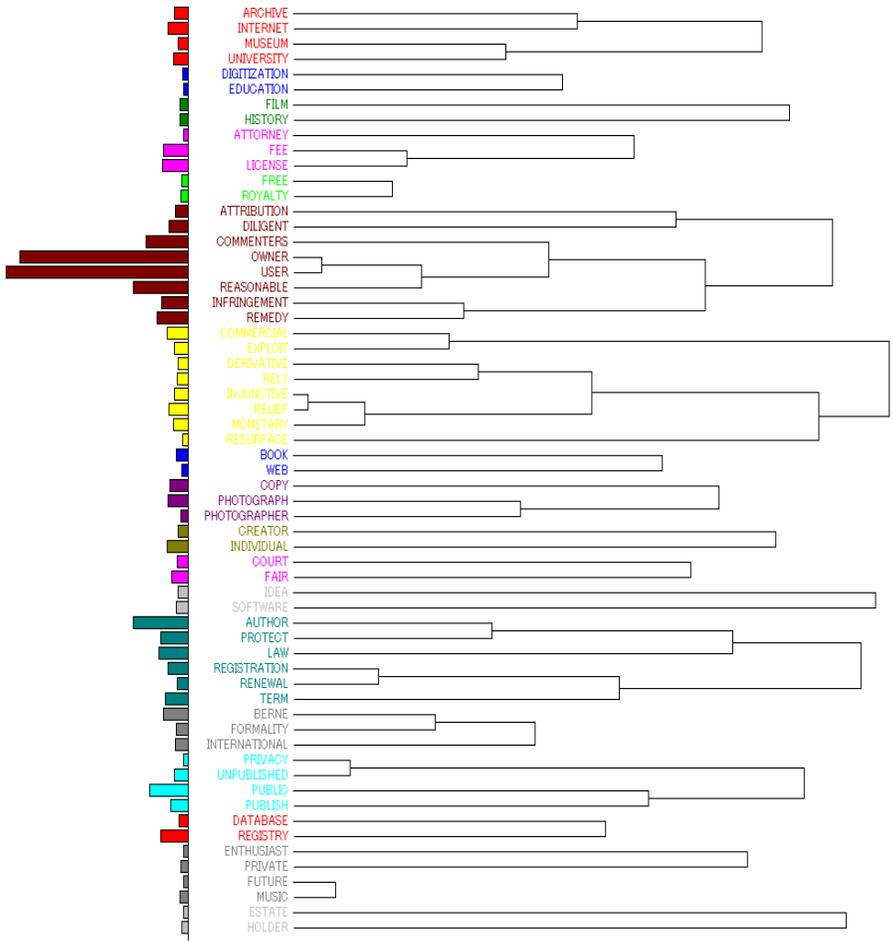


Figure 7: Copyright Office Report Tree Graph

3. 2013 Initial Comments

	FREQUENCY	NO. CASES	% CASES	TF / IDF		FREQUENCY	NO. CASES	% CASES	TF / IDF
DIGITIZATION	1597	70	82.40%	134.7	REMEDY	224	45	52.90%	61.9
LIBRARY	1261	62	72.90%	172.8	COPY	218	39	45.90%	73.8
OWNER	1222	71	83.50%	95.5	FEE	214	49	57.60%	51.2
USER	1112	67	78.80%	114.9	TECHNOLOGY	214	49	57.60%	51.2
HOLDER	948	58	68.20%	157.4	FILM	211	28	32.90%	101.8
LICENSE	909	62	72.90%	124.6	REGISTRATION	208	37	43.50%	75.1
EU	822	26	30.60%	422.9	MUSIC	204	34	40.00%	81.2
AUTHOR	814	59	69.40%	129.1	INDIVIDUAL	197	47	55.30%	50.7
FAIR	791	49	57.60%	189.2	UNIVERSITY	192	36	42.40%	71.6
WEB	765	55	64.70%	144.6	INFRINGEMENT	189	48	56.50%	46.9
LAW	674	63	74.10%	87.7	EXCEPTION	186	30	35.30%	84.1
PUBLIC	644	70	82.40%	54.3	CONTACT	182	45	52.90%	50.3
DILIGENT	601	60	70.60%	90.9	FAITH	180	48	56.50%	44.7
INTERNET	577	62	72.90%	79.1	DANCE	168	6	7.10%	193.4
ARCHIVE	550	49	57.60%	131.6	BUSINESS	162	46	54.10%	43.2
BOOK	484	49	57.60%	115.8	PHOTOGRAPHER	157	30	35.30%	71
COMMERCIAL	478	61	71.80%	68.9	CULTURAL	152	39	45.90%	51.4
PUBLISH	462	59	69.40%	73.3	MUSEUM	150	36	42.40%	56
CREATOR	431	54	63.50%	84.9	FACILITATE	146	39	45.90%	49.4
