

By Electronic Submission

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Dear Ms. Claggett:

The undersigned researchers of the Berkeley Digital Library Copyright Project¹ respectfully submit these comments in response to the Copyright Office's Orphan Works and Mass Digitization Notice of Inquiry, published on October 22, 2012.²

The Berkeley Digital Library Project was established to investigate copyright-related obstacles faced by libraries and other like-minded organizations in their efforts to realize the full potential of present and future digital library initiatives, such as the Digital Public Library of America (DPLA).³ Over the past 18 months we have focused our efforts on orphan works and mass digitization, hosting a major academic conference on the topic, producing several white papers that distill the current state of research with respect to orphan works and mass digitization, writing and encouraging others to write significant academic articles about aspects of orphan works and mass digitization, and initiating (with a research team at American University) the development of orphan works best practices for libraries, archives, and other memory institutions. Given our interest in the orphan works problem, we appreciate the Copyright Office's renewed attention to this issue.

Introduction

Our comments respond to both questions posed by the Notice of Inquiry—developments related to case-by-case orphan works uses, and to mass digitization in the context of orphan works. While numerous other aspects of the orphan works situation interest us, our comments focus

¹ Institutional affiliation is for identification purposes only.

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

³ For a more complete description of the Project, see *Berkeley Digital Library Copyright Project*, BERKELEY LAW, <http://www.law.berkeley.edu/12040.htm> (last visited Jan. 18, 2013). Principal investigators for the project are Berkeley Law professors Pamela Samuelson, Jason Schultz, and Jennifer Urban. David Hansen is the project's full-time Digital Library Fellow, and Gwen Hinze is the project's International Copyright Fellow.



primarily on digital library aspects of orphan works and mass digitization, especially as those problems relate to the creation of large, widely accessible digital public libraries, such as the DPLA.⁴

Part I of our comments discusses the existing empirical data on the orphan works situation, a great deal of which has been gathered since the Copyright Office's 2006 Report. Much of the existing empirical research attempts to estimate the number of potential orphan works in given collections or for particular classes of works, such as books or photographs. The data indicates that there are numerous orphan works and that the orphaned status of these works pose challenges to those who seek to use them. Although more data now exists than in 2005, in the United States researchers have not produced the types of robust studies that would reveal with any accuracy the true extent of the orphan works problem across types of works or types of users. Internationally, while more data is available about the estimated numbers of orphan works, many of these estimates are fraught with methodological concerns, and the differing methodologies used make comparisons of questionable value. Moreover, none of the existing empirical research about the U.S. situation addresses how organizations are using orphan works, what the economic value of these potential orphans is, or how proposed orphan works solutions compare in terms of quantifiable costs and benefits.

Recommendation 1: The Office should encourage and support more empirical research on the orphan works situation in the U.S., especially with regard to the number of orphan works across domains, the ways that orphan works are currently being used, the economic value of unused works, and the quantifiable costs and benefits of proposed solutions.

Part II of our comments discuss legal developments in the United States since 2006 that affect the way that users approach orphan works and mass digitization. Developments regarding how fair use applies to mass digitization and orphan works-specific uses have allowed many users to make confident assertions about the applicability of fair use. In many cases, community-developed codes of best practices have further assured these users about the types of acceptable activities they should undertake with respect to mass digitization and orphan works. For orphan works in particular, community-driven efforts are underway to help libraries, archives, and other memory institutions understand how to approach orphan works in their collections that they would like to use. We recognize that these developments do not reach all users or uses, such as those for whom the fair use argument is weaker or for those who require more certainty or a different type of remedy, such as insulation from injunctive relief. However, these changes do affect a large number of potential orphan works and mass digitization situations.

Recommendation 2: The Office should recognize that fair use is an important part of the orphan works and mass digitization solution space and is being relied upon by libraries and archives. The Office should take care to explicitly preserve fair use as a part of the solution to the orphan works problem, especially if it

⁴ DPLA, <http://dp.la> (last visited Jan. 27, 2013).

decides to recommend legislative reform. This could take the form of an explicit savings clause similar to that in 17 U.S.C. § 108(f)(4).

Recommendation 3: The Office should recognize that voluntary community-driven efforts to create best practices for using orphan works, including in the context of large-scale digitization, are ongoing and that those efforts should be given time to develop.

Recommendation 4: If the Office decides to recommend legislative reform, it should follow the limitation on remedy approach proposed in the Copyright Office's previous report. Any legislative solution for orphan works should include an exemption from statutory damages awards against a user that has conducted a reasonably diligent search. It should also provide a workable solution for derivative works that use works previously considered to be orphaned on the basis of a diligent search.

Part III discusses the existing orphan works and mass digitization solution space. We describe the range of approaches that have been adopted, or are currently under discussion, and identify some of the merits and detractions of the various approaches. This survey of international developments since 2006 highlights that many countries have chosen to treat individual uses of orphan works and mass digitization of collections that include significant numbers of orphan works within the same policy framework, but in most cases, have adopted differing approaches for each, reflecting the different policy issues raised by the different uses. The survey also highlights that many of the countries that have adopted orphan works regimes have recognized the need to tailor solutions for uses of orphan works in different sectors, and for different types of users, such as non-profit public interest and cultural organizations, and commercial users. Finally, while there is much to learn from the recent overseas experience, we note that these specific orphan works systems have been developed in legal regimes that have very different features than the U.S. legal regime, and thus, systems that appear to work effectively in their native environs may not be suitable if transplanted in the US environment.

Recommendation 5: If the Office decides to recommend legislative reform, the Office should consider adopting tailored solutions that facilitate different uses and different types of users of orphan works.

Recommendation 6: If the Office decides to recommend legislative reform, it should consider adopting differentiated approaches to the limits on remedies that apply in the case of re-appearing rightsholders in the context of mass digitization of collections that include significant numbers of orphan works, as distinguished from the preparation of derivative works that incorporate a single or smaller number of suspected orphan works, in recognition of the different policy issues these uses raise and the different level of certainty required by the different types of users.

Part IV discusses extended collective licensing (ECL) regimes in more detail in the context of possible ways to facilitate mass digitization and the creation of a comprehensive digital library including in-copyright works such as the DPLA. It outlines several challenges for implementing an ECL system in the United States, the most significant of which is the current absence of the infrastructure necessary to administer such a regime. While ECL has a long history in the Nordic countries, collective management of rights is less familiar in U.S. copyright culture. Numerous collective management organizations (CMO) exist in the EU and already represent the majority of rightsholders in the relevant class. By comparison, in the U.S. there is no established and trusted CMO that covers the full range of rights and that could administer an ECL regime. In addition, on closer inspection, ECL regimes do not appear to deliver the chief advantage frequently attributed to them: reducing transaction costs to facilitate use of orphan works. This is because searches would still be required in order for CMOs to distribute funds and to price licenses appropriately. At the same time, the duty to search for rightsholders to distribute unclaimed funds presents a serious conflict of interest for CMOs that could otherwise retain those funds for their own uses.

Recommendation 7: The Office should not adopt ECL as a potential means to facilitate use of orphan works.

Recommendation 8: Although an ECL regime may be worth considering as a possible solution for mass digitization projects, there are significant implementation challenges that the Office should more thoroughly study before recommending this approach. If the Office does decide to consider creating an ECL regime to facilitate mass digitization of collections, it should take care to expressly preserve room for the full operation of fair use, and not undermine ongoing mass digitization projects by libraries that would constitute permissible fair use, as recognized in the *Authors Guild, Inc. v. HathiTrust* judgment. To promote efficiency and fairness, the Office should also consider appropriate good governance and transparency obligations that would apply to CMOs that wish to administer rights in the ECL regime.

Part V of our comments discuss forward-looking proposals that would reduce the number of orphan works produced in the future. Technological advances relating to registries and metadata make tracking ownership of copyrighted works easier than ever. In addition, renewed international interest in reinvigorating copyright formalities signals that the time may be right to reevaluate how the copyright formalities system can reduce the number of orphan works.

Recommendation 9: The Office should recognize that an orphan works solution that fails to reduce the number of orphan works going forward would be incomplete. Regardless of the particular approach it recommends, the Office should study further how best to incorporate copyright formalities and the implementation of technological tools, like registries or metadata, into its recommendations. Further, the Office should encourage the development of these tools even in the absence of a legislative recommendation.

Additional Materials

Finally, supplementing our main comments is a set of white papers, academic articles, and reports that we have either authored or commissioned on the topic of orphan works and mass digitization. A number of these are attached as Appendix A:

Orphan Works and Mass Digitization: Obstacles and Opportunities (Symposium Issue), 27 BERKELEY TECH. L.J. (forthcoming 2013), (not included in Appendix A because of comment file-size limitations; available online in Feb. 2013 at <http://btlj.org/symposium>). The symposium issue includes:

Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities (Keynote Address)*

Reviewing some of the early points of tension in the orphan works debate, and pointing out common ground on which most agree, including that in the case of a true orphan work, it does not further the objectives of the copyright system to deny use of the work.

Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*

Warning against the quest for a grand solution to the orphan works problem (explaining that many proposed solutions may do more harm than good), and proposing a common law solution to the orphan works problem, based on well-established principles of imposing and limiting liability from other areas of law.

Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*

Redefining orphan works as “hostages”—constrained in their movement by the restricting combination of the set of rules established by copyright law and the absence of the owner who could release the works from what binds them in their confinement. The hostage metaphor leads to a clearer recognition that what is needed is not a stand in for the “parent” of these orphans, rather what is called for is an incentive for responsible parties to free the hostages. The article proposes a limited liability regime to provide this incentive.

Randal C. Picker, *Private Digital Libraries and Orphan Works*

Discussing the emergence of private digital libraries and, in light of their emergence, the need to avoid distorting this emerging competition by handing over special rights to orphan works to public and nonprofit libraries, while at the same time avoiding tilting the table in favor of a digital library monopoly, either public or private.

Matthew Sag, *Orphan Works as Grist for the Data Mill*

Explaining that, correctly understood, there is no orphan works problem for certain kinds of digitization; in particular, there is no orphan works problem in the

case of mass digitization of copyrighted works for the purpose of enabling non-expressive uses, such as for text-mining. So long as digitization is confined to data processing applications that do not result in infringing expressive or consumptive uses of individual works, there is no orphan works problem because the exclusive rights of the copyright owner are limited to the expressive elements of their works and the expressive uses of their works.

Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*

Arguing that legislation is not necessary to enable some uses of orphan works by nonprofit libraries and archives. Instead, U.S. copyright law's fair use doctrine, which allows certain unpermitted uses of copyrighted works, provides a partial solution.

Stef van Gompel, *The Orphan Works Chimera and How to Defeat it: A View from Across the Atlantic*

Reviewing the variety of situations in which the orphan work problem arises—including mass digitization, transformative and derivative uses, and small-scale incidental uses—and discussing a multi-faceted strategy to address these different uses.

Molly Shaffer Van Houweling, *Atomism and Automation*

Using digital photographs as a case study of copyright atomism—i.e., the current situation in which in which copyrights are numerous, widely-distributed among often unidentified owners, and fragmented into small and idiosyncratic parts that complicate or even foreclose negotiations over reuse of copyrighted works—and explaining how automated systems for tagging and tracing might help to alleviate atomism's costs.

REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES AND OTHER MEMORY INSTITUTIONS (Jan. 2013) (Jennifer Urban and David Hansen, with Pat Aufderheide, Peter Jaszi and Meredith Jacob), <http://centerforsocialmedia.org/orphan>

Discussing the basic challenges that libraries, archives and memory institutions face when dealing with orphan works. These challenges include identifying when orphan works status is relevant to the proposed use, the true (versus perceived) risks of using these works, how and when to conduct a diligent search, and how to address related privacy and ethical concerns about using orphan works. The report concludes with several recommendations, including the creation of community-developed orphan works best practices.

David R. Hansen, Gwen Hinze and Jennifer Urban, *Orphan Works and the Search for Rightsholders: Who Participates in a "Diligent Search" for Rightsholders Under Current and Proposed Regimes* (White Paper No. 4, Berkeley Digital Library Copyright Project, 2013), <http://ssrn.com/abstract=2208163>.

Reviewing the ways that current and proposed orphan works regimes require searches for rightsholders, and explaining that these proposals differ dramatically in terms of who is required to search for rightsholders, the nature and extent of the search required, and what

resources and tools searchers should look to. This paper focuses on who must participate in the search for rightsholders across the range of orphan works regimes.

David R. Hansen, *Orphan Works: Causes of the Problem* (White Paper No. 3, Berkeley Digital Library Copyright Project, 2012), <http://ssrn.com/abstract=2038068>.

Reviewing the underlying causes of the orphan works problem, which include 1) the elimination of copyright formalities, (2) the progressive extension of copyright terms, (3) technological advances that allow authors to create and preserve more copyrightable works, and (4) technological changes in the way users access and consume copyrighted works, especially in the shift from print to digital.

David R. Hansen, *Orphan Works: Mapping the Possible Solution Spaces* (White Paper No. 2, Berkeley Digital Library Copyright Project, 2012), <http://ssrn.com/abstract=2019121>.

Surveying the range of orphan works proposals, and discusses four general categories of proposed solutions to the orphan works problem: 1) Remedy-limitation approaches, such as the one advocated in the 2006 U.S. Copyright office proposal, that are predicated on a user's good-faith, reasonable search for rights holders; 2) central administrative systems, such as the one adopted in Canada, that allow users to petition a centralized copyright board to license specific reuses of orphan works; 3) access and reuse solutions that are tailored to rely upon the existing doctrine of fair use; 4) and extended collective licensing schemes.

David R. Hansen, *Orphan Works: Definitional Issues* (White Paper No. 1, Berkeley Digital Library Copyright Project, 2011), <http://ssrn.com/abstract=1974614>.

This paper outlines responses to two definitional questions that arise in the context of orphan works: (1) exactly what is the "orphan works" problem under the various orphan works regimes?, and (2) what is the size of this problem in terms of numbers of orphan works and severity of the problem of using these works?

I. New Empirical Data about the Orphan Works Problem

Although several years have passed since the Copyright Office first began its study of the orphan works issue, researchers have not generated significant empirical data about the size and severity of the orphan works problem. To make informed recommendations about orphan works policy, the Copyright Office should sponsor or encourage empirical research into the size of the orphan works problem (numbers of orphan works), the prevalence and ways that organizations and individuals are currently using orphan works, the economic value of foregone uses of orphan works (to the extent that is quantifiable), and the quantifiable costs and benefits of proposed solutions.⁵ We encourage the Office to explore opportunities with research organizations, such as the National Academies, or with academic researchers like ourselves. We would be pleased to discuss this further with the Office.

⁵ While we believe that comments, roundtables, and hearings are useful for this purpose, the Office should confirm the outcome of those information-gathering efforts with sustained analysis of quantitative aspects of the various works, uses, and users that we call for here.

We believe that these studies are critically important, and that continuing to pursue orphan works solutions in the absence of this data could result in unintended consequences or ineffective solutions. A central component of the orphan works problem statement is that potential users of orphan works will forego productive and socially beneficial uses of copyrighted works because of a fear of copyright litigation.⁶ To date, however, only scattered quantitative data supports either part of that assertion—the degree to which potential uses are productive or socially beneficial, or that potential users are foregoing use of orphan works because of fear of litigation. Collected commentary and anecdotal evidence suggest that both of those assertions are correct in general,⁷ but for specific communities there is some conflicting evidence which now indicates that these assertions may no longer hold true. For example, the Library Copyright Alliance in its response to this notice of inquiry states that even the highly visible *HathiTrust* litigation “has not deterred libraries from engaging in the mass digitization of archives and special collections,”⁸ based in part on legal developments in the U.S., discussed more below.

In the recent *Report on Orphan Works Challenges for Libraries, Archives, and other Memory Institutions* (a report to which we contributed),⁹ we found that libraries and archives perceive the risks of using orphan works to be much more severe than the risks actually observed by organizations that have digitized and made available orphan works.¹⁰ Reports like this indicate that previously held assumptions about the orphan works problem—especially regarding its potential to disrupt productive or beneficial uses—should be reassessed.

As discussed in more detail below, one matter that is highlighted by reviewing international orphan works developments is that solutions tailored to particular uses, users, or works might sometimes be appropriate. A robust study of the factors identified above will help the Office and Congress quantify the problem and then understand more clearly how and when to make such adjustments based on user and copyright owner needs.

⁶ Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555 (Oct. 22, 2012) (“Under current law, anyone who uses an orphan work without permission runs the risk that the copyright owner(s) might bring an infringement lawsuit for substantial damages, attorneys’ fees, and/or injunctive relief unless a specific exception or limitation applies. In such a situation, a productive and beneficial use of the work may be inhibited—not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license—but merely because the user cannot identify and/or locate the owner and therefore cannot determine whether, or under what circumstances, he or she may make use of the work.”).

⁷ For example, participants at the recent Berkeley symposium, *Orphan Works and Mass Digitization: Obstacles and Opportunities*, reiterated the general challenges faced by a number of types of users—including libraries, archives, commercial studios, technology companies, and others. See *Orphan Works and Mass Digitization: Obstacles and Opportunities*, BERKELEY LAW, <http://www.law.berkeley.edu/orphanworks.htm> (last visited Jan. 17, 2012) (linking to audio recordings and presentations by symposium participants). See also International Federation of Library Associations and Institutions *Statement on Orphan Works* (2011), <http://www.ifla.org/publications/ifla-statement-on-orphan-works-2011>.

⁸ Comments of the Library Copyright Alliance in Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization 6 (Jan. 14, 2013), <http://www.arl.org/bm~doc/lca-orphanworks-comments-14jan13.pdf>.

⁹ REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES AND OTHER MEMORY INSTITUTIONS (January, 2013), <http://centerforsocialmedia.org/report-orphan-works-challenges-libraries-archives-and-other-memory-institutions>.

¹⁰ *Id.* at 11–12.

Existing Data about Orphan Works

With an understanding that the record is still incomplete, the Office should recognize the available orphan works data. As the Copyright Office knows well, in response to the its 2005 Notice of Inquiry,¹¹ many libraries, archives, private and corporate users offered up a host of comments with anecdotal evidence about the types of uses these organizations seek to make of orphan works.¹² Some organizations submitted comments with quantitative data about the number of potential orphan works in some of their collections.¹³ This data, together with the data gathered since 2006, establishes that there are substantial quantities of orphan works in the collections of major cultural institutions across the world, that there is significant uncertainty and concerns about liability that are precluding full use of these works.

Cornell libraries, for example, submitted comments which reported on a library study of 343 in-copyright but out-of-print monographs that it sought to digitize.¹⁴ That report showed that, after spending more than \$50,000 in staff time working on the project, Cornell was unable to identify or locate the rightsholders of 198 works (58% of the group).¹⁵ Similarly, Carnegie Mellon libraries outlined the results of its own efforts to identify rightsholders for a sample of 368 books from its collections which it sought to digitize.¹⁶ Excluding books that were not in the public domain and did not contain third-party visual materials, the library was only able to obtain permission from publishers for 35% of the books.¹⁷

Since the time of the Office's 2005 review of the orphan works problem, several more U.S. based studies have confirmed the same general theme—that there are many orphan works, and that these works pose problems for those individuals and organizations that try to seek permission to use them. Researchers with the HathiTrust have derived estimates for the number of orphan works in their collection (at the time of the study, 5 million volumes, but now over 10 million), indicating that large portions--up to 50%, perhaps--could be considered orphan works.¹⁸

¹¹ Orphan Works Notice of Inquiry, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005).

¹² REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 36-39 (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf> (reviewing categories of proposed uses of orphan works); Denise Troll Covey, *Rights, Registries and Remedies: An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works*, in FREE CULTURE AND THE DIGITAL LIBRARY: SYMPOSIUM PROCEEDINGS 106-40 (Martin Halbert ed., 2005), available at http://works.bepress.com/denise_troll_covey/45 (statistical analysis of initial and reply comments, finding that 52% of initial commenters and 33% of reply commenters reported experience using or seeking to use orphan works).

¹³ REGISTER OF COPYRIGHTS, *supra* note 12, 36-39.

¹⁴ Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works, Comment OW0569, 1-2 (March 23, 2005), <http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>.

¹⁵ *Id.* at 2.

¹⁶ Response by the Carnegie Mellon University Libraries to the Notice of Inquiry Concerning Orphan Works, Comment OW0537, 2 (March 22, 2005), <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>.

¹⁷ *Id.* at 2.

¹⁸ John P. Wilkin, Bibliographic Indeterminacy and the Scale of Problems and Opportunities of “Rights” in Digital Collection Building, RUMINATIONS (Feb. 2011), <http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html>.

Those estimates are of limited use however, because as the author of the report notes, several of the conclusions are based on unproven assumptions about copyright status of more recent works.¹⁹ Other studies to determine the number of orphan works in core library collections—i.e., the collections of print, published books and similar works—have come to similar, but more wide ranging, conclusions. These estimate that anywhere from 17 to 25 percent of the works in the core, published collection of books could be considered orphan works, and up to 70% in other more specialized collections.²⁰

Looking beyond books, special collections libraries and similar organizations are confronted with unique challenges that make the works in their collections more likely to be considered orphans. These collections often contain a mixed bag of various kinds of works, including photographs, letters, diaries, clippings, and other more ephemeral works. Many of these materials lack any copyright-owner produced metadata, or have almost no identifying information at all.²¹

Librarians and archivists working with these types of materials estimate that their collections contain a large number of orphan works. For example, one special collections study, *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, examined a collection containing early twentieth-century personal correspondence from a prominent state politician.²² The research group spent over 450 hour examining 8,400 documents. After identifying around 3,300 unique authors in the collection, the research group was able to locate death dates for 1,709 authors—around 51% in this collection—and filtered out those whose death dates precluded continued copyright protection (about 18% of identified authors). For the remaining authors for whom the group could not identify a death date or whose death date was late enough to indicate continued copyright protection, the group was able to source only 50 outlets from which to obtain contact information. Of those 50, the group received 25 responses, but because of further uncertainty and outdated information, was able to find current, dependable contact information for only two correspondents, who had written a total of four letters in the collection. Those two correspondents were William Randolph Hearst, a

¹⁹ *Id.*

²⁰ See Michael Cairns, *580,388 Orphan Works – Give or Take* (Sept. 9, 2009), <http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html> (focusing on works thought to be in the Google Books corpus and concluding that up to 25% could be considered orphan works). ANNA VUOPALA, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COSTS FOR RIGHTS CLEARANCE (2010, report for European Commission), http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf (summarizing estimates that range from 13% of all in-copyright books to up to 70% for certain collections).

