

Please find below comments and suggestions in response to your request for submissions regarding the problem of orphan works.

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

Arguably, the people most affected by the orphan works problem are scholars interested in archival work, whether in literature, history, film, or other areas of study. Academic publishing occupies but a fraction of the publishing market as a whole, but orphan works nonetheless present a sometimes insurmountable problem for scholars who wish to use these works but cannot locate the author. As a body of scholarly work—in any field—grows, it necessarily becomes more diverse and wide-ranging. It also becomes more dependent on secondary, less well-known, materials. These are precisely the types of materials that are also likely to be orphan works. If these works are not available in some way to scholars, progress in these fields will be slowed or even halted altogether. The same effect will occur if the legal and administrative mechanisms are too cumbersome for people to negotiate.

The problem might well be exacerbated in the case of the independent scholar, who might lack not only the archive resources available to the scholar affiliated with a university or other institution, but who will also likely lack institutional legal resources in the event of litigation. Scholars, on the whole, are not a well-paid group, and so the fear of costly litigation looms large for them. But they are also the people most likely to make important use of orphan works such as letters, diaries, photographs, short films, and other documents. A workable

solution to the orphan works problem, I suggest, will be one which is organized around scholars' vital and unique professional needs without compromising the basic ideals of copyright law.

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

The definition of "orphan works" set out in the notice of inquiry ("works for which the copyright owner cannot be located") seems a solid starting place. The difficulty comes in defining what "cannot be located" will mean. A formal, centralized system is necessary not only to determine which works are orphan works, but also to resolve disputes if the author surfaces after the work has been designated an orphan work. I suggest that a combination of the ad hoc approach and the formal approach is necessary in order to achieve the proper balance between preserving copyright owners' rights and promoting the fundamental goals of copyright law.

The ad hoc side of the equation should begin with a thorough (and perhaps assisted) search of the Copyright Office registration database. Persons wishing to use material that they suspect might be orphaned should first search the database, and then submit a request for an assisted search to a dedicated team at the Copyright Office, who would be more adept at searching registrations. If neither of these searches reveal a locatable author, then notice should be posted to the Copyright Office website (and perhaps in other places as well) that the work is about to be permanently identified as an orphan work.

This plan will work only if the formal side of the equation involves a proportionate effort by copyright owners to secure and maintain their registration status. However, the difficulty in determining whether there is an author is a different matter from the difficulty in locating an identifiable author. These two situations deserve separate solution. In the case where it cannot be determined that the work is registered, the ad hoc notice approach would likely suffice for the majority of cases. In the case, on the other hand, where the author is identified but cannot be

located, then a more formal approach is necessary. This would likely have to depend on public records and perhaps also make use of law enforcement tools for locating people.

3. Nature of “Orphan Works”: Age

In most situations, the age of a work will align with the difficulty in finding an author. The newer the work, the more likely it is an author can be located. However, because the age of potentially orphaned works is likely to vary greatly, a benchmark age that would qualify a work as “orphan” might be too rigid a rule.

Regardless of whether a strict age rule is used, there should be ample exceptions created for works whose age cannot be determined. One such exception might hinge not on the age of the orphan work, but on the age of the work that uses the orphan work: requiring people who wish to use orphan works to pay a certain fee into a reserve account (kept by the Copyright Office) for a short period of time (e.g., five years). If no copyright owner has come forward, the fee is returned to the person using the orphan work. If the copyright owner does come forward—no matter what the age of the orphan work—then he or she receives the fee and agrees not to litigate the matter. This sort of scenario might also have the additional desirable effect of encouraging registration, which might in turn reduce the frequency and cost of litigation.

4. Nature of “Orphan Works”: Publication Status

Although the essence of copyright law is that a work is copyrighted as soon as it is created—instead of as soon as it is published—it makes sense that orphan work status should apply only to published works. Applying orphan work status to unpublished works presents, I think, insurmountable and costly administrative and practical issues. It would also present precisely the type of slippery-slope situation that copyright law generally tries to avoid: one can envision an army of potentially litigious copyright owners coming out of the woodwork once a

work using supposedly “orphan” works is published, each seeking to prove that he or she was the rightful owner of the orphan works used. This would obviously present serious evidentiary problems in litigation, and would shift the burden of showing copying so heavily to the “access” prong that copyright litigation would almost certainly become more costly and difficult.

5. Effect of a Work Being Designated “Orphaned”

With regard to the question of whether an orphan work should be designated an orphan work for all time, or for each individual use, the solution will probably lie somewhere in the solution to the question of the nature of an orphan work itself. In other words, if a fee-reserve system is set up, then it would stand to reason that the orphan work cannot truly be designated “orphan” until that time period (e.g., five years) has expired. At that point, there is no administrative or equitable gain to be had in allowing the work to “lose” its orphan status as against everything *but* that first work. This may seem like a harsh regime, but imagine the converse situation: a work is “orphan” for one or more uses, but copyrighted for others. This uneven landscape would invite not only litigation but also increasingly subjective judicial tests for infringement.

6. International Implications

Nothing suggested herein would run afoul of the Berne Convention’s prohibition on formalities as a condition of the exercise of copyright. As I suggested in section #3, a fee-reserve system might have the effect of increasing registrations, but it does not go so far as to require registration as a condition of copyright. The use of the fee-reserve system, similarly, would not impede the exercise of copyright, but instead would provide an incentive and a prolonged window for that exercise.