PDF	392	35	41.20%	151.1	POLICY	144	42	49.40%	44.1
GOOGLE	377	43	50.60%	111.6	EXPLOIT	142	30	35.30%	64.2
NOTICE	374	64	75.30%	46.1	UK	129	13	15.30%	105.2
PROTECT	373	61	71.80%	53.7	HATHITRUST	128	23	27.10%	72.7
ECL	367	32	37.60%	155.7	ARCHIVIST	125	13	15.30%	101.9
DATABASE	343	42	49.40%	105	FUTURE	122	37	43.50%	44.1
REGISTRY	318	42	49.40%	97.4	RESPECT	121	37	43.50%	43.7
WRITER	301	20	23.50%	189.1	FREE	120	44	51.80%	34.3
REGISTER	295	60	70.60%	44.6	BERNE	118	18	21.20%	79.5
RECORD	290	46	54.10%	77.3	LITIGATION	116	36	42.40%	43.3
INTERNATIONAL	281	54	63.50%	55.4	DIGITIZE	115	36	42.40%	42.9
ART	276	47	55.30%	71	BALANCE	112	33	38.80%	46
COURT	274	50	58.80%	63.1	ACCESSIBLE	111	35	41.20%	42.8
PERMISSION	247	48	56.50%	61.3	FORMALITY	110	22	25.90%	64.6
PURPOSE	244	52	61.20%	52.1	LITERARY	108	22	25.90%	63.4
REASONABLE	239	55	64.70%	45.2	ACADEMIC	105	27	31.80%	52.3
PHOTOGRAPH	238	42	49.40%	72.9	PRIVATE	104	32	37.60%	44.1
TERM	237	45	52.90%	65.5	SETTLEMENT	103	23	27.10%	58.5
ARTIST	234	37	43.50%	84.5	ORIGINAL	95	28	32.90%	45.8
HISTORY	229	45	52.90%	63.3	REFORM	94	22	25.90%	55.2
EDUCATION	224	42	49.40%	68.6	DOCUMENTARY	90	12	14.10%	76.5
					ROYALTY	90	25	29.40%	47.8