²¹ See Dwayne K. Butler, *Intimacy Gone Awry: Copyright and Special Collections*, 52 J. LIBR. ADMIN. 279 (2012) (“Copyright interpretation requires highly fact specific analysis. For many special collections, much of that factual predicate has simply drifted from the historical record.”); see also REPORT ON ORPHAN WORKS CHALLENGES, *supra* note 9.

²² Maggie Dickson, *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, 73 AM. ARCHIVIST 626 (2010), <http://archivists.metapress.com/content/16rh811120280434/fulltext.pdf>. The report indicated that searches for identifying information were conducted in ancestry.com, the Congressional Biographical Directory, the Historical Marker Database online, the Library of Congress authority database, the New Georgia Encyclopedia, print references, the Social Security Death Index, and several other sources. *Id.*

prominent newspaper publisher, and Miles Poindexter, a United States representative and senator from the state of Washington.²³

Since 2006 several international efforts to review intellectual property law and policy have produced reports that gathered data about the orphan works problem. These reports recognize that orphan works are an important part of innovation policy, and efforts such as the UK's Gowers²⁴ and Hargreaves Reviews,²⁵ and reviews conducted for the European Commission²⁶ have concluded based on their own inquiries that the problem is severe and requires a solution.

However, some of the methodologies used to produce these estimates raise significant questions about their accuracy. Because there is no universally agreed definition of "orphan work," no standardized measuring methodology has been developed.²⁷ As a result, comparisons of estimates can be misleading or of questionable value. Several of the most widely cited estimates are based on sampling of small volumes of materials from specialized niche collections that could be expected to have a high proportion of orphan works. While these studies are grounded in empirical analysis, the results may not be representative of other more general collections and if used as a basis for extrapolation across different institutions and classes of works, could give an inaccurate picture of the volume of orphan works present in different cultural institutions.

These non-U.S. studies speak to the severity of the problem, documenting instances where organizations have had to expend significant sums on investigating rights, or have decided to forgo using a work altogether because of difficulty in obtaining copyright clearance. However, they reflect the wider legal environment in which these institutions operate— usually in the context of a legal regime without the flexible doctrine of fair use, which has, as explained below, given some U.S. users more confidence in using potentially orphaned works. Accordingly, while they document what was less clear in 2005-2006—namely, the significant extent of the orphan works problem—there are key differences in the U.S. legal environment that must be taken into account in formulating an orphan works policy framework that will address the U.S. situation.

²³ *Id.* (note that all of the rest of the works would probably not be considered orphans for various reasons such as public domain status, or for certain works whose copyright is owned by the donor to the collection).

²⁴ GOWERS REVIEW OF INTELLECTUAL PROPERTY 69 (2006), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (noting estimates that nearly 90% of museum works have no known author, and that for sound recordings, researchers in the British Library were unable to identify rightsholders for over 50% of works in a sample of over 200).

²⁵ IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (2011), <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

²⁶ See COMITÉ DES SAGES, THE NEW RENAISSANCE (2011), http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf; i2010: DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP, COPYRIGHT SUBGROUP, FINAL REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS (2008), http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf. See also VUOPALA, *supra* note 20.

²⁷ VUOPALA, *supra* note 20, at 16; see also David R. Hansen, *Orphan Works: Definitional Issues* (White Paper No. 1, Berkeley Digital Library Copyright Project, 2011), <http://ssrn.com/abstract=1974614>.

The more recent data collected outside the U.S. indicates that the proportion of orphan works varies greatly across different sectors and classes of works. Consistent with the findings of the Copyright Office’s prior inquiry, the data indicates that the orphan works problem is more acute with respect to collections of photographs, archival film and other audiovisual works, and specialist collections of books.

The most comprehensive figures collected to date appear in the June 2012 UK Intellectual Property Office’s Final Impact Assessment on Orphan Works.²⁸ These estimates were gathered from key UK cultural institutions through a stakeholder consultation on orphan works issues conducted in 2011–2012. Following are the estimated ranges of orphan works in significant UK cultural collections listed in the Final Impact Assessment, arranged by category of works:

Category of Media/ Works	Volume of Sample	Proportion Orphaned
Artwork ²⁹	548,000	20-25%
Sound recordings (hrs)	750,000	5-10%
Commercial film (hrs) ³⁰	21,800,000	0-7%
Archive film (hrs)	513,000	5-35%
Photo libraries	>100,000,000	~0%
Archive photos ³¹	28,280,000	5-90%
Written material ³²	10,400,000	4-30%
Mixed collections ³³	38,000,000	8-40%

²⁸ UK Intellectual Property Office, *Final Impact Assessment on Orphan Works* (June 2012), 10-11, <http://www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf>.

²⁹ *Id.* at 10. Based on a composite of the following estimates: The UK Imperial War Museum estimated that 20% of its 48,000 works collection is orphaned; the Guildhall Art Gallery – 20%; the London Metropolitan Archive – 25%; the National History Museum, London estimated that 25% of its 500,000 item collection is orphaned.

³⁰ *Id.* at 10–11. Calculated by treating an average film as 1.5 hrs long, and includes both UK and European film archives. This was based on the following composite estimates: the European Film Archives previously estimated that 4-7% of its 3,200,000 titles are orphaned; the UK Film Archives (FOCAL) estimates that 0.5% of most of its 17,000,000 hrs are orphans and that 0.25% of its imperial war museum collection is orphaned.

³¹ *Id.* at 10. Based on the following estimates: UK Museum Collections: 90% of its 19,000,000 collection as estimated for the 2011 EU Commission’s Orphan Works Impact Assessment; National Archive: 95% of its 85,000 works sample, also as included in the 2011 EU Commission Impact Assessment; Imperial War Archive: 20% of its 11,000,000 works collection; London Metropolitan Archive: 5-40% of its 260,000 works “New Deal” photo collection and 15% of the rest of its collection.

³² *Id.* 10-11. This does not include Oxford University’s estimated 600,000 orphaned items, nor the National History Museum’s collection of 195 cubic meters of manuscripts, 50% of which are estimated to be orphans. Based on estimates listed on p.10, including National History Museum, London: 20% of 1,000,000 book collection; National Library of Scotland: ~25% of 1,500,000 book collection; British Library: 31% of sample, and 43% of sample of books in copyright, as reported in B. STRATTON, SEEKING NEW LANDSCAPES: A RIGHTS CLEARANCE STUDY IN THE CONTEXT OF MASS DIGITISATION OF 140 BOOKS PUBLISHED BETWEEN 1870 AND 2010, (Sept. 2011) (British Library, produced with assistance from ARROW), <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>.

³³ *Id.* at 11 (calculated by treating the average work of the National Archive & National Records Scotland as a 1 cm holding).

The estimated proportion of orphaned written material does not include the book collection of the legal deposit library of the U.K., the Bodleian Library in Oxford University, which has itself estimated that 600,000 books or 13% of the books published and in-copyright in the U.K. are orphaned.³⁴

The proportion of orphaned works in non-U.S. collections of photographs is particularly high. In the UK, the Image Library of the UK National Archives reported in 2009 that in copyright registration forms for photographs from 1883 to 1912, 95% of rightsholders to 80,000 images still in-copyright were untraceable.³⁵ The Gowers Review reported figures provided by the Chair of the UK Museums Copyright Group that 70 major UK museums could not identify the rightsholders of about 90% of their combined collection of 19 million photographs.³⁶

The 2012 UK Impact Assessment ranges are generally consistent with the findings of a prior 2009 study of 503 UK public sector organizations produced for JISC, which found that the average proportion of orphan works across surveyed institutions was 5-10%, with some institutions, such as archives and libraries, having a higher median of 21-30% orphaned works in their collections. The JISC report concluded that approximately 13 million orphan works exist in the UK based on an extrapolation of the average. However, it noted that several individual institutions have in excess of 7.5 million orphan works in their collections, and that by extrapolation from an adjusted base including these institutions, the total number of orphan works in UK institutions could be as high as 50 million works. It concluded that the UK museum sector likely holds approximately 25 million orphaned works.³⁷

In Australia, a 2012 survey of the National and State Libraries of Australasia found that library collections could comprise between 10% - 70% of unpublished orphan works, depending on the type of works each institution collects.³⁸ Photographs comprised the highest average proportion of orphan works in libraries' collections (38%), together with pictures, manuscripts, maps, oral histories and other audiovisual material, which comprised the bulk of unpublished orphan works.

³⁴ VUOPALA, *supra* note 20, at 18. This estimate is based on figures provided by the Bodleian Library for research libraries from 1850-2009 on (1) how many books published in the UK have live authors, (2) authors to works that are dead but where the works are still in-copyright, and (3) authors to works that have died more than 70 years, which are in the public domain. 13% of UK in-copyright books reported in Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works*, at 17, COM (2011) 289 final, Table A4, at 51 (May 24, 2011), http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf. A 2010 Impact Assessment prepared for the European Commission estimated that there were about 3 million orphaned books in the 27 EU Member States based on an extrapolation from the Bodleian Library figure. VUOPALA, *supra* note 20, at 18.

³⁵ *Id.* at 30; 2011 European Commission Staff Working Paper, *Impact Assessment*, *supra* note 34, at 53.

³⁶ VUOPALA, *supra* note 20, at 29; GOWERS REVIEW, *supra* note 24, ¶4.93.

³⁷ JISC, *IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF 'ORPHAN WORKS' AND ITS IMPACT ON DELIVERY TO THE PUBLIC* 18 (2009), <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>.

³⁸ *Joint Submission of the Australian Digital Alliance and Australian Libraries Copyright Committee to the Australian Law Reform Commission's consultation on Copyright and the Digital Economy*, at 51 (November 2012), <http://digital.org.au/sites/digital.org.au/files/documents/FINAL%20ADA%20ALCC%20CopyRevSub.pdf>.

In relation to film and audiovisual works, the Association des Cinémathèques Européennes reported in 2010 that the average proportion of orphan works held by its member archives was 12%. However, it estimated that that 21% (225,000 of the 1,064,000 works in the European film archives) were *presumed* to be orphan works.³⁹ In 2010, the Australian National Film and Sound Archives estimated that about 20% of its national audiovisual collection is abandoned or orphaned.⁴⁰

In sum, these estimates indicate that there are potentially large numbers of orphan works and that these numbers vary considerably among different sectors. However, several important pieces of data are missing from most of the existing estimates; they do not indicate how these works are being used, the value of these works, or (with any accuracy) the true scope of the problem within particular sectors.

Recommendation 1: The Office should encourage and support more empirical research on the orphan works situation in the U.S., especially with regard to the number of orphan works across domains, the ways that orphan works are currently being used, the economic value of unused works, and the quantifiable costs and benefits of proposed solutions.

II. Developments in the United States Legal Landscape

The Copyright Office’s 2006 *Orphan Works Report* reviewed existing legal solutions, such as fair use or library and archive limitations, but ultimately concluded that these “would not address many orphan works situations.”⁴¹ That statement may no longer be true, at least for some users and uses, including large-scale digitization. Since the Copyright Office investigated the orphan works issue in its 2005 study, development in the United States relating to both the law of fair use and the way organizations approach complex copyright questions like fair use through community-developed best practices have significantly changed the outlook and attitude of some users of many potentially orphaned works. We believe that these developments are positive for both copyright users and copyright owners, as fair use allows for more works to be used in productive ways, while still requiring a careful consideration of the interests of copyright owners. As the fair use caselaw and related best practices continue to develop, we urge the

³⁹ Association des Cinémathèques Européennes, *Results of the Survey of Orphan Works 2009/2010* (March 29, 2010), http://www.ace-film.eu/wp-content/uploads/2011/12/ACE_Orphan_Works_Survey_Results_final_1004014.pdf. By comparison, the Federation of European Audiovisual Directors stated in 2009 that “very few” EU audiovisual works are “truly orphaned”. See Submission of Federation of European Audiovisual Directors to the European Commission’s Reflection Document on Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT, 9 (Oct. 22, 2009), http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/assoc/fera_en.pdf (cited in KEA European Affairs, *Audiovisual Orphan Works in Europe – Report prepared for the British Film Institute*, 13 (May 2011), <http://www.keanet.eu/docs/ORPHAN%20WORKS%20STUDY%20KEA.pdf>).

⁴⁰ Australian National Film and Sound Archive *Statement on Orphan Works* (June 2010), http://www.nfsa.gov.au/site_media/uploads/file/2011/02/03/Statement_on_Orphan_Works.pdf.

⁴¹ Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555, n.2 (Oct. 22, 2012).

Office to recognize these approaches as part of the orphan works and mass digitization solution space and that these approaches should be further developed.

Fair Uses

Since 2006, several fair use cases have clarified that some desired uses of orphan works—and mass digitization of copyrighted works more generally—do not require the permission of the copyright owner. Since 2006, for example, cases like *Perfect 10, Inc. v. Amazon.com, Inc.* clarified that reproduction and display of images in the context of online indexing that promotes information access can be fair use.⁴² *A.V. ex rel. Vanderhye v. iParadigms*, which addressed reuse of digital copies of student papers for purposes of detecting plagiarism, makes clear that fair use allows for information access and manipulation not just with search or indexing of harvested online content, but applies equally to a broader set works and for other non-expressive information access uses.⁴³ Legal commenters have argued that non-expressive uses of a work, such as indexing or search, that rely on technology that requires incidental reproduction of copyrighted works, should be considered fair use.⁴⁴ Although now pending on appeal, the district court in *Authors Guild, Inc. v. HathiTrust* seemed to accept the application of that argument—that mass digitization of orphan works and other works for the purpose of extracting metadata should also be a fair use.⁴⁵

In addition, caselaw related to non-profit educational and research uses, such as those engaged in by libraries and archives, has bolstered the position of those organizations. In *Cambridge University Press v. Becker (Georgia State Univ.)*, for example, the District Court for the Northern District of Georgia confirmed the importance of educational mission to the fair use assertion for making digital copies of scholarly works for teaching purposes.⁴⁶ In *Assoc. for Information Mediation and Equipment v. The Regents of The University of California*, the District Court for the Central District of California twice analyzed the fair use position of the university with respect to a streaming digital video for students, and twice concluded the university’s use was likely fair in part because the educational purpose and character of the use so heavily favored a fair use finding.⁴⁷ The *HathiTrust* case, although ultimately failing to address orphan works uses head-on, has thus far resulted in a decision in which the district court extolled the transformative and socially beneficial aspects of library digitization and access for scholarly and research purposes and for full-text access for the blind, stating that the court “cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ [Mass Digitization Project] and would require that I terminate this invaluable

⁴² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁴³ *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

⁴⁴ Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U.L. REV. 1607 (2009); Matthew Sag, *Orphan Works as Grist for the Data Mill*, 27 BERKELEY TECH. L. J. ____ (forthcoming 2013).

⁴⁵ *Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 HB, 2012 WL 4808939, at *14 (S.D.N.Y. Oct. 10, 2012) (citing approvingly the amicus curiae brief of Digital Humanities and Law Professors)

⁴⁶ *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012)

⁴⁷ *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).

contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”⁴⁸ The court in that case concluded that such uses of a collection of works that are largely non-fiction, many out of print, and in almost all cases, used by a nonprofit library in a way that does not affect established markets, was a fair use.⁴⁹

Of course, plaintiffs in both *HathiTrust* and *Georgia State Univ.* are currently appealing those decisions,⁵⁰ and we recognize that case law could always begin to trend in another direction. Nevertheless, to the extent that the orphan works problem is caused by fear of risk on the part of potential users, these cases have decreased the severity of the problem for those organizations who feel that they can now more confidently rely upon fair use.

In addition to these developments, we believe that there is a strong but as yet untested argument that the orphan works status of a work should itself tend to tilt a given use more toward being fair. This argument, more fully developed in Jennifer Urban’s article, *How Fair Use Can Help Solve the Orphan Works Problem*,⁵¹ focuses on two aspects that are unique to true orphan works: first, the nature of the work itself, as an under-exploited and currently unused work, should tend to tilt the second fair use factor analysis (nature of the work) in favor of a fair use finding, and second, because use of an orphan work has no impact on the potential market for the work under the fourth fair use factor, because no market can exist without an owner to sell or license the work. Urban presents this argument as a partial solution to the orphan works problem for nonprofit libraries, archives, and similar educational users.⁵² The Association of Research Libraries has also adopted this view.⁵³

How organizations go about establishing orphan works status for purposes of asserting fair use in this way, either through a diligent search or by following some other standard, remains to be seen. But, as explained below, libraries, archives and memory institutions are beginning to explore how to do this through the development of best practices.

Recommendation 2: The Office should recognize that fair use is an important part of the orphan works and mass digitization solution space and is being relied upon by libraries and archives. The Office should take care to explicitly preserve fair use as a part of the solution to the orphan works problem if it decides to recommend legislative reform. This could take the form of an explicit savings clause similar to that in 17 U.S.C. § 108(f)(4).

⁴⁸ Authors Guild, Inc. v. HathiTrust, 11 CV 6351 HB, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).

⁴⁹ *Id.*

⁵⁰ Authors Guild, Inc. v. HathiTrust, Case No. 12-0457(2d Cir. 2012); Cambridge University Press v. J.L. Albert, Case No. 12-14676 (11th Cir. 2012).

⁵¹ Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (forthcoming 2013), available at <http://ssrn.com/abstract=2089526>.

⁵² *Id.*

⁵³ ASSOC. RES. LIBRS., RESOURCE PACKET ON ORPHAN WORKS: LEGAL AND POLICY ISSUES FOR RESEARCH LIBRARIES, 9-17 (2011), http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf.

Best Practices

In addition to the developments noted above, users have begun to more effectively assert fair use by creating and then using community-developed best practices in fair use. These best practices, created using a methodology developed by professors Peter Jaszi and Patricia Aufderheide,⁵⁴ originate within the community as an attempt to document the community's norms and practices around fair uses of copyrighted works. They rely on extensive input from the practice community, who are tasked with answering complex copyright questions as part of their daily activities. Best practices documents of this kind have been developed with documentary film makers,⁵⁵ poets,⁵⁶ open courseware providers,⁵⁷ K-12 media literacy teachers,⁵⁸ dance archivists,⁵⁹ cinema and communications scholars,⁶⁰ and several others.⁶¹

Libraries in particular have benefited from this methodology through the development of the Association of Research Libraries' (ARL) *Code of Best Practices in Fair Use for Academic and Research Libraries*.⁶² Among other things, the ARL code contains principles for making fair uses of copyrighted works when digitizing to preserve at-risk items, digitizing and making available special collection and archive materials, reproducing for access by disabled users, and developing databases for non-consumptive scholarly and research uses (e.g., indexing and search).⁶³ Commenters to the Office's 2005 inquiry had previously identified several of these types of uses as desirable but potentially problematic in the orphan works context.⁶⁴

⁵⁴ PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011).

⁵⁵ *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CTR. FOR SOCIAL MEDIA, <http://centerforsocialmedia.org/fair-use/best-practices/documentary/fair-use-and-documentary-film> (last visited Jan. 21, 2013).

⁵⁶ *Code of Best Practices in Fair Use for Poetry*, CTR. FOR SOCIAL MEDIA, <http://centerforsocialmedia.org/fair-use/best-practices/code-best-practices-fair-use-poetry> (last visited Jan. 21, 2013).

⁵⁷ *Code of Best Practices in Fair Use for OpenCourseWare*, CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/ocw> (last visited Jan. 21, 2013).

⁵⁸ *The Code of Best Practices in Fair Use for Media Literacy Education*, CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education> (last visited Jan 21, 2013)

⁵⁹ *Best Practices in Fair Use of Dance-related Materials*, CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials> (last visited Jan. 21, 2013).

⁶⁰ *Code of Best Practices in Fair Use for Scholarly Research in Communication*, CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication> (last visited Jan. 21, 2013).

⁶¹ *See Best Practices*, CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/best-practices> (last visited Jan. 21, 2013).

⁶² ASSOC. RESEARCH LIBRARIES ET AL., CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (Jan. 2012), <http://www.arl.org/pp/ppcopyright/codefairuse/code/index.shtml>.

⁶³ *Id.*

⁶⁴ REGISTER OF COPYRIGHTS, *supra* note 12, at 36-39.

More directly aimed at orphan works and searches for rightsholders, in 2009 the Society of American Archivists (SAA) developed a first-of-its-kind set of best practice guidelines for using orphan works in the archival context.⁶⁵ Though not following the community-centered methodology described above, the SAA document “describes what professional archivists consider to be best practices regarding reasonable efforts to identify and locate rights holders.”⁶⁶ Despite the Copyright Office’s 2006 suggestion that user and rightsholder groups develop best practices like these,⁶⁷ the SAA is unique as it is the only known U.S. guide of its kind. As such, the SAA best practices represent an important first step toward dealing with orphan works at a practical level. At present we have no collected information about how archivists have used the SAA document in practice.

In September 2012, members of this team helped launch an effort to develop a more robust set of orphan works best practices for libraries, archives, and other memory institutions. This effort is ongoing and will follow the community-centered methodology described above. So far, the project has produced a report, *Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions*, which outlines the most recent thinking within the community about the orphan works-related challenges these institutions face.⁶⁸ A full copy of the report is attached in Appendix A. The report explains:

- There is overwhelming evidence that orphan works challenges and fears are most pertinent in the context of digitization, especially mass digitization;
- The potential orphan works status of a work can sometimes obscure uses that libraries could make under fair use or under other copyright limitations without reference to the orphan status of a work;
- Libraries and archives are generally uncertain about how and when to engage in a diligent search for rightsholders of works;
- These organizations are uncertain about the true risks that orphan works pose to potential users, especially in light of reports from several organizations that have digitized with little or no negative reaction from potential rightsholders; and
- That privacy and related concerns outside of copyright often play a large part in determining when to use a potentially orphaned work.

With those challenges in mind, the Orphan Works Best Practices Project has begun to organize focus groups to meet with community members to discuss scenarios where best practices would help guide potentially beneficial uses of those works. Those focus group sessions will take place over the next six months. Based on feedback from those meetings, we anticipate that the community will publish and endorse an orphan works best practices document in summer 2013.

The developments outlined above represent significant changes in the U.S. legal landscape since the Office first studied this issue in 2005. Many of the largest holders of orphan works, such as

⁶⁵ Society of American Archivists, *Orphan Works: Statement of Best Practices* (2009), <http://www.archivists.org/standards/OWBP-V4.pdf>.