Figure 8: 2013 Initial Comments Keyword Chart

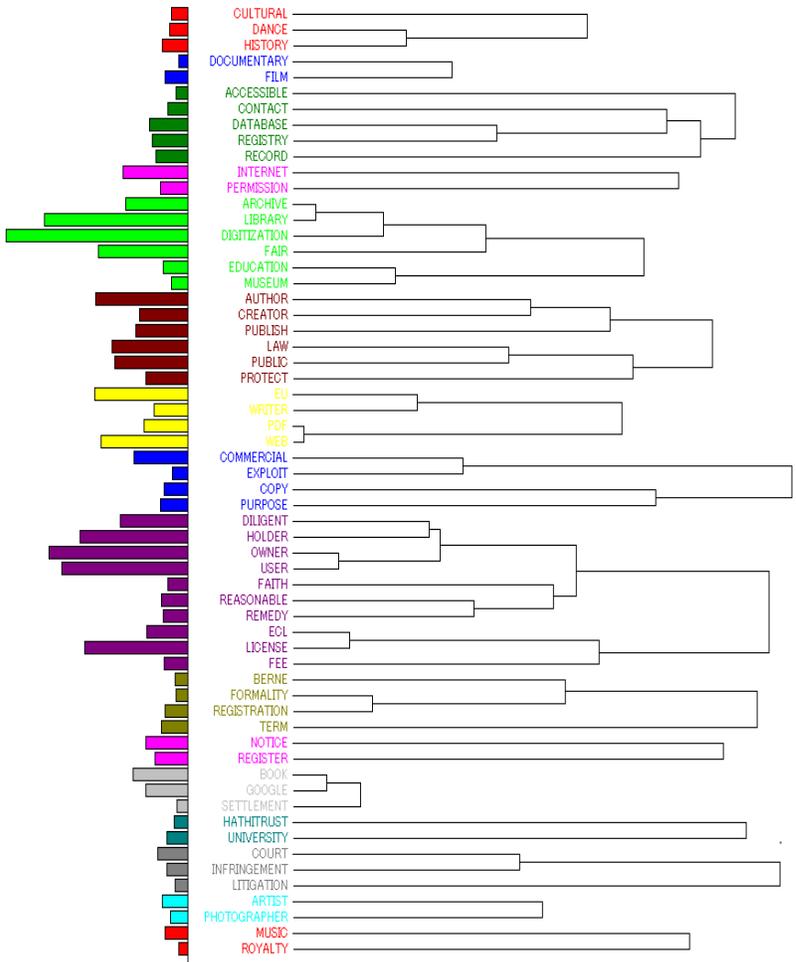


Figure 9: 2013 Initial Comments Tree Graph

APPENDIX E: Credits

Gregory Scott Stein, Editor in Chief, Orphan Work Reply Comment

Bri Whetstone, Managing Editor

Elizabeth Townsend Gard, Lead Faculty Writer

2012 Advanced Copyright and Orphan Work Student Work

Clare Adams (3L), Mass Digitization Analysis and various other work

Richard Austin Blakeslee (3L), Fair Use and Hathi Trust, Kidnapped Orphans, Section 412, and various other work

Claire Carville (2L), Section 506, Judge Chin’s *Google* opinion, Registries, “No orphan work problem”, Existing Databases, and Writers

Daniel Collier (3L), Statistical analysis of 2005 and 2013 Comments, Berne Convention and TRIPS, Remedies (including injunctions), Section 412, Section 1202, proofing, and various other work

Morgan Embleton (3L), Categorizing Comments by User Groups, Education, Criminal Penalties, Footnotes, Photography Case Study, Proofing, and various other work.

Michael Foote (2L), Museum Research and Due Diligence

Joanna Martin (3L), Proposed Google Book Settlement, Termination of Transfers, Registries, and Diligent Search

Melinda Schlinsog (2L), Previous Proposed Orphan Work Legislation and Registries

Alessandra Suuberg (2L), Foreign Solutions to the Orphan Work Problem, Fair Use and Hathi Trust, and various other work

Greg Stein (3L), Orphan Work Definition, European model, proofing, Overview of Orphan Works to the class, and various other work

Dorian Thomas (3L), Photography Case Study (main writer)

Bri Whetstone (3L), Record Search Today, Rights Holders, ITU Database

Zachary Zelany (LL.M.) Foreign Solutions to Orphan Works, and other work.

Elizabeth Townsend Gard, Glazer Professor in Social Entrepreneurship and Associate Professor, Tulane University Law School, general writing and editing, Section 506, duration, Section 412, Section 512(c), and methodology.

Professor Glynn Lunney, Jr., McGlinchey Stafford Professor of Law, Tulane University Law School, statute of limitations, injunctions and moderator of discussions on introductions to orphans and 2008 Legislation

A special note of thanks for the hard work of the students in the Advanced Copyright and Orphan work course. Their dedication, enthusiasm, creativity, and sheer intellectual stamina went far beyond anything we could have imagined. In particular, a special thanks to Dan Collier, for his insightful idea of the statistical analysis of the Comments as well as hard work on many sections and continuous proofing. Morgan Embleton, for her focus on the user groups and her dedication to the bluebooking and footnoting process as well as her hard work on many sections. And finally, Austin Blakeslee and Alessandra Suuberg, for their tireless work on the fair use, “kidnapped orphans,” foreign solutions, and nearly every other section we asked them to add just a little bit.

- Elizabeth, Greg, and Bri