⁶⁶ *Id.*

⁶⁷ REGISTER OF COPYRIGHTS, *supra* note 12, at 110.

⁶⁸ REPORT ON ORPHAN WORKS CHALLENGES, *supra* note 9.

nonprofit libraries, archives, museums, and other memory institutions, are now comfortable making many uses of these works based on a straightforward assertion of fair use without regard to a works orphan status. In addition, this same community is developing a framework, through the Orphan Works Best Practices Project, for how to establish orphan works status through a search for rightsholders and for when such a designation matters to the legal position of the organization.

As the Copyright Office develops its own recommendations about orphan works solutions, it should recognize that these developments have changed the need for any further orphan works legislation, as some users no longer view the risks of using orphan works to be prohibitive.

The Office should also recognize that these developments do not apply equally to all users and uses. As we discussed in the section above, the Office should encourage new empirical research into how organizations use orphan works in order to better understand how to fine tune and tailor an orphan works solution to the needs of users and copyright owners as they exist today. We believe that the use of orphan works to produce derivative works, for example, remains unaddressed by other legal developments because potential for injunctive relief obtained by emergent unknown owners may continue to deter otherwise beneficial uses. Likewise, commercial users may still find use of orphan works to be prohibitively risky because their fair use argument is not as strong. An orphan works solution that fails to address these remaining uses would be incomplete.

Recommendation 3: The Office should recognize that voluntary community-driven efforts to create best practices for using orphan works, including in the context of large-scale digitization, are ongoing and that those efforts should be given time to develop.

Recommendation 4: If the Office decides to recommend legislative reform, it should follow the limitation on remedy approach proposed in the Copyright Office’s previous report. Any legislative solution for orphan works should include exemption from statutory damages awards against a user that has conducted a reasonably diligent search. It should also provide a workable solution for derivative works that use works previously considered to be orphaned on the basis of a diligent search, as outlined in more detail in Recommendation 6.

III. Other Developments in the Orphan Works Solution Space

Since 2006, a number of countries outside the United States have adopted, or are presently considering, legal frameworks to facilitate use of orphan works. This has produced a significant body of information about the costs, effectiveness, policy benefits, and potential detractions of various legal approaches to addressing orphan works. The Copyright Office should consider this information in developing its own approach, but should also recognize that these orphan works regimes have been developed in legal regimes with characteristics that differ significantly from the U.S. legal regime—in particular, as regards the availability of statutory damages for returning copyright owners, and reliance on fair use for libraries and others seeking to use orphan works.

Accordingly, these regimes would not operate in the same way if transplanted in the U.S. environment.

Four major approaches have emerged across different countries' legal regimes to facilitate access to and use of orphan works: (1) limiting the remedies that a re-appearing copyright holder can exercise against a person who uses an apparently orphaned work (the approach proposed by the Copyright Office in 2006 and in subsequent legislative proposals); (2) creating exceptions or limitations in national copyright law permitting particular uses of orphaned works; (3) licensing use of an orphan work by an administrative or government-sanctioned agency; and (4) use of collective licensing regimes. In recognition of the distinct issues raised by case-by-case uses of orphan works and large scale uses including mass digitization of collections containing significant numbers of orphan works, several countries have adopted two-track systems, which provide tailored licensing solutions for individual uses of orphan works, and collective licensing for mass digitization of collections that are likely to include significant numbers of orphan works.

(1) Copyright Exceptions or Limitations Permitting Particular Uses of Orphan Works

This approach was adopted in the 2012 EU Directive on Certain Permitted Uses of Orphan Works⁶⁹ and is currently being considered as one of several options by the Australian government.⁷⁰

EU Orphan Works Directive

The EU Directive requires the 27 EU Member States to create an exception in their national copyright laws to permit publicly accessible libraries, educational establishments, museums, archives, film and audio heritage institutions, and public service broadcasting archives to reproduce, digitize and make available orphaned works in their collections on certain conditions. It also creates a new centralized EU Orphan Works database. The Directive went into effect on October 25, 2012 and must be implemented in the 27 EU member states' national laws by 29 October 2014.⁷¹

The Directive does not seek to address all aspects of the orphan works problem. It differs from the U.S. Copyright Office's 2006 proposal in several respects. First, it applies to a more limited set of users than the previous U.S. Copyright Office proposal: uses by publicly-accessible libraries, educational establishments and museums, archives, film and audio heritage institutions, and public service broadcasting organizations that seek to use orphan works as part of their

⁶⁹ Directive 2012/28/EU of the European Parliament and of the Council of October 25, 2012, on Certain Permitted Uses of Orphan Works at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

⁷⁰ Australian Law Reform Commission Consultation on Copyright and the Digital Economy, *Issues Paper*, August 20, 2012, paragraphs 149-167; Question 24; at: <http://www.alrc.gov.au/publications/issues-paper/orphan-works>.

⁷¹ Directive 2012/28/EU of the European Parliament, *supra* note 69, Article 9.

public interest mission.⁷² Second, it applies to only certain EU works within these institutions' collections—text, audiovisual and cinematographic works. It does not apply to stand-alone photographs, but does cover those incorporated in other covered works, nor does it apply to foreign works. Third, the Directive does not allow EU cultural institutions to make commercial uses of orphan works, although institutions may generate revenue so long as it is used exclusively to defray the cultural institution's costs of digitizing orphan works and making them available to the public.⁷³ Fourth, the Directive requires payment of fair compensation to any re-appearing rightholder of a work previously identified as orphaned, irrespective of whether the use is commercial or non-commercial, and whether or not a prior diligent search was performed. It also precludes ongoing use of an orphaned work or derivative work without the consent of the re-appearing rightholder or holders.

Like the U.S. Copyright Office proposal and proposed legislation, a prior diligent search is a core requirement of the EU Directive.⁷⁴ The Directive provides some guidance on what constitutes a diligent search for this purpose, but the final details will be set out in EU Member States' national laws. The cultural institution that wishes to make use of a suspected orphan work must carry out a good faith search, or it may be conducted by other organizations that EU member states specify in their national implementing legislation. This could include services that undertake diligent searches for a fee.⁷⁵ The Directive contemplates that users will search different sources depending on the nature of the work involved. This follows the sector-specific approach taken in the 2008 Diligent Search Guidelines developed by the EU High Level Expert Group on Digital Libraries established under the i2010 Digital Libraries initiative.⁷⁶

EU cultural institutions must document the search that they have undertaken and the results, which will be recorded in a central publicly accessible online database⁷⁷ that will be established and managed by the European Commission's Office for Harmonization in the Internal Market.⁷⁸ Cultural institutions must also keep a copy of the search record on file, to "be able to substantiate that the search was diligent".⁷⁹ To facilitate cross-border uses of orphan works, the Directive requires mutual recognition across all EU member states of works considered to be orphaned on the basis of a cultural institution's search in one EU country.

Although the Directive was adopted to facilitate the digitization of and making available of cultural institutions' collections to the public, several EU scholars, consumer groups and

⁷² *Id.*, Article 1.

⁷³ *Id.*, Article 6.2; Recital 21.

⁷⁴ *Id.*, Articles 2.1 and 3.

⁷⁵ *Id.*, Article 3.1 & Recital 13.

⁷⁶ European Digital Libraries Initiative, Joint Report on Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works, 2, http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf; Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, June 4, 2008, http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf.

⁷⁷ *Id.*, Article 3.5 and 3.6; Recitals 15 and 16.

⁷⁸ *Id.*, Recital 16; Article 3.6.

⁷⁹ *Id.*, Recital 15.

international library organizations have questioned whether it will be able to do so. The Directive has been criticized for its limited scope, for imposing an onerous and expensive per-work search burden on cultural institutions, and for providing inadequate legal protection to libraries and archives that wish to digitize and make available entire collections to benefit the public interest.⁸⁰ Library organizations claim that while the Directive may provide some assistance for digitization of small-scale and niche collections, libraries will not be incentivized to digitize more diverse large-scale collections due to potential liability and financial uncertainty. In particular, the requirement for cultural institutions to pay compensation to re-appearing rightsholders for all prior uses of a work previously identified as an orphan—even where a diligent search has been conducted—provides no risk management mechanism for libraries, archives and cultural institutions that seek to digitize materials and make available their digital archives.

Australia

Australia is currently holding an inquiry on whether to adopt orphan works legislation based on a copyright exception, a centrally granted license, or an extended collective licensing regime.⁸¹ The Australian Copyright Council Experts Group has recommended differentiating treatment of individual uses of orphan works from mass digitization of collections containing orphan works.⁸² It found that there is a “good case for the introduction of a new exception to infringement to allow the free use of unpublished orphan works for non-commercial purposes by natural persons”, which could also be extended to Internet Service Providers and web-hosting platforms and others that facilitate non commercial use of orphan works. It noted that commercial uses of unpublished orphan works, and uses by non-natural persons raise more complex policy issues.⁸³

(2) Centrally granted licenses with escrow

Canada,⁸⁴ South Korea, Japan, and India have adopted regimes under which a central government agency may grant a non exclusive license to use identified orphan works, upon application by a person or entity that has conducted an unsuccessful search for rightsholders,

⁸⁰ Information Sans Frontieres, *Response to the Final Compromise Text of the Orphan Works Directive*, June 22, 2012, at: <http://informationsansfrontieres.eu/2012/06/22/a-response-from-information-sans-frontieres-to-the-final-compromise-text-of-the-orphan-works-directive-4/>; see also TransAtlantic Consumer Dialogue, *Orphans Left Out in Cold: Final Vote on Weak Directive*, IP POLICY BLOG, Sept 12, 2012, <http://tacd-ip.org/archives/742>.

⁸¹ Australian Law Reform Commission Consultation on Copyright and the Digital Economy, *Issues Paper*, August 20, 2012, paragraphs 149-167; Question 24; at: <http://www.alrc.gov.au/publications/issues-paper/orphan-works>. See also Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 8–9 at <http://www.copyright.org.au/pdf/Copyright%20Council%20Expert%20Group%20-%20Paper%202011.pdf>; D. Brennan and M. Fraser, *The Use of Subject Matter with Missing Owners - Australian Copyright Policy Options* (2012), 7; at <http://www.law.uts.edu.au/comslaw/Researchreports/MissingOwnersDiscussionPaperAugust11.pdf>

⁸² Australian Copyright Council Experts Group, *Directions in Copyright Reform in Australia*, 2011, p. 8 at <http://www.copyright.org.au/pdf/Copyright%20Council%20Expert%20Group%20-%20Paper%202011.pdf>

⁸³ *Id.*

⁸⁴ Copyright Act of Canada, RSC 1985, c. C-42, section 77, available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html>.

with varying degrees of administrative oversight or review of the search.⁸⁵ The People's Republic of China is currently considering adopting a similar orphan works regime.⁸⁶ In these regimes, license fees are usually paid up-front and held in escrow for a re-appearing owner for a specified period, after which the funds are usually made available to the administrative agency for a different purpose.

Canada adopted its system in 1988 and the other countries' systems draw from its regime. Prospective users of works for which owners cannot be located may petition the Copyright Board of Canada requesting a non-exclusive license to make certain uses of a work. The Board may grant a license where it is satisfied that the user has made "reasonable efforts" to locate the rightsholder in the work, and that the owner is unlocatable.⁸⁷ From 1988 to 2009, 441 applications were filed for licenses to use 12,640 suspected orphan works.⁸⁸ Of those, 230 licenses were granted between August 1990 and July 2008.⁸⁹

License regimes requiring review of individual applications have been criticized as being bureaucratic, costly, and "likely to be little used".⁹⁰ The British Library notes that a system requiring payment of up-front licensing fees that would be held in escrow for a returning rightsholder does not sit well with the cultural mission, limited resources, and current clearance practices of many libraries and could make the difference between a digitization project going ahead or not. The British Library noted that for non-commercial digital library projects, it

⁸⁵ See *Copyright Act 1970, Law No. 48 of 1970, 2009* (Japan) art. 67, unofficial translation available at http://www.cric.or.jp/cric_e/clj/clj.html (requiring a potential user to submit an application for a license along with data explaining why the copyright owner cannot be found); *Copyright Act 1957 as amended by the Copyright Amendment Act of 2012* (India) at paras. 17–18, http://copyright.gov.in/Documents/CRACT_AMNDMNT_2012.pdf (allowing for applications to Copyright Board for works where "the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found," and directing that the Copyright Board to grant licenses for use after it has made an inquiry into the good faith of the searcher and satisfied itself that the license needs to be granted after giving any owners an opportunity to be heard); *Copyright Act 1957, Law No. 432, as last amended by Law No. 9625 of April 22, 2009* (South Korea) art. 50, <http://www.wipo.int/wipolex/en/details.jsp?id=7182> (requiring users to submit evidence of considerable efforts to locate the owner); see also *Enforcement Decree of the Copyright Act, 2009-08-06 / No. 21676 / 2009-08-07* (South Korea) (defining "considerable efforts" and detailing the administrative process) at: http://www.wipo.int/wipolex/en/text.jsp?file_id=200937.

⁸⁶ Maria Strong, *External Perspectives on the New Draft Chinese Copyright Law: Informal Comments of the U.S. Copyright Office*, presentation at the Conference on New Developments in Chinese Copyright Law and Enforcement, Berkeley Centre for Law & Technology, October 4, 2012 at http://www.law.berkeley.edu/files/bclt_Panel_2_Maria_Strong.ppt; Dr. Prof. Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*, <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf>.

⁸⁷ Copyright Act of Canada, RSC 1985, c. C-42, section 77, at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html>.

⁸⁸ Jeremy De Beer & Mario Bouchard, *Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board*, 10 OXFORD UNIV. COMMONWEALTH L.J. 215, 242 (2010).

⁸⁹ See *Decisions – Unlocatable Rightsholders*, COPYRIGHT BOARD OF CANADA, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html> (last visited Nov. 12, 2012).

⁹⁰ See UK INTELLECTUAL PROPERTY OFFICE, FINAL IMPACT ASSESSMENT 7 (July 2012) at 4,6 at <http://www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf>

attempts to obtain clearance to use a work from a copyright holder, and in the instances where excessive fees for use have been requested, it has excluded those works from the projects.⁹¹

(3) Extended Collective Licensing Regimes

In recent years there has been increasing interest in Extended Collective Licensing (ECL) regimes as a means of facilitating access to orphan works because ECL regimes are seen as offering protection against copyright infringement liability with lower transaction costs than other approaches to orphan works.⁹² Under an ECL regime, unlocatable rightsholders would be represented by a collective management organization that represents a majority of the identified holders of the rights in the relevant class of works.⁹³

ECL regimes are in operation in Hungary, the Czech Republic, Sweden, Norway, Denmark, Iceland, and Finland. The Nordic country ECL regimes cover primary broadcasting, cable retransmission and communication to the public of previously broadcast television programs, and certain forms of reproduction (including photocopying) for certain activities or by certain institutions. In 2008 Hungary adopted an ECL regime that extends authority to Hungarian CMOs to license orphan works in broader collections of rights in works that they administer, as discussed further below. The European Commission considered an ECL regime as a possible option for facilitating mass digitization of collections involving orphan works and as a possible basis for an EU orphan works directive,⁹⁴ but ultimately opted for an exception-based orphan works regime in the new EU Directive.

⁹¹ Response of the British Library to the UK Government's Consultation on Copyright, March 2012, at 12, at <http://www.ipo.gov.uk/response-2011-copyright-bl.pdf>.

⁹² See, e.g., JOHAN AXHAMN & LUCIE GUIBAULT, CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE'S CULTURAL HERITAGE? 25 (2011), http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf ("ECLs have been an important part of the copyright acts of the Nordic countries ever since their first introduction in relation to primary broadcasting at the beginning of the 1960s.106 This system offers a solution to the high level of transaction costs associated with mass-digitisation and online dissemination.").

⁹³ Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, ch. 9, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, (Daniel Gervais, ed., 2d ed., Kluwer Law International, 2010); DANIEL GERVAIS, APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION (prepared for Department of Canada Heritage, 2003), at http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf.

⁹⁴ The European Commission considered an ECL regime for orphan works regime in its 2011 Impact Assessment on Orphan Works (Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works*, at 17, COM (2011) 289 final (May 24, 2011), http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf) and in its 2009 Reflection Document on Creative Content in a European Digital Single Market: Challenges for the Future (European Commission, *Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document produced by DG INFOSOC and DG MARKT* (October 22, 2009), http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf). It has also considered collective licensing regimes for mass digitization of out-of-commerce works (*Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works*, September 20, 2011, at: http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf). However, the final EU Orphan Works Directive did not adopt ECLs for orphan works, but accommodates the existing ECL regimes in the Nordic countries and would permit introduction of new national schemes by EU Member States (Directive

The Nordic regimes build on existing collective management agreements in respect of particular classes of works, but extend their operation via legislation to permit the collective management organization (CMO) to represent rightsholders who are not members. Non-member rightsholders' interests are protected through legislative provisions requiring CMOs to provide equal treatment of members and non-members regarding remuneration, by provisions on mediation and arbitration, and by providing rightsholders with the ability to opt out and/or seek individual remuneration.⁹⁵

(4) Two-tiered Regimes for Mass Digitization and Individual Uses of Orphan Works

U.K.

The U.K. is proposing to adopt a two-tiered orphan works regime, permitting commercial and non-commercial use of published and unpublished works, and the creation of an orphan works registry.⁹⁶ At the first tier, cultural institutions would be permitted to digitize orphan works in their collections through an Extended Collective Licensing regime. At the second tier, individuals and institutions seeking to make use of individual orphan works can apply for a non-exclusive license from a central government or government-sanctioned private agency on payment of a license fee. The first tier is modeled on the ECL regimes of the Nordic countries; the second track for smaller-scale uses is modeled on the regimes in Canada and Japan.⁹⁷

A diligent search would be required before use at both tiers. The new central licensing body will issue sector-specific guidelines on what constitutes a diligent search, based on input from industry and stakeholders. For large-scale uses, the diligent search would be performed by the cultural institution that wishes to digitize its collection or by a collective management organization that has applied to operate an ECL regime for particular classes of works in the institutions' collection. Diligent searches performed by cultural institutions or their agents would not be individually reviewed. Instead, the new central licensing agency will take a "regulatory" approach, accrediting institutions that want to register orphan works, and periodically testing the quality of institutions' searches and the search process on a random sampling basis.⁹⁸ For individual use license applications, diligent searches would be performed by the user (whether

2012/28/EC 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, Article 1.5).

⁹⁵ AXHAMN & GUIBAULT, *supra* note 92, at 27-28, 30; *see also* Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *supra*, note 93; Henry Olsson, *The Extended Collective License as Applied in the Nordic Countries*, (2010) at <http://www.kopinor.no/en/copyright/extended-collective-license/documents/the-extended-collective-license-as-applied-in-the-nordic-countries>.

⁹⁶ U.K. Intellectual Property Office *Policy Statement: Consultation on Modernising Copyright Licensing*, July 2012, 9-10, at <http://www.ipo.gov.uk/response-2011-copyright.pdf>

⁹⁷ This regime is based on recommendations in Professor Ian Hargreaves' report to the UK Government, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, *supra* note 25, at 40, ¶¶ 4.56-59.

⁹⁸ The government apparently rejected this on the basis of the Canadian experience, which was criticized in submissions as being bureaucratic, costly, and "likely to be little used". See UK Intellectual Property Office Final Impact Assessment, July 2012, 4 at: <http://www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf>.

individual or institution) that wants to make use of an individual orphan work, and would be reviewed and validated by the new central licensing agency.⁹⁹ The authorizing body would require details of searched databases and methods with each license application, which would be recorded in an orphan works registry.¹⁰⁰ The new licensing agency will determine the terms of the non-exclusive license, and set a license fee that would be paid to the agency and held in escrow for re-appearing rightsholders.

The UK Intellectual Property Office estimates that:

- the cost to users of conducting diligent searches for individual uses of orphan works would be £31m - £122m p.a;
- the cost of establishing the new authorizing body would be £2.5m (for establishing an orphan works registry database) to £10 m (for establishing a new body with regulatory functions that could determine whether suspected orphaned works could be used under license); and
- the costs of operating the new authorizing body would be £0.5m - £1.8m p.a.¹⁰¹

Hungary

In 2008 Hungary adopted a two-tiered orphan works regime. It comprises ECL for uses of works that are covered by existing collective management arrangements, and a centrally-granted non-exclusive and non-transferable license granted by the Hungarian Patent Office for use of orphan works falling outside the scope of collective rights management.¹⁰² Licenses to use orphan works may be granted for a maximum term of 5 years, do not permit derivative uses of works, and may authorize both commercial and non-commercial uses. Licenses for non-commercial uses are usually exempt from fees. Licenses for commercial use require payment of remuneration fixed by the HPO, which is held on deposit for reappearing rightsholders for 5 years. If no rightsholder appears to claim the deposit, the HPO transfers the deposited funds to the collective right management society that grants licenses for the other works of the right owner or, where no relevant collective management society exists, to the National Cultural Fund, which must use the funds for making cultural goods accessible.¹⁰³

Applicants for an individual license must conduct a diligent search for rightsholders based on sector-specific guidelines.¹⁰⁴ License applicants must attach proof of the search they have

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.* at 7.

¹⁰² Mihaly Ficsor, *How to deal with orphan works in the digital world? An introduction to the new Hungarian legislation on orphan works*, Presentation to European Parliament, October 2009 at: <http://www.europarl.europa.eu/document/activities/cont/200911/20091117ATT64717/20091117ATT64717EN.pdf>.

¹⁰³ Aniko Gyenge, Hungarian Ministry of Justice and Law Enforcement, Head of Unit on Consumer Protection, Copyright and Industrial Property Unit, *The Hungarian Model of Licensing Orphan Works*, Presentation at the European States Presidency Conference on Digitisation of Cultural Material, Digital Libraries and Copyright, March 14, 2010, Madrid at: http://www.mcu.es/principal/docs/MC/PresidenciaUE2010/Aniko_Gyenge_presentation.pdf.

¹⁰⁴ Decree 100/2009. (V.8.) Korm.) of the Government on the Detailed Rules Related to the Licensing of Certain Use of Orphan Works, Article 2, at: http://www.wipo.int/wipolex/en/text.jsp?file_id=242073.

undertaken and the fact that the search was unsuccessful. The Hungarian Patent Office is required to maintain a publicly accessible register of licenses that have been granted to use orphan works.¹⁰⁵ To date, 22 applications for licenses appear on this Register.¹⁰⁶ Some of these cover multiple orphan works. For instance, the National Audiovisual Archive sought a license to use 370 orphaned works and the Library of the Hungarian Parliament sought a license to use about 1000 orphaned works.¹⁰⁷

Recommendation 5: The Copyright Office should consider adopting tailored solutions that facilitate different uses and different types of users of orphan works.

In line with Recommendation 5, for mass digitization projects, requiring work-by-work searches could be unduly costly and will disincentivize digitization projects that could greatly benefit the public interest. The Copyright Office could facilitate access to orphaned works within broader collections, achieve a fair balance of rights, and promote the fundamental goals of the copyright system by considering a regime that limits liability where the user stops displaying or removes access to a digitized version of a work upon receiving notice from a re-appearing rightsholder. By comparison, prospective creators of derivative works incorporating suspected orphan works require greater certainty about the legality of their use and ability to have ongoing future access to the derivative work *before* investing time and resources to create the derivative work. For these uses and users, limitations on statutory damages awards and injunctive relief that could be brought against them are vital. For such smaller-scale uses, it would be more feasible to condition limitations on statutory damages and injunctive relief on the prospective user undertaking a prior reasonably diligent search.

Recommendation 6: If the Office decides to recommend legislative reform, it should consider adopting differentiated approaches to the limits on remedies that apply in the case of re-appearing rightsholders in the context of mass digitization of collections that include significant numbers of orphan works, as distinguished from the preparation of derivative works that incorporate a single or smaller number of suspected orphan works, in recognition of the different policy issues these uses raise and the different level of certainty required by the different types of users.

IV. Challenges with Implementing Extended Collective Licensing in the United States

As the Copyright Office raised licensing solutions—and extended collective licensing (ECL) in particular—in its Notice of Inquiry and in its prior mass digitization discussion document,¹⁰⁸ we specifically address ECL here. While U.S. libraries are already undertaking significant mass digitization projects relying on fair use as discussed above, some large-scale digitization projects

¹⁰⁵ *Id.*, Article 8.

¹⁰⁶ http://sztnh.gov.hu/szerzoi jog/arva/ARVA-muvek-nyilvantartas_teljes.pdf

¹⁰⁷ Gyenge, *supra*, note 103, at 8.

¹⁰⁸ U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 37 (2011), http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf

sought to be undertaken by other actors, or for commercial purposes, might fall outside fair use. One of the main arguments made in support of an ECL regime is that it would enable the creation of a comprehensive digital library such as the DPLA. Libraries would be allowed to digitize, display and provide full public access to entire in-copyright works that are no longer commercially available. Proponents note that ECL regimes have been used to enable large-scale mass digitization projects being undertaken by National Libraries in Norway¹⁰⁹ and France.¹¹⁰

While there has been increasing interest in recent years in several countries in considering an ECL regime to facilitate mass digitization, there would be significant challenges in implementing an ECL regime in the U.S. legal environment, as outlined below. Although an ECL regime may be worth considering as a possible solution for mass digitization projects, we believe the Copyright Office should more thoroughly study these implementation issues before making any recommendation to adopt this approach.

First and most importantly, the necessary infrastructure for such a regime does not exist in the U.S. There is no single entity that currently holds a comprehensive collection of works like the national libraries in France and Norway, which could act as licensee for such a regime. While the DPLA and/ or HathiTrust might potentially be able to fulfill this role in the future, they are not presently in a position to do so.¹¹¹ There is also no natural candidate for the licensor for a similar U.S. regime. The EU has numerous established collective management organizations (CMOs) that represent and make payments to thousands of rightsholders. These CMOs represent the majority of rightsholders in the relevant class, including foreign rightsholders through reciprocal agreements. By comparison, in the U.S. there is no existing organization that has both the necessary expertise, and the trust of the library community, which could play a similar role in an ECL regime.¹¹² The U.S CMOs that currently operate do not cover the full set of rights that

¹⁰⁹ Contract between KOPINOR and National Library of Norway for the Bookshelf Project, December 2, 2010, providing for digitization of up to 50,000 Norwegian works from 1790-1799, 1890-1899, and 1990-1999, at <http://www.kopinor.no/en/agreements/national-library/documents/bookshelf-contract--661>; Press Release: *Online Access to Norwegian Literature from Entire 20th Century*, KOPINOR (Aug. 29, 2012), <http://www.kopinor.no/en/about-kopinor/news/online-access-to-all-norwegian-literature-from-the-20th-century> (noting permanent extension of Bookshelf Project).

¹¹⁰ Loi no 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle (1) [Law 2012-287 of March 1, 2012 on the Digital Exploitation of Unavailable Books of the Twentieth Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 2, 2012, p. 03986, available at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20120302&numTexte=1&pageDebut=03986&pageFin=03988#. See also *France Guillotines Copyright*, ACTION ON AUTHORS RIGHTS (Feb. 28, 2012), <http://blog.authorsrights.org.uk/2012/02/28/france-guillotines-copyright/>.

¹¹¹ See Pamela Samuelson, *Reforming Copyright Is Possible*, CHRONICLE HIGHER ED., July 9, 2012 at <http://chronicle.com/article/Reforming-Copyright-Is/132751/> (discussing some of the challenges of implementing a licensing regime in the United States in the absence of an established CMO).

¹¹² *Id.* See also Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUMBIA J.L. & ARTS 697, (2011) at <http://www.lawandarts.org/articles/legislative-alternatives-to-the-google-book-settlement/> (noting that the American Society of Composers, Authors and Publishers licenses only public performances of music, and that while the Copyright Clearance Center has relationships with many publishers for which it collects fees for licensing photocopies of textual works, it has a far more limited role in licensing than EU CMOs, and represents only a fraction of the rightsholders whose works would be licensed under a comprehensive orphan works ECL regime. In addition, following the litigation in *Cambridge University Press v. Becker*, (*supra*, note 46), the

would be required for a comprehensive orphan works regime, and do not represent the majority of rightsholders of classes of works. In short, although ECL has a long history in the Nordic countries, collective management of rights is less familiar in U.S. copyright culture, and the U.S. lacks the relevant infrastructure that is in place in other countries where broader use of ECL regimes has been proposed as a solution to the orphan works problem.

Second, on closer inspection, it is not at all clear that ECL regimes offer the chief advantage frequently attributed to them in relation to orphan works: reducing transaction costs by avoiding the need for a diligent search for rightsholders. Although ECL regimes authorize CMOs to issue a license permitting use of orphan works without first undertaking a search, the CMO must still conduct a search for rightsholders for at least two reasons: first, in order to distribute funds to owners; and second, so that they can price licenses appropriately for use of rights in collections of works that have a significant proportion of orphan works.¹¹³ Pricing licenses appropriately requires knowing at least the approximate proportion of orphan works in a licensed class, which requires the orphan works to be identified. Thus, ECL regimes do not appear to obviate the need for a search, but merely defer the time at which it is undertaken and impose the costs of doing so on the CMO rather than the prospective user of the orphan work.

Nordic CMOs are required to undertake searches in order to distribute collected license fees to all rightsholders that they are deemed to represent to fulfill their statutory obligation to provide equal treatment to members and non-members regarding remuneration. In addition, EU CMOs would be required to conduct searches to identify unknown rightsholders for distribution of collected funds under a proposed EU Directive on Management of Collective Management Organizations, which would impose new governance and transparency obligations on all CMOs operating in the EU.¹¹⁴ CMOs would be permitted to make determinations to retain funds that

library community would have very strong reservations about the CCC fulfilling this role. As Professor Samuelson notes, the library community was deeply disappointed by CCC's decision to use CCC funds (including license fees paid by libraries) to support the three plaintiff publishers' claims about the particularly restrictive interpretation of fair use in educational and non-profit library settings, by underwriting 50% of the plaintiff publishers' costs in the litigation they brought against Georgia State University. *See* Letter from Charles B. Lowry, Executive Director, Association of Research Libraries, to Tracey L. Armstrong, President and Chief Executive Officer, Copyright Clearance Center (Nov. 11, 2010), <http://www.arl.org/bm~doc/lccc-final.pdf> (urging the CCC to reconsider its decision, and noting that "this action by the CCC signals to the content user community that the CCC no longer seeks to serve the interests of all of the partners in the scholarly communications enterprise"); *see also* Peter Hirtle, *Who Infringed at Georgia State?* LIBRARY LAW BLOG (Oct. 4, 2010), <http://blog.librarylaw.com/librarylaw/2010/10/who-infringed-at-georgia-state.html>. Andrew Albanese, *Libraries Urge CCC to Reconsider Its Funding of E-Reserve Copyright Case*, PUBLISHERS WEEKLY (Nov. 19, 2010), <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/45257-libraries-urge-ccc-to-reconsider-its-funding-of-e-reserve-copyright-case.html>.

¹¹³ *See* David Hansen, Gwen Hinze & Jennifer Urban, *Orphan Works and the Search for Rightsholders: Who Participates in a "Diligent Search" Under Present and Proposed Regimes?* (White Paper No. 4, Berkeley Digital Library Copyright Project, 2013), available at <http://ssrn.com/abstract=2208163>.

¹¹⁴ Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, COM (2012) 372 final, July 11, 2012, http://ec.europa.eu/internal_market/copyright/management/index_en.htm#maincontentSec1. Article 12.1 would require CMOs to carry out the distribution of revenue collected within 12 months from the end of the financial year in which the rights revenue was collected unless "objective reasons related to . . . identification of rights,

have not been distributed after five years from the end of the financial year in which the revenue was collected, provided that they have taken “*all necessary measures to identify and locate the rightsholders*” (emphasis supplied) and that members approve rules governing distribution of funds in the event of unidentified or unlocatable rightsholders.¹¹⁵ Measures to identify and locate rightsholders would include “verifying membership records and making available to the members of the collective society as well as to the public a list of works and other subject matter for which one or more rightsholders have not been identified or located.”¹¹⁶ To facilitate independent scrutiny of CMOs’ efforts to identify rightsholders, CMOs would also be required to publish an annual transparency report on their website within 6 months of the end of the relevant financial year, with (among other things) “the total amount collected but not yet attributed to rightsholders, with a breakdown per category of rights managed and type of use, and indicating the financial year in which these amounts were collected.”¹¹⁷

In order to establish appropriate pricing models for licenses they issue, CMOs that administer ECL regimes may also need to conduct searches to obtain an understanding of the proportion of orphan works in the rights regimes that they administer. Because orphan works are not actively present in the market, licensees presumably would expect to pay less for licensing them than for non-orphaned works. Given this, pricing the license properly presumably requires some idea of the proportion of orphans in the licensed collection before licenses are priced and granted. As leading U.S. law and economics scholar Randall Picker notes, given the ex ante motivations for creating copyrighted works (and the general expectation that one’s work will not become an orphan), “basing the royalty on the price that is being paid to non-orphans or that would have been paid in a hypothetical negotiation between the entrant and the copyright holder almost certainly results in a royalty that is too high, as measured by what we want socially. We should expect royalty rates for orphan use to be modest.”¹¹⁸

At the same time, the duty to search for rightsholders to distribute unclaimed funds presents a serious potential conflict of interest for CMOs that would otherwise retain unallocated funds for their own uses because CMOs would be incentivized to conduct a less thorough search for non-members. This would also be true in relation to efforts to identify orphan works within a collection for appropriately setting pricing models. CMOs that do not undertake a thorough investigation would stand to benefit from charging a flat fee across all rights and works under their administration.

Finally, ECL regimes pose special concerns for the U.S. legal environment. Creating an ECL regime for mass digitization – even if drafted very narrowly - would likely undermine the scope of operation of fair use, and threaten existing perfectly lawful library mass digitization projects, such as those described in the above discussion of *Authors Guild, Inc. v. HathiTrust*.

rightsholders or to the matching of information on works and other subject matter with rightsholders prevent the collecting society from respecting this deadline.”

¹¹⁵ *Id.*, Article 12.2.

¹¹⁶ *Id.*, Article 12.3; Recital 15.

¹¹⁷ *Id.*, Article 20 & Annex I.

¹¹⁸ See Randal C. Picker, *Private Digital Libraries and Orphan Works*, 27 BERKELEY TECH. L.J. (forthcoming 2013) (arguing that, given ex ante incentives, prices for orphan works under a licensing regime should be modest).

Recommendation 7: The Office should not adopt ECL as a potential means to facilitate use of orphan works.

Recommendation 8: Although an ECL regime may be worth considering as a possible solution for mass digitization projects, there are significant implementation challenges that the Office should more thoroughly study before recommending this approach. If the Office does decide to consider creating an ECL regime to facilitate mass digitization of collections, it should take care to expressly preserve room for the full operation of fair use, and not undermine ongoing mass digitization projects by libraries that would constitute permissible fair use, as recognized in the *Authors Guild, Inc. v. HathiTrust* judgment. To promote efficiency and fairness, the Office should also consider appropriate good governance and transparency obligations that would apply to CMOs that wish to administer rights in the ECL regime.

V. Forward Looking Proposals

Finally, the Office should consider several forward-looking changes that would address the number of orphan works created in the future. As the Office makes clear in its Notice of Inquiry, one of the reasons the orphan works problem is so severe is because the current copyright system generates inadequate information about ownership of copyrighted works. We believe that a proposal that fails to address this root cause of the orphan works problem would be incomplete. Although we ultimately recommend that the Copyright Office investigate these proposals further, we believe that the reinvigoration of copyright formalities, and the creation of technological solutions, such as enhanced copyright-metadata standards and voluntary orphan works registries, would go a long way toward reducing the number of orphan works created in the future.

Reinvigorated Copyright Formalities

As the Office recognizes in this Notice of Inquiry, several changes in the law over the last thirty years have exacerbated the orphan works problem.¹¹⁹ The relaxation of copyright formalities in particular has reduced the need for copyright owners to track and manage their works, and have effectively shifted the burden of discovering information about copyright ownership to users who have little expertise or even ability to do so.¹²⁰ At the same time, copyright owners receive protection for terms that extend longer than ever, with no requirement that they ever provide publicly accessible information about their continued interest in copyright protection or current ownership information about the work. While copyright owners do obtain certain benefits by complying with registration and notice requirements, such as by gaining access to statutory

¹¹⁹ See Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555 (Oct. 22, 2012). In addition to addressing copyright formalities, we also note that copyright term extension and enhanced statutory damages also contribute to the orphan works problem. While we do not suggest that these aspects of the problem can be realistically addressed in a single legislative proposal aimed at orphan works, we do urge the Office to consider revisiting these issues in a more comprehensive way in the future.

¹²⁰ See Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem*, 27 BERKELEY TECH L.J. (forthcoming 2013) (describing copyright owners as least-cost avoiders of the problem).

damages or refuting claims of innocent infringement, these benefits have not resulted in a healthy level of publicly available information about copyright ownership.

Users of copyrighted works face an even more difficult challenge now that so many copyrighted works are created, stored, and transmitted in digital forms. In the pre-digital era, all works were locked up in physical information products and the cost of dissemination was high, the digital networked environment has enabled an interactive, simultaneous and decentralized creation, access and consumption of works. Never before have creative works been made available to the public on such a large scale. This has presented new challenges for copyright law, which lie in the need to create legal certainty regarding claims of copyright, to facilitate rights clearance and to enhance the free flow of information.

We recognize that changes in the past to copyright formalities were made for legitimate and important purposes, in part to keep unwary authors and copyright owners from losing their protection due to technical traps. However, recent thinking about copyright formalities has reimagined the way that formalities could be implemented to both protect legitimate ownership interests while clarifying and sorting those works with owners who are not concerned with copyright protection.¹²¹ Academic interest in formalities--both from the United States and Europe--has led to a cautious, but optimistic, view that the reintroduction of formalities may be an effective strategy for dealing with complex copyright challenges, including the orphan works problem.¹²² Likewise, formal intellectual property law reviews have identified formalities as an important component of their proposals.¹²³

As the Office is aware, the Berkeley Digital Library Copyright Project is sponsoring a conference about the reinvigoration of copyright formalities.¹²⁴ This conference will consider, among other things, the useful role that formalities can play in addressing today's copyright challenges, what kinds of formalities might best serve the interests of authors and of the public, economic considerations posed by formalities, the need for appropriate technological infrastructures to support new formalities regimes, and some constraints that the Berne Convention may pose for the design and implementation of new formalities regimes. We urge the Office to incorporate lessons from this research into any recommendations it makes regarding orphan works.

¹²¹ See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 260-65 (New York: Penguin Press, 2008); William M. Landes & Richard A. Posner, *Indefinitely renewable Copyright*, 70 *UNIV. CHICAGO L. REV.* 471 (2003); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *STANFORD L. REV.* 485 (2004).

¹²² See STEF VAN GOMPEL, *FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE*, Information Law Series 23, Alphen aan den Rijn: Kluwer Law International (2011). Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 *UTAH L. REV.* 551-71; Pamela Samuelson, Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 *BERKELEY TECH. L.J.* 1175, 1199 (2010);

¹²³ HARGREAVES REVIEW, *supra* note 25, at 33 (proposing a digital copyright exchange to assist in securing permission for use, and suggesting that incentives for owner participation in such an exchange might include, for example, enhanced remedies for infringement of registered works); see also COMITÉ DES SAGES, *supra* note 26, at 22 ("Future orphan works must be avoided. Some form of registration should be considered as a precondition for a full exercise of rights. A discussion on adapting the Berne Convention on this point in order to make it fit for the digital age should be taken up in the context of WIPO and promoted by the European Commission.").

¹²⁴ *Reform(aliz)ing Copyright for the Digital Age*, BERKELEY LAW, <http://www.law.berkeley.edu/formalities.htm> (last visited Jan. 28, 2013).

Technological Tools – Registries and Metadata

The Office should also give serious attention to the development of modern registries that can quickly and easily convey information about ownership and copyright status of all varieties of creative works. In a parallel and complimentary track, the Office should investigate how to encourage metadata standards that would promote the attachment of copyright information to creative works. Regardless of which, if any, legislative solution the Copyright Office recommends, the development of these tools would promote greater certainty about the ownership of copyrighted works, enhance bargaining in the case of works with owners, and lower transaction costs for potential searchers under any orphan works regime. Legal commenters have recognized the importance of developing a range of tools, including a variety of types of registries and metadata standards, to help address orphan works-related challenges.¹²⁵ We encourage the Copyright Office to further investigate development of these tools through subsequent inquiries.

In Europe, policy makers have already lent support to the development of the Accessible Registries of Rights Information and Orphan Works towards Europeana (“ARROW”).¹²⁶ This system is designed to “facilitate rights information management in any digitisation project involving text and image based works.”¹²⁷ It bills itself as “a tool to assist ‘diligent search’ for the rights status and rightsholders of text-based works in an automated, streamlined and standardised way, thus reducing time and costs of the search process.”¹²⁸ ARROW itself is not a registry but has instead provides the infrastructure to bring together disparate resources from a variety of metadata providers. ARROW has generated support from a consortium of national libraries, publishers, and collective management organizations, to establish a rights information infrastructure that establishes a network of verified metadata sources containing information about copyright status. This network allows for determination of “whether a work is copyrighted or in public domain, whether it is in print or out of print and find the references of rights holders or collective management organisations (“RRO”s) to be contacted to obtain permission to digitise, or declare that the work is an orphan.”¹²⁹ The Office should encourage efforts to develop systems like ARROW and to develop the variety of resources on which it relies.

A significant set of countries have adopted an orphan works registry as part of their orphan works regimes, or are proposing to do so. The 2012 EU Orphan Works Directive establishes an EU-wide publicly accessible online database that will be managed by the European

¹²⁵ See Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VIRGINIA L. REV. 549, 632 (2010) (describing a “technology-powered mechanism” such as a registry of open-ended machine-readable tags to ease the problem); Molly Shaffer Van Houweling, *Atomism and Automation*, 27 BERKELEY TECH L.J. (forthcoming 2013).

¹²⁶ About, ARROW, <http://www.arrow-net.eu/> (last visited Jan. 28, 2013).

¹²⁷ *Id.*

¹²⁸ *ARROW System*, ARROW, http://www.arrow-net.eu/sites/default/files/ARROWsystem_trifoldSEP2012_WEB_0.pdf (last visited Jan. 28, 2013).

¹²⁹ ARROW: THE RIGHT WAY TO DIGITAL LIBRARIES, <http://www.arrownet.eu/sites/default/files/ARROWtrifoldMAR2011.pdf> (last visited Jan. 28, 2013).

Commission's Office for Harmonization in the Internal Market.¹³⁰ The pending legislative proposals in the UK¹³¹ and the Peoples' Republic of China¹³² respectively contemplate the creation of an orphan works registry. The Canadian¹³³ and Hungarian¹³⁴ orphan works legal regimes also established publicly accessible orphan works registers. In addition, since the Copyright Office's 2006 Report, there has been growing international interest in exploring voluntary registration and recording regimes as a means of reducing the future volume of orphaned works.¹³⁵

Recommendation 9: The Office should recognize that an orphan works solution that fails to reduce the number of orphan works going forward would be incomplete. Regardless of the particular approach it recommends, the Office should take further study how best to incorporate copyright formalities and the implementation of technological tools, like registries or metadata, into its recommendations. Further, the Office should encourage the development of these tools even in the absence of a legislative recommendation.

We would be pleased to provide additional information on the above matters or to elaborate on aspects that would be of assistance to the Copyright Office's inquiry. We can be contacted at dhansen@law.berkeley.edu or at (510) 643-8138.

Respectfully,



David Hansen, with and on behalf of Pamela Samuelson, Jennifer Urban, Jason Schultz, and Gwen Hinze

¹³⁰ See *supra* note 78 and accompanying text.

¹³¹ See *supra* note 101 and accompanying text.

¹³² See *supra* note 87 and accompanying text.

¹³³ See *Decisions – Unlocatable Rightsholders*, COPYRIGHT BOARD OF CANADA, <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html> (visited Nov. 12, 2012).

¹³⁴ See *Szellemi Tulajdon Nemzeti Hivatala - Árva művek nyilvántartása*, HPO, http://sztnh.gov.hu/szerzoi jog/arva/ARVA-muvek-nyilvantartas_teljes.pdf (visited Oct. 2, 2012).

¹³⁵ See for instance, World Intellectual Property Organization Copyright and Registration Projects page, with links to projects created under the WIPO Development Agenda implementation program at http://www.wipo.int/copyright/en/activities/copyright_registration/index.html; and *Summary of the Response to the Questionnaire for Survey on Copyright Registration and Deposit Systems* (2010) at http://www.wipo.int/copyright/en/registration/pdf/registration_summary_responses.pdf and http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html.